THE FLORIDA BAR BUSINESS LAW SECTION

CORPORATIONS, SECURITIES & FINANCIAL SERVICES COMMITTEE MEETING

Saturday, September 3, 2022

Meeting: 1:30 p.m. – 4:00 p.m.[1]

Location: JW Marriott, Marco Island Florida
Calusa 1-2

and via Zoom

Registration for zoom: https://us02web.zoom.us/meeting/register/tzwtduqrrd8te9vhitsizo-jz4qyzj-edpjm

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Michelle Suarez, Chair; Toni Tsvetanova, Vice-Chair; Valeria Angelucci, Second Vice-Chair

AGENDA

1. **Call to Order and Welcome** — Michelle Suarez

2. **Self-Introduction of New Members Present** — Michelle Suarez

3. **Report from Series LLC Task Force** — Lou Conti

    a. Lou Counti will report on draft legislation to create Series LLC's in FL. Draft legislation attached to this Agenda as **Schedule 1**.
    b. Labor Day Retreat: Triple Motion for preliminary vote of the Executive Council to approve Legislation for the adoption of UPSA provisions for the Florida LLC Act. The proposed Triple Motion is attached as **Schedule 2**.
    c. Proposed upcoming deadlines for remaining work if Triple Motion is adopted by CSFS, and then the Executive Council.
        i. October 12, 2022 – work with House & Senate sponsors' staff on draft legislation and finalize BLS White Paper.
        ii. November 9, 2022 – work on any legislative drafting issues

4. **Update at EC Meeting (June 2022)** — Michelle Suarez

    a. For an update as to the activity that CSFS reported and made motions for at the last Executive Council meeting in June 2022, see attached **Schedule 3**.

5. **Approval of June 22, 2022 Minutes** — Michelle Suarez

[1] Note: The CSFS Meeting will occur from 1:30-2:30PM, followed by a CLE, "**Working with Consultants and Testifying Experts in Commercial Litigation**," presented by: Kaufman Rossin)

a. The meeting minutes for June 22, 2022 are attached as **Schedule 4**.

6. **Chapter 617 Matters – Corporations Not-For Profit** Professor Stu Cohn/ Toni Stvetanova

a. The principal activity has been to round out the Ch. 617 committee with appropriate representatives from various groups. Toni has lead the charge on that. The committee had a call with Bill Clark from Pennsylvania who was active in developing the Model NFP Act. They discussed a few areas where there might be some areas of concern. The committee will need to determine (1) what provisions should be harmonized with Ch. 607, (2) what provisions should be changed in light of the Model Act,, and (3) any other provisions that should be amended. We are hoping for more CSFI committee members to participate.

7. **Chapter 517 Matters** Willard Blair/ Professor Stu Cohn

a. Thank you to everyone who has volunteered so far. Below is a list of chapters and those who have volunteered. We would like there to be 3-4 volunteers on each substantive chapter. To that end, we are still looking for several more volunteers for this project. According to the Legislative committee, any draft legislation must be complete, approved by the CSFS Committee, and sent to EC for a vote, in time for the Legislative Committee to have it by December to propose for the 2023 session. Current sections and volunteers are listed below.
    i. General Provisions (including definitions).
    ii. Exemptions from Registration (Stu Cohn; Richard Leisner; Katherine Van de Bogart)
    iii. Registration of Securities (Dan Newman & Roland Chase)
    iv. Broker-Dealers, Agents, Investment Advisers, Investment Adviser Representatives, and Federal Covered Investment Advisers (Robert Brighton & Nader Amer)
    v. Fraud and Liabilities (Will Blair and Francis M. Curran)
    vi. Administrative and Judicial Review (Michelle Suarez)
    vii. Transition

b. Attached as **Schedule 5** is a comparison of the current H.B. 779 to last year's bill, using a redline of Professor Cohn's previous summary of H.B. 779.

8. **Opinion Standards Committee Update** Robert Barron

a. Currently nothing to report but will have something to report at the January 2023 meeting.

9. **Chapter 607 Task Force Update** Phil Schwartz/Gary Teblum

a. Generally**:** Ch. 607 Task Force has been meeting regularly and has been well attended. Their last meeting was on Tues., Aug. 23rd, 2023. Materials currently circulated by this Task Force are attached to this Agenda as **Composite Schedule 6**, which includes:

i. Subchapter E of the MBCA;
ii. Subchapter E comment from our subcommittee in 2019;
iii. DE's Ch. 204 regarding Ratification of Defective Corporate Acts;
iv. DE's Ch. 205 regarding Proceedings regarding validity of defective corporate acts and;
v. Virginia's Defective Corporate Acts statute.

b. Ratification of Defective Acts. The Task Force collectively decided in favor of looking at proposed revisions to Ch. 607, which would include remedies for ratification of defective corporate acts, after looking to Subchapter E of Article 1 of the MBCA.

c. Direct v. Derivative Action. Earlier this year, the subcommittee had extensive discussion about whether the standard established in s. 607.0750 of the FBCA defining when an action is a "direct" action vs. being a "derivative" action should be modified. Also discussed was whether the committee should remove this section (and the corollary section in Chapter 605 on the same topic) from both the corporate and the LLC statute. Unfortunately, the committee was not able to reach consensus on how to proceed on this topic. At the same time, the committee continues to hear concerns from various lawyers (and even a few judges) around the state about the statute that was adopted in the FBCA, but without clarity as to how the statute should be changed. The leaders of the committee plan to consult with members of the Business Litigation Committee and come back to the subcommittee with additional thoughts on this topic for further discussion once the committee concludes its discussions on Ratification of Defective Acts.

10. **CLE Projects** Michelle Suarez

a. ***Regulation D and A/A+ Basics, Updates, & Real-World Applications***

- Date/Location: October 19th, 2022 (likely from 12pm – 1:30pm) Zoom online; recorded live.
- Presented by: Rebeca DiStefano and Willard Blair. Moderated by Michelle Suarez.
- Program Description: The Securities Act of 1933 and the 1934 Securities and Exchange Act ("Securities laws") are two of the primary federal laws that govern what companies can and can't do when it comes to selling their securities. Many practitioners that work with businesses engage in securities work without even knowing it and are ethically required to be aware of these regulations at least a basic level. It's for that reason that we've put together a CLE and panel that will cover two of the most commonly used regulations, Regulation D and Regulation A/A+, to give you a basic sense of what companies need to know when raising capital, as well as recent updates that went into effect last year.

11. **Other Matters for Discussion/Good Order** Michelle Suarez/Members

12. **Adjourn** Michelle Suarez

SCHEDULE 1

PROTECTED SERIES PROVISIONS

GENERAL PROVISIONS

605.12101. SHORT TITLE. Sections 605.12101 - 605.12803 may be cited as the Uniform Protected Series Provisions comprising Part II of this chapter. *Added by Laws 2023, c. 2023-[ ] eff. [ ] 2024.*

605.12102. DEFINITIONS. As used in Sections 605.12101 – 605.12803:

(1) "Asset" means property:

(a) In which a series limited liability company or a protected series has rights; or

(b) As to which the company or protected series has the power to transfer rights.

(2) "Associated asset" means an asset that meets the requirements of s. 605.12301.

(3) "Associated member" means a member that meets the requirements of s. 605.12302.

(4) "Foreign protected series" means an arrangement, configuration, or other structure established by a foreign limited liability company which has attributes comparable to a protected series established under this chapter. The term applies whether or not the law under which the foreign company is organized refers to "series" or "protected series".

(5) "Foreign series limited liability company" means a foreign limited liability company that has at least one foreign series or protected series.

(6) "Non-associated asset" means:

(a) An asset of a series limited liability company which is not an associated asset of the company; or

(b) An asset of a protected series of the company which is not an associated asset of the protected series.

(7) "Person" as defined in s. 605.0102(48)includes a protected series and a foreign protected series.

(8) "Protected series", except in the phrase "foreign protected series", means a protected series established under s. 605.12201.

(9) “Protected-series manager” means a person under whose authority the powers of a protected series are exercised and under whose direction the activities and affairs of the protected series are managed under the operating agreement and this chapter.

(10) “Protected-series transferable interest” means a right to receive a distribution from a protected series.

(11) “Protected-series transferee” means a person to which all or part of a protected-series transferable interest of a protected series of a series limited liability company has been transferred, other than the company. The term includes a person that owns a protected-series transferable interest as a result of ceasing to be an associated member of a protected series.

(12) “Series limited liability company”, except in the phrase “foreign series limited liability company”, means a limited liability company that has at least one protected series.

605.12103. NATURE OF PROTECTED SERIES Error! Bookmark not defined.. A protected series of a series limited liability company is a person distinct from:

(1) The company, subject to ss. 605.12104(1), 605.12501(1), and 605.12502(4);

(2) Another protected series of the company;

(3) A member of the company, whether or not the member is an associated member of the protected series;

(4) A protected-series transferee of a protected series of the company; and

(5) A transferee of a transferable interest of the company.

605.12104. POWERS AND DURATION OF PROTECTED SERIES.

(1) A protected series of a series limited liability company has the capacity to sue and be sued in its own name.

(2) Except as otherwise provided in subsections (3) and (4), a protected series of a series limited liability company has the same powers and purposes as the company.

(3) A protected series of a series limited liability company ceases to exist not later than when the company completes its winding up.

(4) A protected series of a series limited liability company may not:

(A) be a member of the company;

(B) establish a protected series; or

(C) except as permitted by law of this state other than this chapter, have a purpose or power that the law of this state other than this chapter prohibits a limited liability company from doing or having.

605.12105. PROTECTED SERIES GOVERNING LAW. The law of this state governs:

(1) The internal affairs of a protected series of a series limited liability company, including:

(a) Relations among any associated members of the protected series;

(b) Relations among the protected series and:

1. any associated member;

2. any protected-series manager; or

3. any protected-series transferee;

(c) Relations between any associated member and:

1. any protected-series manager: or

2. any protected-series transferee;

(d) The rights and duties of a protected-series manager;

(e) Governance decisions affecting the activities and affairs of the protected series and the conduct of those activities and affairs; and

(f) Procedures and conditions for becoming an associated member or protected-series transferee;

(2) The relations between a protected series of a series limited liability company and each of the following:

(a) The company;

(b) Another protected series of the company;

(c) A member of the company which is not an associated member of the protected series;

(d) A protected-series manager that is not a protected-series manager of the protected series; and

(e) A protected-series transferee that is not a protected-series transferee of the protected series;

(3) The liability of a person for a debt, obligation, or other liability of a protected series of a series limited

liability company if the debt, obligation, or liability is asserted solely by reason of the person being or acting as:

(a) An associated member, protected-series transferee, or protected-series manager of the protected series;

(b) A member of the company which is not an associated member of the protected series;

(c) A protected-series manager that is not a protected-series manager of the protected series;

(d) A protected-series transferee that is not a protected-series transferee of the protected series;

(e) A manager of the company; or

(f) A transferee of a transferable interest of the company;

(4) The liability of a series limited liability company for a debt, obligation, or other liability of a protected series of the company if the debt, obligation, or liability is asserted solely by reason of the company:

(a) Having delivered to the department for filing under s. 605.12201(2) a protected series designation pertaining to the protected series or under ss. 605.12201(4) or 605.12202(c) a statement of designation change pertaining to the protected series;

(b) Being or acting as a protected-series manager of the protected series;

(c) Having the protected series be or act as a manager of the company; or

(d) Owning a protected-series transferable interest of the protected series; and

(5) The liability of a protected series of a series limited liability company for a debt, obligation, or other liability of the company or of another protected series of the company if the debt, obligation, or liability is asserted solely by reason of:

(a) The protected series:

1. Being a protected series of the company or having as a protected-series manager the company or another protected series of the company; or

2. Being or acting as a protected-series manager of another protected series of the company or a manager of the company; or

(b) The company owning a protected-series transferable interest of the protected series.

605.12106. RELATION OF OPERATING AGREEMENT AND THE PROTECTED SERIES PROVISIONS OF THIS CHAPTER.

(1) Except as otherwise provided in this section and subject to ss. 605.12107 and 605.12108, the operating agreement of a series limited liability company governs:

(a) The internal affairs of a protected series, including:

1. Relations among any associated members of the protected series;

2. Relations among the protected series and:

a. any associated member;

b. and protected-series manager; or

c. any protected-series transferee;

3. Relations between any associated member and:

a. any protected-series manager: or

b. any protected-series transferee;

4. The rights and duties of a protected-series manager;

5. Governance decisions affecting the activities and affairs of the protected series and the conduct of those activities and affairs; and

6. Procedures and conditions for becoming an associated member or protected-series transferee;

(b) Relations among the protected series, the company, and any other protected series of the company;

(c) Relations between:

1. The protected series, its protected-series manager(s), any associated member of the protected series, or any protected-series transferee of the protected series; and

2. A person in the person's capacity as:

a. A member of the company which is not an associated member of the protected series;

b. A protected-series transferee or protected-series manager of another protected series; or

c. A transferee of the company.

(2) If this chapter restricts the power of an operating agreement to affect a matter, the restriction applies to a matter under these protected series provisions, in accordance with s. 605.0105.

(3) If law of this state other than this chapter imposes a prohibition, limitation, requirement, condition, obligation, liability, or other restriction on a limited liability company, a member, manager, or other agent of the company, or a transferee of the company, except as otherwise provided in law of this state other than this chapter, the restriction applies in accordance with s. 605.12108.

(4) Except as otherwise provided in s. 605.12107, if the operating agreement of a series limited liability company does not provide for a matter described in subsection (1) in a manner permitted by ss. 605.12101 – 605.12803, the matter is determined in accordance with the following rules:

(a) To the extent ss. 605.12101 – 605.12803 addresses the matter, ss. 605.12101 – 605.12803 governs.

(b) To the extent ss. 605.12101 – 605.12803 do not address the matter, this chapter governs the matter in accordance with s. 605.12108.

605.12107. ADDITIONAL LIMITATIONS ON OPERATING AGREEMENT.

(1) An operating agreement may not vary the effect of:

(a) This section;

(b) Section 605.12103;

(c) Section 605.12104(1);

(d) Section 605.12104(2) to provide a protected series a power beyond the powers in this chapter provides a limited liability company;

(e) Sections 605.12104(3) or (4);

(f) Section 605.12105;

(g) Section 605.12106;

(h) Section 605.12108;

(i) Section 605.12201, except to vary the manner in which a series limited liability company approves establishing a protected series;

(j) Section 605.12202;

(k) Section 605.12301;

(l) Section 605.12302;

(m) Section 605.12303(1) or (2);

(n) Section 605.12304(3) or (6);

(o) Section 605.12401, except to decrease or eliminate a limitation of liability stated in s. 605.12401;

(p) Section 605.12402;

(q) Section 605.12403;

(r) Section 605.12404;

(s) Sections 605.12501(1), (4), and (5);

(t) Section 605.12502, except to designate a different person to manage winding up;

(u) Section 605.12503;

(v) Sections 605.12601- 605.12608;

(w) Sections 605.12701 – 605.12704;

(x) Sections 605.12801 – 605.12803, except to vary:

1. The manner in which a series limited liability company may elect under s. 605.12802(1)(b) to be subject to this chapter; or

2. The person that has the right to sign and deliver to the department for filing a record under s. 605.12802(2)(b); or

(y) A provision of this chapter pertaining to:

1. registered agents; or

2. the department, including provisions pertaining to records authorized or required to be delivered to the department for filing under this chapter.

(2) An operating agreement may not unreasonably restrict the duties and rights under s. 605.12305 but may impose reasonable restrictions on the availability and use of information obtained under s. 605.12305 and may provide appropriate remedies, including liquidated damages, for a breach of any reasonable restriction on use.

605.12108. RULES FOR APPLYING THIS CHAPTER TO SPECIFIED PROVISIONS OF PROTECTED SERIES.

(1) Except as otherwise provided in subsection (2) and s. 605.12107, the following rules apply in applying s. 605.12106, ss. 605.12304(3) and (6), s. 605.12501(4)(a), s. 605.12502(1), and s. 605.12503(2):

(a) A protected series of a series limited liability company is deemed to be a limited liability company that is formed separately from the series limited liability company and is distinct from the series limited liability company and any other protected series of the series limited liability company.

(b) An associated member of the protected series is deemed to be a member of the company deemed to exist under paragraph (1).

(c) A protected-series transferee of the protected series is deemed to be a transferee of the company deemed to exist under paragraph (1).

(d) A protected-series transferable interest of the protected series is deemed to be a transferable interest of the company deemed to exist under paragraph (1).

(e) A protected-series manager is deemed to be a manager of the company deemed to exist under paragraph (1).

(f) An asset of the protected series is deemed to be an asset of the company deemed to exist under paragraph (1), whether or not the asset is an associated asset of the protected series.

(g) Any creditor or other obligee of the protected series is deemed to be a creditor or obligee of the company deemed to exist under paragraph (1).

(2) Subsection (1) does not apply if its application would:

(a) contravene s. 605.0105; or

(b) authorize or require the department to:

1. accept for filing a type of record that this chapter does not authorize or require a person to deliver to the department for filing; or

2. make or deliver a record that this chapter does not authorize or require the department to make or deliver.

ESTABLISHING PROTECTED SERIES

605.12201. PROTECTED SERIES DESIGNATION; AMENDMENT.

(1) With the affirmative vote or consent of all members of a series limited liability company, the company may establish a protected series.

(2) To establish a protected series, a series limited liability company shall deliver to the department for filing a protected series designation, signed by the company, stating the name of the company and the name of the protected series to be established, and any other information which the department requires for filing.

(3) A protected series is established when the protected series designation takes effect under s. 605.0207.

(4) To amend a protected series designation, a series limited liability company shall deliver to the department for filing a statement of designation change, signed by the company, that changes the name of the company, the name of the protected series to which the designation applies, or both. The change takes effect when the statement of designation change takes effect under s. 605.0207.

605.12202. PROTECTED SERIES NAME.

(1) Except as otherwise provided in subsection (2), the name of a protected series must comply with s. 605.0112.

(2) The name of a protected series of a series limited liability company must:

(a) Begin with the name of the series limited liability company, including any word or abbreviation required by s. 605.0112; and

(b) Contain the phrase "Protected Series" or "protected series" or the abbreviation "P.S." or "PS".

(3) If a series limited liability company changes its name, the company shall deliver to the department for filing a statement of designation change for each of the company's protected series, changing the name of each protected series to comply with this section.

605.12203. REGISTERED AGENT.

(1) The registered agent in this state for a series limited liability company is the registered agent in this state for each protected series of the series limited liability company.

(2) Before delivering a protected series designation to the department for filing, a series limited liability company shall agree with a registered agent that the agent will serve as the registered agent in this state for both the company and the protected series.

(3) A person that signs a protected series designation delivered to the department for filing affirms as a fact that the series limited liability company on whose behalf the designation is delivered has complied with subsection (2).

(4) A person that ceases to be the registered agent for a series limited liability company ceases to be the registered agent for each protected series of the company.

(5) A person that ceases to be the registered agent for a protected series of a series limited liability company, other than as a result of the termination of the protected series, ceases to be the registered agent of the company and any other protected series of the company.

(6) Except as otherwise agreed by a series limited liability company and its registered agent, the agent is not obligated to distinguish between a process, notice, demand, or other record concerning the company and a process, notice, demand, or other record concerning a protected series of the company.

605.12204. SERVICE OF PROCESS, NOTICE, DEMAND, OR OTHER RECORD.

(1) A protected series of a series limited liability company may be served with a process, notice, demand, or other record required or permitted by law by:

(a) Serving the company;

(b) Serving the registered agent of the protected series; or

(c) Other means authorized by law of this state other than chapter 605.

(2) Service of a summons and complaint on a series limited liability company is notice to each protected series of the company of service of the summons and complaint and the contents of the complaint.

(3) Service of a summons and complaint on a protected series of a series limited liability company is notice to the series limited liability company and any other protected series of the company of service of the summons and complaint and the contents of the complaint.

(4) Service of a summons and complaint on a foreign series limited liability company is notice to each foreign protected series of the foreign company, of service of the summons and complaint and the contents of the complaint.

(5) Service of a summons and complaint on a foreign protected series of a foreign series limited liability company is notice to the foreign company and any other foreign protected series of the company, of service of the summons and complaint and the

contents of the complaint.

(6) Notice to a person under subsection (2), (3), (4), or (5) is effective whether or not the summons and complaint identify the person if the summons and complaint name as a party and identify:

(a) The series limited liability company or a protected series of the series limited liability company; or

(b) The foreign series limited liability company or a foreign protected series of the foreign series limited liability company.

605.12205. CERTIFICATE OF STATUS FOR PROTECTED SERIES.

(1) On request of any person, the department shall issue a certificate of status for a protected series of a series limited liability company, or a certificate of registration for a foreign protected series, if:

(a) In the case of a protected series:

1. No statement of dissolution, termination, or relocation pertaining to the series limited liability company or the protected series, has been filed; and

2. The series limited liability company has delivered to the department for filing the most recent annual report required by s. 605.0212 and the report includes the name of the protected series, unless:

a. When the series limited liability company delivered the report for filing, the protected series designation pertaining to the protected series had not yet taken effect; or

b. After the series limited liability company delivered the report for filing, the company delivered to the department for filing a statement of designation change changing the name of the protected series; or

(b) In the case of a foreign protected series, it is registered to do business in this state.

(2) A certificate issued under subsection (1) must state:

(a) In the case of a protected series:

1. The name of the protected series of the series limited liability company and the name of the series limited liability company;

2. That the requirements of subsection (1) are met;

3. The date the protected series designation pertaining to the protected series took effect; and

4. If a statement of designation change pertaining to the protected series has been filed, the effective date and contents of the statement;

(b) In the case of a foreign protected series, that it is registered to do business in this state;

(c) That the fees, taxes, interest, and penalties owed to this state by the protected series or foreign protected series and collected through the department have been paid, if:

1. Payment is reflected in the records of the department; and

2. Nonpayment affects the status of the protected series; and

(d) Other facts reflected in the records of the department pertaining to the protected series or foreign protected series which the person requesting the certificate reasonably requests.

(3) Subject to any qualification stated by the department in a certificate issued under subsection (1), the certificate may be relied on as conclusive evidence of the facts stated in the certificate.

605.12206. INFORMATION REQUIRED IN ANNUAL REPORT; EFFECT OF FAILURE TO PROVIDE.

(1) In the annual report required by s. 605.0212, a series limited liability company shall include the name of each protected series of the company:

(a) For which the series limited liability company has previously delivered to the department for filing a protected series designation; and

(b) Which has not dissolved and completed winding up.

(2) A failure by a series limited liability company to comply with subsection (1) with regard to a protected series prevents issuance of a certificate of status pertaining to the protected series, but does not otherwise affect the protected series.

ASSOCIATED ASSET; ASSOCIATED MEMBER; PROTECTED-SERIES TRANSFERABLE INTEREST; MANAGEMENT; RIGHT OF INFORMATION

605.12301. ASSOCIATED ASSET.

(1) Only an asset of a protected series may be an associated asset of the protected series. Only an asset of a series limited liability company may be an associated asset of the series limited liability company.

(2) An asset of a protected series of a series limited liability company is an associated asset of the protected series only if the protected series creates and maintains records that state the name of the protected series and describe the asset with sufficient specificity to permit a disinterested, reasonable individual to:

(a) Identify the asset and distinguish it from any other asset of the protected series, any asset of the company, and any asset of any other protected series of the company;

(b) Determine when and from what person the protected series acquired the asset or how the asset otherwise became an asset of the protected series; and

(c) If the protected series acquired the asset from the series limited liability company or another protected series of the company, determine any consideration paid, the payor, and the payee.

(3) An asset of a series limited liability company is an associated asset of the series limited liability company only if the series limited liability company creates and maintains records that state the name of the series limited liability company and describe the asset with sufficient specificity to permit a disinterested, reasonable individual to:

(a) Identify the asset and distinguish it from any other

asset of the series limited liability company and any asset of any protected series of the series limited liability company;

(b) Determine when and from what person the series limited liability company acquired the asset or how the asset otherwise became an asset of the company; and

(c) If the series limited liability company acquired the asset from a protected series of the company, determine any consideration paid, the payor, and the payee.

(4) The records and recordkeeping required by subsections (2) and (3) may be organized by specific listing, category, type, quantity, or computational or allocational formula or procedure, including a percentage or share of any asset, or in any other reasonable manner.

(5) To the extent permitted by this chapter and law of this state other than this chapter, a series limited liability company or protected series of the company may hold an associated asset directly or indirectly, through a representative, nominee, or similar arrangement, except that:

(a) a protected series may not hold an associated asset in the name of the series limited liability company or another protected series of the series limited liability company; and

(b) the series limited liability company may not hold an associated asset in the name of a protected series of the company.

605.12302. ASSOCIATED MEMBER.

(1) Only a member of a series limited liability company may be an associated member of a protected series of the company.

(2) A member of a series limited liability company becomes an associated member of a protected series of the company if the operating agreement or a procedure established by the agreement states:

(a) That the member is an associated member of the protected series;

(b) The date on which the member became an associated member of the protected series; and

(c) Any protected-series transferable interest the associated member has in connection with becoming or being an associated member of the protected series.

(3) If a person that is an associated member of a protected series of a series limited liability company is dissociated from the company, the person ceases to be an associated member of the protected series.

605.12303. PROTECTED-SERIES TRANSFERABLE INTEREST.

(1) A protected-series transferable interest of a protected series of a series limited liability company must be owned initially by an associated member of the protected series or the series limited liability company.

(2) If a protected series of a series limited liability company has no associated members when established, the company owns the protected-series transferable interests in the protected series.

(3) In addition to acquiring a protected series transferable series interest under subsection (2), a series limited liability company may acquire a protected-series transferable interest through a transfer from another person or as provided in the operating agreement.

(4) Except for s. 605.12108(1)(c), a provision of this chapter which applies to a protected-series transferee of a protected series of a series limited liability company applies to the series limited liability company in its capacity as an owner of a protected-series transferable interest of the protected series. A provision of the operating agreement of a series limited liability company which applies to a protected-series transferee of a protected series of the company applies to the series limited liability company in its capacity as an owner of a protected-series transferable interest of the protected series.

605.12304. MANAGEMENT.

(1) A protected series may have more than one protected-series manager.

(2) If a protected series has no associated members, the series limited liability company is the protected-series manager.

(3) Section 605.12108 applies to determine any duties of a protected-series manager of a protected series of a series limited liability company to:

(a) The protected series;

(b) Any associated member of the protected series; and

(c) Any protected-series transferee of the protected series.

(4) Solely by reason of being or acting as a protected-series manager of a protected series of a series limited liability company, a person owes no duty to:

(a) The series limited liability company;

(b) Another protected series of the company; or

(c) Another person in that person's capacity as:

1. A member of the series limited liability company which is not an associated member of the protected series;

2. A protected-series transferee or protected-series manager of another protected series; or

3. A transferee of the series limited liability company.

(5) An associated member of a protected series of a series limited liability company has the same rights as any other member of the company to vote on or consent to an amendment to

the company's operating agreement or any other matter being decided by the members, whether or not the amendment or matter affects the interests of the protected series or the associated member.

(6) The right of a member to maintain a derivative action to enforce a right of a limited liability company pursuant to s. 605.0802 shall apply to:

(A) An associated member of a protected series, in accordance with s. 605.12108, and

(B) A member of a series limited liability company in accordance with s. 605.12108.

(7) An associated member of a protected series is an agent for the protected series with power to bind the protected series to the same extent that a member of a limited liability company is an agent for the company with power to bind the company under s. 605.04074(1)(a).

605.12305. RIGHT OF PERSON NOT AN ASSOCIATED MEMBER OF PROTECTED SERIES TO INFORMATION CONCERNING PROTECTED SERIES.

(1) A member of a series limited liability company which is not an associated member of a protected series of the company has a right to information concerning the protected series to the same extent, in the same manner, and under the same conditions that a member that is not a manager of a manager-managed limited liability company has a right to information of the company under ss. 605.0410(1)and 605.0410(3)(b).

(2) A person formerly an associated member of a protected series has a right to information concerning the protected series to the same extent, in the same manner, and under the same conditions that a person dissociated as a member of a manager-managed limited liability company has a right to information concerning the company under s. 605.0410(4).

(3) If an associated member of a protected series dies, the legal representative of the deceased associated member has a right to information concerning the protected series to the same extent, in the same manner, and under the same conditions that the legal representative of a deceased member of a limited liability company has a right to information concerning the company under s. 605.0410(9).

(4) A protected-series manager of a protected series has a right to information concerning the protected series to the same extent, in the same manner, and under the same conditions that a manager of a manager-managed limited liability company has a right to information concerning the company under s.

605.0410(3)(a).

(5) The court-ordered inspection provisions of s. 605.0411 shall also apply to the information rights regarding series limited liability companies and protected series described in this s. 605.12305.

LIMITATIONS ON LIABILITY AND ENFORCEMENT OF CLAIMS

605.12401. LIMITATIONS ON LIABILITY.

(1) A person is not liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation, or other liability of:

(a) A protected series of a series limited liability company solely by reason of being or acting as:

1. An associated member, protected-series manager, or protected-series transferee of the protected series; or

2. A member, manager, or a transferee of the company; or

(b) A series limited liability company solely by reason of being or acting as an associated member, protected-series manager, or protected-series transferee of a protected series of the company.

(2) Subject to s. 605.12404, the following rules apply:

(a) A debt, obligation, or other liability of a series limited liability company is solely the debt, obligation, or liability of the company.

(b) A debt, obligation, or other liability of a protected series is solely the debt, obligation, or liability of the protected series.

(c) A series limited liability company is not liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation, or other liability of a protected series of the company solely by reason of the protected series being a protected series of the company, or the series limited liability company:

1. Being or acting as a protected-series manager of the protected series;

2. Having the protected series manage the company; or

3. Owning a protected-series transferable interest of the protected series.

(d) A protected series of a series limited liability company is not liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation, or other liability of the company or another protected series of the company solely by reason of:

1. being a protected series of the series limited liability company;

2. being or acting as a manager of the series limited liability company or a protected-series manager of another protected series of the company; or

3. having the series limited liability company or another protected series of the company be or act as a protected-series manager of the protected series.

605.12402. CLAIM SEEKING TO DISREGARD LIMITATION OF LIABILITY.

(1) Except as otherwise provided in subsection (2), a claim seeking to disregard a limitation in s. 605.12401 is governed by the principles of law and equity, including a principle providing a right to a creditor or holding a person liable for a debt, obligation, or other liability of another person, which would apply if each protected series of a series limited liability company were a limited liability company formed separately from the series limited liability company and distinct from the series limited liability company and any other protected series of the series limited liability company.

(2) The failure of a limited liability company or a protected series to observe formalities relating to the exercise of its powers or management of its activities and affairs is not a ground to disregard a limitation in s. 605.12401(1) but may be a ground to disregard a limitation in s. 605.12401(2).

(3) This section applies to a claim seeking to disregard a limitation of liability applicable to a foreign series limited liability company or foreign protected series and comparable to a limitation stated in s. 605.12401, if:

(a) The claimant is a resident of this state or doing business or registered to do business in this state; or

(b) The claim is to establish or enforce a liability arising under law of this state other than this chapter or from an act or omission in this state.

605.12403. REMEDIES OF JUDGMENT CREDITOR OF ASSOCIATED MEMBER OR PROTECTED-SERIES TRANSFEREE.

The provisions of s. 605.0503 providing or restricting remedies available to a judgment creditor of a member or transferee of a limited liability company apply to a judgment creditor of:

(1) An associated member or protected-series transferee of a protected series; or

(2) A series limited liability company, to the extent the company owns a protected-series transferable interest of a protected series.

605.12404. ENFORCEMENT AGAINST NON-ASSOCIATED ASSET.

(1) In this section:

(a) "Enforcement date" means 12:01 a.m. on the date on which a claimant first serves process on a series limited liability company or protected series in an action seeking to enforce under this section a claim against an asset of the company or protected series by attachment, levy, or the like.

(b) Subject to s. 605.12608(2), "incurrence date" means the date on which a series limited liability company or protected series incurred the liability giving rise to a claim that a claimant seeks to enforce under this section.

(2) If a claim against a series limited liability company or a protected series of the company has been reduced to judgment, in addition to any other remedy provided by law or equity, the judgment may be enforced in accordance with the following rules:

(a) A judgment against the series limited liability company may be enforced against an asset of a protected series of the company if the asset:

1. Was a non-associated asset of the protected series on the incurrence date; or

2. Is a non-associated asset of the protected series on the enforcement date.

(b) A judgment against a protected series may be enforced against an asset of the series limited liability company if the asset:

1. Was a non-associated asset of the series limited liability company on the incurrence date; or

2. Is a non-associated asset of the series limited liability company on the enforcement date.

(c) A judgment against a protected series may be enforced against an asset of another protected series of the

series limited liability company if the asset:

1. was a non-associated asset of the other protected series on the incurrence date; or

2. is a non-associated asset of the other protected series on the enforcement date.

(3) In addition to any other remedy provided by law or equity, if a claim against a series limited liability company or a protected series has not been reduced to a judgment, and law other than this chapter permits a prejudgment remedy by attachment, levy, or the like, the court may apply subsection (2) as a prejudgment remedy.

(4) In a proceeding under this section, the party asserting that an asset is or was an associated asset of a series limited liability company or a protected series of the series limited liability company has the burden of proof on the issue.

(5) This section applies to an asset of a foreign series limited liability company or foreign protected series if:

(a) the asset is real or tangible property located in this state;

(b) the claimant is a resident of this state or doing business or registered to do business in this state, or the claim under s. 605.12404 is to enforce a judgment, or to seek a pre-judgment remedy, pertaining to a liability arising from law of this state other than this chapter or an act or omission in this state; and

(c) the asset is not identified in the records of the foreign series limited liability company or foreign protected series in a manner comparable to the manner required by s. 605.12301.

DISSOLUTION AND WINDING UP OF PROTECTED SERIES

605.12501. EVENTS CAUSING DISSOLUTION OF PROTECTED SERIES.

A protected series of a series limited liability company is dissolved, and its activities and affairs must be wound up, only on the:

(1) Dissolution of the series limited liability company;

(2) Occurrence of an event or circumstance the operating agreement states causes dissolution of the protected series;

(3) Affirmative vote or consent of all associated members of the protected series; or

(4) Entry by the court of an order dissolving the protected series on application by an associated member or protected-series manager of the protected series:

(a) In accordance with s. 605.12108; and

(b) To the same extent, in the same manner, and on the same grounds the court would enter an order dissolving a limited liability company on application by a member or manager of the limited liability company pursuant to s. 605.0702; or

(5) Entry by the court of an order dissolving the protected series on application by the series limited liability company, or a member or manager of the series limited liability company:

(a) In accordance with s. 605.12108; and

(b) To the same extent, in the same manner, and on the same grounds the court would enter an order dissolving a limited liability company on application by a member or manager of the limited liability company pursuant to s. 605.0702.

605.12502. WINDING UP DISSOLVED PROTECTED SERIES.

(1) Subject to subsections (2) and (3) and in accordance with s. 605.12108:

(a) A dissolved protected series shall wind up its activities and affairs in the same manner that a dissolved limited liability company winds up its activities and affairs under s. 605.0709, subject to the same requirements and conditions, and with the same effects; and

(b) Judicial supervision or another judicial remedy is available in the winding up of the protected series to the same extent, in the same manner, under the same conditions, and with the same effects that apply under s. 605.0709(5).

(2) When a protected series of a series limited liability company dissolves, the company may deliver to the department for filing articles of protected series dissolution stating the name of the series limited liability company and the protected series and that the protected series is dissolved. The filing of the articles of dissolution by the department has the same effect with regard to the protected series as the filing by a limited liability company of articles of dissolution with the department under s. 605.0707.

(3) When a protected series of a series limited liability company has completed winding up in accordance with s. 605.0709, the series limited liability company may deliver to the department for filing a statement of designation cancellation stating the name of the company and the protected series and that the protected series is terminated. The filing of the statement of designation cancellation by the department has the same effect as the filing by the department of a statement of termination under s. 605.0709(7).

(4) A series limited liability company has not completed its winding up until each of the protected series of the company has completed its winding up.

605.12503. EFFECT OF REINSTATEMENT OF SERIES LIMITED LIABILITY COMPANY OR REVOCATION OF VOLUNTARY DISSOLUTION. If a series limited liability company that has been administratively dissolved is reinstated, or a series limited liability company that voluntarily dissolved revokes its articles of dissolution prior to filing a statement of termination:

(1) each protected series of the series limited liability company ceases winding up; and

(2) the provisions of s. 605.0708 applies to the series limited liability company and applies to each protected series of the series limited liability company in accordance with s. 605.12108.

ENTITY TRANSACTIONS RESTRICTED

605.12601. DEFINITIONS.

As used in ss. 605.12601 - 605.12608, the terms:

(1) "After a merger" or "after the merger" means when a merger under s. 605.12604 becomes effective and afterwards.

(2) "Before a merger" or "before the merger" means before a merger under s. 605.12604 becomes effective.

(3) "Continuing protected series" means a protected series of a surviving series limited liability company which continues in uninterrupted existence after a merger under s. 605.12604.

(4) "Merging company" means a limited liability company that is party to a merger under s. 605.12604.

(5) "Non-surviving company" means a merging company that does not continue in existence after a merger under s. 605.12604.

(6) "Relocated protected series" means a protected series of a non-surviving company which, after a merger under s. 605.12604, continues in uninterrupted existence as a protected series of the surviving company.

(7) "Surviving company" means a merging company that continues in existence after a merger under s. 605.12604.

605.12602. PROTECTED SERIES MAY NOT BE PARTY TO ENTITY TRANSACTION.

Except as provided in ss. 12605(2), 12606(2), and 12607(1), a protected series may not be a party to, formed, organized, established, or created in, or result from:

(1) A conversion, domestication, interest exchange, or merger under:

(a) This chapter; or

(b) The law of a foreign jurisdiction, however the transaction is denominated under that law; or participate in a domestication; or

(2) A transaction with the same substantive effect as a conversion, domestication, interest exchange or a merger.

605.12603. RESTRICTION ON ENTITY TRANSACTION INVOLVING SERIES LIMITED LIABILITY COMPANY.

A series limited liability company may not be:

(1) A party to, formed organized, created in, or result from:

(a) A conversion, domestication, or interest exchange, under:

(i) This chapter; or

(ii) The law of a foreign jurisdiction, however the transaction is denominated under foreign law; or

(b) A transaction with the same substantive effect as a conversion, domestication, or interest exchange.

(2) except as otherwise provided in s. 605.12604, a party to or the surviving company of:

(a) A merger under:

(i) This chapter; or

(ii)The law of a foreign jurisdiction, however a merger is denominated under that law; or

(b) A transaction with the same substantive effect as a merger.

[The manner in which a protected series may be affected by a merger of its series limited liability company is specified in Sections 605(2), 606(2), and 607(1)].

605.12604. MERGER AUTHORIZED; PARTIES RESTRICTED.

A series limited liability company may be party to a merger in accordance with the provisions of ss. 605.1021 - 605.1026, this section, and ss. 605.12605 - 605.12608, only if:

(1) Each other party to the merger is a limited liability company; and

(2) The surviving company is not created in the merger.

605.12605. PLAN OF MERGER.

In a merger under s. 605.12604, the plan of merger must:

(1) Comply with the provisions of s. 605.1022 pertaining to the contents of a plan of merger of a limited liability company; and

(2) State in a record:

(a) For any protected series of a non-surviving company, whether after the merger the protected series will be a relocated protected series or be dissolved, wound up, and terminated;

(b) For any protected series of the surviving company which exists before the merger, whether after the merger the protected series will be a continuing protected series or be dissolved, wound up, and terminated;

(c) For each relocated protected series or continuing protected series:

1. The name of any person that becomes an associated member or protected-series transferee of the protected series after the merger, any consideration to be paid by, on behalf of, or in respect of the person, the name of the payor, and the name of the payee;

2. The name of any person whose rights or obligations in the person's capacity as an associated member or protected-series transferee will change after the merger;

3. Any consideration to be paid to a person who before the merger was an associated member or protected-series transferee of the protected series and the name of the payor; and

4. If after the merger the protected series will be a relocated protected series, its new name;

(d) For any protected series to be established by the

surviving company as a result of the merger:

1. The name of the protected series;

2. Any protected-series transferable interest to be owned by the surviving company when the protected series is established; and

3. The name of and any protected-series transferable interest owned by any person that will be an associated member of the protected series when the protected series is established; and

(e) For any person that is an associated member of a relocated protected series and will remain a member after the merger, any amendment to the operating agreement of the surviving limited liability company which:

1. Is or is proposed to be in a record; and

2. Is necessary or appropriate to state the rights and obligations of the person as a member of the surviving limited liability company.

605.12606. ARTICLES OF MERGER FOR A PROTECTED SERIES.

In a merger under s. 605.12604, the articles of merger must:

(1) Comply with s. 605.1025 pertaining to the contents of articles of merger; and

(2) Include as an attachment the following records, each to become effective when the merger becomes effective:

(a) For a protected series of a merging company being terminated as a result of the merger, a statement of termination signed by the series limited liability company;

(b) For a protected series of a non-surviving company which after the merger will be a relocated protected series:

1. A statement of relocation signed by the non-surviving company which contains the name of the series limited liability company and the name of the protected series before and after the merger; and

2. A statement of protected series designation signed by the surviving company; and

(c) For a protected series being established by the surviving company as a result of the merger, a protected series designation signed by the surviving company.

605.12607. EFFECT OF MERGER.

When a merger of a protected series under s. 605.12604 becomes effective, in addition to the effects stated in s. 605.1026 stating the effect of a merger:

(1) As provided in the plan of merger, each protected series of each merging series limited liability company which was established before the merger:

(a) Is a relocated protected series or continuing protected series; or

(b) Is dissolved, wound up, and terminated;

(2) Any protected series to be established as a result of the merger is established;

(3) Any relocated protected series or continuing protected series is the same person without interruption as it was before the merger;

(4) All property of a relocated protected series or continuing protected series continues to be vested in the protected series without transfer, reversion, or impairment;

(5) All debts, obligations, and other liabilities of a relocated protected series or continuing protected series continue as debts, obligations, and other liabilities of the relocated protected series or continuing protected series;

(6) Except as otherwise provided by law or the plan of merger, all the rights, privileges, immunities, powers, and purposes of a relocated protected series or continuing protected series remain in the protected series;

(7) The new name of a relocated protected series may be substituted for the former name of the relocated protected series in any pending action or proceeding;

(8) If provided in the plan of merger:

(a) A person becomes an associated member or

protected-series transferee of a relocated protected series or continuing protected series;

(b) A person becomes an associated member of a protected series established by the surviving company as a result of the merger;

(c) Any change in the rights or obligations of a person in the person's capacity as an associated member or protected-series transferee of a relocated protected series or continuing protected series take effect; and

(d) Any consideration to be paid to a person that before the merger was an associated member or protected-series transferee of a relocated protected series or continuing protected series is due; and

(9) Any person that is an associated member of a relocated protected series becomes a member of the surviving company, if not already a member.

605.12608. APPLICATION OF s. 605.12404 AFTER MERGER.

(1) A creditor's right that existed under s. 605.12404 immediately before a merger under s. 605.12604 may be enforced after the merger in accordance with the following rules:

(a) A creditor's right that existed immediately before the merger against the surviving company, a continuing protected series, or a relocated protected series continues without change after the merger.

(b) A creditor's right that existed immediately before the merger against a non-surviving company:

1. May be asserted against an asset of the non-surviving company which vested in the surviving company as a result of the merger; and

2. Does not otherwise change.

(c) Subject to subsection (2), the following rules apply:

1. In addition to the remedy stated in paragraph (1), a creditor with a right under s. 605.12404 which existed immediately before the merger against a non-surviving company or a relocated protected series may assert the right against:

a. An asset of the surviving company, other than an asset of the non-surviving company which vested in the surviving company as a result of the merger;

b. An asset of a continuing protected series; or

c. An asset of a protected series established by the surviving company as a result of the merger;

d. If the creditor's right was against an asset of the non-surviving company, an asset of a relocated series; or

e. If the creditor's right was against an

asset of a relocated protected series, an asset of another relocated protected series.

2. In addition to the remedy stated in paragraph (b), a creditor with a right that existed immediately before the merger against the surviving company or a continuing protected series may assert the right against:

a. an asset of a relocated protected series; or

b. an asset of a non-surviving company which vested in the surviving company as a result of the merger.

(2) For the purposes of subsection (1)(c) and ss. 605.12404(2)(a)1, (b)1, and (c)1, the incurrence date is deemed be the date on which the merger becomes effective.

(3) A merger under s. 605.12604 does not affect the manner in which s. 605.12404 applies to a liability incurred after the merger becomes effective.

FOREIGN PROTECTED SERIES

605.12701. GOVERNING LAW OF FOREIGN PROTECTED SERIES.

The law of the jurisdiction of formation of a foreign series limited liability company governs:

(1) The internal affairs of a foreign protected series of the foreign series limited liability company, including:

(a) Relations among any associated members of the foreign protected series;

(b) Relations between the foreign protected series and:

1. Any associated member;

2. Any protected-series manager; or

3. Any protected-series transferee;

(c) Relations between any associated member and:

1. Any protected-series manager:

2. Any protected-series transferee;

(d) The rights and duties of a protected-series manager;

(e) Governance decisions affecting the activities and affairs of the foreign protected series and the conduct of those activities and affairs; and

(f) Procedures and conditions for becoming an associated member or protected-series transferee;

(2) Relations between the foreign protected series and:

(a) The foreign series limited liability company;

(b) Another foreign protected series of the company;

(c) A member of the company which is not an associated member of the foreign protected series;

(d) A foreign protected-series manager that is not a protected-series manager of the protected series;

(e) A foreign protected-series transferee that is not a foreign protected-series transferee of the protected series; and

(f) A transferee of a transferable interest of the foreign series limited liability company;

(3) Except as otherwise provided in ss. 605.12402 and 605.12404, the liability of a person for a debt, obligation, or other liability of a foreign protected series of a foreign series limited liability company if the debt, obligation, or liability is asserted solely by reason of the person being or acting as:

(a) An associated member, protected-series transferee, or protected-series manager of the foreign protected series;

(b) A member of the foreign series limited liability company which is not an associated member of the foreign protected series;

(c) A protected-series manager of another foreign protected series of the company;

(d) A protected-series transferee of another foreign protected series of the company;

(e) A manager of the company; or

(f) A transferee of a transferable interest of the company; and

(4) Except as otherwise provided in ss. 605.12402 and 605.12404:

(a) The liability of the foreign series limited liability company for a debt, obligation, or other liability of a foreign protected series of the company if the debt, obligation, or liability is asserted solely by reason of the foreign protected series being a foreign protected series of the

foreign series limited liability company, or the foreign protected series limited liability company:

1. Being or acting as a foreign protected-series manager of the foreign protected series;

2. Having the foreign protected series manage the foreign series limited liability company; or

3. Owning a protected-series transferable interest of the foreign protected series; and

(b) The liability of a foreign protected series for a debt, obligation, or other liability of the foreign series limited liability company or another foreign protected series of the company, if the debt, obligation, or liability is asserted solely by reason of the foreign protected series:

1. Being a foreign protected series of the company or having the company or another foreign protected series of the company be or act as foreign protected-series manager of the foreign protected series; or

2. Managing the foreign series limited liability company or being or acting as a foreign protected-series manager of another foreign protected series of the foreign series limited liability company.

605.12702. NO ATTRIBUTION OF ACTIVITIES CONSTITUTING DOING BUSINESS OR FOR ESTABLISHING JURISDICTION.

In determining whether a foreign series limited liability company or foreign protected series of the foreign series limited liability company does business in this state or is subject to the personal jurisdiction of the courts of this state:

(1) The activities and affairs of the foreign series limited liability company are not attributable to a foreign protected series of the company solely by reason of the foreign protected series being a foreign protected series of the foreign series limited liability company; and

(2) the activities and affairs of a foreign protected series are not attributable to the foreign series limited liability company or another foreign protected series of the company, solely by reason of the foreign protected series being a foreign protected series of the foreign series limited liability company.

605.12703. REGISTRATION OF FOREIGN PROTECTED SERIES.

(1) Except as otherwise provided in this section and subject to ss. 605.12402 and 605.12404, the law of this state governing the registration of a foreign limited liability company to obtain a certificate of authority to do business in this state as required under s. 605.0902, including the effect of obtaining a certificate of authority under s. 605.0903, and the consequences of not complying with that law as described in s. 605.0904, apply to a foreign protected series of a foreign series limited liability company as if the foreign protected series were a foreign limited liability company formed separately from the foreign series limited liability company, and distinct from the foreign series limited liability company and any other foreign protected series of the foreign series limited liability company.

(2) An application by a foreign protected series of a foreign series limited liability company for a certificate of authority to do business in this state must include:

(a) The name and jurisdiction of formation of the foreign series limited liability company, and the other information required under s. 605.0902, as well as any other information required by the department; and

(b) If the company has other foreign protected series, the name and street and mailing address of an individual who knows the name and street and mailing address of:

1. Each other foreign protected series of the foreign series limited liability company; and

2. The foreign protected-series manager of, and the registered agent for service of process for, each other foreign protected series of the foreign series limited liability company.

(3) The name of a foreign protected series applying for a

certificate of authority to do business in this state must comply with ss. 605.12202 and 605.0112, and may do so using a fictitious name pursuant to ss. 605.0906 and 865.09, if the fictitious name complies with ss. 605.0906, 605.0112, and 605.12202.

(4) The requirements in ss. 605.0907 pertaining to information required and amending f certificate of authority applies to the information required by subsection(2).

605.12704. DISCLOSURE REQUIRED WHEN FOREIGN SERIES LIMITED LIABILITY COMPANY OR FOREIGN PROTECTED SERIES PARTY TO PROCEEDING.

(1) Not later than [30] days after becoming a party to a proceeding before a civil, administrative, or other adjudicative tribunal of or located in this state, or a tribunal of the United States located in this state:

(a) A foreign series limited liability company shall disclose to each other party the name and street and mailing address of:

1. Each foreign protected series of the company; and

2. Each foreign protected-series manager of and a registered agent for service of process for each foreign protected series of the company; and

(b) A foreign protected series of a foreign series limited liability company shall disclose to each other party the name and street and mailing address of:

1. The company and each manager of the company and an agent for service of process for the company; and

2. Any other foreign protected series of the company and each foreign protected-series manager of and an agent for service of process for the other foreign protected series.

(2) If a foreign series limited liability company or foreign protected series challenges the personal jurisdiction of the tribunal, the requirement that the foreign series limited liability company or foreign protected series make disclosure under subsection (1) is tolled until the tribunal determines whether it has personal jurisdiction.

(3) If a foreign series limited liability company or foreign protected series does not comply with subsection (1), a party to

the proceeding may:

(a) Request the tribunal to treat the noncompliance as a failure to comply with the tribunal's discovery rules; or

(b) Bring a separate proceeding in the court to enforce subsection (1).

MISCELLANEOUS PROVISIONS

605.12801. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. The provisions of Section 605.1102 applies to ss. 605.12101 – 605.12803.

605.12802. TRANSITIONAL PROVISIONS.

(1) Before [all-inclusive date], ss. 605.12101 – 605.12803 governs only:

(a) A protected series limited liability company formed, or a protected series established, on or after [the effective date]; and

(b) A limited liability company that is a foreign series limited liability company before [the all-inclusive date],and elects, in the manner provided in its operating agreement or by law for amending the operating agreement, to be subject to ss. 605.12101 – 605.12803.

(2) If a series limited liability company elects under subsection (1)(a) to be subject to ss. 605101 – 605.12803:

(a) The election applies to each protected series of the series limited liability company, whenever established; and

(b) A manager of the foreign series limited liability company has the right to sign and deliver to the department for filing any record necessary to comply with this chapter, whether the record pertains to the foreign series limited liability company, a protected series of the company, or both.

(3) On and after [all-inclusive date], this chapter governs all series limited liability companies and protected series.

[(4) Until [one year after the effective date], ss. 605.12402 and 605.12404 do not apply to a foreign protected series that was established before [the effective date] or a foreign limited liability company that became a foreign series limited liability company before [the effective date].

605.12803. EFFECTIVE DATE. Ss. 605.12101 – 605.12803 take effect [. . . .]

SCHEDULE 2

PROPOSED TRIPLE MOTION REGARDING SERIES LLC

RESOLVED, that the Florida Bar Business Law Section (the "Section") supports proposed legislation adding Protected Series Limited Liability Company provisions to the Florida Revised Limited Liability Company Act, Chapter 605 (the "Florida LLC Act"), by adding new Sections 605.12101 through 605.12803, Florida Statutes, with respect to the creation of Florida Protected Series Limited Liability Companies, and for rules addressing the registration and requirements for foreign Series Limited Liability Companies doing business in Florida. The proposed new sections being added to the Florida LLC Act are based on the Uniform Protected Series Act promulgated and adopted by the Uniform Law Commission. The form of the proposed Protected Series LLC provisions are substantially in the form of the draft legislation, draft dated as of August 31, 2022, as presented to the Executive Council of the Section, and subject to such further changes as are deemed appropriate and approved by (i) the Protected Series Limited Liability Company Task Force, and (ii) the Executive Committee of the Section; and it is further

RESOLVED, that the Proposed Legislation: (1) Is within the Section's subject matter jurisdiction as described in the Section's bylaws; (2) Either is beyond the scope of the bar's permissible legislative or political activity, or is within the bar's permissible scope of legislative or political activity and the proposed Section position is consistent with an official bar position on that issue; and (3) Does not have the potential for deep philosophical or emotional division among a substantial segment of the bar's membership.

Schedule 3

CSFS Report from Executive Council meeting minutes taken at BLS June 2022 Meeting

The Committee Report was given by Michelle Suarez who reported the Committee is planning a seminar on Regulations D and A in September. Ms. Suarez then recognized the article that Daniel H. Aronson, Stuart R. Cohn, and she wrote for the Florida Bar Journal discussing the differences between forming business entities in Florida as opposed to Delaware. The Committee also discussed and voted on approval of its legislative positions. Mr. Conti then moved for the Section to create a Chapter 517 Task Force, which motion was seconded by Valeria Angelucci. Upon vote taken, the motion passed unanimously. Ms. Saurez then moved for the creation of a Chapter 617 Task Force, which motion was seconded by Alan Howard. Upon vote taken, the motion passed unanimously.

SCHEDULE 4

THE FLORIDA BAR BUSINESS LAW SECTION

ANNUAL MEETING OF THE
CORPORATIONS, SECURITIES AND FINANCIAL SERVICES COMMITTEE

Thursday, June 23, 2022, 12:30PM – 2:30 PM
2022 June Meeting
Held Remotely via Zoom and in person at Bonnet Creek, Orlando, FL

MINUTES

1. Call to Order and Welcome. The meeting of the Corporations, Securities and Financial Services Committee (the "**Committee**") was called to order at 10:00 A.M. by Stephen Sandiford, Chair of the Committee, who presided at the meeting. Mrs. Michelle Suarez, the Vice Chair, and Ms. Toni Tsvetanova, the Second Vice Chair, were also present. The meeting was well attended with over 10 people appearing online and about 20 people in person.

2. Introduction of new Members: Tabitha Taylor (Fellow), Amanda Decker, Karissa Taylor, Ian Berkowitz.

3. Executive Council and Legislative Chairs came in: Stephanie Loeb updates: Financial literacy, Ch. 48 service of process, UCC Pick your Partner, Kearny Fix (waiting on action from governor). Next session begins in March, so we need white paper, triple motion, and text of your bill, and on page forum, all done before Labor Day. Your bill also needs to be shared with other sections and committees that might have an input on it. Also, session starts early in 2024, so they would need anything in 2024 by June 2023.

4. Approval of Meeting Minutes. The Committee, upon motion duly seconded, approved the minutes of meeting of the Committee's meeting held in January, 2022. Motion made to approve by Michelle Suarez; seconded by Valeria Angelucci. Minutes approved.

5. Chapter 617 Matters – Corporations Not-For Profit

    a. Report provided by Toni Tsvetanova.
    b. Reached out RPTLS and tax section. Bill Clark will also be engaging with the committee to give direction as to how to implement changes on the state level that were applied to the Model not for profit act.
    c. Approval of Motion to recommend to the Executive Council the approval of a Chapter 617 Task Force for the purpose of developing BLS reform proposals to Chapter 617, Florida Statutes.
    d. Alan Howard noted a simple Motion is all that is required to propose to Executive Council that our committee is forming a Task Force to study the Model not for profit act.

e. Stephen Sandiford made a Motion for this Committee to approve the creation of a Task Force to study the Model not for Profit Act to determine what revisions, if any, are advisable for Florida's Chapter 617. Michelle Suarez seconded the Motion. The Motion carried without objection.

6. **Chapter 517 Matters**

a. Commissioner Weigel of the Florida Office of Financial Regulation, who attended the meeting in person, gave a brief summary of the proposed changes to Ch. 517. Issues the legislative staff had concerns with dealt with offering. It would be the first re-write of the statute in over 30 years. The changes are intended to ignite a capital market eco-system in FL.

b. Will Blair has agreed to serve as the Chair of a Ch. 517 Task Force, if voted to be created, with Professor Cohn as Vice-Chair.

i. Will Blair will send an email to committee members inviting them to join the task force. Chemere Ellis expressed interest in joining.

c. Approval of Motion and to recommend to the Executive Council the approval of a Chapter 517 Task Force for the purpose of developing BLS reform proposals to Chapter 517, Florida Statutes Stephen Sandiford moved to approve the formation of the Task Force, Seconded by Karen J. Orlin. Motion carried.

7. Renewal of Certain Legislative Initiatives Positions

i. Opposition to impose Income tax on limited liability companies and subchapter S corporations.

1. Lou Conti commented that the Tax Section was the original section that was involved in reappealing tax against LLC's in Florida. Committee voted and approved to maintain this legislative position.

ii. Opposition to legislation that would transfer the functions of the Division of Corporations in the Department of State to the Department of Revenue.

1. Gary Teblum commented on this, that there is no effort today to do this, but there was about 10 years ago. Committee voted to maintain this legislative position.

iii. Opposition to the "sunset" of the Division of Corporations of the Department of State.

1. Committee voted to maintain this legislative position.

iv. Opposition to changes to Ch. 607, Florida Statutes, which addresses the filing of biennial reports by domestic and foreign corporations.

1. Gary Teblum commented that there is a legislature down in Fort Myers that has previously brought this up. Because this would make information available likely to be more stale. Lou Conti commented that it would be a disaster. Committee voted to maintain this legislative position.

v. Support of proposed legislation updating and modernizing the Florida Business Corporation Act, the Florida Revised Limited Liability Company Act and other for profit business entity statutes.
    1. Committee voted to maintain this legislative position.

vi. Support proposed legislation to provide for Series LLC.
    1. Committee voted to maintain this legislative position.

vii. Support legislative proposals amending Chapter 517, the Florida Securities and Investor Protection Act.
    1. Committee voted to maintain this legislative position.

viii. Opposition to legislation, including without limitation currently proposed legislation to amend Section 542.275, Florida Statutes, that directly or indirectly requires pre-closing notice and/or providing of information to the Office of the Florida Attorney General as to certain merger and acquisition transactions and/or requires post-closing filing of notice and/or providing information to the Office of the Florida Attorney General without reasonable exemption for Florida's Sunshine Laws.
    1. Gary Teblum provided commentary that our concerns are that it is a trap for the unwary for many businesses that would be unaware of this requirement. Also, this would possibly make this subject to public disclosure because of the sunshine act.
    2. Committee voted to maintain this legislative opposition.

8. Report from Series LLC Task Force.

a. Lou Conti commented. The Uniform Law Commission's model series LLC act. It creates one class of a protected series. Florida is a uniform LLC act state. We have centrally adopted, with modifications, the most recent version of the revised uniform LLC Act. He also opined that there are tweaks we should make to the revised LLC Act. Process is just starting to have a Florida bill by mid-July.

b. Lou Conti gave a brief history: Series LLC's have been around for a while. The concept is that one legal entity can create and form the equivalent of a subsidiary that would be part of the entity that is originally formed. We didn't have series LLC's until 1996. On the federal tax level, is that any mother ship LLC will be taxed as a separate entity, but we allow foreign entities to operate in Florida by registering as a foreign entity. First thing we have to address, is how to Judges address series LLC's in Florida. The fundamental concept is that if you form a series LCL by designating (in our case a protected entity) and then underneath you form a designation for each series under that. You can separate management and members. But there is a fundamental requirement that the 3rd parties can understand what the assets of a particular series are and they will be transparent with any litigation that might entail a protected series. The purpose is to give courts structure to deal with foreign series, to allow Fl to utilize FL LLC's for businesses that want to use series LLC's, and to provide creditors rights for third parties that interact with these series LLC's in Florida. The legislation itself will be a plug into our existing LLC act

and it will allow series LLC's to be formed in FL and provide rules for the operation of series LLC's in FL. Every series would have a separate tax ID number.

c. Gary commented that about 23 other states have adopted series LLC's and several of them have modeled them after the uniform LLC Act.

9. Opinion Standards Committee Update.

a. Robert Barron reported that Daniel Peterson is now joining as a co-chair of the committee with Gary Teblum, and Robert Barron will be stepping down.

b. Third party legal opinions, which are most often issued in lending transactions, is what is primarily affected by this committee and they are looking for commentary and input from those who operate in this area.

10. Chapter 607 Task Force Update.

a. Phill could not be here, so Gary Teblum reported. A comprehensive revision was done in 2020. They are looking back at derivative versus direct actions and defective acts and being able to correct defective acts (like in Delaware).

11. CLE Projects.

a. Michelle Suarez reported that there is an article that will be published in the July/August 2022 Florida Bar Journal coming out of this committee that was co-written by Stu Cohn, Dan Aronson, and Michelle Suarez. Also, there will be a CLE coming out of this committee in September 2022, presented by Will Blair and Rebecca DiStefano of Greenberg Traurig on Regulation D and Regulation A basics and updates, and another that is being organized with the help of Gary Teblum on how a bill becomes a law. She encouraged other members that have article or CLE ideas to let her know so that we can work as a committee to increase our CLE output.

12. Other Matters for Discussion/Good Order.

a. Willard Blair reported the SEC Institute CLE will go forward, in person in Miami, FL on March 2 and 3rd, 2023.

b. Commissioner Weigel asked if this committee has ever considered Digital Autonomous Organizations ("DAO"). Gary Teblum responded that it was brought up in the digital task force committee but he was unsure if it was specifically addressed.

13. Adjourn.

SCHEDULE 5

517 Task Force - Comparison of HB 779

Description of Reform Measures

(A) Registration Exemptions

1.Reform of the Crowdfunding Exemption (s. 517.0611)

Section 5 of the 1933 Securities Act requires that all offerings of securities be federally registered unless an exemption from registration exists. Section 5 applies to any offering that utilizes an instrument of interstate commerce and has no minimum or de minimis exceptions. Smaller companies and start-ups cannot afford the time and expense of registered offerings and therefore must look to exemptions for capital-raising purposes. The exemption most used is SEC Rule 506(b), a private offering exemption that forbids general advertising and solicitation of the offering and limits the number of non-accredited investor purchasers. Smaller companies often do not have the capacity to comply with the limitations of Rule 506(b). A companion exemption, Rule 506(c), allows for general advertising and solicitation but purchasers are limited to accredited investors.

In response to the concern that smaller companies and start-ups need a more workable exemption from registration, a federal exemption was adopted in 2015 for internet-based crowdfunding offerings. The exemption grew out of the internet crowdfunding phenomenon and is therefore referred to as the crowdfunding exemption. Although the exemption, set forth at 17 C.F.R. 227.100 to 227.503, provides for federal preemption of state registration laws, the federal crowdfunding exemption is so replete with technical, onerous requirements that it has proved to be of little value to smaller companies needing to raise capital.

As a result of the failure at the federal level to create a viable, workable crowdfunding exemption, nearly every state has adopted an exemption from state registration for relatively small intrastate offerings. The state crowdfunding exemption is conditioned on compliance with the federal exemption for intrastate offerings contained in Section 3(a)(11) of the Securities Act of 1933 and SEC Rules 147 and 147A, which means that the securities offering must be by a company principally located within the state and the sales of securities must be limited to the residents of the state.

Following the national trend, Florida adopted an intrastate crowdfunding exemption in 2015. Fl. Stat. Ch. 517.0611. Unfortunately, Florida's legislation did nothing more than mirror the federal requirements which have proven to be of very limited usefulness. As a result, to date there has not been a single securities offering under Florida's crowdfunding statute. The OFR proposed reform measures would bring Florida's crowdfunding exemption in line with similar exemptions in other states and will open opportunities for smaller companies to raise capital within a much more reasonable and workable regulatory framework. We have been advised, for example, that there have been numerous offerings in Georgia under their crowdfunding provisions that are substantially similar to the OFR's reform proposals.

The principal reform elements to the crowdfunding exemption are:

(1) **Expands companies eligible to use the exemption** by eliminating the requirement that the company be incorporated in Florida. Therefore, a Florida-based corporation or LLC formed in another state, such as Delaware, can raise capital under this exemption provided that Florida is the company's principal place of business as determined by objective criteria set forth in SEC Rule 147A.

(2) **Increases the amount a company can raise** under the exemption within a 12-month period from $1 million to $5 million. The SEC recently amended its crowdfunding exemption to allow for a $5 million maximum amount. In today's economy, limiting a company to raising $1 million in a 12-month period may be too restrictive for many businesses.

~~(3) **Sets a flat $10,000 maximum that a non-accredited investor can invest** in crowdfunding offerings in a 12-month period. This proposal avoids the confusion of the formula-based limitations in the current statute. For accredited investors, there is no investment limitation in the current statute or the proposed bill.~~

~~(4) **Eliminates the requirement that the offering be administered by a dealer or an intermediary**. The requirement that the issuer employ a third-party dealer or registered intermediary to administer the offering may be the greatest impediment to the use of the crowdfunding exemption, as it is costly to the issuer and hinders the ability of the issuer to market its offering. Nearly every other state exemption has eliminated this requirement. The issuer may choose to use an intermediary, in which case the OFR proposal contains in s. 517.12 provisions for the registration of the intermediary and sets forth the intermediary's statutory obligations. If the issuer chooses not to use an intermediary, the issuer is obligated to perform the duties that would otherwise be performed by an intermediary, including assuring that the investors are advised of the risks of the offering, are qualified, and that the disclosure materials are given to all potential investors.~~

~~(5) **Eliminates the mandatory third-party escrow of funds**. The current statute requires that the issuer set a minimum target amount and that all proceeds from the sale of securities be deposited with a third-party escrow agent until the target amount has been reached. While seemingly unobtrusive, in practice the escrow requirement is a major impediment for smaller companies. The OFR reported, and Task Force members confirmed, that banks and other institutions are not willing to serve as escrow agents for small companies for reasons of administrative costs and potential liabilities. The OFR proposal allows the issuer to use a third-party escrow agent. Alternatively, the issuer is required to deposit the proceeds in a federally insured bank until the target amount has been reached. If the target amount is not reached within a pre-determined, disclosed time period, the issuer is obligated to return all funds to the investors.~~

(3) **Escrow Requirement.** The section is amended to eliminate the requirement that investor funds be placed in an escrow account and replace it with the requirement that investor funds, through an escrow agreement or trust account arrangement entered into with an independent third party, be deposited in a federally insured account for the benefit of the investors. All funds are to remain in such account until such time as either the target offering amount has been reached, the offering has been terminated, or the offering has expired. In practice the existing escrow requirement is a major impediment for smaller companies because banks and other institutions are unwilling to serve as escrow agents for newly formed organizations due to administrative cost and potential liability.

(4) **Minor Updates.** This section is amended as follows: to specifically include limited liability companies, to replace gender specific terms with gender neutral terms, for clarity, to replace the term "potential investor" with "prospective investor" throughout, to replace the term "principal shareholders" with "control persons," and to ensure any amendments to the federal securities laws are included by reference.

(6) **Allows general solicitation and advertising**. The current statute has no provision that permits the issuer to solicit potential investors and use general advertising, other than through an intermediary. The proposal allows the issuer to engage directly in general solicitation and advertising of the offering, provided that all communications limit the target audience to residents of the state.

(7) **"Demo day" presentations**. The issuer is permitted to engage in carefully prescribed "demo day" meetings with potential investors in accordance with conditions analogous to those set forth in recently adopted SEC Rule 148. Such meetings are limited in terms of sponsors, must involve more than one issuer, there are strict limitations on issuer communications, and cannot involve any investment recommendations, negotiations or commitments.

(8) **Eliminates required annual reports to investors**. The OFR proposal eliminates this requirement. No other exemption from registration has this requirement, and both the corporation and limited liability company statutes allow for inspection of financial statements and other records by shareholders or members.

(9) **Three-day voidability provision**: This provision, contained in Florida's limited offering exemption in Ch. 517.061(11), is proposed to be added to the crowdfunding statute. It allows an investor to rescind the transaction within the latter of 3 days after (i) purchase or (ii) being advised of the right to rescind. The Task Force recognizes that this provision may be a trap for the unwary issuer, but it has long been a part of Florida's securities laws and is an investor protection measure.

(10) **Financial statement disclosures**. The proposed bill retains the substantial disclosure obligations of issuers to prospective investors. Because of the change in maximum offering amounts, the financial disclosure obligations have been revised for differing offering amounts and clarified as to the required types of financial statements.

2.**Adoption of an Accredited Investor Exemption (s. 517.061(23))**

The proposed bill adopts the Accredited Investor exemption developed by the North American Securities Administrators Association. This state registration exemption has been adopted by most states. It is limited to accredited investors residing in the state, contains substantial issuer disqualification provisions, cannot be used by so-called "blank-check development companies," and substantially limits the resale of securities by purchasers. The state exemption avoids federal registration by qualifying under the federal exemption for intrastate offerings.

Many companies raise capital through SEC Rule 506, the federal private offering exemption that preempts state law. Rule 506(b), however, does not permit any form of general advertising or solicitation. This can hinder a small company's capacity to find accredited investors. The state accredited investor exemption allows for general advertising and solicitation under limited conditions. Rule 506(c), an alternative exemption, permits general advertising and solicitation, but that exemption is relatively under-utilized because of its stringent requirements for verifying the accredited investor status of each purchaser.

The state Accredited Investor exemption is conditioned on the issuer's, or issuer's agent's, reasonable belief that the prospective purchaser is an accredited investor, which is the traditional Rule 506(b)

standard. The Accredited Investor exemption may therefore prove very useful for local companies who need to engage in some general advertising or solicitation in order to attract potential investors.

Adoption of the Accredited Investor exemption also allows both Florida and out-of-state issuers that wish to take advantage of the SEC Rule 504 federal exemption to offer the securities to Florida residents under the Accredited Investor exemption without the need to register the offering in Florida.

3**.Amendments to the Current Limited Offering Exemption (s. 517.061(11))**

The proposed bill makes a major change to the exemption set forth in Ch. 517.061(11), Florida's current limited offering exemption:

(1) **Integration**: The provisions relating to the integration of the offering with other offerings have been eliminated. Instead, the bill provides that the Commission will adopt by rule new provisions that are in substantial compliance with recently adopted SEC Rule 152. Rule 152 significantly reduces the threat to companies, especially smaller ones that have continuing and sporadic needs for capital, that multiple offerings will be integrated as one, with the result that otherwise distinct valid exempt offerings will be deemed in violation of the registration provisions. The OFR's proposed bill has an effective date of October 1, 2023, which allows for considerable time for the Commissioner's office to adopt reasonable integration guidelines along the lines of Rule 152.

~~(2) **Limited "Demo Day" Solicitation**: Although the limited offering exemption prohibits "any form of general solicitation or general advertising in this state," the proposed bill allows for issuers to participate in "demo day" presentations in accordance with the provisions of recently adopted SEC Rule 148. The presentations can only be at meetings sponsored by certain limited organizations, such as universities, state or local instrumentalities, business incubators, or defined angel investor groups, must involve more than one issuer, issuer communications are strictly limited, and there can be no investment recommendations, advice, negotiations or commitments. The ability to engage in this limited form of public disclosure is important for smaller companies and start-ups trying to attract potential investors.~~

NEW Section 517.XXX "Pre-Offering Communication" (Stand-Alone Demo-Day and Testing-the-Waters Statute Applicable to All Offerings)

- This section is created to allow issuers to participate in "demo day" presentations in accordance with the provisions of recently adopted SEC Rule 148. The ability to engage in this limited form of public disclosure is important for smaller companies and start-ups trying to attract potential investors. Likewise, the safe harbor protects the promotor of small company showcasing events – the business incubators and accelerators -- from being required to register as dealers, provided the safe harbor restrictions are followed.
  - Effective March 2021, new SEC Rule 148 provides that certain "demo day" communications are not deemed general solicitation or general advertising if made in connection with a seminar or meeting sponsored by a college, university, or other institution of higher education, State or local government or instrumentality thereof, a nonprofit organization, or

an angel investor group, incubator, or accelerator. Under the rule, sponsors are prohibited from: making investment recommendations or providing investment advice to attendees of the event; engaging in any investment negotiations between the issuer and investors attending the event; charging attendees of the event any fees, other than reasonable administrative fees; receiving any compensation for making introductions between attendees and issuers, or investment negotiations between parties; and receiving any compensation with respect to the event that would require it to register as a broker or dealer under the Exchange Act or as an investment adviser under the Advisers Act. Additionally, Rule 148 specifies that advertising for the event may not reference any specific offering of securities by the issuer and limits the information that may be conveyed at the event regarding the offering of securities by or on behalf of the issuer. Further, Rule 148 limits online participation in the event.

- This section is also created to allow issuers to "test the waters" by engaging in pre-offering oral or written communications with prospective investors to determine whether there is any interest in a contemplated securities offering. The ability to determine in advance the likelihood of investor reaction to a contemplated offering can save a company from the considerable time and expense of an unsuccessful offering.
  - Effective March 2021, new SEC Rule 241 allows an issuer or any person authorized to act on behalf of an issuer to "test the waters" by communicating orally or in writing to determine whether there is any interest in a contemplated offering of securities exempt from registration under the Act at any time before making a determination as to the exemption from registration under the Act under which an offering of securities will be conducted. Communications made in reliance on this rule must state: 1) the issuer is considering an offering of securities exempt from registration under the Act, but has not determined a specific exemption from registration the issuer intends to rely on for the subsequent offer and sale of the securities; 2) no money or other consideration is being solicited, and if sent in response, will not be accepted; 3) no offer to buy the securities can be accepted and no part of the purchase price can be received until the issuer determines the exemption under which the offering is intended to be conducted and, where applicable, the filing, disclosure, or qualification requirements of such exemption are met; and 4) A person's indication of interest involves no obligation or commitment of any kind.

(B) Registration of Securities

These proposals apply to offerings that are registered in Florida, including federally registered offerings and offerings that are only state registered (such as registered intrastate offerings).

~~**1. Coordination with Other States (s. 517.081(1))**~~

~~Federally registered offerings are also registered in every state where an offering will be made, and each state has authority to review the offering under its merit review and other substantive standards. The bill allows the Commission to adopt rules for the cooperation and coordination with other states in the review process of federally registered offerings. It is important for the issuer, and for each state, that there be some coordination among states to avoid duplication, costs, and timing concerns. Many states~~

~~have entered into state coordinating processes, and the proposed bill allows Florida to be part of the process. The proposal does not impact Florida's ability to impose its own standards of review on the offering.~~

~~2.Elimination of the "fair, just and equitable" merit review standard (s. 517.081(7))~~

~~The bill eliminates the "fair, just, and equitable" standard as part of the review process for registered offerings. Florida is among a minority of states that continues to have this ambiguous standard embodied in its statute. The "fair, just and equitable" has long been considered too vague to be a workable standard.~~

~~Consistent with other states, the bill retains the ability of the OFR to deny registration to offerings that fail to meet state-mandated disclosure standards or that the OFR believes may be fraudulent or tend to work a fraud on investors. The commission is also authorized to adopt rules that relate to substantive, investor-protection aspects of the offering, such as the relative amounts of promoter and investor equity. Florida currently has in its Administrative Code several such provisions that conform to investor protection standards adopted by the North American Securities Administrators Association.~~

~~3."Testing the Waters" and "Demo Day" Communications (ss. 517.081(11)-(12))~~

~~Consistent with recent SEC rules, the proposed bill allows issuers to "test the waters" by engaging in pre-offering oral or written communications with prospective investors to determine whether there is any interest in a contemplated securities offering. The ability to determine in advance the likelihood of investor reaction to a contemplated offering can save a company from the considerable time and expense of an unsuccessful offering. There cannot be any solicitation or acceptance of money or other consideration, nor any commitment from any person to purchase the contemplated securities.~~

~~The communication can also be made at a "demo day" presentation as described above in Item A.3(2) regarding the limited offering exemption. Both the "testing the waters" and "demo day" communications are deemed to be an "offering" and are therefore subject to the anti-fraud, civil and criminal penalty provisions set forth in Ch. 517. Misleading disclosures or omissions of material information made through such communications may therefore subject issuers to Florida's civil, administrative and criminal liability provisions.~~

1. This section is amended to eliminate the Commission's ability to fix by rule the maximum discounts, commissions, expenses, remuneration, and other compensation as these terms are best negotiated by the parties participating in an offering.

2. This section is amended to divide securities offerings into two categories: 1) those that seek to raise more than the maximum amount provided in s. 3(b) of the Securities Act of 1933; and 2) those that seek to raise the amount provided in s. 3(b) of the Securities Act of 1933 or less. The maximum amount currently provided in s. 3(b) of the Securities Act of 1933 is $5 million. For issuers in category one, they may use forms designated by Commission rule as a guide in preparing their prospectus and must pay a $1,000 application fee. Issuers in category two must use forms designated by Commission rule and must pay a $200 application fee.

3. This section is amended to allow all issuers meeting certain criteria, not just corporations, to use a simplified offering circular to register securities.

4. This section is amended to allow the Commission to specify by rule the time period for completing an application to register securities. If the application is not timely completed, the application shall be deemed abandoned.

5. This section is amended to specifically include limited liability companies, technical changes for clarity, and to ensure any amendments to the federal securities laws are included by reference.

6. This section is amended to move provisions pertaining to viatical settlements to s. 517.072, F.S.

Section 517.082 "Registration by notification; federal registration statements"

1. This section is amended for clarity and to ensure any amendments to the federal securities laws are included by reference.

2. This section is amended to eliminate the exclusion for limited partnership interests from the requirement that registered offerings be priced higher than $5 per share.
[COMMENT FOR DISCUSSION: WHY NOT ELIMINATE A PRICING LIMITATION ALTOGETHER????]

3. This section is amended to eliminate the outdated reference to the National Association of Securities Dealers Automated Quotation (NASDAQ) System.

4. This section is amended to allow the Office to deem an application abandoned if an applicant's federal registration statement is not declared effective by the SEC within 180 days of the filing of such application for registration by notification with the Office.

Section 517.111 "Revocation or denial of registration of securities"

1. This section is amended to define the term "insolvent" as "unable to pay its debts as they become due in the usual course of business."

2. This section is amended to include "investigation" in addition to "examination" in various provisions as provisions in this section are applicable to both examinations and investigations conducted by the Office.

3. This section is amended to remove the phrase "is in any other way dishonest or" because the standard is too vague.

4. This section is amended to eliminate the ability of the Office to notice the entry of an order pursuant to this section by "telephone confirmed in writing, or by telegraph to the issuer" as these methods are outdated and not used elsewhere in the chapter.

5. This section is amended to eliminate the phrase "demonstrated any evidence of unworthiness," a vague standard, and replace it with "violated or is violating any provision of s. 517.161(1)," a workable standard.

6. This section is amended to remove "failure to timely complete an application" as grounds for denial as this provision is incorporated in the registration sections (ss. 517.081 and 517.082, F.S.).

7. This section is amended to specifically include limited liability companies.

~~**(C) Registration of Finders (s. 517.12(20))**~~

~~The proposed bill requires the registration of certain defined "Finders" who are compensated by issuers to introduce or refer potential investors to issuers who the Finders reasonably believe to be accredited investors. Finders might not be dealers or investment advisers who are registered with the state, as their limited activities might not require such registration. Finders fall into a somewhat gray, unregulated area. Nevertheless, because they assist the issuer in finding investors and are compensated by issuers for doing so, the proposed bill adopts registration and disclosure requirements as investor protection measures. The SEC has also expressed concern about the activities of unlicensed finders and has set forth proposals for regulation. Those proposals have not yet been adopted.~~

~~Finders are defined in the bill to be natural persons or entities who reside or do business in Florida and who receive compensation in connection with an issuer's offer of securities to introduce or refer accredited investors to the issuer. Such persons must apply for and be approved as registered Finders in the state under a detailed application process. A Finder cannot make any statement regarding the value or advisability of the investment. The Finder must also disclose to persons they refer to the issuer the type and amount of compensation that has or will be paid to the Finder in connection with the introduction or referral.~~

~~If adopted, Florida will be a leader among states in requiring the registration of Finders. While the current proposal is limited to specific types of investors, the Commissioner plans to continue to examine the "finder" issue and consider further registration requirements.~~

Section 517.12 "Registration of dealers"

1. This section is amended to separate dealers into Tier I dealers and Tier II dealers and to describe the registration requirements for each category. Tier II dealers, or capital connectors, are dealers compensated by an issuer for introducing or referring prospective investors to such issuer. Such activity requires registration as a dealer with the OFR. However, very few capital connectors register as dealers either because they do not realize that their limited activities require registration or because the regulatory burdens and costs associated with registration are too great. The amendments allow capital connectors to elect Tier II dealer registration which is appropriate for their limited activity and is a less costly and burdensome dealer registration than traditional, Tier I, dealer registration. While less costly and burdensome, Tier II dealer registration nevertheless requires that an applicant be fingerprinted and make disclosures to ensure investor protection.

2. This section is amended to remove the requirement that issuers register with Office to sell or offer for sale in or from offices in this state or sell securities to persons in this state from offices outside

this state. This registration requirement is not necessary because issuers are required to disclose all material facts about themselves when registering an offering of securities.

3. This section is amended to clarify which exempt transactions the registration requirements apply to.

4. This section is amended to eliminate the requirement that the Office find an applicant is of "good repute and character." This standard is not defined, and its meaning is unclear.

5. This section is amended to replace the phrase "any person directly or indirectly controlling the applicant" with "control person."

6. This section is amended to clarify the meaning of "securities business."

7. This section is amended to update cross-references, specifically include limited liability companies, and replace gender specific terms with gender neutral terms.

Section 517.1215 "Requirements, rules of conduct, and prohibited business practices for investment advisors and their associated persons"

1. This section is amended to replace the term "advisors" with "advisers."

Section 517.1217 "Rules of conduct and prohibited business practices for dealers and their associated persons and for intermediaries"

1. This section is amended to include intermediaries.

2. This section is amended to specifically identify the activities that a Tier II dealer can and cannot engage in. Tier II dealers, or capital connectors, are dealers compensated by an issuer for introducing or referring prospective investors to such issuer. Among other things, Tier II dealers must enter into a written agreement with each prospective investor defining the relationship among the parties and make certain disclosures.

~~**(D) Notice Filing (s. 517.083)**~~

~~So-called "federal covered securities" listed in Section 18(b) of the 1933 Securities Act are exempt from state registration. The offerings are not, however, exempt from state filing and anti-fraud laws. The proposed bill requires that notifications and prescribed documents be filed with the OFR for certain offerings of federal covered securities, including the issuer's consent to service of process. The OFR is given authority to suspend the sale of such securities if there is a failure to comply with the filing and notification requirements. The information obtained will also be used by the Commission to determine the amount of any fees that may be owed to the state by issuers.~~

Section 517.161 "Revocation, denial, or suspension of registration of dealer, investment adviser, intermediary, or associated person

1. This section is amended to replace the phrase "person directly or indirectly controlling" with "control person" and remove the term "broker" for consistency.

2. This section is amended to remove the "unworthiness to transact business" and the "of bad business repute" standards because they are vague and to remove the term "small loan companies" as it is undefined.

3. This section is amended to define "insolvent" as "unable to pay its debts as they become due in the usual course of business."

4. This section is amended to add failure to pay or attempting to avoid paying certain final judgments, arbitration awards, fines, civil penalties, orders of restitution and disgorgement, or similar monetary payment obligations as grounds for denying, suspending, or revoking a registration.

5. This section is amended to specifically include limited liability companies.

Section 517.1611 "Guidelines"

1. This section is amended to replace the phrase "any person directly or indirectly controlling the applicant" with "control person."

Section 517.181 "Escrow Agreement"

1. This section is repealed as it is not utilized, and no federal counterpart exists. This section requires the impound of securities to be held for issuance contingent on a milestone being reached such as receipt of a patent.

(E) Enforcement Provisions

1**. Control Person Liability (517.191(4))**

The bill authorizes the OFR to bring enforcement actions against control persons for violations by controlled persons unless the control person acted in good faith and did not directly or indirectly induce the acts that violated the statute.

2**.Aiding and Abetting Liability (517.191(4))**

The bill authorizes the OFR to bring enforcement actions against any person who knowingly or recklessly provides substantial assistance to another person in violation of the statute.

3.Recovery of Attorney's Fees (517.191(5))

The bill allows the OFR to recover costs and attorney fees related to the investigation or enforcement of the statute.

(F). Definition Amendments (s. 517.021)

The proposed bill adds several new terms to the definitions section and clarifies existing definitions.

New Terms

(a) “Accredited Investor” s. 517.021(1)

(b) “Control person” 517.021(8)

~~(c) “Finder” 517.021(12)~~

(d) “Natural person” 517.021(18)

(e) “Office” 517.021(20)

(f) “Person” 517.021(21)

(g) "Angel investor group" s. 517.021(2)

(h) "Business accelerator" s. 517.021(7)

(i) "Business incubator" s. 517.021(8)

(j) "Target offering amount" 517.021(30)

Amended Terms

(a) “Associated Person” s. 517.021(3)

(b) “Dealer” s. 517.021(9)

(b) “Intermediary” s. 517.021(15)

(c) “Investment Adviser” s. 517.021(16)

Miscellaneous Additional Changes

The proposed bill contains numerous other changes to Ch. 517 that are less substantial but also salutary. Among such changes are

1. Reduction from 15 to 6 in the number of clients a person can have without having to register as an investment adviser. This conforms to the National Securities Markets Improvement Act.
2. Elimination of “issuer” from the definition of “dealer,” an unusual and unnecessary licensing requirement.
3. Inclusion of references to limited liability companies and managers in various registration and disclosure provisions.

SCHEDULE 6

607 Task Force Materials

West's Delaware Code Annotated
Title 8. Corporations
Chapter 1. General Corporation Law
Subchapter VI. Stock Transfers

8 Del.C. § 204

§ 204. Ratification of defective corporate acts and stock

Effective: August 1, 2018
Currentness

<Text of section applicable as provided by 80 Laws 2015, ch. 40, § 16; 81 Laws 2018, ch. 354, § 16.>

(a) Subject to subsection (f) of this section, no defective corporate act or putative stock shall be void or voidable solely as a result of a failure of authorization if ratified as provided in this section or validated by the Court of Chancery in a proceeding brought under § 205 of this title.

(b)(1) In order to ratify 1 or more defective corporate acts pursuant to this section (other than the ratification of an election of the initial board of directors pursuant to paragraph (b)(2) of this section), the board of directors of the corporation shall adopt resolutions stating:

(A) The defective corporate act or acts to be ratified;

(B) The date of each defective corporate act or acts;

(C) If such defective corporate act or acts involved the issuance of shares of putative stock, the number and type of shares of putative stock issued and the date or dates upon which such putative shares were purported to have been issued;

(D) The nature of the failure of authorization in respect of each defective corporate act to be ratified; and

(E) That the board of directors approves the ratification of the defective corporate act or acts.

Such resolutions may also provide that, at any time before the validation effective time in respect of any defective corporate act set forth therein, notwithstanding the approval of the ratification of such defective corporate act by stockholders, the board of directors may abandon the ratification of such defective corporate act without further action of the stockholders. The quorum and voting requirements applicable to the ratification by the board of directors of any defective corporate act shall be the quorum and voting requirements applicable to the type of defective corporate act proposed to be ratified at the time the board adopts the resolutions ratifying the defective corporate act; provided that if the certificate of incorporation or bylaws of the corporation, any plan or agreement to which the corporation was a party or any provision of this title, in each case as in effect as of the time of the defective corporate act, would have required a larger number or portion of directors or of specified directors for a quorum to be present or to approve the defective corporate act, such larger number or portion

of such directors or such specified directors shall be required for a quorum to be present or to adopt the resolutions to ratify the defective corporate act, as applicable, except that the presence or approval of any director elected, appointed or nominated by holders of any class or series of which no shares are then outstanding, or by any person that is no longer a stockholder, shall not be required.

(2) In order to ratify a defective corporate act in respect of the election of the initial board of directors of the corporation pursuant to § 108 of this title, a majority of the persons who, at the time the resolutions required by this paragraph (b)(2) of this section are adopted, are exercising the powers of directors under claim and color of an election or appointment as such may adopt resolutions stating:

(A) The name of the person or persons who first took action in the name of the corporation as the initial board of directors of the corporation;

(B) The earlier of the date on which such persons first took such action or were purported to have been elected as the initial board of directors; and

(C) That the ratification of the election of such person or persons as the initial board of directors is approved.

(c) Each defective corporate act ratified pursuant to paragraph (b)(1) of this section shall be submitted to stockholders for approval as provided in subsection (d) of this section, unless:

(1)(A) No other provision of this title, and no provision of the certificate of incorporation or bylaws of the corporation, or of any plan or agreement to which the corporation is a party, would have required stockholder approval of such defective corporate act to be ratified, either at the time of such defective corporate act or at the time the board of directors adopts the resolutions ratifying such defective corporate act pursuant to paragraph (b)(1) of this section; and

(B) Such defective corporate act did not result from a failure to comply with § 203 of this title; or

(2) As of the record date for determining the stockholders entitled to vote on the ratification of such defective corporate act, there are no shares of valid stock outstanding and entitled to vote thereon, regardless of whether there then exist any shares of putative stock.

(d) If the ratification of a defective corporate act is required to be submitted to stockholders for approval pursuant to subsection (c) of this section, due notice of the time, place, if any, and purpose of the meeting shall be given at least 20 days before the date of the meeting to each holder of valid stock and putative stock, whether voting or nonvoting, at the address of such holder as it appears or most recently appeared, as appropriate, on the records of the corporation. The notice shall also be given to the holders of record of valid stock and putative stock, whether voting or nonvoting, as of the time of the defective corporate act (or, in the case of any defective corporate act that involved the establishment of a record date for notice of or voting at any meeting of stockholders, for action by written consent of stockholders in lieu of a meeting, or for any other purpose, the record date for notice of or voting at such meeting, the record date for action by written consent, or the record date for such other action, as the case may be), other than holders whose identities or addresses cannot be determined from the records of the corporation. The notice shall contain a copy of the resolutions adopted by the board of directors pursuant to paragraph (b)(1) of this section or the information required by paragraphs (b)(1)(A) through (E) of this section and a statement that any claim that the defective

corporate act or putative stock ratified hereunder is void or voidable due to the failure of authorization, or that the Court of Chancery should declare in its discretion that a ratification in accordance with this section not be effective or be effective only on certain conditions must be brought within 120 days from the applicable validation effective time. At such meeting, the quorum and voting requirements applicable to ratification of such defective corporate act shall be the quorum and voting requirements applicable to the type of defective corporate act proposed to be ratified at the time of the approval of the ratification, except that:

(1) If the certificate of incorporation or bylaws of the corporation, any plan or agreement to which the corporation was a party or any provision of this title in effect as of the time of the defective corporate act would have required a larger number or portion of stock or of any class or series thereof or of specified stockholders for a quorum to be present or to approve the defective corporate act, the presence or approval of such larger number or portion of stock or of such class or series thereof or of such specified stockholders shall be required for a quorum to be present or to approve the ratification of the defective corporate act, as applicable, except that the presence or approval of shares of any class or series of which no shares are then outstanding, or of any person that is no longer a stockholder, shall not be required;

(2) The approval by stockholders of the ratification of the election of a director shall require the affirmative vote of the majority of shares present at the meeting and entitled to vote on the election of such director, except that if the certificate of incorporation or bylaws of the corporation then in effect or in effect at the time of the defective election require or required a larger number or portion of stock or of any class or series thereof or of specified stockholders to elect such director, the affirmative vote of such larger number or portion of stock or of any class or series thereof or of such specified stockholders shall be required to ratify the election of such director, except that the presence or approval of shares of any class or series of which no shares are then outstanding, or of any person that is no longer a stockholder, shall not be required; and

(3) In the event of a failure of authorization resulting from failure to comply with the provisions of § 203 of this title, the ratification of the defective corporate act shall require the vote set forth in § 203(a)(3) of this title, regardless of whether such vote would have otherwise been required.

Shares of putative stock on the record date for determining stockholders entitled to vote on any matter submitted to stockholders pursuant to subsection (c) of this section (and without giving effect to any ratification that becomes effective after such record date) shall neither be entitled to vote nor counted for quorum purposes in any vote to ratify any defective corporate act.

(e) If a defective corporate act ratified pursuant to this section would have required under any other section of this title the filing of a certificate in accordance with § 103 of this title, then, whether or not a certificate was previously filed in respect of such defective corporate act and in lieu of filing the certificate otherwise required by this title, the corporation shall file a certificate of validation with respect to such defective corporate act in accordance with § 103 of this title. A separate certificate of validation shall be required for each defective corporate act requiring the filing of a certificate of validation under this section, except that (i) 2 or more defective corporate acts may be included in a single certificate of validation if the corporation filed, or to comply with this title would have filed, a single certificate under another provision of this title to effect such acts, and (ii) 2 or more overissues of shares of any class, classes or series of stock may be included in a single certificate of validation, provided that the increase in the number of authorized shares of each such class or series set forth in the certificate of validation shall be effective as of the date of the first such overissue. The certificate of validation shall set forth:

(1) Each defective corporate act that is the subject of the certificate of validation (including, in the case of any defective corporate act involving the issuance of shares of putative stock, the number and type of shares of putative stock issued and the date or dates upon which such putative shares were purported to have been issued), the date of such defective corporate act, and the nature of the failure of authorization in respect of such defective corporate act;

(2) A statement that such defective corporate act was ratified in accordance with this section, including the date on which the board of directors ratified such defective corporate act and the date, if any, on which the stockholders approved the ratification of such defective corporate act; and

(3) Information required by 1 of the following paragraphs:

a. If a certificate was previously filed under § 103 of this title in respect of such defective corporate act and no changes to such certificate are required to give effect to such defective corporate act in accordance with this section, the certificate of validation shall set forth (x) the name, title and filing date of the certificate previously filed and of any certificate of correction thereto and (y) a statement that a copy of the certificate previously filed, together with any certificate of correction thereto, is attached as an exhibit to the certificate of validation;

b. If a certificate was previously filed under § 103 of this title in respect of the defective corporate act and such certificate requires any change to give effect to the defective corporate act in accordance with this section (including a change to the date and time of the effectiveness of such certificate), the certificate of validation shall set forth (x) the name, title and filing date of the certificate so previously filed and of any certificate of correction thereto, (y) a statement that a certificate containing all of the information required to be included under the applicable section or sections of this title to give effect to the defective corporate act is attached as an exhibit to the certificate of validation, and (z) the date and time that such certificate shall be deemed to have become effective pursuant to this section; or

c. If a certificate was not previously filed under § 103 of this title in respect of the defective corporate act and the defective corporate act ratified pursuant to this section would have required under any other section of this title the filing of a certificate in accordance with § 103 of this title, the certificate of validation shall set forth (x) a statement that a certificate containing all of the information required to be included under the applicable section or sections of this title to give effect to the defective corporate act is attached as an exhibit to the certificate of validation, and (y) the date and time that such certificate shall be deemed to have become effective pursuant to this section.

A certificate attached to a certificate of validation pursuant to paragraph (e)(3)b. or c. of this section need not be separately executed and acknowledged and need not include any statement required by any other section of this title that such instrument has been approved and adopted in accordance with the provisions of such other section.

(f) From and after the validation effective time, unless otherwise determined in an action brought pursuant to § 205 of this title:

(1) Subject to the last sentence of subsection (d) of this section, each defective corporate act ratified in accordance with this section shall no longer be deemed void or voidable as a result of the failure of authorization described in the resolutions adopted pursuant to subsection (b) of this section and such effect shall be retroactive to the time of the defective corporate act; and

(2) Subject to the last sentence of subsection (d) of this section, each share or fraction of a share of putative stock issued or purportedly issued pursuant to any such defective corporate act shall no longer be deemed void or voidable and shall be deemed to be an identical share or fraction of a share of outstanding stock as of the time it was purportedly issued.

(g) In respect of each defective corporate act ratified by the board of directors pursuant to subsection (b) of this section, prompt notice of the ratification shall be given to all holders of valid stock and putative stock, whether voting or nonvoting, as of the date the board of directors adopts the resolutions approving such defective corporate act, or as of a date within 60 days after such date of adoption, as established by the board of directors, at the address of such holder as it appears or most recently appeared, as appropriate, on the records of the corporation. The notice shall also be given to the holders of record of valid stock and putative stock, whether voting or nonvoting, as of the time of the defective corporate act, other than holders whose identities or addresses cannot be determined from the records of the corporation. The notice shall contain a copy of the resolutions adopted pursuant to subsection (b) of this section or the information specified in paragraphs (b)(1)(A) through (E) or paragraphs (b)(2)(A) through (C) of this section, as applicable, and a statement that any claim that the defective corporate act or putative stock ratified hereunder is void or voidable due to the failure of authorization, or that the Court of Chancery should declare in its discretion that a ratification in accordance with this section not be effective or be effective only on certain conditions must be brought within 120 days from the later of the validation effective time or the time at which the notice required by this subsection is given. Notwithstanding the foregoing, (i) no such notice shall be required if notice of the ratification of the defective corporate act is to be given in accordance with subsection (d) of this section, and (ii) in the case of a corporation that has a class of stock listed on a national securities exchange, the notice required by this subsection and the second sentence of subsection (d) of this section may be deemed given if disclosed in a document publicly filed by the corporation with the Securities and Exchange Commission pursuant to § 13, § 14 or § 15(d) [15 U.S.C. § 78m, § 77n or § 78***o***(d)] of the Securities Exchange Act of 1934, as amended, and the rules and regulations promulgated thereunder, or the corresponding provisions of any subsequent United States federal securities laws, rules or regulations. If any defective corporate act has been approved by stockholders acting pursuant to § 228 of this title, the notice required by this subsection may be included in any notice required to be given pursuant to § 228(e) of this title and, if so given, shall be sent to the stockholders entitled thereto under § 228(e) and to all holders of valid and putative stock to whom notice would be required under this subsection if the defective corporate act had been approved at a meeting other than any stockholder who approved the action by consent in lieu of a meeting pursuant to § 228 of this title or any holder of putative stock who otherwise consented thereto in writing. Solely for purposes of subsection (d) of this section and this subsection, notice to holders of putative stock, and notice to holders of valid stock and putative stock as of the time of the defective corporate act, shall be treated as notice to holders of valid stock for purposes of §§ 222 and 228, 229, 230, 232 and 233 of this title.

(h) As used in this section and in § 205 of this title only, the term:

(1) “Defective corporate act” means an overissue, an election or appointment of directors that is void or voidable due to a failure of authorization, or any act or transaction purportedly taken by or on behalf of the corporation that is, and at the time such act or transaction was purportedly taken would have been, within the power of a corporation under subchapter II of this chapter (without regard to the failure of authorization identified in § 204(b)(1)(D) of this title), but is void or voidable due to a failure of authorization;

(2) “Failure of authorization” means: (i) the failure to authorize or effect an act or transaction in compliance with (A) the provisions of this title, (B) the certificate of incorporation or bylaws of the corporation, or (C) any plan or agreement to which the corporation is a party or the disclosure set forth in any proxy or consent solicitation statement, if and to the extent such failure would render such act or transaction void or voidable; or (ii) the failure of the board of directors or any officer of the corporation to authorize or approve any act or transaction taken by or on behalf of the corporation that would have required for its due authorization the approval of the board of directors or such officer;

(3) “Overissue” means the purported issuance of:

a. Shares of capital stock of a class or series in excess of the number of shares of such class or series the corporation has the power to issue under § 161 of this title at the time of such issuance; or

b. Shares of any class or series of capital stock that is not then authorized for issuance by the certificate of incorporation of the corporation;

(4) "Putative stock" means the shares of any class or series of capital stock of the corporation (including shares issued upon exercise of options, rights, warrants or other securities convertible into shares of capital stock of the corporation, or interests with respect thereto that were created or issued pursuant to a defective corporate act) that:

a. But for any failure of authorization, would constitute valid stock; or

b. Cannot be determined by the board of directors to be valid stock;

(5) "Time of the defective corporate act" means the date and time the defective corporate act was purported to have been taken;

(6) "Validation effective time" with respect to any defective corporate act ratified pursuant to this section means the latest of:

a. The time at which the defective corporate act submitted to the stockholders for approval pursuant to subsection (c) of this section is approved by such stockholders or if no such vote of stockholders is required to approve the ratification of the defective corporate act, the time at which the board of directors adopts the resolutions required by paragraph (b)(1) or (b)(2) of this section;

b. Where no certificate of validation is required to be filed pursuant to subsection (e) of this section, the time, if any, specified by the board of directors in the resolutions adopted pursuant to paragraph (b)(1) or (b)(2) of this section, which time shall not precede the time at which such resolutions are adopted; and

c. The time at which any certificate of validation filed pursuant to subsection (e) of this section shall become effective in accordance with § 103 of this title.

(7) "Valid stock" means the shares of any class or series of capital stock of the corporation that have been duly authorized and validly issued in accordance with this title.

In the absence of actual fraud in the transaction, the judgment of the board of directors that shares of stock are valid stock or putative stock shall be conclusive, unless otherwise determined by the Court of Chancery in a proceeding brought pursuant to § 205 of this title.

(i) Ratification under this section or validation under § 205 of this title shall not be deemed to be the exclusive means of ratifying or validating any act or transaction taken by or on behalf of the corporation, including any defective corporate act, or any issuance of stock, including any putative stock, or of adopting or endorsing any act or transaction taken by or in the name of the corporation prior to the commencement of its existence, and the absence or failure of ratification in accordance with either

this section or validation under § 205 of this title shall not, of itself, affect the validity or effectiveness of any act or transaction or the issuance of any stock properly ratified under common law or otherwise, nor shall it create a presumption that any such act or transaction is or was a defective corporate act or that such stock is void or voidable.

Credits

Added by 79 Laws 2013, ch. 72, § 4, eff. April 1, 2014. Amended by 80 Laws 2015, ch. 40, § 8, eff. June 24, 2015; 81 Laws 2018, ch. 354, §§ 4 to 8, eff. Aug. 1, 2018.

Notes of Decisions (3)

8 Del.C. § 204, DE ST TI 8 § 204

Current through ch. 324 of the 151st General Assembly (2021-2022). Some statute sections may be more current, see credits for details. Revisions to 2022 Acts by the Delaware Code Revisors were unavailable at the time of publication.

End of Document

8 Del.C. § 205

§ 205. Proceedings regarding validity of defective corporate acts and stock

Effective: June 24, 2015
Currentness

<Text of section applicable as provided by 80 Laws 2015, ch. 40, § 16.>

(a) Subject to subsection (f) of this section, upon application by the corporation, any successor entity to the corporation, any member of the board of directors, any record or beneficial holder of valid stock or putative stock, any record or beneficial holder of valid or putative stock as of the time of a defective corporate act ratified pursuant to § 204 of this title, or any other person claiming to be substantially and adversely affected by a ratification pursuant to § 204 of this title, the Court of Chancery may:

(1) Determine the validity and effectiveness of any defective corporate act ratified pursuant to § 204 of this title;

(2) Determine the validity and effectiveness of the ratification of any defective corporate act pursuant to § 204 of this title;

(3) Determine the validity and effectiveness of any defective corporate act not ratified or not ratified effectively pursuant to § 204 of this title;

(4) Determine the validity of any corporate act or transaction and any stock, rights or options to acquire stock; and

(5) Modify or waive any of the procedures set forth in § 204 of this title to ratify a defective corporate act.

(b) In connection with an action under this section, the Court of Chancery may:

(1) Declare that a ratification in accordance with and pursuant to § 204 of this title is not effective or shall only be effective at a time or upon conditions established by the Court;

(2) Validate and declare effective any defective corporate act or putative stock and impose conditions upon such validation by the Court;

(3) Require measures to remedy or avoid harm to any person substantially and adversely affected by a ratification pursuant to § 204 of this title or from any order of the Court pursuant to this section, excluding any harm that would have resulted if the defective corporate act had been valid when approved or effectuated;

(4) Order the Secretary of State to accept an instrument for filing with an effective time specified by the Court, which effective time may be prior or subsequent to the time of such order, provided that the filing date of such instrument shall be determined in accordance with § 103(c)(3) of this title;

(5) Approve a stock ledger for the corporation that includes any stock ratified or validated in accordance with this section or with § 204 of this title;

(6) Declare that shares of putative stock are shares of valid stock or require a corporation to issue and deliver shares of valid stock in place of any shares of putative stock;

(7) Order that a meeting of holders of valid stock or putative stock be held and exercise the powers provided to the Court under § 227 of this title with respect to such a meeting;

(8) Declare that a defective corporate act validated by the Court shall be effective as of the time of the defective corporate act or at such other time as the Court shall determine;

(9) Declare that putative stock validated by the Court shall be deemed to be an identical share or fraction of a share of valid stock as of the time originally issued or purportedly issued or at such other time as the Court shall determine; and

(10) Make such other orders regarding such matters as it deems proper under the circumstances.

(c) Service of the application under subsection (a) of this section upon the registered agent of the corporation shall be deemed to be service upon the corporation, and no other party need be joined in order for the Court of Chancery to adjudicate the matter. In an action filed by the corporation, the Court may require notice of the action be provided to other persons specified by the Court and permit such other persons to intervene in the action.

(d) In connection with the resolution of matters pursuant to subsections (a) and (b) of this section, the Court of Chancery may consider the following:

(1) Whether the defective corporate act was originally approved or effectuated with the belief that the approval or effectuation was in compliance with the provisions of this title, the certificate of incorporation or bylaws of the corporation;

(2) Whether the corporation and board of directors has treated the defective corporate act as a valid act or transaction and whether any person has acted in reliance on the public record that such defective corporate act was valid;

(3) Whether any person will be or was harmed by the ratification or validation of the defective corporate act, excluding any harm that would have resulted if the defective corporate act had been valid when approved or effectuated;

(4) Whether any person will be harmed by the failure to ratify or validate the defective corporate act; and

(5) Any other factors or considerations the Court deems just and equitable.

(e) The Court of Chancery is hereby vested with exclusive jurisdiction to hear and determine all actions brought under this section.

(f) Notwithstanding any other provision of this section, no action asserting:

(1) That a defective corporate act or putative stock ratified in accordance with § 204 of this title is void or voidable due to a failure of authorization identified in the resolution adopted in accordance with 204(b) of this title; or

(2) That the Court of Chancery should declare in its discretion that a ratification in accordance with § 204 of this title not be effective or be effective only on certain conditions,

may be brought after the expiration of 120 days from the later of the validation effective time and the time notice, if any, that is required to be given pursuant to § 204(g) of this title is given with respect to such ratification, except that this subsection shall not apply to an action asserting that a ratification was not accomplished in accordance with § 204 of this title or to any person to whom notice of the ratification was required to have been given pursuant to § 204(d) or (g) of this title, but to whom such notice was not given.

Credits

Added by 79 Laws 2013, ch. 72, § 5, eff. April 1, 2014. Amended by 80 Laws 2015, ch. 40, § 9, eff. June 24, 2015.

Notes of Decisions (5)

8 Del.C. § 205, DE ST TI 8 § 205

Current through ch. 324 of the 151st General Assembly (2021-2022). Some statute sections may be more current, see credits for details. Revisions to 2022 Acts by the Delaware Code Revisors were unavailable at the time of publication.

End of Document

Subchapter E (Model Act ss. 1.45 – 1.52).

Subchapter E of the Model Act covers the topic of ratification of defective corporate acts. These provisions provide non-exclusive mechanisms to ratify defective corporate acts, which are corporate actions purportedly taken that were, at the respective times the actions were taken, within the power of the corporation, but were void or voidable due to a failure of authorization or constituted an overissue (a purported issuance of shares in excess of the number of shares of a class or series that the corporation has the power to issue at the time of such issuance or shares of any class or series that were not then authorized for issuance under the articles of incorporation). These Model Act provisions were published in 2017 in *The Business Lawyer* and, to the knowledge of the Subcommittee, these provisions have not yet been adopted into the corporate statute of any other state. The corollary provisions of the Delaware General Corporation Law (the "DGCL"), which are contained in ss. 204 and 205 of the DGCL, have been in place for several years, but continue to be the subject of debate and proposed modification in Delaware as the mechanics of using these provisions are tested.

While the Subcommittee believes that this topic should be considered for addition in the FBCA at a future time, a decision has been made to defer consideration of these provisions to allow the law on this topic (both in Delaware and in other Model Act states) to further develop before provisions addressing this topic are considered for adoption in the FBCA. Any provisions addressing this topic will be considered at some future time as a legislative initiative separate from this proposal.

CROSS-REFERENCES

"Deliver" defined, see § 1.40.

Notices and other communications, see § 1.41.

OFFICIAL COMMENT

The proxy rules under the Securities Exchange Act of 1934 permit publicly held corporations to meet their obligation to deliver proxy statements and annual reports to shareholders who share a common address by delivery of a single copy of such materials to the common address under certain conditions. This practice is known as "householding." This section permits a corporation comparable flexibility to household the written notice of shareholders' meetings as well as any other written notices, reports or statements required to be delivered to shareholders under the Act or the corporation's articles of incorporation or bylaws. Ability to household such notices, reports or statements would not, of course, eliminate the practical necessity of delivering to a common address sufficient copies of any accompanying document requiring individual shareholder signature or other action, such as a proxy card or consent.

To meet the conditions of section 1.44(a), the written notice, report or statement must be delivered to the common address. Address means a street address, a post office box number, an electronic mail address, a facsimile telephone number or another similar destination to which paper or electronic transmission may be sent. Whether consent is explicit or implicit, it is revocable at any time as provided in section 1.44(b).

To be effective, the written notice of intention to household notices, reports or other statements permitted by section 1.44(b) must explain that affirmative or implied consent may be revoked and the method for revoking.

Subchapter E.
RATIFICATION OF DEFECTIVE CORPORATE ACTIONS

§ 1.45 Definitions

Subchapter E In this subchapter:

"Corporate action" means any action taken by or on behalf of the 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.

"Date of the defective corporate action" means the date (or the approximate date, if the exact date is unknown) the defective corporate action was purported to have been taken.

"Defective corporate action" means (i) any corporate action purportedly taken that 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, and (ii) an overissue.

"Failure of authorization" means the failure to authorize, approve or otherwise effect a corporate action in compliance with the provisions of this Act, the articles of incorporation 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.

"Overissue" means the purported issuance of:

(i) shares of a class or series in excess of the number of shares of a class or series the corporation has the power to issue under section 6.01 at the time of such issuance; or

(ii) shares of any class or series that is not then authorized for issuance by the articles of incorporation.

"Putative shares" means the shares of any class or series (including shares issued upon exercise of rights, options, warrants or other securities convertible into shares of the corporation, or interests with respect to such shares) that were created or issued as a result of a defective corporate action, that (i) but for any failure of authorization would constitute valid shares, or (ii) cannot be determined by the board of directors to be valid shares.

"Valid shares" means the shares of any class or series that have been duly authorized and validly issued in accordance with this Act, including as a result of ratification or validation under this subchapter.

"Validation effective time" with respect to any defective corporate action ratified under this subchapter means the later of:

(iii) the time at which the ratification of the defective corporate action is approved by the shareholders, or if approval of shareholders is not required, the time at which the notice required by section 1.49 becomes effective in accordance with section 1.41; and

(iv) the time at which any articles of validation filed in accordance with section 1.51 become effective.

The validation effective time shall not be affected by the filing or pendency of a judicial proceeding under section 1.52 or otherwise, unless otherwise ordered by the court.

CROSS-REFERENCES

Authorized shares, see § 6.01.

Corporate powers, see § 3.02.

Issuance of shares, see § 6.21.

Lack of power to act, see § 3.04.

Share rights, options, warrants and awards, see § 6.24.

OFFICIAL COMMENT

The definitions of "corporate action," "defective corporate action" and "failure of authorization" are intentionally broad so as to permit ratification of any corporate action purportedly taken that would have been within the power granted to a corporation under the Act.

The term "defective corporate action" includes an "overissue" of shares and other defects in share issuances that could cause shares to be treated as void. For purposes of determining which shares are overissued, only those shares issued in excess of the number of shares permitted to be issued under section 6.01 of the Act would be deemed overissued shares. If it cannot be determined from the records of the corporation which shares were issued before others, all shares included in an issuance that is or results in an overissue would be overissued shares.

§ 1.46 Defective Corporate Actions

(a) A defective corporate action shall not be void or voidable if ratified in accordance with section 1.47 or validated in accordance with section 1.52.

(b) Ratification under section 1.47 or validation under section 1.52 shall not be deemed to be the exclusive means of ratifying or validating any defective corporate action, and the absence or failure of ratification in accordance with this subchapter shall not, of itself, affect the validity or effectiveness of any corporate action properly ratified under common law or otherwise, nor shall it create a presumption that any such corporate action is or was a defective corporate action or void or voidable.

(c) In the case of an overissue, putative shares shall be valid shares effective as of the date originally issued or purportedly issued upon:

(1) the effectiveness under this subchapter and under chapter 10 of an amendment to the articles of incorporation authorizing, designating or creating such shares; or

(2) the effectiveness of any other corporate action under this subchapter ratifying the authorization, designation or creation of such shares.

CROSS-REFERENCES

Amendment of articles of incorporation by board of directors and shareholders, see § 11.03.
Authorized shares, see § 6.01.
Correcting filed documents, see § 1.24.

OFFICIAL COMMENT

Subchapter E provides a statutory ratification procedure for corporate actions that may not have been properly authorized and shares that may have been improperly issued. The statutory ratification procedure is designed to supplement common law ratification. Corporate actions ratified under this subchapter remain subject to equitable review.

Examples of defective corporate actions subject to ratification include the failure of the incorporator to validly appoint an initial board of directors, corporate action taken in the absence of board resolutions authorizing the action, the failure to obtain the requisite shareholder approval of a corporate action, issuance of shares in the absence of evidence that consideration payable to the corporation for shares was received, the failure to comply with appraisal requirements and the issuance of shares without complying with preemptive rights. The ratification procedure is intended to be available only where there is objective evidence that a corporate action was defectively implemented. For example, subchapter E would permit ratification of shares previously issued but subsequently determined to have been issued improperly. It would not permit the corporation to issue shares retroactively as of an earlier date, however, where there is no objective evidence that those shares had previously been issued. Objective evidence may include resolutions, issuance of share certificates, subscription or share purchase agreements, entries in a share ledger or other correspondence indicating that shares were issued or intended to have been issued.

Section 1.46(a) does not distinguish between void and voidable actions. Instead it provides that any defective corporate action that is ratified in accordance with section 1.47 or validated under section 1.52 shall not be void or voidable. Section 1.47 is not the exclusive means by which a defective corporate action may be ratified. Thus, the general common law doctrine of ratification, as applied to a board of directors' adoption of actions taken by officers who may not

have had the actual authority to take such actions, continues to be an effective mode of ratification. Section 1.46(b) makes clear that the corporation's ratification of a defective corporate action that is voidable but not void using common law methods of ratification rather than under section 1.47 will not, standing alone, affect the validity of the action or create a presumption that the action is not valid. In addition, ratification under subchapter E is distinct from correction of an already filed document under section 1.24.

Section 1.46(c) provides that an overissue can be remedied by the adoption of articles of amendment or other corporate action that has the effect of authorizing, designating or creating shares of a series or class, such that the putative shares that resulted in the overissue are deemed to be validly issued from the date of original issuance. 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. It also permits a corporation to remedy an overissue even if it cannot specifically identify the putative shares.

§ 1.47 Ratification of Defective Corporate Actions

(a) To ratify a defective corporate action under this section (other than the ratification of an election of the initial board of directors under subsection § 1.47(b)), the board of directors shall take action ratifying the action in accordance with section 1.48, stating:
  (1) the defective corporate action to be ratified and, if the defective corporate action involved the issuance of putative shares, the number and type of putative shares purportedly issued;
  (2) the date of the defective corporate action;
  (3) the nature of the failure of authorization with respect to the defective corporate action to be ratified; and
  (4) that the board of directors approves the ratification of the defective corporate action.

(b) In the event that a defective corporate action to be ratified relates to the election of the initial board of directors of the corporation under section 2.05(a)(2), a majority of the persons who, at the time of the ratification, are exercising the powers of directors may take an action stating:
  (1) the name of the person or persons who first took action in the name of the corporation as the initial board of directors of the corporation;
  (2) the earlier of the date on which such persons first took such action or were purported to have been elected as the initial board of directors; and
  (3) that the ratification of the election of such person or persons as the initial board of directors is approved.

(c) If any provision of this Act, the articles of incorporation or bylaws, any corporate resolution or any plan or agreement to which the corporation is a party in effect at the time action under subsection § 1.47(a) is taken requires shareholder approval or would have required shareholder approval at the date of the occurrence of the defective corporate action, the ratification of the defective corporate action approved in the action taken by the directors under subsection § 1.47(a) shall be submitted to the shareholders for approval in accordance with section 1.48.

(d) Unless otherwise provided in the action taken by the board of directors under subsection § 1.47(a), after the action by the board of directors has been taken and, if required, approved by the shareholders, the board of directors may abandon the ratification at any time before

the validation effective time without further action of the shareholders.

CROSS-REFERENCES

Organization of corporation, see § 2.05.

Requirement for and functions of board of directors, see § § 8.01.

OFFICIAL COMMENT

The information required by section 1.47(a)(1)(a)(1) regarding the listing of putative shares may be satisfied by attaching a table, including a capitalization table, listing the putative shares. Section 1.47(b) permits the ratification of the initial election of the board of directors by the persons who are acting as the current board of directors, recognizing that if the corporation's initial board of directors was defectively appointed, there may be no effective method of ratification because a duly elected board of directors does not exist.

§ 1.48 Action on Ratification

(a) The quorum and voting requirements applicable to a ratifying action by the board of directors under section 1.47(a) shall be the quorum and voting requirements applicable to the corporate action proposed to be ratified at the time such ratifying action is taken.

(b) If the ratification of the defective corporate action requires approval by the shareholders under section 1.47(c), and if the approval is to be given at a meeting, the corporation shall notify each holder of valid and putative shares, regardless of whether entitled to vote, as of the record date for notice of the meeting and as of the date of the occurrence of defective corporate action, provided that notice shall not be required to be given to holders of valid or putative shares whose identities or addresses for notice cannot be determined from the records of the corporation. The notice must state that the purpose, or one of the purposes, of the meeting, is to consider ratification of a defective corporate action and must be accompanied by (i) either a copy of the action taken by the board of directors in accordance with section 1.47(a) or the information required by sections 1.47(a)(1) through (a)(4), and (ii) a statement that any claim that the ratification of such defective corporate action and any putative shares issued as a result of such defective corporate action should not be effective, or should be effective only on certain conditions, shall be brought within 120 days from the applicable validation effective time.

(c) Except as provided in subsection § 1.48(d) with respect to the voting requirements to ratify the election of a director, the quorum and voting requirements applicable to the approval by the shareholders required by section 1.47(c) shall be the quorum and voting requirements applicable to the corporate action proposed to be ratified at the time of such shareholder approval.

(d) The approval by shareholders to ratify the election of a director requires that the votes cast within the voting group favoring such ratification exceed the votes cast opposing such ratification of the election at a meeting at which a quorum is present.

(e) Putative shares on the record date for determining the shareholders entitled to vote on any matter submitted to shareholders under section 1.47(c) (and without giving effect to any ratification of putative shares that becomes effective as a result of such vote) shall neither be entitled to vote nor counted for quorum purposes in any vote to approve the ratification of

any defective corporate action.

(f) If the approval under this section of putative shares would result in an overissue, in addition to the approval required by section 1.47, approval of an amendment to the articles of incorporation under chapter 10 to increase the number of shares of an authorized class or series or to authorize the creation of a class or series of shares so there would be no overissue shall also be required.

CROSS-REFERENCES

Notices and other communications, see § 1.41.

Quorum and voting requirements for the board of directors, see § 8.24.

Quorum and voting requirements for voting groups, see § 7.25.

OFFICIAL COMMENT

Notwithstanding the shareholder notice required by section 1.48(b), only valid shares are entitled to vote on the ratification action or counted for quorum purposes. The retroactive effect of a ratification of putative shares does not invalidate the quorum or voting result of the ratification.

For matters other than the election of directors, the quorum and voting requirements applicable to shareholder approval of ratification are the quorum and voting requirements applicable to the corporate action being ratified at the time of such approval. For example, if the defective corporate action being ratified is an amendment to the articles of incorporation, whether in connection with an overissue or otherwise, the vote required would be governed by section 10.03. If the defective corporate action involves a merger, the vote required would be the vote required by section 11.04.

§ 1.49 Notice Requirements

(a) Unless shareholder approval is required under section 1.47(c), prompt notice of an action taken under section 1.47 shall be given to each holder of valid and putative shares, regardless of whether entitled to vote, as of (i) the date of such action by the board of directors and (ii) the date of the defective corporate action ratified, provided that notice shall not be required to be given to holders of valid and putative shares whose identities or addresses for notice cannot be determined from the records of the corporation.

(b) The notice must contain (i) either a copy of the action taken by the board of directors in accordance with section 1.47(a) or (b) or the information required by sections 1.47(a)(1) through (a)(4) or sections 1.47(b)(1) through (b)(3), as applicable, and (ii) a statement that any claim that the ratification of the defective corporate action and any putative shares issued as a result of such defective corporate action should not be effective, or should be effective only on certain conditions, shall be brought within 120 days from the applicable validation effective time.

(c) No notice under this section is required with respect to any action required to be submitted to shareholders for approval under section 1.47(c) if notice is given in accordance with section 1.48(b).

(d) A notice required by this section may be given in any manner permitted by section 1.41 and, for any corporation subject to the reporting requirements of section 13 or 15(d) of the

Securities Exchange Act of 1934, may be given by means of a filing or furnishing of such notice with the United States Securities and Exchange Commission.

CROSS REFERENCES

Corporate records, see § 16.01.

Householding, see § 1.44.

Notices and other communications, see § 1.41.

§ 1.50 Effect of Ratification

From and after the validation effective time, and without regard to the 120-day period during which a claim may be brought under section 1.52:

(a) Each defective corporate action ratified in accordance with section 1.47 shall not be void or voidable as a result of the failure of authorization identified in the action taken under section 1.47(a) or (b) and shall be deemed a valid corporate action effective as of the date of the defective corporate action;

(b) The issuance of each putative share or fraction of a putative share purportedly issued pursuant to a defective corporate action identified in the action taken under section 1.47 shall not be void or voidable, and each such putative share or fraction of a putative share shall be deemed to be an identical share or fraction of a valid share as of the time it was purportedly issued; and

(c) Any corporate action taken subsequent to the defective corporate action ratified in accordance with this subchapter in reliance on such defective corporate action having been validly effected and any subsequent defective corporate action resulting directly or indirectly from such original defective corporate action shall be valid as of the time taken.

OFFICIAL COMMENT

Ratification is effective as of the validation effective time and is not dependent on the expiration of the 120-day time period in which an action challenging the ratification must be brought. The ratification of a defective corporate action has the additional effect of ratifying corporate actions that are defective as a result of the original defective corporate action. For example, an overissue which results in subsequent director elections being invalid calls into question all actions by the invalidly elected board members. The ratification of the overissue, however, would cure any such additional defects.

§ 1.51 Filings

(a) If the defective corporate action ratified under this subchapter would have required under any other section of this Act a filing in accordance with this Act, then, regardless of whether a filing was previously made in respect of such defective corporate action and in lieu of a filing otherwise required by this Act, the corporation shall file articles of validation in accordance with this section, and such articles of validation shall serve to amend or substitute for any other filing with respect to such defective corporate action required by this Act.

(b) The articles of validation must set forth:

(1) the defective corporate action that is the subject of the articles of validation (including, in the case of any defective corporate action involving the issuance of putative shares, the number and type of putative shares issued and the date or dates upon which such putative shares were purported to have been issued);
(2) the date of the defective corporate action;
(3) the nature of the failure of authorization in respect of the defective corporate action;
(4) a statement that the defective corporate action was ratified in accordance with section 1.47, including the date on which the board of directors ratified such defective corporate action and the date, if any, on which the shareholders approved the ratification of such defective corporate action; and
(5) the information required by subsection § 1.51(c).

(c) The articles of validation must also contain the following information:
(1) if a filing was previously made in respect of the defective corporate action and no changes to such filing are required to give effect to the ratification of such defective corporate action in accordance with section 1.47, the articles of validation must set forth (i) the name, title and filing date of the filing previously made and any articles of correction to that filing and (ii) a statement that a copy of the filing previously made, together with any articles of correction to that filing, is attached as an exhibit to the articles of validation;
(2) if a filing was previously made in respect of the defective corporate action and such filing requires any change to give effect to the ratification of such defective corporate action in accordance with section 1.47, the articles of validation must set forth (i) the name, title and filing date of the filing previously made and any articles of correction to that filing and (ii) a statement that a filing containing all of the information required to be included under the applicable section or sections of the Act to give effect to such defective corporate action is attached as an exhibit to the articles of validation, and (iii) the date and time that such filing is deemed to have become effective; or
(3) if a filing was not previously made in respect of the defective corporate action and the defective corporate action ratified under section 1.47 would have required a filing under any other section of the Act, the articles of validation must set forth (i) a statement that a filing containing all of the information required to be included under the applicable section or sections of the Act to give effect to such defective corporate action is attached as an exhibit to the articles of validation, and (ii) the date and time that such filing is deemed to have become effective.

CROSS-REFERENCES

Correcting filed documents, see § 1.24.

Effective time and date of filing, see § 1.23.

OFFICIAL COMMENT

Section 1.51 requires that in the event any filing is or would have been required under the Act to effect the defective corporate action, such filing (if no filing was previously made), such corrected filing (if correction to a previous filing is required), or such original filing (if no correction to a previous filing is required) be attached as an exhibit to the articles of validation. This is intended to provide a clear public record of the actions relating to the ratification.

§ 1.52 Judicial Proceedings Regarding Validity of Corporate Actions

(a) Upon application by the corporation, any successor entity to the corporation, a director of the corporation, any shareholder, beneficial shareholder or unrestricted voting trust beneficial owner of the corporation, including any such shareholder, beneficial shareholder or unrestricted voting trust beneficial owner as of the date of the defective corporate action ratified under section 1.47, or any other person claiming to be substantially and adversely affected by a ratification under section 1.47, the [name or describe court] may:
   (1) determine the validity and effectiveness of any corporate action or defective corporate action;
   (2) determine the validity and effectiveness of any ratification under section 1.47;
   (3) determine the validity of any putative shares; and
   itmodify or waive any of the procedures specified in section 1.47 or 1.48 to ratify a defective corporate action.

(b) In connection with an action under this section, the court may make such findings or orders, and take into account any factors or considerations, regarding such matters as it deems proper under the circumstances.

(c) Service of process of the application under subsection § 1.52(a) on the corporation may be made in any manner provided by statute of this state or by rule of the applicable court for service on the corporation, and no other party need be joined in order for the court to adjudicate the matter. In an action filed by the corporation, the court may require notice of the action be provided to other persons specified by the court and permit such other persons to intervene in the action.

(d) Notwithstanding any other provision of this section or otherwise under applicable law, any action asserting that the ratification of any defective corporate action and any putative shares issued as a result of such defective corporate action should not be effective, or should be effective only on certain conditions, shall be brought within 120 days of the validation effective time.

CROSS-REFERENCES

"Beneficial shareholder" defined, see § 1.40.

"Shareholder" defined, see § 1.40.

"Unrestricted voting trust beneficial owner" defined, see § 1.40.

OFFICIAL COMMENT

Section 1.52 confers plenary jurisdiction on a designated court to hear and determine claims regarding the validity of any corporate action or any shares, rights, options or warrants. The court's jurisdiction is not limited to reviewing corporate actions ratified or purportedly ratified under section 1.47, and includes the ability of a corporation or other permitted person to obtain a declaration regarding the validity of any corporate actions or shares that are potentially defective. In determining the validity of a corporate action or reviewing a corporate action ratified under section 1.47, the court may consider any factors or considerations it deems proper under the circumstances. These might include whether the person originally taking the defective corporate action believed that the action complied with corporate requirements, whether the corporation and board of directors has treated the defective corporate action as a valid action, whether any person has acted in reliance on the public record that such defective corporate action was valid

and whether any person will be or was harmed by the ratification of the defective corporate action or will be harmed by the failure to ratify or validate the defective corporate action.

Code of Virginia
Title 13.1. Corporations
Chapter 9. Virginia Stock Corporation Act
Article 1.1. Ratification of Defective Corporate Actions

§ 13.1-614.1. Definitions

As used in this article:

"Corporate action" means any action taken by or on behalf of the corporation, including any action taken by the incorporator, the board of directors, a committee, an officer or agent of the corporation, or the shareholders.

"Date of the defective corporate action" means the date, or the approximate date if the exact date is unknown, the defective corporate action was purported to have been taken.

"Defective corporate action" means (i) any corporate action purportedly taken that 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 (ii) an over-issuance of shares.

"Failure of authorization" means the failure to authorize, approve, or otherwise effect a corporate action in compliance with the provisions of this chapter, the articles of incorporation 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 voidable.

"Over-issuance of shares" means the purported issuance of:

1. Shares of a class or series in excess of the number of shares of the class or series the corporation had the power to issue under § 13.1-638 at the time of such issuance; or

2. Shares of any class or series that was not then authorized for issuance by the articles of incorporation.

"Putative shares" means the shares of any class or series of the corporation, including shares issued upon exercise of rights, options, warrants, or other securities convertible into shares of the corporation, or interests with respect to such shares, that were created or issued as a result of a defective corporate action, that (i) but for any failure of authorization would constitute valid shares or (ii) cannot be determined by the board of directors to be valid shares.

"Valid shares" means the shares of any class or series of the corporation that have been duly authorized and validly issued in accordance with this chapter, including as a result of ratification or validation under this article.

"Validation effective time" with respect to any defective corporate action ratified under this article means the later of:

1. The time at which the ratification of the defective corporate action is approved by the shareholders or, if approval of shareholders is not required, the time at which the notice required by § 13.1-614.5 becomes effective in accordance with § 13.1-610;and

2. The time at which any document filed in accordance with § 13.1-614.7 becomes effective.

The validation effective time shall not be affected by the filing or pendency of a proceeding under § 13.1-614.8 or otherwise, unless ordered by the Commission.

2019, c. 734;2020, c. 1226.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

§ 13.1-614.2. Defective corporate actions

A. A defective corporate action shall not be void or voidable if ratified in accordance with § 13.1-614.3 or validated in accordance with § 13.1-614.8.

B. Ratification under § 13.1-614.3 or validation under § 13.1-614.8 shall not be deemed to be the exclusive means of ratifying or validating any defective corporate action, and the absence or failure of ratification in accordance with this article shall not, of itself, affect the validity or effectiveness of any corporate action properly ratified under this chapter, common law, or otherwise, nor shall it create a presumption that any such corporate action is or was a defective corporate action or void or voidable.

C. In the case of an over-issuance of shares, putative shares shall be valid shares effective as of the date originally issued or purportedly issued upon:

1. The effectiveness under this article and under Article 11 (§ 13.1-705 et seq.) of an amendment of the articles of incorporation authorizing, designating, or creating such shares; or

2. The effectiveness of any other corporate action under this article ratifying the authorization, designation, or creation of such shares.

2019, c. 734.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

Code of Virginia
Title 13.1. Corporations
Chapter 9. Virginia Stock Corporation Act
Article 1.1. Ratification of Defective Corporate Actions

§ 13.1-614.3. Ratification of defective corporate actions

A. To ratify a defective corporate action under this section, other than the ratification of an election of the initial board of directors under subsection B, the board of directors shall adopt resolutions ratifying the action in accordance with § 13.1-614.4, stating:

1. The defective corporate action to be ratified and, if the defective corporate action involved the issuance of putative shares, the number and type of putative shares purportedly issued;

2. The date of the defective corporate action;

3. The nature of the failure of authorization with respect to the defective corporate action to be ratified; and

4. That the board of directors approves the ratification of the defective corporate action.

B. In the event that a defective corporate action to be ratified relates to the election of the initial board of directors of the corporation under subdivision A 2 of § 13.1-623, a majority of the persons who, at the time of the ratification, are exercising the powers of directors may take an action stating:

1. The name of the person or persons who first took action in the name of the corporation as the initial board of directors of the corporation;

2. The earlier of the date on which such persons first took such action or were purported to have been elected as the initial board of directors; and

3. That the ratification of the election of such person or persons as the initial board of directors is approved.

C. If any provision of this chapter, the articles of incorporation or bylaws, any corporate resolution or any plan or agreement to which the corporation is a party in effect at the time action under subsection A is taken requires shareholder approval or would have required shareholder approval at the date of the occurrence of the defective corporate action, the ratification of defective corporate action approved in the action taken by the directors under subsection A shall be submitted to the shareholders for approval in accordance with § 13.1-614.4.

D. Unless otherwise provided in the action taken by the board of directors under subsection A, after the action by the board of directors has been taken and, if required, approved by the shareholders, the board of directors may abandon the ratification at any time before the validation effective time without further action of the shareholders.

2019, c. 734.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

§ 13.1-614.4. Action of ratification

A. The quorum and voting requirements applicable to a ratifying action by the board of directors under subsection A of § 13.1-614.3 shall be the quorum and voting requirements applicable to the corporate action proposed to be ratified at the time such ratifying action is taken.

B. If the ratification of the defective corporate action requires approval by the shareholders under subsection C of § 13.1-614.3, and if the approval is to be given at a meeting, the corporation shall notify each holder of valid and putative shares, regardless of whether entitled to vote, as of the record date for notice of the meeting and as of the date of the occurrence of defective corporate action, provided that notice shall not be required to be given to holders of valid or putative shares whose identities or addresses for notice cannot be determined from the records of the corporation. The notice shall state that the purpose, or one of the purposes, of the meeting, is to consider ratification of a defective corporate action and shall be accompanied by (i) either a copy of the action taken by the board of directors in accordance with subsection A of § 13.1-614.3 or the information required by subdivisions A 1 through A 4 of § 13.1-614.3 and (ii) a statement that any claim that the ratification of such defective corporate action and any putative shares issued as a result of such defective corporate action should not be effective, or should be effective only on certain conditions, shall be brought within 120 days from the applicable validation effective time.

C. Except as provided in subsection D with respect to the voting requirements to ratify the election of a director, the quorum and voting requirements applicable to the approval by the shareholders required by subsection C of § 13.1-614.3 shall be the quorum and voting requirements applicable to the corporate action proposed to be ratified at the time of such shareholder approval.

D. The approval by shareholders to ratify the election of a director requires that the votes cast within the voting group favoring such ratification exceed the votes cast opposing such ratification of the election at a meeting at which a quorum is present.

E. Putative shares on the record date for determining the shareholders entitled to vote on any matter submitted to shareholders under subsection C of § 13.1-614.3, and without giving effect to any ratification of putative shares that becomes effective as a result of such vote, shall neither be entitled to vote nor counted for quorum purposes in any vote to approve the ratification of any defective corporate action.

F. If the approval under this section of putative shares would result in an over-issuance of shares, in addition to the approval required by § 13.1-614.3, the corporation shall approve an amendment of the articles of incorporation under Article 11 (§ 13.1-705 et seq.) to increase the number of shares of an authorized class or series or to authorize the creation of a class or series of shares so there is no over-issuance of shares.

2019, c. 734.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

§ 13.1-614.5. Notice

A. Unless shareholder approval is required under subsection C of § 13.1-614.3, prompt notice of an action taken under § 13.1-614.3 shall be given to each holder of valid and putative shares, regardless of whether entitled to vote, as of (i) the date of such action by the board of directors and (ii) the date of the defective corporate action ratified, provided that notice shall not be required to be given to holders of valid and putative shares whose identities or addresses for notice cannot be determined from the records of the corporation.

B. The notice shall contain (i) either a copy of the action taken by the board of directors in accordance with subsection A or B of § 13.1-614.3 or the information required by subdivisions A 1 through 4 or B 1, 2, and 3 of § 13.1-614.3, as applicable, and (ii) a statement that any claim that the ratification of the defective corporate action and any putative shares issued as a result of such defective corporate action should not be effective, or should be effective only on certain conditions, shall be brought within 120 days from the applicable validation effective time.

C. No notice under this section is required with respect to any action required to be submitted to shareholders for approval under subsection C of § 13.1-614.3 if notice is given in accordance with § 13.1-614.4.

D. A notice required by this section may be given in any manner permitted by § 13.1-610 and for any public corporation may be given by means of a filing or furnishing of such notice with the U.S. Securities and Exchange Commission.

2019, c. 734.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

§ 13.1-614.6. Effect of ratification

From and after the validation effective time, and without regard to the 120-day period during which a claim may be brought under § 13.1-614.8:

1. Each defective corporate action ratified in accordance with § 13.1-614.3 shall not be void or voidable as a result of the failure of authorization identified in the action taken under subsection A or B of § 13.1-614.3 and shall be deemed a valid corporate action effective as of the date of the defective corporate action;

2. The issuance of each putative share or fraction of a putative share purportedly issued pursuant to a defective corporate action identified in the action taken under § 13.1-614.3 shall not be void or voidable, and each such putative share or fraction of a putative share shall be deemed to be an identical share or fraction of a valid share as of the time it was purportedly issued; and

3. Any corporate action taken subsequent to the defective corporate action ratified in accordance with this article in reliance on such defective corporate action having been validly effected and any subsequent defective corporate action resulting directly or indirectly from such original defective corporate action shall be valid as of the time taken.

2019, c. 734.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

Code of Virginia
Title 13.1. Corporations
Chapter 9. Virginia Stock Corporation Act
Article 1.1. Ratification of Defective Corporate Actions

§ 13.1-614.7. Filings

A. After a defective corporate action is ratified under this article for a document required by this chapter to be filed with the Commission, the corporation shall deliver to the Commission for filing:

1. If a filing with the Commission was previously made with respect to such defective corporate action and the Commission issued with respect thereto a certificate, the articles of ratification, which may serve to amend or substitute for the filing previously made; or

2. If no filing with the Commission was previously made with respect to such defective corporate action, the articles required by this chapter.

B. The document required by subsection A shall set forth:

1. The defective corporate action that is the subject of the document, including, in the case of any defective corporate action involving the issuance of putative shares, the number and type of putative shares issued and the date or dates upon which such putative shares were purported to have been issued;

2. The date of the defective corporate action;

3. The nature of the failure of authorization in respect of the defective corporate action;

4. A statement that the defective corporate action was ratified in accordance with § 13.1-614.3, including the date on which the board of directors ratified such defective corporate action and the date, if any, on which the shareholders approved the ratification of such defective corporate action; and

5. The information required by subsection C.

C. The document required by subsection A shall also contain the following information:

1. If a filing with the Commission was previously made in respect of the defective corporate action and no changes to such filing are required to give effect to the ratification of such defective corporate action in accordance with § 13.1-614.3, the filed document shall set forth (i) the name, title and filing date of the filing previously made and any articles of correction to that filing and (ii) a statement that a copy of the filing previously made, together with any articles of correction to that filing, is attached as an exhibit;

2. If a filing with the Commission was previously made in respect of the defective corporate action and such filing requires any change to give effect to the ratification of such defective corporate action in accordance with § 13.1-614.3, the document shall set forth (i) the name, title, and filing date of the filing previously made and any articles of correction to that filing, (ii) a statement that a filing containing all of the information required to be included under the applicable section or sections of this chapter to give effect to such defective corporate action is attached as an exhibit, and (iii) the date and time that the document is deemed to have become

effective; or

3. If a filing with the Commission was not previously made in respect of the defective corporate action and the defective corporate action ratified under § 13.1-614.3 would have required a filing under any other section of this chapter, the document shall set forth (i) all of the information required to be included under the applicable section or sections of this chapter to give effect to such defective corporate action and (ii) the date and time that the document is deemed to have become effective.

D. If the Commission finds that the document required by subsection A complies with the requirements of law and that all required fees have been paid, it shall issue a certificate of ratification of defective corporate action or the certificate required by this chapter for the articles that were filed.

2019, c. 734;2020, c. 1226.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

Code of Virginia
Title 13.1. Corporations
Chapter 9. Virginia Stock Corporation Act
Article 1.1. Ratification of Defective Corporate Actions

§ 13.1-614.8. Commission proceedings regarding validity of corporate actions

A. Upon application by the corporation, any successor entity to the corporation, a director of the corporation, any shareholder, beneficial shareholder, or unrestricted voting trust beneficial owner of the corporation, including any such shareholder, beneficial shareholder, or unrestricted voting trust beneficial owner as of the date of the defective corporate action ratified under § 13.1-614.3, or any other person claiming to be substantially and adversely affected by a ratification under § 13.1-614.3, the Commission may:

1. Determine the validity and effectiveness of any corporate action or defective corporate action;

2. Determine the validity and effectiveness of any ratification under § 13.1-614.3;

3. Determine the validity of any putative shares; and

4. Modify or waive any of the procedures specified in § 13.614.3 or 13.1-614.4 to ratify a defective corporate action.

B. In connection with an action under this section, the Commission may make such findings or orders and take into account any factors or considerations regarding such matters as it deems proper under the circumstances.

C. Service of process of the application under subsection A on the corporation may be made in any manner provided by statutes of the Commonwealth or by rule of the Commission for service on the corporation, and no other party need be joined in order for the Commission to adjudicate the matter. In an action filed by the corporation, the Commission may require notice of the action be provided to other persons specified by the Commission and permit such other persons to intervene in the action.

D. Notwithstanding any other provision of this section or otherwise under applicable law, any action asserting that the ratification of any defective corporate action and any putative shares issued as a result of such defective corporate action should not be effective, or should be effective only on certain conditions, shall be brought in a petition filed within 120 days of the validation effective time.

2019, c. 734.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.