

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 Commerce and Tourism

BILL: CS/SB 1198

INTRODUCER: Senator Martin

SUBJECT: Corporate Actions

DATE: January 24, 2024

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Baird</u>	<u>McKay</u>	<u>CM</u>	<u>Fav/CS</u>
2.	_____	_____	<u>RC</u>	_____

I. Summary:

CS/SB 1198 provides a statutory ratification procedure for corporate actions that may not have been properly authorized and for shares that may have been improperly issued. These improperly authorized corporate actions, that would otherwise be proper, are called defective corporate actions.

The bill provides a statutory ratification process that is intended to supplement common law ratification. Subsequent ratified defective corporate actions, under these proposed provisions, would remain subject to equitable review. The ratification procedure is intended to be available only where there is objective evidence that a corporate action was defectively implemented. The bill gives specified affected parties the ability to file motions in the circuit court of the applicable county.

The bill also provides a statutory method, though filing a single composite statement, for a registered agent to resign from more than one corporate entity at a time, if the specified entity has been dissolved, administratively or voluntarily, for 10 years or longer. The bill applies to the following business entity types:

- Limited liability companies or a foreign limited liability companies;
- Corporations; and
- Corporations not for profit.

The bill keeps the fee to file the registered agent resignation the same for the listed above business entity types, even if filing to resign from more than one entity at a time.

The bill takes effect July 1, 2024.

II. Present Situation:

Corporations that do business within Florida are governed by the requirements laid forth in the Florida Business Corporation Act, a law that is modeled after the Model Business Corporation Act (MBCA) promulgated by the American Bar Association (ABA) in 1950.¹ The general business law community, headed by groups like the ABA and the Florida Bar Business Law Section (Business Law Section), are continually participating in collaborative efforts to make corporate laws clearer and pragmatic.

Limited Liability Companies (Chapter 605)

A Limited Liability Company (LLC) is a type of business entity recognized by and regulated under chapter 605, F.S., the Florida Revised Limited Liability Company Act. Benefits to forming a business as an LLC include a flexible tax structure and a vertical liability shield, which limits the personal liability of the LLC's members and managers for company obligations. Currently, LLCs are the most popular business entity in Florida, with over 2 million active LLCs as of 2023.²

Corporations for Profit (Chapter 607)

A for profit corporation is a type of business entity recognized and regulated under chapter 607, F.S. In order for a corporation to organize, the entity must file articles of incorporation, including specifics such as a corporate name, address, number of shares, and the designation of a registered office and agent.³

Corporations Not for Profit (Chapter 617)

A corporation not for profit is a type of business entity recognized and regulated under chapter 617, F.S. The structure of corporations not for profit are similar to for profit corporations, needing the filing of articles of incorporation.

The Department of State

The Department of State (DOS) is the state's central location responsible for receiving and maintaining a number of corporate records. Florida law requires certain documents to be filed with the Division of Corporations (division) of the DOS in order for a business to be organized as a corporation, partnership, LLC, or other business/commercial entity. Business entities can file these documents and check their status through an internet portal that is maintained by the division.

¹ See generally Section 607, F.S.

² Florida Department of State, Division of Corporations Yearly Statistics, available at <https://dos.fl.gov/sunbiz/about-us/yearly-statistics/> (last visited January 2024).

³ Section 607.0202, F.S.

Fees

In order to help maintain these records, the DOS is statutorily allowed to collect fees. Florida's fee requirements for business entities are some of the most competitive in the United States; where a corporation in Delaware (the state with the most incorporations, because of their notoriously pro-business laws) will pay no less than \$175 and no more than \$200,000 in annual fees, Florida only requires an aggregate of \$150 in fees per year.⁴

In 2013, the Legislature passed a law to make fees more uniform across the various business law chapters. However, each specific type of business entity should be aware of the various fees associated with their respective business organization chapter.

The relevant fees for the bill are as follows:⁵

<u>Corporation Fees</u>	
New Florida/Foreign Corporation	
Filing Fees	\$35.00
Registered Agent Designation	\$35.00
Annual Reports	
Annual Report of a For Profit Corporation	\$150.00
Annual Report of Not For Profit Corporation	\$61.25
Resignation of Agent	
Resignation of Registered Agent of an Active Corporation	\$87.50
Resignation of Registered Agent of an Administratively Dissolved/Voluntarily Dissolved/Withdrawn Corporation/Inactive Corporation	\$35.00

<u>Limited Liability Company Fees</u>	
New Florida/Foreign LLC	
Filing Fee	\$100.00
Registered Agent Designation Fee	\$25.00
Annual Reports	
Annual Report	\$138.75
Resignation of Agent	
Resignation of Registered Agent for an active LLC	\$85.00
Resignation of Registered Agent for a dissolved/inactive LLC	\$25.00

⁴ U.S. Securities and Exchange Commission, Schedule 14-A, Saga Communications, Inc. Proxy Statement (Apr. 16, 2020), available at https://www.sec.gov/Archives/edgar/data/0000886136/000110465921050534/tm2111304-1_def14a.htm, (last visited January 22, 2024).

⁵ The Florida Department of State, Division of Corporations, Fees, available at <https://dos.fl.gov/sunbiz/forms/fees/>, (last visited January 22, 2024).

Defective Corporate Actions

Under the Florida Business Corporation Act, there are certain requirements that a corporation must establish in order to be considered a valid corporation and properly authorized. For instance, a corporation must file its articles of incorporation with the DOS to transact business in the state. If a corporation does not file those articles of incorporation or does not include the requirements of the articles of incorporation, they are not entitled to filing by the department and may be considered an invalid corporation.⁶

Additionally, a corporation could have filed all documents correctly, but made an error in the appointment of their board of directors. Subsequent actions by the corporation, after that incorrect appointment of the board of directors, may be considered invalid. Another potential scenario of a defective corporate action may arise when a corporation issues shares but did not adhere to the correct share issuing guidelines. Any subsequent action, after that incorrect share issuance, may be considered invalid.

Being an invalid corporation can also be referred to as being a defective corporation or an unauthorized corporation. However, because of their nature, corporations, whether it be the incorporator, the board of directors, an officer or agent of the corporation, or the shareholders, can take actions even though the corporation is technically defective, unauthorized, or invalid.

When an unauthorized or defective corporation takes an action, such as improperly issuing shares, a legal situation can arise. For example, a corporation that is trying to make a business deal with another entity or raise capital usually has to reveal certain corporate records for the other parties due diligence, discovering a defective corporate action can immediately halt a transaction or potential transaction. If a business deal has already been agreed upon prior to the discovering the defective corporate action, legal issues can arise.

Currently, disputed acts or defective share issuances that are carried out by a defective or unauthorized corporation are governed by common law in the court system. These disputes can cost business entities time and money to resolve, in addition to the time and resources that have to be allocated by the state via the court system.

Amending Articles of Incorporation

The articles of incorporation govern a corporation. A corporation can amend or add as many articles of incorporation as necessary.⁷ The amendment of an articles of incorporation must be adopted and approved. The adopting and approving can be done several ways, including, through the provided method in the articles of incorporation, either by the incorporators or board of directors, if shareholder action is not required, or by the shareholders or shareholders through voting groups.⁸

⁶ Section 607.0120(1), F.S.

⁷ Section 607.1001, F.S.

⁸ Section 607.1003(1-9), F.S., provides various methods for amending the articles of incorporation.

The amendment can be done in one single amendment form for a fee of \$35.00.⁹ This form, called the articles of amendment form, must be signed and delivered to the DOS, among other specific requirements laid out in statute.¹⁰

Active vs Dissolved Business Entities

The division annually assigns an accompanying status to business entities based on that business entities' filings and payment of fees. When a business entity pays their filing fees and files their initial required filings, (for an LLC it is their articles of organization, and for a corporation it is their articles of incorporation) the division will review the filings and if everything is satisfied the business entity will be assigned an "active" status.

After the initial filings to begin the business entity, a business entity is considered "active" when it has filed the annual report and paid the associated fee. Typically in the fall, the division will go through all of their filings and determine if a business entity is up to date in all of their filings and fees. If the division does not have the required information and associated fee on record they will assign the business entity an "inactive" status and the business entity will be administratively dissolved or administratively revoked.¹¹

A business entity can determine their status by logging in to the online portal operated by the DOS, or they can file and pay to have the DOS send them a certificate of status, for a \$5 fee for an LLC or an \$8.75 fee for a corporation.¹²

A business entity may file a reinstatement application, accompanied with the associated fee, to reactivate their business status and become an "active" business entity again.

Registered Agents

Generally, one of the statutory requirements that a business entity must meet is designating a registered agent.¹³ A registered agent must be an individual who resides in this state whose business address is identical to the address of the registered office.¹⁴ The registered agent must also be available at that Florida address during normal business hours and promptly forward any significant legal or state documents to the business. Registered agents are required to serve as the contact for the business entity that receives service of process, legal notifications, and other official state documents for a business entity.

The DOS is required to maintain an accurate record of the registered agent and registered office for service of process, and must promptly furnish any information disclosed thereby upon request and payment of the required fee.¹⁵ An individual within the business may serve as the entity's

⁹ Florida Department of State, Division of Corporations, Articles of Amendment form, *available at* <https://form.sunbiz.org/pdf/cr2e011.pdf>, (last visited on January 22, 2024).

¹⁰ Section 607.1006, F.S.

¹¹ Note that a general partnership is not required to file an annual report or pay an annual report fee.

¹² For LLCs *see* section 605.0213(12), F.S. and for Corporations *see* section 607.0122(19), F.S.

¹³ Section 607.0501, F.S.

¹⁴ *Id.*

¹⁵ *Id.*

registered agent. Additionally, a business entity with an active Florida filing or registration may serve as a registered agent, however an entity cannot serve as its own registered agent.

Additionally, if a business entity does not appoint and maintain a registered agent, the DOS may administratively dissolve that business entity.¹⁶

In Florida, a registered agent is required for the following:

- Limited Liability Companies;
- Corporation/Foreign Corporation (for profit);
- Corporation/Foreign Corporation (not for profit);
- Limited Partnerships (domestic and foreign); and
- Limited Liability Partnerships (domestic and foreign).¹⁷

In order for a registered agent to resign as the registered agent of the business entity, the registered agent must complete a specific form, accompanied by the payment of the fee, and mail it in to the division. Currently, a registered agent must pay a separate fee to resign as a registered agent of each business entity, separately.

III. Effect of Proposed Changes:

Ratification of Defective Corporate Actions

Sections 1 through 6 create new sections of law detailing the required procedures for ratifying a defective corporate action.

Section 7 of the bill creates filing requirements for ratifying a defective corporate action.

Section 8 of the bill creates law contemplating the jurisdiction and process for judicial proceedings regarding the validity of corporate actions.

Procedural Requirements

Section 1 creates s. 607.145, F.S., defining the following terms, among others, as:

- “Corporate action” meaning any action taken by or on behalf of a corporation, including any action taken by the incorporator the board of directors, a committee of the board of directors, an officer or agent of the corporation, or the shareholders;
- “Defective corporate action” meaning any corporate action purportedly taken which is, and at the time such corporate action was purportedly taken would have been, within the power of the corporation, but is void or voidable due to a failure of authorization; or an overissue; and
- “Failure of authorization” meaning the failure to authorize, approve, or otherwise effect a corporate action in compliance with this chapter, the corporation’s articles of incorporation

¹⁶ For limited partnerships Section 620.1809, F.S. governs.

¹⁷ Note that a general partnership is not required to have a registered agent. Section 620.8301, F.S., states that each general partner is an agent of the partnership. (Note that a general partnership can still designate a separate registered agent, through their initial general partnership registration form, but partners of the general partnership are deemed to be agents and therefore the statutes do not require a general partnership to have a registered agent.)

or bylaws, a corporate resolution, or any plan or agreement to which the corporation is a party, if and to the extent such failure would render such corporate action void or voidable.

Section 2 creates s. 607.0146, F.S., providing that a defective corporate action is not void or voidable if the defective corporate action was ratified (under the ratification requirements that are being created in section 607.0147, F.S.) This section of the bill also emphasizes that the ratification process for a defective corporate action is not the exclusive means of ratifying or validating any defective corporate action.

Additionally, the bill provides that an overissue of shares over and above the number authorized in the corporation's articles of incorporation can be remedied by the adoption of an amendment to the articles of incorporation or other corporate action that authorizes or creates the putative shares that resulted in the overissue. This provision enables a corporation to cure an overissue occurring when shares have been duly authorized but are issued before articles of amendment are filed.

Section 3 creates s. 607.0147, F.S., which sets forth the steps that a corporation must use to remedy a defective corporate action. This includes stating:

- The defective corporate action to be ratified;
- The number and type of putative shares purportedly issued (if shares were issued);
- The date of the defective corporate action;
- The nature of the failure of authorization; and
- The approval of the ratification of the defective corporate action by the board of directors.

This bill also sets forth a similar mechanism as listed above but for a scenario where the defective corporate action to be ratified relates to the election of the initial board of directors of the corporation. In this described scenario the bill provides that after the board of directors takes action it must refer the matter to shareholders for approval. This section clarifies that the board of directors may abandon ratification even after approval without further action.

Section 4 creates s. 607.0148, F.S., which sets forth specific procedural requirements for the ratification of defective corporate actions. The bill provides that the board of directors are subject to the same quorum and voting requirements for the ratification process that exist at the time such ratifying action is taken and that notice, of whether the defective corporate action is to be ratified at a meeting or by written consent, is required to be given to shareholders. The bill also provides notice requirements for whether the corporate action is to be ratified by written consent.

If the shareholders are meeting to ratify the election of a director, or if the ratification is through written consent, the bill requires that it must be approval by a majority vote. The bill clarifies that putative shares existing on the record date are only entitled to notice of matter relating to ratification and that such shares are not entitled to vote, are not counted for quorum purposes, and are not counted in any written consent and that to ratify putative shares, an amendment to the articles of incorporation must be approved.

Section 5 creates s. 607.0149, F.S., detailing notice requirements to shareholders and holders of putative shares when shareholder action to approve the ratification of the defective corporate action is not required. The bill requires "prompt" notice to shareholders following the ratification

of a corporate action by the board of directors. The bill provides for exceptions to the notice requirements, such as that notice is not required to be submitted to shareholders for approval if notice is given pursuant to s. 607.0148(2), F.S., and a disclaimer that notice required by this section may be given in any manner that is authorized under section 607.0141, F.S, and in the case of a public company, notice may be given by any means required by the United States Securities and Exchange Commission.

Section 6 creates s. 607.0150, F.S., which sets forth how a ratification, upon proper notice, affects the corporation and the timing of any ratification. The bill provides that where a defective corporate action is properly ratified, it is deemed no longer void or voidable and is deemed for all intents and purposes to be a validly approved corporate action, effective as the date of the original defective act. Similarly, the bill provides that issuances of putative shares, or fractions of putative shares, are deemed to be issuances of identical valid shares, or fractions of shares, on the date on which the mentioned shares were purportedly issued.

This section clarifies that any corporate action that was taken, subsequent to the defective corporate action that was ratified pursuant to statute, in reliance on such defective corporate action and any subsequent defective corporate action resulting directly or indirectly from such original defective corporate action, is valid as of the respective time such corporate action was taken.

Filing Requirements

Section 7 creates s. 607.0151, F.S., which establishes a new filing requirement (articles of validation) for defective corporate actions ratified that would have normally required a filing, regardless of whether or not the filing was properly made. The bill provides specific requirements for the content of the articles of validation, including that the articles of validation must be filed with the DOS and that the articles of validation will serve to amend or be a substitute for any other filings related to the defective corporate action.

Judicial Proceedings

Section 8 creates s. 607.0152, F.S., conferring jurisdiction on the circuit court in the applicable county to hear and determine claims regarding the validity of any corporate action. The bill provides that it can be a successor thereto, a director of a corporation, or any shareholder of the corporation that can make the filing to a court to determine the validity of any corporate action and that when the filing is made, the court may make any findings or orders it deems proper under the circumstances.

This section of the bill clarifies that service of process for any of these such proceedings should follow the same rules as set forth in Chapter 48, F.S., and that any action brought forth must be done so within 120 days after the validation effective time. Additionally, this section of the bill sets forth a non-exclusive list of various factors that may be considered by the court and certain actions that the court may decide for determinations on the validity of the challenged corporate action.

Resignation of a Registered Agent

Sections 9 through 11 amend the requirements for the resignation of a registered agent.

Sections 12 through 14 amend the associated fees for the resignation of a registered agent.

Section 9 amends s. 605.0115, F.S., to redesignate certain subsections and create a mechanism for a registered agent to resign as the registered agent of more than one dissolved **limited liability company** or inactive **foreign limited liability company**, that has been dissolved for 10 years or longer, through a single composite statement. Additionally, the bill sets forth requirements that the composite resignation statement should contain the name of each dissolved company and the date of the respective companies dissolution. The resignation statement, or composite resignation statement, if resigning from two or more companies at a time, once filed with the DOS, must also be delivered to the company or each respective companies' current mailing address as it appears in the records of the DOS.

Section 10 amends s. 607.0503, F.S., to redesignate certain subsections and create a mechanism for a registered agent of more than one dissolved **corporation** that has been dissolved for 10 years or longer, through a single composite statement. Additionally, the bill sets forth requirements that the composite resignation statement should contain the name of each dissolved corporation and the date of the respective corporation's dissolution. The resignation statement, or composite resignation statement, if resigning from two or more corporations at a time, once filed with the DOS, must also be delivered to the corporation or each respective corporations' current mailing address as it appears in the records of the DOS.

Section 11 amends s. 617.0502, F.S., to redesignate certain subsections and create a mechanism for a registered agent of more than one dissolved **(not for profit) corporation** that has been dissolved for 10 years or longer, through a single composite statement. Additionally, the bill sets forth requirements that the composite resignation statement should contain the name of each dissolved corporation and the date of the respective corporations' dissolution. The resignation statement, or composite resignation statement, if resigning from two or more corporations at a time, once filed with the DOS, must also be delivered to the corporation or each respective corporations' current mailing address as it appears in the records of the DOS.

Fees

Section 12 amends s. 605.0213, F.S., to provide that the fee to resign as a registered agent of a dissolved limited liability company is the same, regardless of whether one is resigning from one entity or more than one entity.

Section 13 amends s. 607.0122, F.S., to provide that the fee to resign as a registered agent of an dissolved corporation is the same, regardless of whether one is resigning from one corporation or more than one corporation.

Section 14 amends s. 617.0122, F.S., to provide that the fee to resign as a registered agent of an inactive corporation is the same, regardless of whether one is resigning from one corporation or more than one corporation.

Incorporating Amendments

Sections 15 through 26 make conforming changes.

Effective Date

Section 27 provides an effective date of July 1, 2024.

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.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

Registered agents looking to resign from more than one inactive corporation at a time will see a reduction in their charged fees.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Indeterminate at this time.

The DOS is likely to see a reduced amount in collected fees if a registered agent is able to resign from more than one corporation at a time paying only one fee, as opposed to current law that makes a registered agent pay to resign from each corporation separately.

VI. Technical Deficiencies:

None.

VII. Related Issues:**Fees**

The bill creates a new filing requirement, the filing of articles of validation. Section 7 of the bill states that “a corporation that ratifies a defective corporate action and that corporate action that was ratified would have required a filing under ss. 607.0145-607.0152, F.S., must file articles of validation.” Typically filings have fees associated with them, however this bill does not contemplate any fee for filing articles of validation.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes:, 605.0115, 607.0503, 617.0502, 605.0213, 607.0122, 617.0122, 605.0207, 605.0113, 658.23, 607.0501, 607.193, 607.0120, 607.1507, 39.8298, 252.71, 288.012, 617.1807, 617.2006, 617.0501, and 617.0503.

The bill creates sections 607.0145, 607.0146, 607.0147, 607.0148, 607.0149, 607.0150, 607.0151, and 607.0152 of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Commerce and Tourism on January 23, 2024:

The committee substitute primarily makes clarifying and stylistic changes throughout the bill. The most significant adjustments to the bill are as follows:

- The amendment adds clarifying language to the definition of “validation effective time” stating that the filing or pendency of a judicial proceeding will not affect the validation effective time.
- The amendment adds clarifies when the issuance of putative shares become effective.
- The amendment clarifies what actions a circuit court can take regarding challenges to the validity of defective corporate actions.
- The amendment adjusts the language to clarify which types of business entities a registered agent can resign from using a composite statement to resign from more than one business entity at a time.
- The amendment clarifies language associated with the fees.

Additionally, the amendment deletes language regarding a registered agent being able to resign from one or more foreign corporations or partnerships at a time with a single composite statement and fee.

B. Amendments:

None.

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