

HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: CS/HB 339 Business Organizations

SPONSOR(S): Regulatory Reform Subcommittee, Robinson, W. and others

TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 602

FINAL HOUSE FLOOR ACTION: 115 Y's

1 N's

GOVERNOR'S ACTION: Approved

SUMMARY ANALYSIS

CS/HB 339 passed the House on April 28, 2021, as CS/SB 602.

The bill amends several provisions of the Florida Business Corporation Act (FBCA), the Florida Revised Limited Liability Company Act, and corporations not for profit laws to address concerns raised by corporations and the legal community following a complete revision of the statutes in 2019 and 2020.

The bill:

- Narrows the circumstances under which a shareholder may assert appraisal rights;
- Modifies an appraisal rights exception, known as the "market out" exception, which requires certain shareholders to accept adverse corporate action or sell their shares on an organized market, to accommodate corporations whose stock is not traded on an organized market, but has a comparable trading process;
- Addresses appraisal arbitrage, wherein disinterested parties misuse the appraisal rights afforded under Florida law to generate additional profits from the process;
- Makes clarifying and conforming changes to fix minor errors in 2019 and 2020 FBCA legislation;
- Revises the timeframe for eligible entities to be able to use the name of a dissolved corporation;
- Clarifies the application of corporation not for profit laws to the operation of timeshares, condominiums, cooperatives, homeowners' associations, and mobile homeowners' associations.

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

The bill was approved by the Governor on May 7, 2021, ch. 2021-13, L.O.F., and became effective on that date.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

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.¹ However, individual states may promulgate laws relating to the creation, organization, operation, and dissolution of corporations and other entities in their respective jurisdictions.²

Generally, Florida regulates the following entities:³

- Business corporations;
- Nonprofit corporation;
- General partnerships, including limited liability partnerships;
- Limited partnerships, including limited liability limited partnerships;
- Limited liability companies;
- Declarations of trust; and
- Foreign entities.

As of October 2020, Florida had approximately 2,500,212 active business entities in the state,⁴ regulated under the Florida Business Corporation Act (FBCA),⁵ The Florida Revised Limited Liability Company Act (FRLCA),⁶ corporations not for profit laws,⁷ and limited partnership laws,⁸ which are now largely modeled after the MBCA.⁹ In 2014, the Corporations, Securities, and Financial Services Committee of the Florida Bar Business Law Section (FBBLS) organized a drafting task force to recommend revisions to Florida business entity laws, last overhauled in 1989, as the ABA was in the process of revising and modernizing the MBCA.¹⁰ The task force's mission statement included a full FBCA study and the proposal of revisions to:

- Bring the laws in line with MBCA revisions;
- Maintain Florida's competitiveness with other jurisdictions;
- Fix issues in existing law; and
- Encourage the formation and use of Florida corporations.¹¹

The task force's effort resulted in the Legislature passing a comprehensive revision to Florida's entity statutes¹² signed into law on June 7, 2019, with a January 1, 2020 effective date.¹³ However, the task force subsequently identified issues that needed clarification, in addition to several errors in the enrolled bill, including grammar, punctuation, cross reference errors, and statutory inconsistencies.¹⁴ Some issues were fixed in the 2020 Session,¹⁵ but additional issues have since been identified.¹⁶

¹ 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. 26, 2021).

² *Id.*

³ S. 605.0102(23), F.S.; Title XXXVI, F.S.

⁴ The Florida Department of State, Division of Corporations, *Yearly Statistics*, <https://dos.myflorida.com/sunbiz/about-us/yearly-statistics/> (last visited Mar. 26, 2021).

⁵ Ch. 607, F.S.

⁶ Ch. 605, F.S.

⁷ Ch. 617, F.S.

⁸ Ch. 620, F.S.

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

¹⁰ *Id.*

¹¹ *Id.*

¹² 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.

¹³ Ch. 2019-90, L.O.F., in CS/CS/HB 1009 (2019).

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

¹⁵ Ch. 2020-32, L.O.F., in CS/SB 838 (2020).

¹⁶ Florida Bar Business Law Section (FBBLS), Chapter 607 Drafting Subcommittee, *White Paper for S.B. 602 & H.B. 339: An Act Relating to Corporations and Other Entities*, 1-2 (Feb. 2021).

Appraisal Rights for Corporation Shareholders

Triggers of Appraisal Rights for Minority Shareholders – Current Situation

Minority shareholders may dissent to corporate or majority shareholder action by asserting their appraisal rights, pursuant to ss. 607.1301-607.1340, F.S., which requires a corporation to buy the minority shareholders' stock at its "fair value."¹⁷ This remedy is one of the few protections against actions that "... fundamentally change the nature of the shareholders' investments without the check and balance of informed shareholder approval, and [provide] the opportunity for dissenters to withdraw from the corporation."¹⁸ The appraisal process is effectuated through a judicial hearing, where a court appraises the fair value of the shareholder's interests and assesses the corporation for payment of both the fair value and any accrued interest, calculated according to s. 55.03, F.S.

A minority shareholder may assert his or her appraisal rights only in specific instances where a fundamental corporate change occurs, including (and subject to substantial restrictions and limits) the domestication or conversion to another type of business entity, a merger or share exchange, a disposition of all or substantially all of the corporation's assets, an amendment to the corporation's articles of incorporation that creates fractional shares, and in other cases involving a corporation's articles of incorporation, bylaws, or a resolution of its board of directors.^{19, 20} For example, in s. 607.1302(1)(g), F.S., shareholders may assert appraisal rights where an amendment to the articles of incorporation or bylaws adversely alters or abolishes the shareholder's voting rights or other rights.²¹ Also, in s. 607.1302(1)(h), F.S., a shareholder of a class of shares prescribed in an articles of incorporation prior to October 1, 2003, including any shares within that class subsequently authorized by amendment, is entitled to appraisal rights if there is amendment of the articles of incorporation on which the shareholder is entitled to vote and such amendment would adversely affect such shareholder by certain actions to reduce shares, value of the shares, and voting rights.²²

Triggers for Appraisal Rights for Minority Shareholders – Effect of the Bill

The bill narrows the instances that trigger a minority shareholder's appraisal rights by deleting the provision allowing shareholders to assert appraisal rights where an amendment to the articles of incorporation or bylaws adversely alters or abolishes the shareholder's voting or other rights. However, the bill allows shareholders in a corporation with 100 or fewer shareholders, whose shares were authorized on, or after October 1, 2003, the same appraisal rights as granted in s. 607.1302(1)(h), F.S. Minority shareholders may still assert their appraisal rights under several other bases enumerated in s. 607.1302(1), F.S.

Market Out Exception to Appraisal Rights – Current Situation

What is commonly called the "market out exception" means that appraisal rights are unavailable for certain shareholders in certain situations and the shareholders must either accept the adverse corporate action or sell their shares in an organized market.²³ The theory behind the "market out" exception is that the shareholder, if dissatisfied with the proposed corporate action, can choose to sell

¹⁷ S. 607.1302(1), F.S.; S. 607.1301(5), F.S., defines "fair value" as the value of the corporation's shares immediately before the effectiveness of the corporate action in question, using commonly-used valuation concepts and techniques, without discounting for lack of marketability or minority status of the shares.

¹⁸ Gregory Yadley and Christina Nethero, *Florida Corporate Practice: Appraisal Rights* s. 11:1 (2020); see also, *South End Improvement Group, Inc. by & through Bank of New York v. Mulliken*, 602 So. 2d 1327, 1332 (Fla. 4th DCA 1992).

¹⁹ Section 607.1302(1), F.S.

²⁰ Gregory Yadley and Christina Nethero, *Florida Corporate Practice: Appraisal Rights* s. 11:2.C (2020).

²¹ S. 607.1302(1)(g), F.S.

²² S. 607.1302(1)(h), F.S.

²³ FBBLS, *supra* note 16, at 4.

the shares into an organized market that is liquid and where the value of the shares is reasonably calculated to arrive at a price reflective of an arm's length transaction.²⁴

Thirty-eight states, including Florida, operate under the market out exception, which restricts the appraisal rights available to shareholders of stock in large or publicly traded corporations. “[P]ublic shareholders presumptively have an available market. [W]hen a public market exists..., public shareholders must employ market price instead of court-appraisal as the measure of their interests.”²⁵

In Florida, the market out exception excludes shareholders from asserting appraisal rights if:²⁶

- Their triggering action is:
 - Consummation of a domestication or a conversion of such corporation, if shareholder approval is required for the domestication or the conversion;
 - Consummation of a merger to which such corporation is a party, in certain situations;
 - Consummation of a share exchange to which the corporation is a party as the corporation whose shares will be acquired, except any shareholder of the corporation with respect to any class or series of shares that is not acquired in the share exchange;
 - Consummation of a disposition of assets if the shareholder is entitled to vote on the disposition, including a sale in dissolution, in certain situations; or
 - An amendment of the articles of incorporation with respect to a class or series of shares which reduces the number of shares of a class or series owned by the shareholder to a fraction of a share if the corporation has the obligation or the right to repurchase such fractional share; and
- Their shares are:
 - A covered security;
 - Not a covered security, but are traded in an organized market; or
 - Issued by an open end management investment company that is registered with the Securities and Exchange Commission.

Whether the market out exception applies is determined as of:

- The record date fixed to determine the shareholders entitled to receive notice of the meeting of shareholders to act upon the corporate action requiring appraisal rights, or the date of offer for a merger or share exchange; or
- If there will be no meeting of shareholders and no offer of a merger or share exchange is made, the close of business on the day before the consummation of the corporate action or the effective date of the amendment of the articles, as applicable.

“Record date” means the date fixed for determining the identity of the corporation’s shareholders and their share holdings. Unless another time is specified when the record date is fixed, the determination is made as of the close of business at the principal office of the corporation on the date so fixed.²⁷

Market Out Exception to Appraisal Rights – Effect of the Bill

The bill broadens the market out exception by prohibiting appraisal actions asserted in connection with a corporation’s merger, share exchange, or disposition of corporate assets (as permitted by the corporation’s articles of incorporation or bylaws), or those that adversely affect a shareholder of a closely held corporation or a shareholder who holds shares issued prior to October 1, 2003.

The bill also provides that the market out exception applies where the shares held are not a covered security, but traded in an organized market or subject to a “comparable trading process.” The bill defines a “comparable trading process” as one where the:

²⁴ *Id.*

²⁵ Gil Matthews, *The “Market Exception” in Appraisal Statutes*, (Mar. 30, 2020), <https://corpgov.law.harvard.edu/2020/03/30/the-market-exception-in-appraisal-statutes/> (last visited Mar. 26, 2021).

²⁶ S. 607.1302(2), F.S.

²⁷ S. 607.01401(63), F.S.

- Share's market price is determined at least quarterly based on an independent valuation and by following a formalized process that is designed to determine a value for the corporation's shares that is comparable to the value of a comparable publicly traded companies; and
- Corporation repurchases the shares at pricing set by its board of directors based on the independent valuation and subject to established terms and conditions that have been provided to the shareholders.

The bill clarifies that, in cases in which the triggering corporate action must be approved by shareholders' written consent, the applicability of the market share exception must be decided at the point at which the record date was fixed to determine which shareholders are entitled to sign the consent.

Assertion of Appraisal Rights by Nominees and Beneficial Owners - Current Situation

"Record shareholder" means the person:²⁸

- In whose name shares are registered in the records of the corporation; or
- Identified as a beneficial owner of shares in the beneficial ownership certificate on file with the corporation to the extent of the rights granted by such certificate.

"Beneficial shareholder" means a person who owns the beneficial interest in shares. Such person may be a record shareholder or a person on whose behalf shares are registered in the name of an intermediary or nominee.²⁹ Generally, an intermediary or a nominee holds legal ownership of a security, including shares, while beneficial ownership is held by someone else who receives all dividends and other benefits of ownership.³⁰

A record shareholder may assert appraisal rights as to fewer than all the shares registered in the record shareholder's name but owned by a beneficial shareholder or a voting trust beneficial owner only if the record shareholder:³¹

- Objects with respect to all shares of the class or series owned by the beneficial shareholder or the voting trust beneficial owner; and
- Notifies the corporation in writing of the name and address of each beneficial shareholder or voting trust beneficial owner on whose behalf appraisal rights are being asserted.

The rights of a record shareholder who asserts appraisal rights for only part of the shares held in the record shareholder's name under this subsection are determined as if the shares as to which the record shareholder objects and the record shareholder's other shares were registered in the names of different record shareholders.³²

A beneficial shareholder and a voting trust beneficial owner may assert appraisal rights as to shares of any class or series held on behalf of the shareholder only if such shareholder:³³

- Submits to the corporation the record shareholder's written consent to the assertion of such rights no later than the date referred to in s. 607.1322(2)(b)2; and
- Does so with respect to all shares of the class or series that are beneficially owned by the beneficial shareholder or the voting trust beneficial owner.

²⁸ S. 607.01401(64), F.S.

²⁹ S. 607.01401(7), F.S.

³⁰ The Free Dictionary by Farlex, The Financial Dictionary, *Nominee*, <https://financial-dictionary.thefreedictionary.com/nominee> (last visited Mar. 26, 2021).

³¹ S. 607.1303(1), F.S.

³² *Id.*

³³ S. 607.1303(2), F.S.

Currently, a shareholder who wishes to demand an appraisal rights payment from the corporation must take certain actions before the triggering corporate action is effectuated.³⁴ There is no specific requirement for when shares must have been beneficially owned to be able to demand payment. FBBLs has identified perceived abuses associated with appraisal rights being simultaneously bought and sold (arbitrage), stemming from most simultaneous buyers and sellers of appraisal rights (arbitrageurs) not being historical shareholders of the corporation, but rather those who purchase their shares after the announcement date of, or record date for, the meeting at which the corporate action is to be voted upon, or the effective date of the written consent approving such corporate action.³⁵

Assertion of Appraisal Rights by Nominees and Beneficial Owners – Effect of the Bill

The bill requires a beneficial shareholder who wishes to assert his or her appraisal rights and demand payment to have a beneficial ownership in their shares in the corporation by the record date established for the triggering corporate action.

The bill provides that a record shareholder asserting appraisal rights as to fewer than all the shares registered in the record shareholder's name but owned by a beneficial shareholder or a voting trust beneficial owner may only do so if the beneficial shareholder or voting trust beneficial owner acquired all of their shares before the record date for the triggering corporate action.

Award of Accrued Interest in an Appraisal Action – Current Situation

Currently, "accrued interest" as it applies to interest on payments made pursuant to an assertion of one's appraisal rights is calculated at the statutory judgment interest rate as described in s. 55.03, F.S.³⁶ The interest rate, set by the Chief Financial Officer on December 1, March 1, June 1, and September 1 of each year, is payable on judgments for the calendar quarter beginning January 1, and adjusted quarterly on April 1, July 1, and October 1 by averaging the discount rate of the Federal Reserve Bank of New York for the preceding 12 months, then adding 400 basis points.³⁷

Award of Accrued Interest in an Appraisal Action – Effect of the Bill

The bill amends the definition of "accrued interest" to require the parties in an appraisal action either to agree to an interest rate between themselves, or to accept a rate determined by a court to be equitable. The court's rate may not exceed the statutory judgment rate described in s. 55.03, F.S. Additionally, the bill allows a court to prohibit the payment of interest where it finds that the shareholder who asserted his or her appraisal rights acted arbitrarily or not in good faith.

The bill also makes conforming changes to reflect both that the rate of interest is variable and that a court may choose not to award accrued interest pursuant to the amended definition of the term.

Prepayment in an Appraisal Action – Current Situation

Currently, there is no provision allowing prepayment of the fair value of shares that are the subject of a shareholder's appraisal action to a shareholder. FBBLs argues that allowing such prepayment would shorten the amount of time during which interest can accrue, and therefore mitigates risk to the corporation.³⁸

Prepayment in an Appraisal Action – Effect of the Bill

³⁴ S. 607.1321

³⁵ FBBLs, *supra* note 16, at 8.

³⁶ S. 607.1301(1), F.S.

³⁷ S. 55.03(1), F.S.

³⁸ FBBLs, *supra* note 16, at 8.

The bill gives corporations the option to prepay the fair value of the shares that are the subject of a shareholder's appraisal action, and requires such shareholder to accept such prepayment. Specifically, the bill allows the corporation to prepay all, or any part of the amount, that it determines is due to the shareholder. If the corporation makes the prepayment within 90 days after the appraisal notice, then the corporation may only be liable for the accrued interest on any amount above what it prepaid to the shareholder. If the corporation makes a payment after the 90-day period, but before a judicial determination of the interest due, then the corporation must prepay interest at the statutory judgment rate provided for in s. 55.03, F.S., and may be liable for additional interest on any excess payment due, calculated from the date the corporate action became effective.

The bill makes conforming changes to acknowledge the prepayment options provided in the bill.

Name of a Dissolved Entity – Current Situation

Currently, the name of a dissolved corporation is not available for use by another corporation for one year after the effective date of dissolution, unless the dissolved corporation gives certain consent.³⁹ Previous to 2019, the time period was 120 days.⁴⁰ FBBS indicates that the change was inadvertent and should go back to the 120 day time period previously authorized.⁴¹

Name of a Dissolved Entity – Effect of the Bill

The bill reverts to the 120-day period, and makes a non-substantive conforming change.

Property Associations and Not-For-Profit Corporations

Committee Requirements – Current Situation

Section 617.0825, F.S., outlines requirements for not for profit corporation board and advisory committees. Such requirements do not apply to board or advisory committees established under:

- Chapter 718, F.S., relating to condominium associations, to perform functions under s. 718.303(3), relating to levying fines for violating the declaration, bylaws, or rules;
- Chapter 719, F.S., relating to cooperative associations, to perform the functions under s. 719.303(3), relating to levying fines for violating the documents or rules; or
- Chapter 720, F.S., relating to homeowners' associations, to perform functions under s. 720.303(2), relating to board meetings, or s. 720.3035(1), relating to architectural and construction improvements.

Committee Requirements – Effect of the Bill

The bill revises the property association activity committees which are exempt from the not for profit corporation advisory committee requirements. The bill removes homeowners' association committees related to board meetings, and adds homeowners' association committees related to levying fines for violating the declaration, bylaws, or rules and reviving covenants.

Quorum Requirements – Current Situation

Currently, an amendment to the articles of incorporation or the bylaws of any not for profit corporation which adds, changes, or deletes a quorum or voting requirement must meet the same quorum or voting requirement and be adopted by the same vote and voting groups required to take action under the quorum and voting requirements then in effect or proposed to be adopted, whichever is greater.⁴²

³⁹ S. 607.1405, F.S.

⁴⁰ Ch. 2019-90, L.O.F.

⁴¹ FBBS, *supra* note 16, at 9.

⁴² S. 617.0725, F.S.

Quorum Requirements – Effect of the Bill

The bill exempts not for profit corporations that are condominium, cooperative, or homeowners' associations from not for profit corporation requirements for amending articles of incorporation or bylaws for a not for profit corporation in a way that changes quorum or voting requirements.

Application of Not For Profit Corporations Chapter to Community Associations – Current Situation

Currently, in the event of any conflict between the provisions of chapter 617, F.S., for not for profit corporations, and chapters regarding community associations (chapter 718, F.S., regarding condominiums, chapter 719, F.S., regarding cooperatives, chapter 720, F.S., regarding homeowners' associations, chapter 721, F.S., regarding timeshares, or chapter 723, F.S., regarding mobile home owners' associations), the provisions of the applicable community association chapter applies where an exception is carved out.⁴³

Application of Not For Profit Corporations Chapter to Community Associations – Effect of the Bill

The bill clarifies that chapter 617, F.S., applies to such community associations, except where there is a conflict, and then the chapters for community associations apply.

Access to Records for Limited Liability Companies – Current Situation

Currently, during regular business hours and at a reasonable location specified by the company, a member may inspect and copy:⁴⁴

- The company records; and
- Full information regarding the activities, affairs, financial condition, and other circumstances of the company as is just and reasonable if the member:
 - Seeks the information for a purpose reasonably related to the member's interest as a member; or
 - Makes a demand in a record received by the company, describing with reasonable particularity the information sought and the purpose for seeking the information, and if the information sought is directly connected to the member's purpose.

Access to Records for Limited Liability Companies – Effect of the Bill

The bill clarifies that in order for a member to access full information regarding the activities, affairs, financial condition, and other circumstances of the company, such member must both:

- Seek the information for a purpose reasonably related to the member's interest as a member; and
- Make a demand in a record received by the company, describing with reasonable particularity the information sought and the purpose for seeking the information, and if the information sought is directly connected to the member's purpose.

The bill updates cross-references to correct scrivener's errors.

The bill took effect upon becoming law on May 7, 2021.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

⁴³ S. 617.1703, F.S.

⁴⁴ S. 605.0410(3), F.S.

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.