Summary of Recently Adopted Changes to the Florida Business Corporation Act (Chapter 607, Florida Statutes) and Harmonizing Changes to Other Florida Entity Statutes (Part I.B.)

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This is the second of four articles that are being posted on the webpage of the Chapter 607 Drafting Subcommittee, which is contained on the website (www.flabizlaw.org) of The Florida Bar Business Law Section ("Section"). The four articles will comprehensively address many of the key substantive changes made to the Florida Business Corporation Act (Chapter 607 or FBCA) and to certain other Florida entity statutes in Chapter 2019-90, Florida Statutes (the revised act). This article, along with a first article, Part I.A., which is simultaneously being posted on the Subcommittee's webpage, covers more extensively the sections of the revised act that are discussed in a more summary fashion in an article being published by the authors in the November/December 2019 edition of the Florida Bar Journal. The third and fourth articles in this series (Parts II.A. and II.B.) will cover more extensively the sections of the revised act that will be discussed in a more summary fashion in an article to be published by the authors in the January/February 2020 edition of the Florida Bar Journal.

This second article addresses changes made in the revised act to Article 7 (shareholders) and Article 8 (directors and officers) of the FBCA. It specifically addresses provisions dealing with meetings of shareholders, shareholder written consents, meeting notices, proxies, shareholder quorum and voting, voting agreements, shareholder agreements, derivative action proceedings, direct actions vs. derivative actions, director duties and qualifications, director voting, terms of office, removal of directors and filling vacancies, director written consents, director quorum and voting, board committees, force the vote provisions, director and officer duties, standards and liability, conflicts of interest, and director and officer indemnification.

Overview.

The revised act (designated CS/CS/HB 1009) was unanimously approved by the Florida House of Representatives on April 25, 2019 and by the Florida Senate on April 30, 2019, and Governor DeSantis signed the revised act into law on June 7, 2019. The bill as adopted has been designated as Chapter 2019-90, Florida Statutes. The revised act makes significant changes to existing law, and in an effort to give users of the FBCA the opportunity to become familiar with

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the changes before they become effective, and hopefully to create new compliant forms and other documents, the revised act will not become effective until January 1, 2020.

In the course of a focused study of the final version of the revised act, as adopted, a number of glitches in the revised act were discovered (including typographical errors, incorrect wording and lack of parallel wording). Although these glitches are not believed to be substantive, efforts are currently underway to address the cleanup of these glitches, and a glitch bill is expected to be presented to the Florida legislature for consideration during the 2020 legislative session.

This revised act uses the term "chapter" to refer to Chapter 607, Parts I, II and III, and eliminates the use of the term "act." It also uses its defined terms in lower case consistent with the approach taken by existing Chapter 607 and by the Florida Revised Limited Liability Company Act (Chapter 605).

As part of its work, the Subcommittee has written an extensive commentary which describes each of the changes made in the revised act and identifies the origins of each such change. A full version of Chapter 607, annotated with the changes made in the revised act and accompanied by the commentary, is available for download on the Subcommittee's webpage, which can be found on the Section's website.

Reference is made to the first article posted on the Section's website for an overview of the revised act and for specific information about the changes that were made by the revised act to Article 1 through Article 6 of the FBCA. The following sets forth important changes to the FBCA made to Articles 7 and 8 in the revised act. The discussions below are grouped together by Article of revised Chapter 607. References to sections are to sections of the Florida Statutes.

Article 7 - Shareholders

Annual and special shareholder meetings. Section 607.0701, dealing with annual meetings of shareholders, and §607.0702, dealing with special meetings of shareholders, were modified to remove from those sections (and move elsewhere) the discussion regarding participation in meetings of shareholders by remote communication. Further, other clarifying changes were made to those sections to make them more understandable. These other changes are derived from the corollary sections of the Model Act and are largely considered non-substantive.

The provisions dealing with participation in meetings of shareholders by remote communication are now contained in new §607.0709. The new language, which is contained in subsection (1) of new §607.0709 and is based on the language in the corollary section of the Model Act, allows the Board to authorize remote participation by all or less than all of the shareholders (selecting between classes and series that can participate in a meeting of shareholders by remote participation). It also, in subsection (4) of new §607.0709, authorizes the

Board of Directors, in its sole discretion, to determine that the meeting can be held at a physical place or solely by means of remote communication (*i.e.*, a virtual meeting). However, the revised act does not include the recently promulgated Model Act virtual meeting changes, based on the view of the Subcommittee that new subsection (4) effectively accomplishes the same purpose. Finally, §607.0705 requires that shareholders be given notice in the meeting notice of the types of remote communications that shareholders can use in order to participate in the meeting.

Court ordered shareholder meetings. As under current law, if a corporation fails to hold an annual meeting of shareholders in a timely manner, a court may order a meeting. Subsection (1)(a) of §607.0703 is amended to lengthen (from 13 months to 15 months) the amount of time a corporation has to hold its annual meeting or undertake action by written consent before a court may order a meeting or other action. Subsection 1(b) of §607.0703 also authorizes the court to order a special meeting if the corporation does not follow the directions of the requisite shareholders to call a special meeting, or, after calling the meeting, it does not hold the meeting. Further, subsection (2) of §607.0703 has been modified to recognize a court's ability to establish quorum requirements for separate voting groups at a meeting held upon its call. Finally, the section adds the word "summarily" to the discussion about court ordered meetings, in an effort to urge courts to act quickly on these types of requests.

Shareholder action by written consent. Language has been added to subsection (1) of §607.0704 to clarify when a shareholder consent meets the requirements to reflect delivery of consents representing a number of shares sufficient to authorize or take the action within the 60-day timeframe contemplated by this statute. Subsection (4) of §607.0704 has also been modified to allow the corporation to delay effectiveness of the action for a reasonable period of time to permit tabulation of the consents received. Further, new subsection (7) of §607.0704 has been added to make expressly clear (consistent with what is believed to be the current state of the law) that the failure to give the required notice to shareholders who did not submit a consent does not delay the effectiveness of the action or invalidate the action taken, subject, of course, to the right of a court to fashion an appropriate remedy for failure to give such notice. Finally, new subsection (8) of §607.0704 clarifies that if a corporation's articles of incorporation authorize shareholders to cumulate their votes when electing directors pursuant to §607.0728, directors may only be elected by written consent if the shareholder consent is unanimous.

Notice of shareholder meeting. Section 607.0705 has been modified to set forth the information that is required to be included in a notice of a shareholders' meeting, including information about participation by remote communications (if authorized). Further, clarifying changes have been made to subsection (5) of §607.0705, which authorizes the corporation not to have to give notice to certain missing shareholders under certain circumstances, following the current version of §230 of the DGCL (upon which this provision is based).

Record date. Section 607.0707 has been amended to expressly allow a corporation's bylaws to establish a bifurcated record date whereby there can be a different record date for

which shareholders may vote at a meeting versus the record date for which shareholders are entitled to notice of a meeting. This option to use a bifurcated record date, although not regularly used, is most likely to be used from time to time by public companies, and public companies will need to consider the SEC's proxy rules and the practicalities of proxy voting and vote counting mechanisms in utilizing this flexibility. Further, language has been added to subsection (3) of §607.0707 to clarify how the record date for a shareholder action by written consent is to be determined.

Finally, new subsection (9) of §607.0707 has been added to resolve an inconsistency between §607.0707(1), which states that shareholders of record on the record date are to receive notice of and are authorized to vote at a shareholders' meeting, and §607.0631, which provides that shares acquired by a corporation shall become, when acquired by the corporation, authorized but not issued and outstanding shares of the corporation (or authorized and issued, but not outstanding, treasury shares under the circumstances set forth in §607.0631(5)). Because of these currently inconsistent positions, a Florida corporation might be reluctant to reacquire its own shares between the record date of a meeting and a meeting date because of the uncertainty as to how to deal with voting of those shares, given the fact that, under §607.0631(1), these shares would not be outstanding on the meeting date, even though they were issued and outstanding on the record date. This new provision, which is designed to fix this inconsistency, is based on a similar provision contained in Maryland's corporate statute.

Shareholder lists for meetings. Section 607.0720, dealing with shareholder lists for meetings, has been modified to add language to further implement bifurcated record dates. The revised section also expressly states that shareholders' electronic mail addresses may be excluded from the shareholder list, and removes a pre-set $5,000 civil penalty for the improper sale or distribution of a shareholder's list. The removal of the express penalty for improper disclosure of a shareholder list is not intended to eliminate the penalty, but rather to give courts the discretion to determine the appropriate penalty under the circumstances (whether higher or lower than $5,000).

Voting entitlement of shares. Subsection (2) of §607.0721 continues the rule that shares of its own stock owned by a corporation are not entitled to vote. However, subsection (3) has been modified to make clear that if shares are held by the corporation in a fiduciary capacity, the corporation may vote those shares. While the changes made in this section are not considered substantive, they clean up the language in this section to make it more understandable, largely following the language in the corollary section of the Model Act.

Proxies. Changes have been made to subsection (3) of §607.0722 to clarify that a proxy is valid for the period specified in the appointment form (which can be less than 11 months, 11 months, or more than 11 months), and that if no term is specified in the proxy, the term would be defaulted to 11 months unless such appointment is irrevocable under subsection (5) of §607.0722 (because it is coupled with an interest). Further, language has been added to subsection (7) of

§607.0722, following recently adopted changes to §7.22 of the Model Act, to make clearer that unless the appointment otherwise provides, an appointment made irrevocable under subsection (5) of §607.0722 continues in effect after a transfer of the shares and a transferee takes subject to the appointment, except if such transferee is a transferee for value who did not know (or have reason to know from a notation on the certificate or in a related information statement) that there was an irrevocable appointment associated with these shares. This clarifying change is not believed to be substantive, but rather to expressly state what the prior statutory language was believed to convey.

Voting by voting groups. Section 607.0725 has been modified to add new subsection (8), which makes clear that shares that are entitled to vote as a separate voting group must follow the rules contained in §607.1004 (with respect to voting by separate voting group on an amendment to the articles of incorporation).

*Voting procedures and inspectors of election. New §*607.0729 creates the office of inspector of elections. A public corporation must, and any other corporation may, appoint an inspector of elections (one or more persons) to determine voting results at a shareholders' meeting. The inspector of elections generally determines the validity and number of votes cast and keeps relevant books and records relating to a corporation's shareholders. The role of the inspector of elections has also been incorporated into §607.0724 (which deals with acceptance of votes) and expands a corporation's or inspector of elections' scope of scrutiny to include scrutiny of ballots and shareholder demands, in addition to votes, consents, waivers, or proxy appointments. Lastly, the bill deems a determination made by an inspector of elections to be controlling, but also subjects the decision to de novo review by a court.

Voting agreements. In the current version of the FBCA, §607.0731 and §607.0732 both refer to shareholders' agreements. However, §607.0731 only deals with the enforcement of voting agreements among shareholders to vote their shares in a certain manner. As a result, the name of §607.0731 has been modified to make clear that §607.0731 only relates to voting agreements.

Shareholders' agreements. Section 607.0732 allows shareholders to modify traditional corporate norms in a myriad of ways. Under the existing statute, this provision only applies to corporations with 100 or fewer shareholders. However, in the revised act, the 100 shareholder limitation has been eliminated. Further, two additional categories of the types of actions that can be taken in a unanimous shareholders' agreement have been added. The first category includes provisions that potentially impose liability on a shareholder for fees and expenses in connection with an internal corporate claim (often called a fee shifting provision). Fee shifting provisions are not otherwise permitted. The second category includes provisions that provide a mechanism for breaking a deadlock among the directors or shareholders of the corporation.

Finally, the provision that allows shareholders' agreements to include any other types of provisions so long as such provisions are not contrary to public policy has been retained. However, the examples of provisions that might be considered as being contrary to public policy has been eliminated in favor of allowing courts to determine what may be contrary to public policy under particular circumstances. This change was made because it was believed that the types of provisions in the examples that are contained in the existing statute might be contrary to public policy in some circumstances, but might not be contrary to public policy in other circumstances, and the permitted versus prohibited provisions may change over time.

Additionally, new subsection (8) has been added to §607.0732 to make clear that shareholders' agreements that do not meet the requirements of §607.0732 because not all shareholders joined in the agreement may still nevertheless be valid against those specific shareholders who entered into the agreement and against the corporation under certain circumstances.

Derivative actions generally. The FBCA currently includes all of the derivative action provisions in a single statutory section. On the other hand, the Model Act breaks this topic into multiple sections (§§ 7.41-7.47). The changes in the revised act follow the approach of the Model Act and thus break the derivative action provisions into multiple sections in a manner similar to the Model Act. However, many of the derivative action provisions contained in the revised act continue the substance of the current derivative action provisions contained in existing §607.07401.

Derivative actions – Standing. New §607.0741 provides that a shareholder may not commence a derivative action proceeding unless the particular shareholder was a shareholder of the corporation when the transaction complained of occurred or unless the person became a shareholder through transfer by operation of law from one who was a shareholder at that time. The revised standing provision does not add any specific language to the effect that a shareholder must remain a shareholder throughout the derivative action proceeding in order to continue to proceed with an otherwise properly brought derivative action. It was the general view of the Subcommittee that imposing any such condition to continuing to maintain such an action should be based on the equities in each respective situation and thus should be left to the courts to decide.

Further, the Model Act concept contained in §7.41(b) requiring that the shareholder fairly and adequately represent the interests of the corporation in enforcing the rights of the corporation was not included in the revised act out of a concern that this additional standing requirement is an invitation to litigation that would be costly and would unduly delay the process, thus operating as an inappropriate hindrance to derivative actions. Again, it was the view of the Subcommittee that any such determination should be based on the equities in each respective situation and thus should be left to the courts to decide.

Derivative actions – Demand and excuse. Under current §607.07401(2), a derivative proceeding cannot be brought unless the complainant alleges that demand was made to obtain action of the Board of Directors (commonly called "universal demand") and the demand was refused or ignored by the Board of Directors for a period of at least 90 days from the first demand, unless it could be shown that irreparable injury to the corporation would result from waiting the 90 days, in which case a shortened waiting period would be permitted.

The Model Act continues to include a required universal demand before a derivative action may be brought. On the other hand, FRLLCA, in §605.0802(2), contemplates that if making a demand on the other members (in a member-managed LLC) or on the other managers (in a manager-managed LLC) would be futile or would cause irreparable injury to the company, then such demand shall not be required in order to maintain a derivative proceeding against the LLC. The FRLLCA provision follows the revised uniform limited liability company act on this issue. Further, while not in the DGCL, the futility concept, as an alternative to a demand requirement, has been adopted as a matter of judicial policy by the Delaware courts.

Based on an extensive analysis by the Subcommittee of all of these factors, new §607.0742 allows a complaining shareholder to argue that demand would be futile by alleging the reasons for the shareholder not making the effort to obtain the action desired. The language used in the statute is largely derived from existing §607.07401(2), but adds the opportunity to allege the reasons for not making the demand and leaves it to the courts to determine, under such circumstances, whether demand would, in that particular situation, be considered futile.

Derivative actions – Dismissal. Section 607.07401(3) currently states that a court may dismiss a derivative proceeding under certain circumstances. Similar to §605.0804(5) of FRLLCA, new §607.0744 gives the court discretion to dismiss a derivative action based on the recommendation of a board committee of qualified directors (truly independent directors who qualify under the definition set forth in §607.0143) or a disinterested litigation committee appointed by the court in a situation where the committee is disinterested and independent and, in both cases, where the committee has acted in good faith, independently and with reasonable care. Both of these provisions are different from the Model Act, which requires a court to dismiss a derivative action on the recommendation of a disinterested special litigation committee.

Derivative actions – Expenses. Consistent with existing law, new §607.0746 contains similar language to the existing statute and provides that the court can order the corporation to pay the plaintiff's reasonable expenses if the plaintiff was successful in whole or in part in the action. The revised act does not adopt the language in the corollary Model Act provision that requires that the plaintiff show "substantial benefit to the corporation" to receive expenses.

Derivative actions – Applicability to foreign corporations. New §607.0747 makes clear that a derivative proceeding in the right of a foreign corporation brought in the courts of Florida

shall be governed by the laws of the jurisdiction of incorporation of the foreign corporation, except for those enumerated sections that relate to judicial discretionary decisions that are appropriately governed by Florida procedural standards and do not implicate the internal affairs doctrine.

Direct actions by shareholders. In an effort to bring greater consistency to positions taken on this topic by courts in Florida, new §607.0750 provides a definition of when an action will be considered a direct action versus a derivative action. The provision as adopted is largely modeled after §605.0801 of FRLLCA, but modifies the language in this section to bring it into substantial conformity with recent Florida case law on this topic, and particularly the holdings in Dinuro Investments, LLC v. Camacho, 141 So.3d 731 (Fla. 3rd DCA 2014) and Strazzulla, et. al. v. Riverside Banking Co., et. al., 175 So.3d. 879 (Fla. 4th DCA 2015). Similar harmonizing modifications have also been made to §605.0801 so that the two sections are mirrored.

Available remedies outside of judicial dissolution. Two new sections have been added to the FBCA to authorize certain remedies in situations outside the context of a judicial dissolution proceeding. The first provision, new §607.0748 allows the appointment of a receiver or custodian in two situations arising outside the context of seeking a judicial dissolution: (i) when directors are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock and irreparable injury to the corporation is threatened or is being suffered, or (ii) when the directors or those in control of the corporation are acting fraudulently and irreparable injury to the corporation is threatened or being suffered. This section is designed to make clear that courts have authority to make such appointments in these situations. Without this section, the express statutory power and authority under Chapter 607 to appoint a receiver or custodian is only available ancillary to an action for judicial dissolution (although Florida courts, through common law equitable powers, seem to have been able to fashion, and have from time to time fashioned, such a remedy under current law).

The second provision, new §607.0749 (which is a corollary to §607.1435 of the FBCA), allows the appointment of a provisional director outside the context of seeking judicial dissolution when the directors are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock. Without this section, the express statutory power and authority under Chapter 607 to appoint a provisional director is only available ancillary to an action for judicial dissolution (although Florida courts, through common law equitable powers, seem to have been able to fashion, and have from time to time fashioned, such a remedy under current law).

Article 8 – Directors and Officers

Qualifications for directors. New subsections (2) and (3) of §607.0802 have been added to clarify how changes to the qualifications of directors prescribed before a director is nominated or before a director has been elected or appointed impact the nomination, election, or

appointment process, following the corollary provision of the Model Act. However, unlike the intent expressed by the Model Act commentary, these changes are not intended to require a director to resign if the director no longer meets the enumerated qualifications during his or her term, but rather to leave it to the corporation (and to the courts, if there is a dispute) to determine whether the director will be allowed to continue to serve.

Weighted director voting. Existing §607.0804 includes the concept of weighed proportional director voting, if permitted in the corporation's articles of incorporation. This is not a Model Act provision, but follows §141(d) of the DGCL. Two changes were made in connection with weighted director voting. First, the title of this section has been expanded to highlight that this section includes these weighted director voting provisions. Second, in order to eliminate ambiguity, language has been added to make clear that if a shareholders' agreement has been adopted in conformity with §607.0732, which changes the weight of director votes (even if not in the corporation's articles of incorporation), those provisions will be respected and all references in Chapter 607 to a majority or other proportion of directors shall refer to a majority or other proportion of the votes of such directors (in the same manner as if such weighted director voting was included in the articles of incorporation under this section).

Staggered terms for directors. Language has been added to §607.0806 to make clear how staggered terms for directors should operate. These changes largely follow the corollary provision of the Model Act. The revised act continues to include non-Model Act language that when director terms are staggered terms, directors should be apportioned among the classes to make all classes as nearly equal in number as possible.

Removal of directors by judicial proceedings. The revised act, in new §607.08081, adds statutory language that expressly authorizes a court to remove a director in a derivative proceeding if the court finds that: (a) the director engaged in fraudulent conduct with respect to the corporation or its shareholders, grossly abused their position of director, or intentionally inflicted harm on the corporation; and (b) considering the director’s course of conduct and the inadequacy of other available remedies, removal or such other relief would be in the best interest of the corporation. While it is believed that courts already have this power in equity and in an injunction proceeding, having this power expressly set forth in the statute was believed to be a good policy decision, particularly when more than 30 states (including Delaware) have some form of judicial remedy to remove directors in their respective state’s corporate statutes.

Filling Board vacancies. Section 607.0809 has been modified to clarify that if a particular director is to be elected by a particular voting group, only the remaining directors elected by that particular voting group or the shareholders in that particular voting group may fill that director vacancy. Thus, if there are no remaining directors elected by a particular voting group, the other remaining directors no longer have the ability to fill the vacancy (and, in that case, only the shareholders in the particular voting group will be able to fill the vacancy).

Director action by written consent. The revised act does not change the requirement in §605.0821 that unless the articles of incorporation or bylaws of the corporation provide otherwise, director written consents must be unanimous.

Waiver of notice by directors. New language in §607.0823 has been added to clarify that a director's attendance at the meeting constitutes waiver of not only the place and time of the meeting, but also the date and purpose of the meeting, unless the director properly objects.

Committees of the Board of Directors. The revised act makes extensive changes to §607.0825 dealing with the composition, operations and authority of board committees, including authorizing board committees comprised of only one board member and modifying what actions cannot be delegated to a board committee. The revised section also eliminates the provision in current law that imposes limits on the ability of a board of directors to delegate the issuance or sale of shares, or the designation of relative rights preferences and limitations of a voting group, to a Board committee, and instead authorizes such ability to delegate without the need to establish parameters.

By way of clarifying language derived from §8.25 of the Model Act, this section confirms the intent of prior §607.0825 to the effect that this section relates only to board committees exercising one or more board functions. This section does not apply to other committees, including advisory committees, set up by the board that may include officers, employees, or others who are not board members and that might be created to deal with non-board issues or to make recommendations for the board or a board committee to consider. Moreover, it does not limit the board’s power to designate non-board member observers to attend meetings of board committees. However, no such non-board member observer can be a voting member of a board committee.

Force the vote. New §607.0826, which follows the corollary section of the Model Act (§8.26), provides express authorization for a corporation to enter into an agreement (such as a merger agreement) containing a "force the vote" provision. The Model Act commentary notes, however, that this provision is not intended to relieve the board of directors from its duty to carefully consider a proposed transaction and the interests of the corporation's shareholders. Thirteen states, including Delaware, have statutes similar to §8.26 of the Model Act.

Director fiduciary standards. The revised act makes extensive modifications to §607.0830 which is the provision setting out fiduciary standards for directors (and which effectively includes a codification of the business judgment rule). This section has been modified to follow the organization and the wording of the corollary section of the Model Act, although for the most part, the change in language does not change the substance of standards applicable to directors. However, several changes of note have been made.

First, the revised act retains the non-Model Act clarifying reference from the existing Florida statute that these standards apply to directors whether they are acting as members of the

board or as members of a committee of the board. The applicability to service as a board committee member is believed to be implicit under the Model Act provision, but this express concept was retained because it was included in the current Florida statute and there was concern that deleting it might be interpreted as taking that standard and its protections away from directors when they are acting in their capacity as a committee member of a board committee.

Second, the "prudent person" standard of care in subsection (1) of the existing statute was replaced in subsection (2) with a standard of care that "a person in a like position would reasonably believe appropriate under similar circumstances" standard, thus incorporating into the standard the concept of a "reasonable belief" under the circumstances. The new language is derived from the Model Act provision, and is not believed to change the standard in any meaningful way, but rather to give better guidance to courts about how to take this standard into account under various circumstances, and to allow courts, as guidance, to look to case law in other Model Act states that have adopted this Model Act provision as their standard of care for directors.

Finally, §8.30(c) of the Model Act was not added to the FBCA. Subsection (c), dealing with a director's obligations of disclosure to the board under various circumstances, was one of several Model Act changes that flowed from the Enron/WorldCom scandals, and the work of the ABA Task Force on Corporate Responsibility and the group addressing revisions to the conflict of interest provisions of the Model Act. This general concept of disclosure is believed to already be the standard in Florida. However, silence on this issue should allow Florida courts to continue to have the latitude to determine the scope of a director's obligation to disclose under each particular circumstance that may arise from time to time.

Director conflicts of interest. The revised act makes extensive modifications to the director conflicts of interest provision to match the conflict of interest approach adopted in FRLLCA, and particularly to make clear that (i) an "unfair" conflict of interest transaction cannot be "sanitized" by an approval of qualified directors (defined in §607.0143) or disinterested shareholders, and (ii) approval of a conflict of interest transaction by qualified directors or disinterested shareholders will have the effect of shifting the burden of who has to prove whether such transaction is or was fair. The revised provision eliminates the provisions in the current statute that could be read to provide that an "unfair" director conflict of interest transaction could be sanitized if it were approved by disinterested directors or disinterested shareholders.

Modifications have also been made to §607.0831, dealing with liability of directors, to make clear that §607.0831 incorporates the director conflict of interest provision as revised by the revised act.

Required officers. Revised §607.0841 makes clear that officers must be natural persons meeting the same requirements as exist in §607.0802 for directors.

General fiduciary standards for officers. The revised act adds new §607.08411, which sets forth general fiduciary standards for officers. This new provision is modeled after §8.42 of the Model Act, but includes non-Model Act language to make the language comparable to the general fiduciary standards for directors contained in the FBCA. This provision, which is included in the corporate statutes in more than a majority of states in the United States, is intended to provide greater guidance to its audience (in particular, counselors to corporate officers and directors) with as little as possible left to interpretation, including a roadmap for courts as to the duties of officers. It replaces common law principles of an agent's duties, which arguably do not provide particularly clear guidance. Further, the more specific guidance provided by this section could be helpful in determining an officer's entitlement to indemnification and in providing offensive and defensive arguments when an officer is named as a defendant in litigation (derivative or otherwise). Other aspects of this new provision that are considered to be of some significance are the specific requirements for "up the line" reporting and transparency, and the very specific (and corporate structure-related) definitions of reasonable "reliance", the latter of which has not clearly been part of traditional agency rules.

Indemnification – Generally. The FBCA currently includes all of the indemnification provisions in a single statutory section, §607.0850. On the other hand, the Model Act breaks this topic into multiple sections (§§ 8.50-8.59). The new provisions that appear in §§ 607.0850-607.0859 follow the approach of the Model Act and thus break the indemnification provisions into multiple sections. At the same time, and as noted in the commentary to the various indemnification sections in the FBCA (§§ 607.0850-607.0859), many of these sections follow the wording of the existing Florida statute and, to that extent, are not intended to make substantive changes to those sections.

Indemnification – Permissible indemnification. The Model Act leaves indemnity of employees and agents to the laws of agency. Although the Florida statute in effect prior to this revision included employees and agents in the applicable sections of §607.0850 which provided for permissible and mandatory indemnification, the new structure of which this new section is a part follows the Model Act structure and elects to cover employees and agents instead under the laws of agency. Notwithstanding, this change is not intended to substantively cut back on the power of a corporation to indemnify its employees or agents (and, in that regard, new §607.0858(6) expressly states that nothing in §§ 607.0850-607.0859 limits the power of the corporation to indemnify its agents and employees).

Section 8.51(a)(2) of the Model Act, which requires any indemnity that is provided beyond the statutory provisions must be included in the corporation's articles of incorporation to be applicable, has not been adopted in the revised act. Thus, to be consistent with that approach, §607.0202 of the FBCA does not include the Model Act language which would expressly allow for indemnity beyond the statutory provisions only in circumstances where such authorization is set forth in the corporation's articles of incorporation. As a consequence, indemnity beyond the statutory provisions may be provided in various ways.

To make this point clear, new §607.0858(1) expressly acknowledges that, subject to the limitations contained in §607.0859(1), a corporation is allowed to provide any other or further indemnification or advancement of expenses beyond that permitted in the statute. Thus, in comparison to the corollary Model Act provisions and consistent with the existing Florida statute, §607.0858(1) allows any legally permissible expanded indemnification to be included in the corporation's articles of incorporation, in its bylaws, in any agreement, or in resolutions adopted by a vote of shareholders or disinterested directors, or otherwise.

Indemnification – Mandatory indemnification. The standard for statutory mandatory indemnification in new §607.0852 follows the Model Act requirement that an officer or director must be "wholly successful" to be entitled to mandatory indemnification. This is in contrast with the "successful" standard in §607.0850(3) that was in effect prior to this revision. An indemnification agreement can still incorporate the "successful" standard, but absent written agreement to such effect, the default will now be a "wholly successful" standard.

Indemnification – Advancement of expenses. New §607.0853 deals with the advancement of expenses. The provisions in Model Act §8.53(c), which establish how advancement of expenses is to be determined when there are directors who are parties to the proceeding at the time of authorization, has been included in the revised act to clearly reflect how this decision is to be made under different circumstances. The language on shareholder votes in subsection (3)(b) is modeled on the language in the Model Act, and not on the language in §607.0850(4)(d) that was in effect prior to the revised act. Further, the term "qualified director," as defined in §607.0143, is used to reflect that true independent directors are making the decision.

A corporation may obligate itself pursuant to §607.0858(1) to advance expenses under §607.0853 by means of a provision set forth in its articles of incorporation or bylaws, by a resolution of its board of directors or shareholders, in an agreement, or otherwise. Moreover, unless provided otherwise, §607.0858(1) expressly deems a general obligatory provision requiring indemnification to the fullest extent permitted by law to include advancement for expenses to the fullest extent permitted by law (unless the provision specifically provides otherwise), even if not specifically mentioned, subject to providing the required repayment undertaking. No other procedures, including without limitation any requirement of certification of good faith and reasonable belief or any requirement of merits proof, are required or contemplated, although obligatory arrangements may expressly include notice and/or any other requirements (including certification of good faith and reasonable belief and/or merits proof) that the directors decide are appropriate to include in such obligatory arrangements.

Indemnification – Court ordered indemnification and advance for expenses. New §607.0854 deals with court-ordered indemnification and advancement for expenses. In subsection (1), the word "may" that is contained in existing §607.0850(9) has been retained. By comparison, the word "shall" is used in the comparable Model Act provision. Subparagraphs (1)(a), (b) and (c) of §607.0854 provide that the court shall determine whether the grounds for

mandatory indemnification exist under §607.0852, whether indemnification or advancement of expenses is available to an officer or director in the articles, bylaws or in an agreement under §607.0858, or whether indemnification or advancement of expenses is available under the discretionary standard set forth in subparagraph (c). Subsection (2) is consistent with existing subsection (9) of §607.0850.

Indemnification – Determination and authorization of indemnification. New §607.0855 lays out the manner in which a decision is to be made on whether to indemnify or advance expenses. This section combines the substance and the wording of Model Act §8.55 with the existing language contained in §607.0850(4) and (5) of the FBCA. It uses the term "qualified director" as defined in §607.0143 so that the decision is being made by truly independent directors.

Indemnification – Variation by corporate action and overriding restrictions on indemnification. New §607.0858 permits the corporation to indemnify officers and directors beyond the permissive indemnification contained in §607.0851 and the advancement of expenses under §607.0853. The wording of §607.0850(7) that was in effect prior to this revision, which sets forth how a corporation may obligate itself to provide indemnification beyond the provisions contained in existing §607.0850, has been retained in §607.0858(1) rather than following the more limited corollary provision contained in the Model Act. However, even under this subsection, as in the FBCA provision that was in effect prior to this revision, indemnification cannot be provided under the circumstances described in §607.0859.

The limits of permitted indemnification are contained in new §607.0859. They are derived from §607.0850(7) as it was in effect prior to this revision. These limits are intentionally not applicable to mandatory indemnification. It is believed that if a director or officer is able to satisfy the relatively high threshold conditions of being entitled to mandatory indemnification under §607.0852, it is highly unlikely that the limitations set forth in §607.0859 will have been exceeded. The choice that has been made, consistent with §607.0850 as it was in effect prior to this revision, was to always mandate indemnification where the requirements of §607.0852 are met, rather than to impose on the director or officer or on the corporation an obligation to further establish that none of the limits in §607.0859 were exceeded.

Part II.A. and II.B.

The third and fourth articles of this series (Part II.A. and II.B.) are expected to be posted on the Subcommittee's webpage later this year. These two additional articles will cover the remainder of the changes made to Chapter 607 and to other Florida entity statutes by the revised act. The third and fourth articles in this series will cover more extensively the sections of the revised act that will be discussed in a more summary fashion in an article to be published by the authors in the January/February 2020 edition of the Florida Bar Journal.