

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.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL: CS/SB 838

INTRODUCER: Commerce and Tourism Committee and Senator Simmons

SUBJECT: Business Organizations

DATE: January 28, 2020

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Harmsen</u>	<u>McKay</u>	<u>CM</u>	<u>Fav/CS</u>
2.	<u>Ravelo</u>	<u>Cibula</u>	<u>JU</u>	<u>Favorable</u>
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 838 amends several sections of the Florida Business Corporation Act, ch. 607, F.S., and its related statutes to:

- Make clarifying and conforming changes to, and fix minor errors in, the 2019 Florida Business Corporation Act legislation;¹
- Modify the laws that govern the makeup of not-for-profit corporations' board committees to allow persons other than board directors to serve on those committees; and
- Re-instate the Florida Department of State's ability to direct interrogatories to a corporation to determine the corporation's compliance with ch. 607, F.S.

II. Present Situation:

In 2019, the Legislature substantially amended ch. 607, F.S., the Florida Business Corporation Act (FBCA),² to better reflect recent changes to the Model Business Corporation Act³ and ch. 605, F.S., the Florida Revised Limited Liability Corporate Act (FRLCA). These changes were made with the input of the Florida Bar's Business Law Section (Business Law Section). Since final passage of the 2019 legislation, the Business Law Section has identified errors and

¹ Chapter 2019-90, L.O.F. CS/CS/HB 1009 was signed into law on June 7, 2019, and took effect on January 1, 2020.

² *Id.*

³ American Bar Association, *Model Business Corporation Act* (2016),

https://www.americanbar.org/content/dam/aba/administrative/business_law/corplaws/2016_mba.authcheckdam.pdf (last visited Jan. 14, 2020).

inconsistencies to the 2019 legislation. Prior to the 2019 legislation, FBCA had not been substantially amended within the last 30 years.⁴ This bill, in part, attempts to resolve the issues identified.

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

III. Effect of Proposed Changes:

Interrogatories issued by the Department of State

The 2019 FBCA revision inadvertently deleted language from s. 607.0130, F.S., that permitted the Department of State (Department) to direct interrogatories⁵ to a corporation that was regulated under the FBCA, including any of its officers or directors.⁶ The Department used these interrogatories to determine a corporation's compliance with the FBCA. The Department could institute civil proceedings against a corporation found to be in violation of the FBCA based on the interrogatories.⁷

Section 67 creates s. 607.1703, F.S., to restore the Department's authority to issue interrogatories to corporations that operate pursuant to the FBCA and to their officers or directors. Like the deleted FBCA provision, the bill:

- Gives the corporation 30 days to respond, or longer if the Department permits;
- Requires that interrogatories directed to an individual be answered by that individual;
- Provides timeframes for filing a court record relating to the interrogatories; and
- Grants powers and duties to the Department to administer the FBCA, including authority to:
 - Institute a civil action in a circuit court to collect a penalty, fee, or tax that is owed to the state by the corporation, and to compel any legally required finding, qualification, or registration;
 - File a *lis pendens*⁸ against any property owned by the corporation;
 - Refer its findings to the Department of Legal Affairs for the purpose of initiating further action; and
 - Adopt rules necessary to carry out the FBCA.

The bill slightly modifies the FBCA's prior language to specify that the Department may serve interrogatories on a *domestic or foreign* corporation, and to change references from a corporation's "president, vice president, secretary, or assistant secretary" to a corporation's "officer or director" [or] "shareholder ... or fiduciary," when specified.

⁴ The Florida Bar, *Legislature Rewrites Corporations Statute*, FLA. BAR. NEWS, May 1 2019, <https://www.floridabar.org/the-florida-bar-news/legislature-rewrites-corporations-statutes/>

⁵ "Interrogatories" are a list of questions posed by one party to its opposing party in a civil action as part of the discovery process. The recipient must answer the questions under oath. Fla. R. Civ. P. 1.340(a)

⁶ See Ch. 2019-90, Laws of Fla.; see also The Florida Bar Business Law Section, *Proposed Modifications to Chapter 607* (Jan. 24, 2019)(on file with the Senate Committee on Commerce and Tourism).

⁷ Section 607.0130 (2007).

⁸ A "lis pendens," is filed with the clerk of the court to provide written notice that a lawsuit has been filed that involves either title to or a claimed ownership interest in real property. See Legal Information Institute, *Lis Pendens*, https://www.law.cornell.edu/wex/lis_pendens (last visited Jan. 14, 2020).

Not-for-Profit Corporation Board Committees

A not-for-profit corporation's board of directors is vested with the corporation's powers⁹ and must fulfill the corporation's obligations to its members, beneficiaries, donors, and community.¹⁰ The board of directors may also appoint board directors to serve as members of a corporate committee, which acts with the board's full authority, except that the committee cannot:¹¹

- Approve or recommend for approval actions or proposals that members must approve;
- Fill board or board committee vacancies; or
- Adopt, amend, or repeal the bylaws.

Florida law does not allow a not-for-profit corporation's board to appoint non-directors to its board committees. Despite a lack of authority, it is believed that many not-for-profit corporations include non-director members on the board committees.¹²

The Model Not-For-Profit Corporation Act permits a not-for-profit corporation's board to create an advisory committee made up of non-director appointees. The Model Not-For-Profit Corporation Act also dictates that an advisory committee may not have board authority, and may only make recommendations to the board or the not-for-profit corporation's officers or members.¹³

Section 77 authorizes a not-for-profit corporation's board of directors to create board committees and appoint as members thereto any person, whether or not they serve as a director for the not-for-profit corporation's board, subject to the following requirements:

- If an executive committee is created by a resolution of the board of directors, the board may appoint non-board members, but the majority of the executive committee's membership must consist of board directors; and
- If the committee is created by the board or is otherwise authorized by the articles of incorporation or bylaws, and its scope of authority relates to director elections, nominations, or credentials, or is otherwise involved in the director election process, the committee's membership may be made up of entirely non-board members; and
- If an advisory committee is created by the corporation, its membership may consist of any number of non-directors, but the advisory committee may not act on behalf of the board, exercise any board power or authority, or bind the not-for-profit corporation to any action. The advisory committee may make recommendations to the board or corporate officers or members, however.

⁹ See s. 617.01401(2), F.S. (defining a "board of directors" as the "group of persons vested with the management of the affairs of the corporation..."), and s. 607.0302, F.S., which outlines corporate duties as the powers 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.

¹⁰ 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), available at <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 Jan. 14, 2020).

¹¹ Section 617.0825(1) and (3), F.S.

¹² The Florida Bar Business Law Section, *White Paper for S.B. [838] & H.B. [495]*, (Oct. 21, 2019)(on file with the Senate Committee on Commerce and Tourism).

¹³ American Bar Association Committee on Nonprofit Organizations, *Model Nonprofit Corporation Act* §8.25 (3d ed. 2008).

Additionally, the bill defines a non-director committee member's responsibility, fiduciary duty,¹⁴ and liability protections¹⁵ as equal to those provided to a director committee member.

This section does not apply to a condominium, cooperative, or homeowners' association board's fining or architectural review committees acting pursuant to ss. 718.303(3), 719.303(3), and 720.303(2) or 720.3035(1), F.S., respectively.

Conforming Changes

The bill amends ss. 607.0120, 607.0125, 607.0141, 607.0620, 607.0720, 607.1002, 607.11921, 607.1202, 607.1302, 607.1333, 607.1422, 607.1431, 607.14401, 607.1502, 607.1504, 607.15091, 607.1602, and 605.0116, F.S., to provide for consistent terminology throughout ch. 607, F.S., by amending the following terms from:

- "act" to "chapter;"
- "action" to "proceeding;"
- "representative" to "authorized representative;"
- "corporation" to "domestic corporation or foreign corporation;"
- "his or her" to "his, her, or its;"
- "business entity" to "eligible entity;"¹⁶
- "successor" to "successor or assignee;"
- "rights of action" to "proceedings and actions;" and
- "do business" to "transact business."

The bill also amends ss. 607.1103, 607.1106, 607.11920, 607.11921, 607.11923, 607.11924, 607.11935, 607.1432, 607.1520, and 607.504, F.S., to:

- Add references to obligations, other securities, eligible interests, and rights to acquire any combination of shares, securities, cash, or property in connection with organic transactions;
- Ensure consistent use of the term "separate voting group;"
- Change "the receiver" to "any receiver" to reflect that a court may appoint and order compensation for one or more receivers;
- Tailor a reference regarding the process for the withdrawal and cancellation of certificate of authority for a foreign corporation to refer to a foreign corporation, rather than to "it;" and
- Clarify that an entity may elect to become a social purpose corporation by domestication.

Clarifying Changes

The bill makes clarifying changes to ss. 607.0601, 607.0602, 607.0705, 607.0808, 607.0850, 607.0901, 607.1102, 607.1103, 607.11921, 607.11932, 607.1501, 607.1509, and 607.1602, F.S. The changes include:

¹⁴ A director must discharge his or her duties to the corporation in good faith, with the care of an ordinarily prudent person in a similar position, and in a manner he or she reasonably believes to be in the not-for-profit corporation's best interest. *See* s. 617.0830(1)(a)-(c), F.S.

¹⁵ 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. *See* ss. 607.0831 and 617.0830, F.S.

¹⁶ An "eligible entity" is a domestic corporation, foreign corporation, nonprofit corporation, general partnership, limited partnership, limited liability company, real estate investment trust, or any other foreign or domestic entity that is organized under an organic law. Section 607.01401(28)(a), F.S.

- Specifying that a series of shares that has voting rights is authorized to receive the corporation's net assets upon its dissolution;
- Replacing language to clarify that a series of shares may exist only within one class of shares rather than in one or more classes;
- Changing the term "checks in payment" to "payment" to permit forms of payment to shareholders other than by check;
- Permitting a corporate board to meet on the issue of removal of a board director *and* any additional purpose, if all of the purposes are stated on a properly distributed meeting notice;
- Expanding the definition of "expenses" to include reasonable attorney fees *and expenses*;
- Replacing, in the context of affiliated transactions governed by s. 607.0901, F.S., the term "shares" with "interests" to accommodate those entities that do not have shares;
- Clarifying that a domestic corporation may acquire all of, or one or more classes or series of, both another corporation's shares *and* its rights to acquire shares;
- Ensuring that laws that govern organic transactions contemplate the transaction of all of the following: obligations, other securities, eligible interests, and rights to acquire any combination of shares, securities, cash, or property;
- Specifying that s. 607.1103(6)(a), F.S., details the voting procedures on a plan of merger only;
- Permitting a corporation's articles of incorporation to limit or eliminate specific voting rights, or any combination thereof, as applies to a plan of merger or plan for share exchange;
- Clarifying that ch. 607, F.S., in addition to a foreign corporation's articles of incorporation or board action, may require a vote greater than a quorum to approve the foreign corporation's plan of domestication or plan of conversion;
- Clarifying that a foreign corporation that maintains an account (not just a bank account) in a financial institution is not transacting business, and is therefore not subject to the Department's regulatory authority in virtue thereof;
- Replacing an incorrect word to clarify that a statement of change or similar document is effective when it has been filed *with* the department, not *by* it; and
- Specifying that a shareholder may only inspect the records of actions taken without a meeting by a board committee *of the corporation*.

Cross-Reference Corrections

The bill corrects missing or incorrect cross references in ss. 607.1406, 607.1422, 607.1430, 607.1504, 607.1604, and 607.1622, F.S.

The bill also modifies the sections, subsections, or paragraphs to which provisions apply in ss. 607.0721 and 607.605.0702, F.S.

Grammar, Punctuation, and Duplicative Language Corrections

The bill 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, 607.11 03, 607.11035, 607.11045, 607.11932, 607.11935, 607.1303, 607.1320, 607.1340, 607.1403, 607.1430, 607.1503, 607.1505, 607.1507, 607.15101, 605.0702, 605.0716, and 617.0501, F.S.

The bill also deletes unnecessary and duplicative language in ss. 605.1104, 607.0630, 607.0707, and 607.1301, F.S.

Effective Date

Section 78 provides that the act takes effect upon becoming law.

Bill Section Directory

Section 1	Section 607.0120, F.S.
Section 2	Section 607.0123, F.S.
Section 3	Section 607.0125, F.S.
Section 4	Section 607.0127, F.S.
Section 5	Section 607.01401, F.S.
Section 6	Section 607.0141, F.S.
Section 7	Section 607.0501, F.S.
Section 8	Section 607.0601, F.S.
Section 9	Section 607.0602, F.S.
Section 10	Section 607.0620, F.S.
Section 11	Section 607.0623, F.S.
Section 12	Section 607.0630, F.S.
Section 13	Section 607.0704, F.S.
Section 14	Section 607.0705, F.S.
Section 15	Section 607.0707, F.S.
Section 16	Section 607.0720, F.S.
Section 17	Section 607.0721, F.S.
Section 18	Section 607.0732, F.S.
Section 19	Section 607.0750, F.S.
Section 20	Section 607.0808, F.S.
Section 21	Section 607.0832, F.S.
Section 22	Section 607.0850, F.S.
Section 23	Section 607.0855, F.S.
Section 24	Section 607.0858, F.S.
Section 25	Section 607.0901, F.S.
Section 26	Section 607.1002, F.S.
Section 27	Section 607.1003, F.S.
Section 28	Section 607.1102, F.S.
Section 29	Section 607.1103, F.S.
Section 30	Section 607.11035, F.S.
Section 31	Section 607.11045, F.S.
Section 32	Section 607.1106, F.S.
Section 33	Section 607.11920, F.S.
Section 34	Section 607.11921, F.S.
Section 35	Section 607.11923, F.S.
Section 36	Section 607.11924, F.S.
Section 37	Section 607.11932, F.S.
Section 38	Section 607.11933, F.S.
Section 39	Section 607.11935, F.S.
Section 40	Section 607.1202, F.S.
Section 41	Section 607.1301, F.S.
Section 42	Section 607.1302, F.S.
Section 43	Section 607.1303, F.S.

Section 44	Section 607.1320, F.S.
Section 45	Section 607.1333, F.S.
Section 46	Section 607.1340, F.S.
Section 47	Section 607.1403, F.S.
Section 48	Section 607.1406, F.S.
Section 49	Section 607.1422, F.S.
Section 50	Section 607.1430, F.S.
Section 51	Section 607.1431, F.S.
Section 52	Section 607.1432, F.S.
Section 53	Section 607.14401, F.S.
Section 54	Section 607.1501, F.S.
Section 55	Section 607.1502, F.S.
Section 56	Section 607.1503, F.S.
Section 57	Section 607.1504, F.S.
Section 58	Section 607.1505, F.S.
Section 59	Section 607.1507, F.S.
Section 60	Section 607.1509, F.S.
Section 61	Section 607.15091, F.S.
Section 62	Section 607.15101, F.S.
Section 63	Section 607.1520, F.S.
Section 64	Section 607.1602, F.S.
Section 65	Section 607.1504, F.S.
Section 66	Section 607.1622, F.S.
Section 67	Section 607.1703, F.S.
Section 68	Section 607.1907, F.S.
Section 69	Section 607.504, F.S.
Section 70	Section 605.0116, F.S.
Section 71	Section 605.0207, F.S.
Section 72	Section 605.0215, F.S.
Section 73	Section 605.0702, F.S.
Section 74	Section 605.0716, F.S.
Section 75	Section 605.1104, F.S.
Section 76	Section 617.0501, F.S.
Section 77	Section 617.0825, F.S.
Section 78	Effective Date

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:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates s. 607.1703 of the Florida Statutes and substantially amends the following sections of the Florida Statutes: 607.0120, 607.0123, 607.0125, 607.0127, 607.01401, 607.0141, 607.0501, 607.0601, 607.0602, 607.0620, 607.0623, 607.0630, 607.0704, 607.0705, 607.0707, 607.0720, 607.0721, 607.0732, 607.0750, 607.0808, 607.0832, 607.0850, 607.0855, 607.0858, 607.0901, 607.1002, 607.1003, 607.1102, 607.1103, 607.11035, 607.11045, 607.1106,

607.11920, 607.11921, 607.11923, 607.11924, 607.11932, 607.11933, 607.11935, 607.1202, 607.1301, 607.1302, 607.1303, 607.1320, 607.1333, 607.1340, 607.1403, 607.1406, 607.1422, 607.1430, 607.1431, 607.1432, 607.14401, 607.1501, 607.1502, 607.1503, 607.1504, 607.1505, 607.1507, 607.1509, 607.15091, 607.15101, 607.1520, 607.1602, 607.1604, 607.1622, 607.1907, 607.504, 605.0116, 605.0207, 605.0215, 605.0702, 605.0716, 605.1104, 617.0501, and 617.0825.

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 January 14, 2020:

- Deletes unnecessary language that implies that a corporation could obtain a life insurance policy for a shareholder that is not a natural person;
- Clarifies that a favorable vote of a majority of all shares entitled to vote on an amendment are required to amend a corporation's articles of incorporation;
- Provides that changes made to board committee membership requirements do not apply to condominium, cooperative, or homeowner's association committees that perform specific duties; and
- Deletes duplicative rulemaking authority in chs. 605 and 607, F.S.

- B. **Amendments:**

None.