

This draft proposal to modify Chapter 607 of the Florida Statutes (the Florida Business Corporation Act), has been prepared by the Chapter 607 Drafting Subcommittee of the Corporations, Securities and Financial Services Committee of The Florida Bar Business Law Section. This draft proposal is still being finalized and therefore remains subject to change. The proposal is expected to be finalized and presented to the Florida legislature for its consideration in the fall of 2018, with the hope that it will be considered for adoption by the Florida legislature during the 2019 legislative session.

**PROPOSAL TO MODIFY
CHAPTER 607
OF THE FLORIDA STATUTES
(*FLORIDA BUSINESS CORPORATION ACT*)**

Draft Dated August 22, 2018

1 ARTICLE 1

2 GENERAL PROVISIONS

3
4 607.0101 Short title.

5 ~~This Chapter 607~~¹ ("chapter") may be cited as the "Florida Business Corporation Act." Part I
6 of Chapter 607 ("act") contains provisions of general applicability to corporations, Part II of
7 Chapter 607 applies to social purpose corporations, and Part III of Chapter 607 applies to benefit
8 corporations.

9

¹ This proposal uses the term "chapter" to refer to Chapter 607, Parts I, II and III, and "act" to refer to Part I of Chapter 607. It also uses defined terms in lower case consistent with FRLICA.

10 **Commentary to Section 607.0101:**

11 This proposal is the work of the Chapter 607 Drafting Subcommittee (the "Subcommittee") of the
12 Corporations, Securities and Financial Services Committee of the Business Law Section of The
13 Florida Bar. The members of the Subcommittee who actively participated in the work of the
14 Subcommittee are listed on Exhibit "A" to this proposal.

15 Florida's corporate statute is modeled on the Revised Model Business Corporation Act (the "Model
16 Act"). The Model Act is promulgated by the Corporate Laws Committee (the "Corporate Laws
17 Committee") of the Business Law Section of the American Bar Association. In preparing this
18 proposal, the Subcommittee initially considered the version of the Model Act published through
19 the 2013 Supplement. It also reviewed and considered changes to the Model Act made in the 2016
20 version of the Model Act.

21 In the many years since Chapter 607 was comprehensively revised, the Florida legislature has
22 passed Part II applying to social corporations and Part III applying to benefit corporations. The
23 changes clarify that when reference is made to Chapter 607 or to this chapter, the reference intends
24 to include corporations organized under Parts II and III, as well as corporations organized under
25 Part I.

26 While many jurisdictions have recently overhauled their corporate acts, none appear to have
27 inserted the word "Revised" or any of its variations into the title of their act. From this perspective,
28 although inconsistent with the approach taken with respect to naming the most recent overhauls of
29 FRUPA, FRULPA and FRLCA, this revision follows the naming approach taken in the Model
30 Act by the Corporate Laws Committee.

31 In various places, this proposal contains references to and/or excerpts from the commentary in
32 "*Florida Business Laws Annotated*", a treatise on Florida business laws authored by Stuart R. Cohn
33 and Stuart D Ames, two well-known Florida corporate lawyers (the "Ames and Cohn Treatise").

34 For ease of use of this Master Draft, (i) items noted in **yellow** refer to changes to the FBCA that
35 are to be proposed to be made in Chapter 605, and (ii) items noted in **green** refer to issues that
36 need follow-up when the Subcommittee reviews other sections of the FBCA that have not yet
37 been reviewed.

38

39 607.0102 Reservation of power to amend or repeal.

40 The Legislature has power to amend or repeal all or part of this ~~aet~~chapter at any time, and
41 all domestic and foreign corporations subject to this ~~aet~~ chapter shall be governed by the
42 amendment or repeal.

43

44 **Commentary to Section 607.0102:**

45 No material changes have been made. Florida follows the Model Act almost identically, the only
46 difference being in the last part of the sentence, which is non-substantive (The Model Act states
47 that "all domestic and foreign corporations subject to this act are governed by the amendment or
48 repeal").

49

50 607.0120 Filing requirements; extrinsic facts.

51 (1) A document must satisfy the requirements of this section and of any other section that
52 adds to or varies these requirements to be entitled to filing by the department ~~of State~~.

53 (2) This ~~aet~~-chapter must require or permit filing the document in the office of the
54 department ~~of State~~.

55 (3) The document must contain the information required by this ~~aet~~-chapter and it.~~It~~ may
56 contain other information.

57 (4) The document must be typewritten or printed, or, if electronically transmitted, the
58 document must be in a format that can be retrieved or reproduced in typewritten or printed form,
59 and must be legible.

60 (5) The document must be in the English language. A corporate name need not be in English
61 if written in English letters or Arabic or Roman numerals, and the certificate of status required of
62 foreign corporations need not be in English if accompanied by a reasonably authenticated English
63 translation.

64 (6) The document must be signed ~~executed~~:

65 (a) By a director of a domestic or foreign corporation, or by its president or by another
66 of its officers;

67 (b) If directors or officers have not been selected or the corporation has not been
68 formed, by an incorporator; or

69 (c) If the corporation is in the hands of a receiver, trustee, or other court-appointed
70 fiduciary, by that fiduciary.

71 (7) The person executing the document shall sign it and state beneath or opposite his or her
72 signature his or her name and the capacity in which he or she signs. The document may, but need
73 not, contain the corporate seal, an attestation, an acknowledgment, or a verification.

74 (8) If the department ~~of State~~ has prescribed a mandatory form for the document under s.
75 607.0121(1), the document must be in or on the prescribed form.

76 (9) The document must be delivered to the office of the department ~~of State~~ for filing.
77 Delivery may be made by electronic transmission if and to the extent permitted by the department
78 ~~of State~~. If it is filed in typewritten or printed form and not transmitted electronically, the
79 department ~~of State~~ may require one exact or conformed copy, to be delivered with the document.

80 (10) When the document is delivered to the ~~D~~department of ~~S~~State for filing, the correct filing
81 fee, and any other tax, license fee, or penalty required to be paid by this ~~a~~et chapter or other law to
82 be paid at the time of delivery for filing shall be paid or provision for payment made in a manner
83 permitted by the ~~D~~department of ~~S~~State.

84 (11) Whenever a provision of this chapter permits any of the terms of a plan or a filed
85 document to be dependent on facts objectively ascertainable outside the plan or filed document,
86 the following provisions apply:

87 (a) The manner in which the facts will operate upon the terms of the plan or filed
88 document shall be set forth in the plan or filed document.

89 (b) The facts may include, but are not limited to:

90 1. Any of the following that is available in a nationally recognized news or
91 information medium either in print or electronically: statistical or market indices, market
92 prices of any security or group of securities, interest rates, currency exchange rates, or
93 similar economic or financial data;

94 2. A determination or action by any person or body, including the corporation or
95 any other party to a plan or filed document; or

96 3. The terms of, or actions taken under, an agreement to which the corporation is a
97 party, or any other agreement or document.

98 (c) As used in this subsection:

99 1. "Filed document" means a document filed with the department under any
100 provision of this chapter, except for ss. 607.1501-607.1532.

101 2. "Plan" means a plan of merger, a plan of share exchange, a plan of conversion,
102 and a plan of share domestication.

103 (d) The following provisions of a plan or filed document may not be made dependent on
104 facts outside the plan or filed document:

105 1. The name and address of any person required in a filed document;

106 2. The registered office of any entity required in a filed document;

107 3. The registered agent of any entity required in a filed document;

108 4. The number of authorized shares and designation of each class or series of
109 shares;

110 5. The effective date of a filed document; and

111 6. Any required statement in a filed document of the date on which the underlying
112 transaction was approved or the manner in which that approval was given.

113 (e) If a provision of a filed document is made dependent on a fact ascertainable outside
114 of the filed document, and that fact is neither ascertainable by reference to a source described
115 in subsection (11)(b)(1) or a document that is a matter of public record, nor have the affected
116 shareholders received notice of the fact from the corporation, then the corporation shall file
117 with the department articles of amendment to the filed document setting forth the fact
118 promptly after the time when the fact referred to is first ascertainable or thereafter changes.
119 Articles of amendment under this subsection (11)(e) are deemed to be authorized by the
120 authorization of the original filed document to which they relate and may be filed by the
121 corporation without further action by the board of directors or the shareholders.

122

123 **Commentary to Section 607.0120:**

124 Section 607.0120 substantially follows the 1989 version of the Model Act except as otherwise
125 noted above.

126 The words "and must be legible" in subsection (4) were added to the FBCA in 1993. They are not
127 in the corollary Model Act provision. Since these words have been in the FBCA for more than 20
128 years, they have been retained.

129 The Model Act authorizes the "chairman of the board of directors" to sign a document; not any
130 officer. The wording "signed by a director was added in 2003 (prior to 2003, this provision in the
131 FBCA read "by the chair or any vice chair of the board of directors"). The 2003 changes were
132 made (according to the report of the Corporations, Securities and Financial Services Committee
133 when it made the proposal) at the request of the Department to minimize the burden on the
134 Department to interpret the statute and to liberalize the execution provisions to allow more
135 flexibility as to who can sign. The existing wording is retained in the statute.

136 New subsection (11) is derived from the Model Act. It permits any of the terms of a filed document
137 or a plan to be made dependent on facts outside the document or plan, except to the extent provided
138 in subsection (11)(d). The fact on which the filed document or plan is to be dependent need not
139 be within the control of the corporation, but must be objectively ascertainable and the filed
140 document or plan must state the manner in which the facts will operate. Subsection (11)(e)
141 establishes a procedure that assists shareholders in determining what facts are the underlying facts
142 on which a filed document or plan is dependent.

143

144 607.0121 Forms.

145 (1) The department of ~~State~~ may prescribe and furnish on request forms for:

146 (a) An application for certificate of status,

147 (b) A foreign corporation's application for certificate of authority to transact
148 business in the state,

149 (c) A foreign corporation's notice of withdrawal of application for certificate of
150 authority withdrawal, and

151 (d) The annual report, for which the department may prescribe the use of the uniform
152 business report, pursuant to s. 606.06.

153 (2) If the ~~D~~department of ~~State~~ so requires, the use of these forms shall be mandatory.

154 (3) The ~~D~~department of ~~State~~ may prescribe and furnish on request forms for other
155 documents required or permitted to be filed by this ~~act~~ chapter, but their use shall not be mandatory.

156

157 **Commentary to Section 607.0121:**

158 Clean up changes have been made. Except for a few non-substantive language differences, and the
159 non-Model Act cross reference to s. 606.06 that is referred to below, this statute mirrors the Model
160 Act. Florida is one of thirteen jurisdictions to have adopted subsection (1) without substantive
161 change, and the vast majority of American jurisdictions have adopted subsection (2) without
162 substantive change.

163 The cross reference to s. 606.06 that is contained in subsection (1)(d) was added to the statute in
164 1999. It deals with the uniform annual report provision that is part of and intended to facilitate the
165 creation of a master business index under the Florida Business Coordination Act (Chapter 606).
166 Chapter 606 is intended to establish a master business index within the DOS and to facilitate a
167 reporting mechanism that consolidates and coordinates business entity licensing and reporting
168 requirements wherever possible. A similar provision is included in s. 605.0212(7) of FRLCA.

169

170 607.0122 Fees for filing documents and issuing certificates.

171 The ~~D~~department of ~~S~~State shall collect the following fees when the documents described
172 in this section are delivered to the department for filing:

173 (1) Articles of incorporation: \$35.

174 (2) Notice of transfer of reserved name. \$35.

175 (32) Application for registered name: \$87.50.

176 (43) Application for renewal of registered name: \$87.50.

177 (54) Corporation's statement of change of registered agent or registered office or both if not
178 included on the annual report: \$35.

179 (65) Designation of and acceptance by registered agent: \$35.

180 (76) Agent's statement of resignation from active corporation: \$87.50.

181 (87) Agent's statement of resignation from an inactive corporation: \$35.

182 (98) Amendment of articles of incorporation: \$35.

183 (109) Restatement of articles of incorporation with amendment of articles: \$35.

184 (1140) Articles of merger or share exchange for each party thereto: \$35.

185 (1244) Articles of dissolution: \$35.

186 (1342) Articles of revocation of dissolution: \$35.

187 (1443) Application for reinstatement following administrative dissolution: \$600.

188 (1544) Application for certificate of authority to transact business in this state by a foreign
189 corporation: \$35.

190 (1645) Application for amended certificate of authority: \$35.

191 (1746) Application for certificate of withdrawal by a foreign corporation: \$35.

192 (1847) Annual report: \$61.25.

193 (1948) Articles of correction: \$35.

194 (2049) Application for certificate of status: \$8.75.

- 195 (~~2120~~) Certificate of domestication of a foreign corporation: \$50.
- 196 (~~2221~~) Certified copy of document: \$52.50.
- 197 (~~2322~~) Serving as agent for substitute service of process: \$87.50.
- 198 (~~2423~~) Supplemental corporate fee: \$88.75.
- 199 (~~2524~~) Any other document required or permitted to be filed by this act: \$35.
- 200

201 **Commentary to Section 607.0122:**

202 No changes have been made to the existing statute.

203

204 607.0123 Effective time and date of document.²

205 Except as otherwise provided in s. 607.0124(5)³ and subject to s. 607.0124(4), any
206 document delivered to the department for filing under this chapter may specify an effective time
207 and a delayed effective date. In the case of initial articles of incorporation, a prior effective date
208 may be specified in the articles of incorporation if such date is within 5 business days before the
209 date of filing. Subject to s. 607.0124, a document accepted for filing is effective:

210 (1) If the filing does not specify an effective time and does not specify a prior or a
211 delayed effective date, on the date and at the time the filing is accepted, as evidenced by the
212 department's endorsement of the date and time on the filing;

213 (2) If the filing specifies an effective time, but not a prior or delayed effective date, on
214 the date the filing is filed at the time specified in the filing;

215 (3) If the filing specifies a delayed effective date, but not an effective time, at 12:01 a.m.
216 on the earlier of:

217 (a) The specified date; or

218 (b) The 90th day after the date of the filing.

219 (4) If the filing specifies a delayed effective date and an effective time, at the specified
220 time on the earlier of:

221 (a) The specified date; or

222 (b) The 90th day after the date of the filing.

223 (5) If the filing is of initial articles of incorporation and specifies an effective date before
224 the date of the filing, but no effective time, at 12:01 a.m. on the later of:

225 (a) The specified date; or

226 (b) The 5th business day before the date of the filing.

227 (6) If the filing is of initial articles of incorporation and specifies an effective time and a
228 date before the date of the filing, at the specified time on the later of:

229 (a) The specified date; or

² Conforming changes to s. 605.0207 of FRLCA should also be made.

³ If we add Subchapter E to Article 1, a cross reference to those sections should be added here.

230 (b) The 5th business day before the date of the filing.

231 (7) If a filed document does not specify the time zone or place at which a date or time or
232 both is to be determined, the date or time or both at which it becomes effective shall be those
233 prevailing at the place of filing in this state.

234 ~~(1) Except as provided in subsections (2) and (4) and in s. 607.0124(3), a document~~
235 ~~accepted for filing is effective (a) on the date and at the time of filing, as evidenced by such means~~
236 ~~as the department of State may use for the purpose of recording the date and time of filing; or (b)~~
237 ~~on the date and at the time specified in the document as its effective time on the date it is filed.~~

238 ~~(2) A document may specify a delayed effective date and, if desired, a time on that date, and~~
239 ~~if it does the document shall become effective on the date and at the time, if any, specified. If a~~
240 ~~delayed effective date is specified without specifying a time on that date, the document shall~~
241 ~~become effective at the start of business on that date. Unless otherwise permitted by this chapter~~
242 ~~act, a delayed effective date for a document may not be later than the 90th day after the date on~~
243 ~~which it is filed.~~

244 ~~(38) If a document is determined by the department of State to be incomplete and~~
245 ~~inappropriate for filing, the department of State may return the document to the person or~~
246 ~~corporation filing it, together with a brief written explanation of the reason for the refusal to file,~~
247 ~~in accordance with s. 607.0125(3). If the applicant returns the document with corrections in~~
248 ~~accordance with the rules of the department within 60 days after it was mailed to the applicant by~~
249 ~~the department and if at the time of return the applicant so requests in writing, the filing date of~~
250 ~~the document will be the filing date that would have been applied had the original document not~~
251 ~~been deficient, except as to persons who relied on the record before correction and were adversely~~
252 ~~affected thereby.~~

253 ~~(4) Corporate existence may predate the filing date, pursuant to s. 607.0203(1).~~

254

255 **Commentary to Section 607.0123:**

256 The changes harmonize this provision with s. 605.0207 of FRLCA and are consistent with the
257 changes to the corollary provision in the Model Act.

258 While subsection (3) (renumbered as (8)), dealing with defective or incomplete filings, is not
259 derived from the Model Act, it has been in the FBCA in substantially this form since 1989 and is
260 retained.

261

262 607.0124 Correcting filed document; withdrawal of filed record before effectiveness.

263 (1) A domestic or foreign corporation may correct a document filed by the ~~D~~department of
264 ~~State within 30 days after filing~~ if the document:

265 (a) Contains an inaccuracy;

266 (b) Was defectively ~~executed~~ signed, attested, sealed, verified, or acknowledged; or

267 (c) The electronic transmission to the department was defective.

268 (2) A document is corrected:

269 (a) By preparing articles of correction that:

270 1. Describe the document (including its filing date) or attach a copy of it to the
271 articles of correction;

272 2. Specify the inaccuracy or defect to be corrected; and

273 3. Correct the inaccuracy or defect; and

274 (b) By delivering the articles of correction to the department of ~~State~~ for filing, signed
275 ~~executed~~ in accordance with s. 607.0120.

276 (3) Articles of correction are effective on the effective date of the document they correct
277 except as to persons relying on the uncorrected document and adversely affected by the correction.
278 As to those persons, articles of correction are effective when filed.

279 (4) Articles of correction may not contain a delayed effective date for the correction.

280 (5) Unless otherwise provided in ss. 607.1107(2), 607.11923(3) or 607.11934(3), a filing
281 delivered to the department may be withdrawn before it takes effect by delivering to the department
282 for filing a withdrawal statement.

283 (a) A withdrawal statement must:

284 1. Be signed by each person who signed the filing being withdrawn; and

285 2. Identify the filing to be withdrawn.

286 (b) On the filing by the department of a withdrawal statement, the action or transaction
287 evidenced by the original filing does not take effect.

288

289 **Commentary to Section 607.0124:**

290 With few exceptions, this section mirrors the Model Act.

291 The language contained in the existing statute in subsection (1) providing that a document can only
292 be corrected within 30 days of filing has been removed from the statute, thus allowing a correction
293 at any time. The Model Act does not provide a limited timeframe for correcting the record.
294 Similarly, section 605.0209 in FRLCA (correcting filed record) does not provide a limited
295 timeframe for correcting a record with the DOS.

296 The change in subsection (1)(c) conforms this section with the wording on the same topic in s.
297 605.0209 of FRLCA.

298 The revised provision allows, as an alternative to describing the inaccuracy to be corrected, the
299 previously filed articles to be attached, using the language contained in s. 1.24(b)(1)(i) of the
300 Model Act. The Subcommittee recommends that this same change also be made in s. 605.0209 of
301 FRLCA, as follows:

- 302 (3) A statement of correction:
- 303 (a) May not state a delayed effective date;
 - 304 (b) Must be signed by the person correcting the filed record;
 - 305 (c) Must identify the filed record to be corrected (including its filing date) or attach a
306 copy of it to the statement of correction;
 - 307 (d) Must specify the inaccuracy or defect to be corrected; and
 - 308 (e) Must correct the inaccuracy or defect.
- 309

310 The addition of subsection (4) conforms this section with the wording on the same topic in s.
311 605.0209(3)(a) of FRLCA.

312 New subsection (5) has been added to allow corporations to withdraw a filing before it becomes
313 effective. It is modeled after s. 605.0208 of FRLCA and is consistent with the Department's
314 current position on this issue.

315

316 607.0125 Filing duties of Department of State.

317 (1) If a document delivered to the ~~Department of State~~ for filing satisfies the requirements
318 of s. 607.0120, the department ~~of State~~ shall file it.

319 (2) The ~~Department of State~~ files a document by stamping or otherwise endorsing the
320 document as "filed," together with the department's official title and recording it as filed on the
321 date and time of receipt. After filing a document, the department ~~of State~~ shall deliver an
322 acknowledgment of the filing or certified copy of the document to the domestic or foreign
323 corporation or its authorized representative.

324 (3) If the ~~Department of State~~ refuses to file a document, the department ~~it~~ shall, within 15
325 days after the document is delivered, return the document ~~it~~ to the domestic or foreign corporation
326 or its authorized representative ~~within 15 days after the document was received for filing~~, together
327 with a brief, written explanation of the reason for the refusal.

328 (4) The ~~Department's of State's~~ duty to file documents under this section is ministerial. The
329 filing or refusing to file a document does not:

330 (a) Affect the validity or invalidity of the document in whole or part;

331 (b) Relate to the correctness or incorrectness of information contained in the
332 document; or

333 (c) Create a presumption that the document does or does not conform to the
334 requirements of this chapter or that the is valid or invalid or that information contained in the
335 document is correct or incorrect.

336 (5) If not otherwise provided by law and the provisions of this ~~act~~ chapter, the ~~Department~~
337 ~~of State~~ shall determine, by rule, the appropriate format for, number of copies of, manner of
338 execution of, method of electronic transmission of, and amount of and method of payment of fees
339 for, any document placed under its jurisdiction.

340

341 **Commentary to Section 607.0125:**

342 The Florida statute follows the Model Act, with some differences. Changes were made to conform
343 this section with the language contained in s. 605.0210(1) of FRLCA.

344 Subsection (3) has been modified to conform the language of this statute to s. 605.0210(3) of
345 FRLCA. The Florida statute allows 15 days for the return of a refused filing, while the Model
346 Act allows 5 days. The existing Florida time period is retained.

347 Subsection (5) is unique to Florida and is also contained in FRLCA. This provision was adopted
348 in 1989 at the request of the Department. However, according to the Ames and Cohn Treatise, the
349 Department has not adopted any such rules that remain in effect.

350

351 607.0126 Appeal from department's of State's refusal to file document.

352 If the ~~D~~department of State refuses to file a document delivered to its office for filing, ~~within~~
353 ~~30 days after return of the document by the department by mail, as evidenced by the postmark, the~~
354 ~~domestic or foreign corporation-~~ the person who submitted the document for filing may:

355 (1) ~~—Appeal the refusal pursuant to s. 120.68; or~~

356 (2) ~~—Appeal the refusal to petition the circuit court of the county in and for Leon County,~~
357 ~~Florida where the corporation's principal office (or, if none in this state, its registered office) is or~~
358 ~~will be located to compel filing of the document. The document and the explanation from the~~
359 ~~department of the refusal to file must be attached to the petition. The court may decide the matter~~
360 ~~in a summary proceeding. The appeal is commenced by petitioning the court to compel filing the~~
361 ~~document and by attaching to the petition the document and the department's of State's explanation~~
362 ~~of its refusal to file. The matter shall promptly be tried de novo by the court without a jury. and~~
363 ~~the court may summarily order the D~~department of State to file the document or take other action
364 the court considers appropriate. The court's final decision may be appealed as in other civil
365 proceedings.

366

367 **Commentary to Section 607.0126:**

368 This section harmonizes the FBCA with s. 605.0210(7) of FRLCA on the same topic.

369 The Subcommittee recommends (for clarity) that s. 605.0210 be modified to add the following
370 additional wording:

371 (7) If the department refuses to file a record delivered to its office for filing, the person
372 who submitted the record for filing may petition the circuit court in and for Leon County,
373 Florida ~~the applicable county~~ to compel filing of the record. The record and the explanation
374 from ~~of~~ the department of the refusal to file must be attached to the petition. The court may
375 decide the matter in a summary proceeding and the court may summarily order the department
376 to file the record or take other action the court considers appropriate. The court's final decision
377 may be appealed as in other civil proceedings.

378 The 30-day statute of limitations contained in the current statute and the Model Act has been
379 eliminated. This statute of limitations provision is not contained in s. 605.0210(7) of FRLCA and
380 has not been historically followed or enforced by the Department of State.

381

382 607.0127 Certificates to be received in evidence and evidentiary effect of certified copy
383 of filed document.

384 All certificates issued by the department in accordance with this chapter shall be taken and
385 received in all courts, public offices and official bodies as prima facie evidence of the facts stated.

386 A certificate ~~from the Department of State~~ delivered with a copy of a document filed by the
387 ~~Department, of State~~ bearing the signature of the secretary of state (which may be in facsimile),
388 and the seal of this state, is conclusive evidence that the original document is on file with the
389 department.

390

391 **Commentary to Section 607.0127:**

392 This section has been revised to harmonize with s. 605.0215 of FRLLCA on the same topic.
393 Further, language from s. 617.0127 to the effect that a document filed with the Department
394 attaching a copy of a document and "bearing the signature of the Secretary of State (which may be
395 in facsimile)" has been added. This language was previously in Chapter 607 and has been added
396 back to the statute for clarity at the request of the Department.

397 The Subcommittee recommends that the word "certified" be added to the title of s. 605.0215 of
398 FRLLCA to make it consistent with the changes made to this statute. It also recommends that
399 conforming changes be made to s. 605.0215 to reflect the additional changes to this section that
400 have been made.

401

402 607.0128 Certificate of status.

403 (1) The department, upon request and payment of the requisite fee, shall issue a certificate
404 of status for a corporation if the records filed in the department show that the department has
405 accepted and filed the corporation's articles of incorporation. A certificate of status must state the
406 following:

407 (a) The corporation's name.

408 (b) That the corporation was organized under the laws of this state and the date of
409 organization.

410 (c) Whether all fees due to the department under this chapter have been paid.

411
412 (d) Whether the corporation's most recent annual report required under s. 607.1622
413 has been filed by the department.

414
415 (e) Whether the department has administratively dissolved the corporation or received
416 a record notifying the department that the corporation has been dissolved by judicial action
417 pursuant to s. 607.1433.

418
419 (f) Whether the department has filed articles of dissolution for the corporation.

420
421 (2) The department, upon request and payment of the requisite fee, shall furnish a certificate
422 of status for a foreign corporation if the records filed show that the department has filed a certificate
423 of authority. A certificate of status for a foreign corporation must state the following:

424 (a) The foreign corporation's name and any⁴ current alternate name adopted under s.
425 607.1506 for use in this state.

426
427 (b) That the foreign corporation is authorized to transact business in this state.

428
429 (c) Whether all fees and penalties due to the department under this chapter or other
430 law have been paid.

431
432 (d) Whether the foreign corporation's most recent annual report required under s.
433 607.1622 has been filed by the department.

434
435 (e) Whether the department has:

436
437 1. Revoked the foreign corporation's certificate of authority; or

438
439 2. Filed a notice of withdrawal of certificate of authority.

⁴ The Subcommittee recommends that the word "any" be added to s. 605.0211((2)(a) of FRLCA after the word "and" and before the word "current" to conform to the change in this statute.

440
441 (1) ~~Anyone may apply to the department of State to furnish a certificate of status for a~~
442 ~~domestic corporation or a certificate of authorization for a foreign corporation.~~

443 (2) ~~A certificate of status or authorization sets forth:~~

444 (a) ~~The domestic corporation's corporate name or the foreign corporation's corporate~~
445 ~~name used in this state;~~

446
447 (b) 1. ~~That the domestic corporation is duly incorporated under the law of this state~~
448 ~~and the date of its incorporation, or~~

449
450 2. ~~That the foreign corporation is authorized to transact business in this state;~~

451
452 (c) ~~That all fees and penalties owed to the department have been paid, if:~~

453
454 1. ~~Payment is reflected in the records of the department, and~~

455
456 2. ~~Nonpayment affects the existence or authorization of the domestic or foreign~~
~~corporation;~~

457 (d) ~~That its most recent annual report required by s. 607.1622 has been delivered to~~
458 ~~the department; and~~

459 (e) ~~That articles of dissolution have not been filed.~~

460 (3) Subject to any qualification stated in the certificate, a certificate of status ~~or authorization~~
461 ~~issued by the department is may be relied upon as~~ conclusive evidence that the domestic ~~or foreign~~
462 corporation is in existence and of active status in this state or the foreign corporation is authorized
463 to transact business in this state and is of active status in this state.⁵

464

⁵ The Subcommittee recommends that s. 605.0211(3) of FRLUCA be modified in a similar manner to harmonize with the changes in this FBCA section, as follows:

(3) Subject to any qualification stated in the certificate of status, a certificate of status issued by the department is conclusive evidence that the domestic limited liability company is in existence and of active status in this state or the foreign limited liability company is authorized to transact business in this state and of active status in this state.

465 **Commentary to Section 607.0128:**

466 This section of the FBCA harmonizes the language on this topic with s. 605.0211 of FRLCA on
467 the same topic.

468 The statute does not include subsection (2) of the corollary Model Act provision. In subsection
469 (2)(b)(1), the Model Act provides that the certificate of status will provide information as to
470 whether the corporation's existence is less than perpetual. The Model Act also adds an additional
471 subsection under (2) that allows "other facts of record in the office of the Secretary of State that
472 may be requested by the applicant". This does not seem necessary in Florida and would place an
473 undue burden on the Department of State.

474

475 Model Act s. 1.29 Penalty for Signing False Document.

476 This section, which provides for sanctions for signing a false document, was part of the FBCA as
477 adopted in 1989 (consistent with the predecessor Florida corporate statute). However, this section
478 was removed from the FBCA in 2005, effective January 1, 2006. The Subcommittee believes that
479 this section was removed from the FBCA in favor of the general statute that covers the same topic
480 (s. 817.155, FS).

481 Florida is one of only eleven jurisdictions (Arizona, District of Columbia, Louisiana, Minnesota,
482 Nevada, New Jersey, New Mexico, New York, North Carolina, and Pennsylvania) that do not have
483 a comparable section to Model Act Section 1.29 in their corporate statute.

484

485 607.0130 Powers of department of State.

486 The department has the authority reasonably necessary to administer this chapter
487 efficiently, to perform the duties imposed upon it, and to adopt reasonable rules necessary to carry
488 out its duties and functions under this chapter.

489 ~~(1) The department of State may propound to any corporation subject to the provisions
490 of this act, and to any officer or director thereof, such interrogatories as may be reasonably
491 necessary and proper to enable it to ascertain whether the corporation has complied with all
492 applicable provisions of this act. Such interrogatories must be answered within 30 days after
493 mailing or within such additional time as fixed by the department. Answers to interrogatories must
494 be full and complete, in writing, and under oath. Interrogatories directed to an individual must be
495 answered by the individual, and interrogatories directed to a corporation must be answered by the
496 president, vice president, secretary, or assistant secretary.~~

497 ~~—(2) The department of State is not required to file any document:~~

498 ~~—(a) To which interrogatories, as propounded pursuant to subsection (1), relate, until
499 the interrogatories are answered in full;~~

500 ~~—(b) When interrogatories or other relevant evidence discloses that such — document is
501 not in conformity with the provisions of this Act; or~~

502 ~~(c) When the department has determined that the parties to such document have
503 not paid all fees, taxes, and penalties due and owing this state.~~

504 ~~—(3) The department of State may, based upon its findings hereunder or as provided in s.
505 213.053(15), bring an action in circuit court to collect any penalties, fees, or taxes determined to
506 be due and owing the state and to compel any filing, qualification, or registration required by law.
507 In connection with such proceeding the department may, without prior approval by the court, file
508 a lis pendens against any property owned by the corporation and may further certify any findings
509 to the Department of Legal Affairs for the initiation of any action permitted pursuant to s. 607.0505
510 which the Department of Legal Affairs may deem appropriate.~~

511 ~~—(4) The department of State shall have the power and authority reasonably necessary to
512 enable it to administer this chapter efficiently, to perform the duties herein imposed upon it, and
513 to promulgate reasonable rules necessary to carry out its duties and functions under this chapter.~~

514

515 **Commentary to Section 607.0130:**

516 This section harmonizes the FBCA with s. 605.0214 of FRLCA on the same topic.

517

518 607.01401 Definitions.

519 As used in this act, unless the context otherwise requires, the term:

520 (1) "Acquired eligible entity" means the domestic or foreign eligible entity that will have all
521 of one or more classes or series of its shares or eligible interests acquired in a share exchange.

522 (2) "Acquiring eligible entity" means the domestic or foreign eligible entity that will acquire
523 all of one or more classes or series of shares or eligible interests of the acquired eligible entity in
524 a share exchange.

525 (3) "Applicable county" means the county in this state in which the corporation's principal
526 office is located or was located at such time of such action; if the corporation has, and at the time
527 of such action had, no principal office in this state, then in the county in which the corporation has,
528 or at the time of such action had, an office in this state; or if none in this state, then in the county
529 in which the corporation's registered office is or was last located.

530 (14) "Articles of incorporation" includes original, amended and restated articles of
531 incorporation, articles of share exchange and articles of merger, and all amendments thereto. When
532 used with respect to a foreign corporation, the "articles of incorporation" means the document of
533 such entity that is equivalent to the articles of incorporation of a domestic corporation.

534 (5) "Authorized entity" means:

535 (a) A corporation for profit;

536 (b) A limited liability company;

537 (c) A limited liability partnership; or

538 (d) A limited partnership, including a limited liability limited partnership.

539 (26) "Authorized shares" means the shares of all classes a domestic or foreign corporation is
540 authorized to issue.

541 (7) "Beneficial shareholder" means a person who owns the beneficial interest in shares,
542 which may be a record shareholder or a person on whose behalf shares are registered in the name
543 of an intermediary or nominee.

544 (38) "Business day" means Monday through Friday, excluding any day a national banking
545 association is not open for normal business transactions.

546 (49) "Conspicuous" means so written, displayed or presented that a reasonable person against
547 whom the writing is to operate should have noticed it. For example, ~~printing~~ text in italics,
548 boldface, ~~or a~~ contrasting color, or capitals, or underlined text, is conspicuous.

549 (10) "Conversion" means a transaction pursuant to ss. 607.11930 through 607.11935.

550 (11) "Converted eligible entity" means the converting eligible entity as it continues in
551 existence after a conversion.

552 (12) "Converting eligible entity" means the domestic corporation that approves a plan of
553 conversion pursuant to s. 607.11932 or a foreign eligible entity that approves a conversion pursuant
554 to the organic law of the foreign eligible entity.

555 (513) "Corporation" or "domestic corporation" means a corporation for profit, which is not
556 a foreign corporation, incorporated under ~~or subject to the provisions of this act~~ chapter.

557 (614) "Day" means a calendar day.

558 (715) "Deliver" or "delivery" means any method of delivery used in conventional
559 commercial practice, including delivery by hand, mail, commercial delivery, and, if authorized in
560 accordance with s. 607.0141, by electronic transmission.

561 (16) "Department" means the Division of Corporations of the Florida Department of State.⁶

562 (17) "Derivative proceeding" means a civil suit in the right of a domestic corporation or,
563 to the extent provided in s. 607.0747, in the right of a foreign corporation.

564 (818) "Distribution" means a direct or indirect transfer of money or other property (except
565 its own shares) or incurrence of indebtedness by a corporation to or for the benefit of its
566 shareholders in respect of any of its shares. A distribution may be in the form of a declaration or
567 payment of a dividend; a purchase, redemption, or other acquisition of shares; a distribution of
568 indebtedness; a distribution in liquidation; or otherwise.

569 (19) "Document" means:

570 (a) Any tangible medium on which information is inscribed, and includes any writing
571 or written instrument, or

572 (b) An electronic record.

573 (20) "Domestic," with respect to an entity, means an entity governed as to its internal affairs
574 by the law of this state.

⁶ This definition needs to be added to s. 605.0102 of FRLCA.

575 (21) "Domesticated corporation" means the domesticating corporation as it continues in
576 existence after a domestication.

577 (22) "Domesticating corporation" means the domestic corporation that approves a plan of
578 domestication pursuant to s. 607.11921 or the foreign corporation that approves a domestication
579 pursuant to the organic law of the foreign corporation.

580 (23) "Domestication" means a transaction pursuant to ss. 607.11920 through 607.11924.

581 (24) "Effective date," when referring to a document accepted for filing by the department,
582 means the date and time determined in accordance with s. 607.0123.

583 (25) "Electronic" means relating to technology having electrical, digital, magnetic,
584 wireless, optical, electromagnetic, or similar capabilities.

585 (26) "Electronic record" means information that is stored in an electronic or other medium
586 and is retrievable in paper form through an automated process used in conventional commercial
587 practice, unless otherwise authorized in accordance with s. 607.0141.

588 ~~(27)~~ "Electronic transmission" or "electronically transmitted" means any form or process
589 of communication not directly involving the physical transfer of paper or another tangible medium,
590 which:

591 (a) Is suitable for the retention, retrieval, and reproduction of information by the
592 recipient, and

593 (b) Is retrievable in paper form by the recipient through an automated process used
594 in conventional commercial practice, unless otherwise authorized in accordance with s.
595 607.0141.

596 For purposes of proxy voting in accordance with ss. 607.0721, 607.0722, and 607.0724, the term
597 includes, but is not limited to, telegrams, cablegrams, telephone transmissions, and transmissions
598 through the Internet.

599 (28) "Eligible entity" means:

600 (a) A domestic corporation;

601 (b) A foreign corporation;

602 (c) A non-profit corporation;

603 (d) A general partnership, including a limited liability partnership;

604 (e) A limited partnership, including a limited liability limited partnership;

- 605 (f) A limited liability company;
606 (g) A real estate investment trust; or
607 (h) Any other foreign or domestic entity that is organized under an organic law.

608 "Eligible Entity" does not include:

- 609 (v) An individual;
610 (w) A trust with a predominantly donative purpose or a charitable trust;
611 (x) An association or relationship that is not a partnership solely by reason of s.
612 620.8202(2) or a similar provision of the law of another jurisdiction;
613 (y) A decedent's estate; or
614 (z) A government or a governmental subdivision, agency or instrumentality.

615 "Eligible Entities" means more than one eligible entity.

616 (29) "Eligible interests" means interests or memberships.

617 ~~(4030)~~ "Employee" includes an officer but not a director. A director may accept duties that
618 make him or her also an employee.

619 ~~(4131)~~ "Entity" includes corporation and foreign corporation; unincorporated
620 association; business trust, estate, limited liability company, partnership, trust, and two or more
621 persons having a joint or common economic interest; and state, United States, and foreign
622 governments. Entities means more than one entity.

623 (32) "Expenses" means reasonable expenses of any kind that are incurred in connection
624 with a matter.

625 (33) The phrase "facts objectively ascertainable" outside of a plan or filed document is defined
626 in s. 607.0120(11).

627 (34) "Filing entity" means an entity, other than a limited liability partnership, that is of a type
628 that is created by filing a public organic record or is required to file a public organic record that
629 evidences its creation.

630 (35) "Foreign," with respect to an entity, means an entity governed as to its internal affairs by
631 the organic law of a jurisdiction other than this state.

632 (1236) "Foreign corporation" means an entity a corporation for profit incorporated or
633 organized under laws other than the laws a law other than the law of this state which would be a
634 corporation for profit if incorporated under the law of this state.

635 (37) "Foreign nonprofit corporation" means an entity incorporated or organized under a law
636 other than the law of this state that would be a nonprofit corporation if incorporated under the law
637 of this state.

638 (1338) "Governmental subdivision" includes authority, county, district, and municipality.

639 (39) "Governor" means:

640 (a) A director of a corporation for profit;

641 (b) A director or trustee of a nonprofit corporation;

642 (c) A general partner of a general partnership;

643 (d) A general partner of a limited partnership;

644 (e) A manager of a manager-managed limited liability company;

645 (f) A member of a member-managed limited liability company;

646 (g) A director or a trustee of a real estate investment trust; or

647 (h) Any other person under whose authority the powers of an entity are exercised and
648 under whose direction the activities and affairs of the entity are managed pursuant to the
649 organic law and organic rules of the entity.

650 (1440) "Includes" denotes a partial definition or a non-exclusive list.

651 (1541) "Individual" includes the estate of an incompetent or deceased individual.

652 (1642) "Insolvent" means either:

653 (a) The inability of a corporation to pay its debts as they become due in the usual
654 course of its business, or

655 (b) The value of the corporation's total assets would be less than the sum of its total
656 liabilities.

657 (43) "Interest" means:

658 (a) A share in a corporation for profit;

659 (b) A membership in a nonprofit corporation;

660 (c) A partnership interest in a general partnership, including a limited liability
661 partnership;

662 (d) A partnership interest in a limited partnership, including a limited liability limited
663 partnership;

664 (e) A membership interest in a limited liability company;

665 (f) A share or beneficial interest in a real estate investment trust;

666 (g) A member's interest in a limited cooperative association;

667 (h) A beneficial interest in a statutory trust, business trust, or common law business
668 trust; or

669 (i) A governance interest or distributional interest in another entity.

670 (44) "Interest holder" means:

671 (a) A shareholder of a corporation for profit;

672 (b) A member of a nonprofit corporation;

673 (c) A general partner of a general partnership;

674 (d) A general partner of a limited partnership;

675 (e) A limited partner of a limited partnership;

676 (f) A member of a limited liability company;

677 (g) A shareholder or beneficial owner of a real estate investment trust;

678 (h) A beneficiary or beneficial owner of a statutory trust, business trust, or common
679 law business trust; or

680 (i) Another direct holder of an interest.

681 (45) "Interest holder liability" means:

682 (a) Personal liability for a liability of an entity which is imposed on a person:

683 1. Solely by reason of the status of the person as an interest holder; or

684 2. By the organic rules of the entity which make one or more specified interest
685 holders or categories of interest holders liable in their capacity as interest holders for all
686 or specified liabilities of the entity.

687 (b) An obligation of an interest holder under the organic rules of an entity to contribute
688 to the entity.

689
690 (c) For purposes of this subsection (45), except as otherwise provided in the articles of
691 incorporation of a domestic corporation or the organic law or organic rules of an entity,
692 interest holder liability arises under subsection (a) when the corporation or entity, as
693 applicable, incurs the liability.

694
695 (46) "Jurisdiction of formation" means, with respect to an entity:

696
697 (a) The jurisdiction under whose organic law the entity is formed, incorporated, or created
698 or otherwise comes into being; however, for these purposes, if an entity exists under the law
699 of a jurisdiction different from the jurisdiction under which the entity originally was formed,
700 incorporated, or created or otherwise came into being, then the jurisdiction under which the
701 entity then exists is treated as the jurisdiction of formation; or

702
703 (b) In the case of a limited liability partnership or foreign limited liability partnership, the
704 jurisdiction in which the partnership's statement of qualification or equivalent document is
705 filed.

706
707 ~~(1747)~~ "Mail" means the United States mail, facsimile transmissions, and private mail
708 carriers handling nationwide mail services.

709 ~~(1848)~~ "Means" denotes an exhaustive definition.

710 (49) "Membership" means the rights of a member in a domestic or foreign nonprofit
711 corporation.

712 (50) "Merger" means a transaction pursuant to s. 607.1101.

713 (51) "New interest holder liability" means interest holder liability of a person, resulting from
714 a merger or share exchange that is:

715 (a) In respect of an eligible entity which is different from the eligible entity and not the
716 same eligible entity in which the person held shares or eligible interests immediately before
717 the merger or share exchange became effective; or

718 (b) In respect of the same eligible entity as the one in which the person held shares or
719 eligible interests immediately before the merger or share exchange became effective if:

720 1. The person did not have interest holder liability immediately before the merger
721 or share exchange became effective, or

722 2. The person had interest holder liability immediately before the merger or share
723 exchange became effective, the terms and conditions of which were changed when the
724 merger or share exchange became effective.

725 (52) "Nonprofit corporation" or "domestic nonprofit corporation" means a corporation
726 incorporated under the laws of this state and subject to the provisions of Chapter 617 of the Florida
727 Statutes.

728 (53) "Organic law" means the law of the jurisdiction in which the entity was formed.

729 (54) "Organic rules" means the public organic record and private organic rules of an entity.

730 (55) "Party to a merger" means any domestic or foreign entity that will merge under a plan of
731 merger, but does not include a survivor created by the merger.

732
733 ~~(1956)~~ "Person" includes an individual and an entity.

734 ~~(2057)~~ "Principal office" means the office (in or out of this state) where the principal
735 executive offices of a domestic or foreign corporation are located as designated in the articles of
736 incorporation or other initial filing until an annual report has been filed, and thereafter as
737 designated in the annual report.

738 (58) "Private organic rules" means the rules, whether or not in a record, which govern the
739 internal affairs of an entity, are binding on all its interest holders, and are not part of its public
740 organic record, if any. Where private organic rules have been amended or restated, the term means
741 the private organic rules as last amended or restated. The term includes:

742
743 (a) The bylaws of a corporation for profit;

744
745 (b) The bylaws of a nonprofit corporation;

746
747 (c) The partnership agreement of a general partnership;

748
749 (d) The partnership agreement of a limited partnership;

750
751 (e) The operating agreement, limited liability company agreement or similar agreement⁷
752 of a limited liability company;

753
754 (f) The bylaws, trust instrument, or similar rules of a real estate investment trust; and
755

⁷ This language should be added to the corollary language in Chapter 605.

756 (g) The trust instrument of a statutory trust or similar rules of a business trust or common
757 law business trust.

758
759 ~~(2159)~~ "Proceeding" includes a civil suit, a criminal action, an administrative action, and an
760 investigatory action.

761
762 (60) "Protected agreement" means:

763
764 (a) A record evidencing indebtedness and any related agreement in effect on
765 _____ , 20__ ;

766
767 (b) An agreement that is binding on an entity on _____ , 20__ ;

768
769 (c) The organic rules of an entity in effect on _____ 20__ ; or

770
771 (d) An agreement that is binding on any of the governors or interest holders of an entity
772 on _____ , 20__ .⁸

773
774 (61) "Public organic record" means a record, the filing of which by a governmental body is
775 required to form an entity, and an amendment to or restatement of that record. Where a public
776 organic record has been amended or restated, the term means the public organic record as last
777 amended or restated. The term includes the following:

778
779 (a) The articles of incorporation of a corporation for profit;

780
781 (b) The articles of incorporation of a nonprofit corporation;

782
783 (c) The certificate of limited partnership of a limited partnership;

784
785 (d) The articles of organization, certificate of organization, or certificate of formation of
786 a limited liability company;

787
788 (e) The articles of incorporation of a general cooperative association or a limited
789 cooperative association;

790
791 (f) The certificate of trust of a statutory trust or similar record of a business trust; or

792
793 (g) The articles of incorporation of a real estate investment trust.

794

⁸ In all cases, the date to be inserted will be the effective date of the new act.

795 (62) "Record," if used as a noun, means information that is inscribed on a tangible
796 medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

797 ~~(2263)~~ "Record date" means the date fixed for determining on which a corporation
798 determines the identity of the corporation's its shareholders and their share holdings for purposes
799 of this act chapter. Unless another time is specified when the record date is fixed, the The
800 determination shall be made as of the close of the business at the principal office of the corporation
801 on the date so on the record date unless another time is fixed.

802 (64) "Record shareholder" means:

803 (a) The person in whose name shares are registered in the records of the corporation; or

804 (b) The person identified as a beneficial owner of shares in the beneficial ownership
805 certificate pursuant to s. 607.0723 on file with the corporation to the extent of the rights
806 granted by such certificate.

807 ~~(2365)~~ "Secretary" means the corporate officer to whom the board of directors has delegated
808 responsibility under s. 607.08401 to maintain for custody of the minutes of the meetings of the
809 board of directors and of the shareholders and for authenticating records of the corporation.

810 (66) "Secretary of State" means the Secretary of State of the State of Florida.

811 ~~(2467)~~ "Shareholder" or "stockholder" means a record shareholder one who is a holder of
812 record of shares in a corporation or the beneficial owner of shares to the extent of the rights granted
813 by a nominee certificate on file with a corporation. If used in this chapter, the term "stockholder"
814 means a "shareholder."

815 ~~(2568)~~ "Shares" means the units into which the proprietary interests in a corporation are
816 divided.

817 (69) "Share exchange" means a transaction pursuant to s. 607.1102.

818 ~~(2670)~~ "Sign" or "signature" means, with present intent to authenticate or adopt a document:

819 (a) To execute or adopt a tangible symbol to a document, and includes any manual,
820 facsimile, or conformed signature; or

821 (b) To attach or to logically associate with an electronic transmission an electronic sound,
822 symbol, or process, and includes an electronic signature in an electronic transmission any
823 symbol, manual, facsimile, conformed, or electronic signature adopted by a person with the
824 intent to authenticate a document.

825 ~~(2771)~~ "State," when referring to a part of the United States, includes a state and
826 commonwealth (and their agencies and governmental subdivisions) and a territory and insular
827 possession (and their agencies and governmental subdivisions) of the United States.

828 ~~(2872)~~ "Subscriber" means a person who subscribes for shares in a corporation, whether
829 before or after incorporation.

830 (73) "Survivor" in a merger means the domestic or foreign eligible entity into which one or
831 more other eligible entities are merged.

832 ~~(2974)~~ "Treasury shares" means shares of a corporation that belong to the corporation,
833 which shares are authorized and issued shares that are not outstanding, are not canceled, and have
834 not been restored to the status of authorized but unissued shares.

835 (75) "Type of entity" means a generic form of entity:

836 (a) Recognized at common law; or

837 (b) Formed under an organic law, regardless of whether some entities formed under
838 that organic law are subject to provisions of that law that create different categories of the
839 form of entity.

840 ~~(3076)~~ "United States" includes district, authority, bureau, commission, department, and any
841 other agency of the United States.

842 (77) "Unrestricted voting trust beneficial owner" means, with respect to any shareholder
843 rights, a voting trust beneficial owner whose entitlement to exercise the shareholder right in
844 question is not inconsistent with the voting trust agreement.

845 ~~(3178)~~ "Voting group" means all shares of one or more classes or series that under the
846 articles of incorporation or this ~~act~~ chapter are entitled to vote and be counted together collectively
847 on a matter at the meeting of shareholders. All shares entitled by the articles of incorporation or
848 this ~~act~~ chapter to vote generally on the matter are for that purpose a single voting group.

849 (79) "Voting trust beneficial owner" means an owner of a beneficial interest in shares of
850 the corporation held in a voting trust established pursuant to s. 607.0730(1).

851 (80) "Writing" or "written" means any information in the form of a document.

852

853 **Commentary to Section 607.01401:**

854 The changes above reflect numerous changes that have been made in the Model Act since the last
855 revisions to this section in Florida.

856 The definitions in subsections (19), (25), (26) and (62) were added and the definitions in
857 subsections (15), (19), and (70) [new subsection numbering] relate to 2010 changes to the Model
858 Act to facilitate electronic transmission and e-signatures. Corresponding changes have been made
859 to Section 607.0120 and 607.0141.

860 The definition of "expenses" in subsection (32) adds a global definition of "expenses" for purposes
861 of the provisions in Articles 7, 8, 13, 14, and 16.

862 The definition of eligible entity (s. 607.01401(28)) is derived from the definition of entity in s.
863 605.0102(23) of FRLUCA. The definition of eligible entity also excludes certain categories of
864 persons and entities, based on what is in the corollary section of FRLUCA. For reference, s.
865 620.8202(3) deals with sharing of profits from a business where the profits are received in payment
866 (i) of a debt by installments or otherwise, (ii) for services as an independent contractor or of wages
867 or other compensation to an employee, (iii) of rent, (iv) of an annuity or other retirement benefit
868 to a beneficiary, representative, or designee of a deceased or retired partner, (v) of interest or other
869 charges on a loan, even if the amount of payment varies with the profits of the business, or (vi) for
870 the sale of the goodwill of a business or other property by installments or otherwise.

871 The Model Act and the existing statute include governmental entities as entities. Section
872 605.0102(23) of FRLUCA considers them non-entities. This statute following the definition in
873 FRLUCA and excludes governmental entities from the definition of eligible entity.

874 The definition of "applicable county" (s. 607.01401(1)) has been added to make clear where
875 actions can be brought by a corporation or against a corporation under certain circumstances.

876 The definition of "insolvent in subsection (42) has been modified to add a balance sheet test to
877 the definition. This makes the definition consistent with s. 607.06401 and s. 736.103 (Florida's
878 fraudulent transfer law).

879 A definition of "authorized entity" has been added to clarify that types of entities that may act as
880 the registered agent for a Florida corporation or for a foreign corporation authorized to transact
881 business in Florida.

882 The following definitions are derived from FRLUCA:

- 883 • The term "governor" is derived from s. 605.0102(28).
- 884 • The term "interest" is derived from s. 605.0102(29).
- 885 • The term "interest holder" is derived from s. 605.0102(32)

- 886 • The term "interest holder liability" is derived from s. 605.0102(32).
- 887 • The term "jurisdiction of formation" is derived from s. 605.0102(34).
- 888 • The term "organic law" is derived from s. 605.0102(46).
- 889 • The term "organic rules" is derived from s. 605.0102(47).
- 890 • The term "private organic rules" is derived from s. 605.0102(55).
- 891 • The term "protected agreement" is derived from s. 605.0102(57).
- 892 • The term "public organic record" is derived from 605.0102(58).
- 893 • The term "type of entity" is derived from s. 605.0102(68).

894 The following definitions are derived from s. 11.01 of the Model Act: (i) subsection (1) –
895 acquired entity; subsection (2) – acquiring entity; (iii) subsection (51) – new interest holder
896 liability; (iv) subsection (55) – party to a merger; and (iv) subsection (73) – survivor.

897 The following definitions are derived from s. 9.01 of the Model Act: (i) subsection (10) –
898 conversion; (ii) subsection (11) – converted entity; (iii) subsection (12) – converting entity; (iv)
899 subsection (20) – domestic; (v) subsection (21) – domesticated corporation; (vi) subsection (22)
900 – domesticating corporation; and (vii) subsection (23) – domestication.

901

902 607.0141 Notices and other communications.

903 (1) (a) Notice under this chapter ~~aet~~ must be in writing, unless oral notice is:

904 1. Expressly authorized by the articles of incorporation or the bylaws, and

905 2. Reasonable under the circumstances.

906 (b) Unless otherwise agreed between the sender and the recipient, words in a notice or
907 other communication under this chapter must be in English.

908 (c) Notice by electronic transmission is written notice.

909 (2) A notice or other communication may be given by any method of delivery including
910 voice mail (where oral notice is permitted), except that electronic transmissions must be in
911 accordance with this section. ~~Notice may be communicated in person; by telephone, voice mail~~
912 (~~where oral notice is permitted~~), or other electronic means; or by mail or other method of delivery.

913 (3) (a) Written notice by a domestic or foreign corporation authorized to transact
914 business in this state to its shareholder, if in a comprehensible form, is effective:

915 1. Upon deposit into the United States mail, if mailed postpaid and correctly
916 addressed to the shareholder's address shown in the corporation's current record of
917 shareholders; or

918 2. When electronically transmitted to the shareholder in a manner authorized
919 by the shareholder.

920 (b) Unless otherwise provided in the articles of incorporation or bylaws, and
921 without limiting the manner by which notice otherwise may be given effectively to
922 shareholders, any notice to shareholders given by the corporation under any provision of
923 this chapter, the articles of incorporation, or the bylaws shall be effective if given by a
924 single written notice to shareholders who share an address if consented to by the
925 shareholders at that address to whom such notice is given. Any such consent shall be
926 revocable by a shareholder by written notice to the corporation, and if a written notice of
927 revocation is delivered to the corporation, the corporation shall begin providing
928 individual notices, reports and other statements to the revoking shareholder no later than
929 30 days after delivery of the written notice of revocation.

930 (c) Any shareholder who fails to object in writing to the corporation, within 60 days
931 after having been given written notice by the corporation of its intention to send the single
932 notice permitted under paragraph (b), shall be deemed to have consented to receiving
933 such single written notice.

934 ~~(d) This subsection shall not apply to s. 607.0620, s. 607.1402, or s. 607.1404.~~

935 (4) Written notice to a domestic corporation or to a foreign corporation authorized to
936 transact business in this state may be addressed:

937 (a) To its registered agent at its registered office; or

938 (b) To the corporation or its secretary at the corporation's ~~its~~ principal office or
939 electronic mail address as authorized and shown in its most recent annual report or, in the
940 case of a corporation that has not yet delivered an annual report, in a domestic
941 corporation's articles of incorporation or in a foreign corporation's application for
942 certificate of authority.

943 (5) Except as provided in subsection (3) or elsewhere in this ~~act~~ chapter, written notice, if
944 in a comprehensible form, is effective at the earliest date of the following:

945 (a) When received;

946 (b) Five days after its deposit in the United States mail, if mailed postpaid and
947 correctly addressed; or

948 (c) On the date shown on the return receipt, if sent by registered or certified mail,
949 return receipt requested, and the receipt is signed by or on behalf of the addressee; or

950 (d) When it enters an information processing system that the recipient has
951 designated or uses for the purposes of receiving electronic transmissions or information
952 of the type sent, and from which the recipient is able to retrieve the electronic
953 transmission, and it is in a form capable of being processed by that system.

954 ~~(6) Oral notice is effective when communicated if communicated directly to the person to~~
955 ~~be notified in a comprehensible manner. Except with respect to notice to directors by the~~
956 ~~corporation, notice or other communications may be delivered by electronic transmission if~~
957 ~~consented to by the recipient or if authorized by subsection (7). Notice or other communication to~~
958 ~~directors by the corporation may be delivered by electronic transmission if consented to by the~~
959 ~~recipient director; however, if the articles or bylaws require or authorize electronic transmission~~
960 ~~of notice or other communication to a director by the corporation, then no consent by the director~~
961 ~~recipient shall be required for the corporation to deliver notice or other communications to the~~
962 ~~director by electronic transmission.~~

963 (7) A notice or other communication may be in the form of an electronic transmission that
964 cannot be directly reproduced in paper form by the recipient through an automated process used
965 in conventional commercial practice only if (a) the electronic transmission is otherwise retrievable
966 in perceivable form, and (b) the sender and the recipient have consented in writing to the use of
967 such form of electronic transmission.

968 (8) Any consent under subsection (7) may be revoked by the person who consented by written
969 or electronic notice to the person to whom the consent was delivered. Any such consent is deemed
970 revoked if (1) the corporation is unable to deliver two consecutive electronic transmissions given
971 by the corporation in accordance with such consent, and (2) such inability becomes known to the
972 secretary or assistant secretary of the corporation or to the transfer agent, or other person
973 responsible for the giving of notice or other communications; provided, however, that the
974 inadvertent failure to treat such inability as a revocation shall not invalidate any meeting or other
975 action.

976 (9) Receipt of an electronic acknowledgement from an information processing system
977 described in subsection (5)(d) establishes that an electronic transmission was received, but, by
978 itself, does not establish that the content sent corresponds to the content received.

979 (10) An electronic transmission is received under this section even if no person is aware of its
980 receipt.

981 (11) Notice or other communication, if in a comprehensible form or manner, is effective at
982 the earliest of the following:

983 (a) Oral notice is effective when communicated if communicated directly to the
984 person to be notified in a comprehensive manner; or

985 (b) If an electronic transmission, when it is received as provided in subsection
986 (5)(d);

987 ~~(7)~~ (12) If this ~~act~~ chapter prescribes requirements for notices ~~notice requirements~~ or other
988 communications ~~for~~ in particular circumstances, those requirements govern. If articles of
989 incorporation or bylaws prescribe requirements for notices or other communications not less
990 stringent than the requirements of this section or other provisions of this chapter ~~act~~, those
991 requirements govern. The articles of incorporation or bylaws may authorize or require delivery of
992 notices of meetings of directors by electronic transmission.

993 (13) In the event that any provisions of this chapter are deemed to modify, limit, or supersede
994 the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001 et seq.,
995 the provisions of this chapter shall control to the maximum extent permitted by section 102(a)(2) of
996 that federal act.

997 **Commentary to Section 607.0141:**

998 This adopts most of the changes made in the notice requirements in s. 1.41 of the Model Act,
999 although it moves the subsections around in a fashion consistent with the proposal by the
1000 committee that reviewed Article 1 in 2011. These changes to the Model Act were initially
1001 published in 2009 and were formally adopted in 2010. The Committee on Corporate Laws of the
1002 ABA Section of Business Law stated that these changes were made to incorporate terms from the
1003 Uniform Electronic Transmissions Act and the Electronic Signatures in Global and National
1004 Commerce Act (or the E-Sign act) into the Model Act. With the heavy growth of electronic
1005 transmission (and a corresponding decline in mailed correspondence), a corresponding
1006 modernization of the Florida Act is believed necessary.

1007 The language in s. 1.41(b) of the Model Act, which allows notice to be given by means of a broad
1008 non-exclusionary distribution to the public if the methods of delivery approved in this section are
1009 impracticable, has not been adopted.

1010 Subsection (6) adds a clarification that if the articles or bylaws provide for notice or other
1011 communications to directors by electronic transmission, then no consent of the recipient director
1012 shall be required for the corporation to provide notice or other communication to the recipient
1013 director by electronic transmission.

1014 The Model Act provision dealing with the topic of householding provisions is s. 1.44.
1015 Householding provisions were added to subsection (3) of the FBCA in 2003. Since the language
1016 in the current version of the FBCA is similar to the language in s. 1.44 of the Model Act, this
1017 statute continues to include the householding provisions in s. 607.0141(3). The statute includes a
1018 modification from the current version of s. 1.44 of the Model Act providing that if a shareholder
1019 revokes its consent to householding, the corporation must begin sending notices to the revoking
1020 shareholder not later than 30 days after delivery of the revocation notice.

1021 Subsection (13) mirrors s. 1.41(i) of the Model Act. It implements E-Sign section 7002(a)(2),
1022 which exempts from the federal preemption provisions of E-Sign certain state laws that modify,
1023 limit or supersede E-Sign, and that also make specific reference to E-Sign.

1024

1025 Model Act s. 1.42 Number of Shareholders.

1026 Section 1.42 of the Model Act (Number of shareholders) has not been added to the FBCA.

1027 Commentary on the 1989 proposal stated that this section of the Model Act was not proposed

1028 because the subject matter was treated elsewhere in the FBCA.

1029

1030 § 607.0143 Qualified director.

1031 (1) A "qualified director" is a director who, at the time action is to be taken under:

1032 (a) s. 607.0744, does not have (i) a material interest in the outcome of the proceeding,
1033 or (ii) a material relationship with a person who has such an interest.

1034 (b) s. 607.0832, is not a director (i) as to whom the transaction is a director's conflict of
1035 interest transaction, or (ii) who has a material relationship with another director as to whom the
1036 transaction is a director's conflict of interest transaction; or

1037 (c) ss. 607.0853 or 607.0855, (i) is not a party to the proceeding, (ii) is not a director as
1038 to whom a transaction is a director's conflict of interest transaction, which transaction is
1039 challenged in the proceeding, and (iii) does not have a material relationship with a director
1040 who is disqualified by virtue of not meeting the requirements of either clause (i) or clause (ii)
1041 of this subsection (1)(c).

1042 (2) For purposes of this section:

1043 (a) "Material relationship" means a familial, financial, professional, employment or other
1044 relationship that would reasonably be expected to impair the objectivity of the director's
1045 judgment when participating in the action to be taken; and

1046 (b) "Material interest" means an actual or potential benefit or detriment (other than one
1047 which would devolve on the corporation or the shareholders generally) that would reasonably
1048 be expected to impair the objectivity of the director's judgment when participating in the
1049 action to be taken.

1050 (3) The presence of one or more of the following circumstances shall not automatically
1051 prevent a director from being a qualified director:

1052 (a) Nomination or election of the director to the current board by any director who is not
1053 a qualified director with respect to the matter (or by any person that has a material relationship
1054 with that director), acting alone or participating with others;

1055 (b) Service as a director of another corporation of which a director who is not a qualified
1056 director with respect to the matter (or any individual who has a material relationship with that
1057 director), is or was also a director; or

1058 (c) With respect to action to be taken under s. 607.0744, status as a named defendant, as
1059 a director against whom action is demanded, or as a director who approved the conduct being
1060 challenged.

1061 **Commentary to Section 607.0143:**

1062 This section is based on the definition contained in s. 1.43 of the Model Act. The term "qualified
1063 director" is used in the derivative action provisions of Article 7, and the director conflict of interest
1064 and indemnification provisions contained in Article 8.

1065 This definition is used in these statutes to make clear that only truly independent directors are
1066 making the decisions called for under those statutes.

1067

1068 Model Act s. 1.44 Householding.

1069

1070 Householding was added to the FBCA (in s. 607.0141(3)) in 2003. Section 607.0141(3) uses

1071 language very similar to the Model Act provision on this topic.

1072

1073 Subchapter E (Model Act ss. 1.45 – 1.52).
1074

1075 Subchapter E of the Model Act covers the topic of ratification of defective corporate acts. These
1076 provisions provide non-exclusive mechanisms to ratify defective corporate acts, which are
1077 corporate actions purportedly taken that were, at the respective times the actions were taken, within
1078 the power of the corporation, but were void or voidable due to a failure of authorization or
1079 constituted an overissue (a purported issuance of shares in excess of the number of shares of a
1080 class or series that the corporation has the power to issue at the time of such issuance or shares of
1081 any class or series that were not then authorized for issuance under the articles of incorporation).
1082 These Model Act provisions were published late last year in *The Business Lawyer* and, to the
1083 knowledge of the Subcommittee, these provisions have not yet been adopted into the corporate
1084 statute of any other state. The corollary provisions of the Delaware General Corporation Law (the
1085 "DGCL"), which are contained in ss. 204 and 205 of the DGCL, have been in place for several
1086 years, but continue to be the subject of debate and proposed modification in Delaware as the
1087 mechanics of using these provisions are tested.

1088 While the Subcommittee believes that this topic should be considered for addition in the FBCA at
1089 a future time, a decision has been made to defer consideration of these provisions to allow the law
1090 on this topic (both in Delaware and in other Model Act states) to further develop before provisions
1091 addressing this topic are considered for adoption in the FBCA. Any provisions addressing this
1092 topic will be considered either (i) later in the process of finalizing this statute, or (ii) at some future
1093 time as a legislative initiative separate from this proposal.

1094

ARTICLE 2

INCORPORATION

1095

1096

1097

1098 607.0201 Incorporators.

1099 One or more persons may act as the incorporator or incorporators of a corporation by
1100 delivering articles of incorporation to the ~~D~~epartment of ~~S~~tate for filing.

1101

1102 **Commentary to Section 607.0201:**

1103 No substantive changes have been made.

1104

1105

- 1106 607.0202 Articles of incorporation; content.
- 1107 (1) The articles of incorporation must set forth:
- 1108 (a) A corporate name for the corporation that satisfies the requirements of s.
1109 607.0401;
- 1110 (b) The street address of the initial principal office and, if different, the mailing
1111 address of the corporation;
- 1112 (c) The number of shares the corporation is authorized to issue;
- 1113 (d) ~~If any preemptive rights are to be granted to shareholders, the provision therefor;~~
- 1114 ~~(e) The street address of the corporation's initial registered office and the name of~~
1115 ~~its initial registered agent at that office together with a written acceptance as required in~~
1116 ~~s. 607.0501(3); and~~
- 1117 (f) The name and address of each incorporator.
- 1118 (2) The articles of incorporation may set forth:
- 1119 (a) The names and addresses of the individuals who are to serve as the initial
1120 directors;
- 1121 (b) Provisions not inconsistent with law regarding:
- 1122 1. The purpose or purposes for which the corporation is organized;
- 1123 2. Managing the business and regulating the affairs of the corporation;
- 1124 3. Defining, limiting, and regulating the powers of the corporation and its
1125 board of directors and shareholders;
- 1126 4. A par value for authorized shares or classes of shares;
- 1127 5. The imposition of personal liability on shareholders for the debts of the
1128 corporation to a specified extent and upon specified conditions; and
- 1129 6. Exclusive forum provisions, to the extent permitted by s. 607.0208.
- 1130 (c) If any preemptive rights are to be granted to shareholders, the provision therefor.
- 1131
- 1132 (d) Any provision that under this chapter~~act~~ is required or permitted to be set forth
1133 in the bylaws.

1134 (3) The articles of incorporation need not set forth any of the corporate powers enumerated
1135 in this chapter aet.

1136 (4) Provisions of the articles of incorporation may be made dependent upon facts objectively
1137 ascertainable outside the articles of incorporation in accordance with s. 607.0120(11).

1138 (5) The articles of incorporation may not contain any provision that would impose liability
1139 on a shareholder for the attorneys' fees or expenses of the corporation or any other party in
1140 connection with an internal corporate claim, as defined in s. 607.0208(4) of this chapter.

1141

1142 **Commentary to Section 607.0202:**

1143 Cleanup changes have been made to subsections (1) and (2). New subsection (2)(b)6. expressly
1144 authorizes articles of incorporation that allow exclusive forum provisions to the extent permitted by
1145 s. 607.0208. Although the Subcommittee believes that this provision would already be permissible
1146 under the catch-all language in subsection (2)(d), a cross reference was added to confirm that such
1147 provisions are permissible under this section.

1148 New subsection (4) makes clear that articles of incorporation may be made dependent upon facts
1149 objectively ascertainable outside the articles of incorporation in accordance with s. 607.0120(11).

1150 New subsection (5) prohibits the inclusion in articles of incorporation of provisions that purport to
1151 impose liability upon a shareholder for the attorneys' fees or expenses of the corporation or any
1152 other party in connection with an internal corporate claim, as defined in new section 607.0208(4).
1153 A similar provision has been added as new subsection (5) in s. 607.0206.

1154 Similar provisions were recently added to the DGCL following the decision of the Delaware
1155 Supreme Court in *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014), in which
1156 the Delaware Supreme Court upheld as facially valid a bylaw imposing liability for certain legal
1157 fees of the nonstock corporation on certain members who participated in the litigation. As a policy
1158 matter, the Subcommittee does not believe that such provisions are appropriate if unilaterally
1159 placed in articles or bylaws.

1160 At the same time, a new subsection has been added to subsection (1) of s. 607.0732 to make clear
1161 that this new subsection of s. 607.0202 is not intended to prevent the application of such fee
1162 shifting provisions pursuant to an agreement that is entered into in compliance with s. 607.0732.

1163

1164 607.0203 Incorporation.

1165 (1) Unless a delayed effective date is specified, the corporate existence begins when the
1166 articles of incorporation are filed or on a date specified in the articles of incorporation, if such date
1167 is within 5 business days prior to the date of filing.

1168 (2) The ~~D~~department's ~~of State's~~ filing of the articles of incorporation is conclusive proof
1169 that the incorporators satisfied all conditions precedent to incorporation except in a proceeding by
1170 the state to cancel or revoke the incorporation or ~~involuntarily~~ administratively dissolve the
1171 corporation.

1172

1173 **Commentary to Section 607.0203:**

1174 No substantive changes have been made.

1175

1176 607.0204 Liability for preincorporation transactions.

1177 All persons purporting to act as or on behalf of a corporation, ~~having actual knowledge~~
1178 knowing that there was no incorporation under this chapter, are jointly and severally liable for all
1179 liabilities created while so acting ~~except for any liability to any person who also had actual~~
1180 ~~knowledge that there was no incorporation.~~

1181

1182 **Commentary to Section 607.0204:**

1183 Revisions are based on language changes in the current version of s. 2.04 of the Model Act.

1184

1185 607.0205 Organizational meeting of directors.

1186 (1) After incorporation:

1187 (a) If initial directors are named in the articles of incorporation, the initial directors shall
1188 hold an organizational meeting, at the call of a majority of the directors, to complete the
1189 organization of the corporation by appointing officers, adopting bylaws, and carrying on any
1190 other business brought before the meeting;

1191 (b) If initial directors are not named in the articles of incorporation, the incorporators
1192 shall hold an organizational meeting at the call of a majority of the incorporators:

1193 1. To elect directors and complete the organization of the corporation; or

1194 2. To elect a board of directors who shall complete the organization of the
1195 corporation.

1196 (2) Action required or permitted by this chapter ~~act~~ to be taken by incorporators or directors
1197 at an organizational meeting may be taken without a meeting if the action taken is evidenced by
1198 one or more written consents describing the action taken and signed by each incorporator or
1199 director.

1200 (3) The directors or incorporators calling the organizational meeting shall give at least ~~3~~ 2
1201 days' notice thereof to each director or incorporator so named, stating the time and place of the
1202 meeting.

1203 (4) An organizational meeting may be held in or out of this state.

1204

1205 **Commentary to Section 607.0205:**

1206 Subsection (3) is changed to specify 2 days' notice rather than 3 days' notice, to be consistent with
1207 s. 607.0822(2) of the FBCA and s. 108 of the DGCL.

1208

1209 607.0206 Bylaws.

1210 (1) The incorporators or board of directors of a corporation shall adopt initial bylaws for the
1211 corporation unless that power is reserved to the shareholders by the articles of incorporation.

1212 (2) The bylaws of a corporation may contain any provision ~~for managing the business and~~
1213 ~~regulating the affairs of the corporation~~ that is not inconsistent with law or the articles of
1214 incorporation, including the provisions described in subsections (3) and (4) below.

1215 (3) The bylaws of a corporation may contain one or both of the following provisions:

1216 (a) A requirement that if the corporation solicits proxies or consents with respect to an
1217 election of directors, the corporation include in its proxy statement and any form of its proxy
1218 or consent, to the extent and subject to such procedures or conditions as are provided in the
1219 bylaws, one or more individuals nominated by a shareholder in addition to individuals
1220 nominated by the board of directors; and

1221 (b) A requirement that the corporation reimburse the expenses incurred by a shareholder in
1222 soliciting proxies or consents in connection with an election of directors, to the extent and subject
1223 to such procedures and conditions as are provided in the bylaws, provided that no bylaw so
1224 adopted shall apply to elections for which any record date precedes its adoption.

1225 (4) The bylaws of a corporation may contain exclusive forum provisions to the extent
1226 permitted by s. 607.0208.

1227 (5) Notwithstanding s. 607.1020(1)(b), the shareholders in amending, repealing, or adopting
1228 a bylaw described in subsection (3) may not limit the authority of the board of directors to amend
1229 or repeal any condition or procedure set forth in or to add any procedure or condition to such a
1230 bylaw to provide for a reasonable, practical, and orderly process.

1231 (6) The bylaws may not contain any provision that would impose liability on a shareholder
1232 for the attorneys' fees or expenses of the corporation or any other party in connection with an
1233 internal corporate claim, as defined in s. 607.0208(4) of this chapter.

1234

1235 **Commentary to Section 607.0206:**

1236 The change to subsection (2) is to bring Chapter 607 into line with the Model Act. The Committee
1237 believes that the existing language in subsection (2) is intended to mean the same as the current
1238 language in the Model Act, allowing broad latitude as to what type of provisions can be contained
1239 in a corporation's bylaws. This includes, for example, the ability to include an exclusive forum
1240 bylaw provision. The change is designed to bring the language in the Florida statute into line with
1241 the Model Act and thus avoid any potential of claim that the words "for managing the business
1242 and regulating the affairs of the corporation" were intended to be limiting. For completeness, a
1243 cross reference to subsections (3) and (4) has been added to this subsection.

1244 New subsection (3) expressly authorizes bylaws that require the corporation to include individuals
1245 nominated by shareholders for election as directors in its proxy statement and proxy cards (or
1246 consents) and that require the reimbursement by the corporation of expenses incurred by a
1247 shareholder in soliciting proxies (or consents) in an election of directors, in each case subject to such
1248 procedures or conditions as may be provided in the bylaws. Although the Subcommittee believes
1249 that this provision would already be permissible under subsection (2), because this provision is
1250 expressly in the DGCL and in the Model Act, the decision was made to add these confirming
1251 subsections to the FBCA.

1252 For completeness, new subsection (4) has been added to cross reference s. 607.0208 into this
1253 provision, which expressly authorizes bylaws that allow exclusive forum provisions to the extent
1254 permitted by that section.

1255 New subsection (6) prohibits the inclusion in bylaws of any provision that purports to impose
1256 liability upon a shareholder for the attorneys' fees or expenses of the corporation or any other party
1257 in connection with an internal corporate claim, as defined in new section 607.0208(4). A similar
1258 provision has been added as new subsection (5) in s. 607.0202.

1259

1260 607.0207 Emergency bylaws.

1261 (1) Unless the articles of incorporation provide otherwise, the board of directors ~~of a~~
1262 ~~corporation~~ may adopt bylaws to be effective only in an emergency defined in subsection (5). The
1263 emergency bylaws, which are subject to amendment or repeal by the shareholders, may make all
1264 provisions necessary for managing the corporation during an emergency, including:

1265 (a) Procedures for calling a meeting of the board of directors;

1266 (b) Quorum requirements for the meeting; and

1267 (c) Designation of additional or substitute directors.

1268 (2) The board of directors, either before or during any such emergency, may provide, and
1269 from time to time modify, lines of succession in the event that during such emergency any or all
1270 officers or agents of the corporation are for any reason rendered incapable of discharging their
1271 duties.

1272 (3) All provisions of the regular bylaws not inconsistent with the emergency bylaws remain
1273 effective during the emergency. The emergency bylaws are not effective after the emergency ends.

1274 (4) Corporate action taken in good faith in accordance with the emergency bylaws:

1275 (a) Binds the corporation; and

1276 (b) May not be used to impose liability on a ~~corporate~~ director, officer, employee, or
1277 agent of the corporation.

1278 (5) An emergency exists for purposes of this section if a quorum of the ~~corporation's~~ board
1279 of directors cannot readily be assembled because of some catastrophic event.

1280

1281 **Commentary to Section 607.0207:**

1282 No substantive changes have been made.

1283

1284 607.0208 Forum selection provisions.

1285 (1) The articles of incorporation or the bylaws may require that any or all internal corporate
1286 claims shall be brought exclusively in any specified court or courts of this state and, if so specified,
1287 in any additional courts in this state or in any other jurisdictions with which the corporation has a
1288 reasonable relationship.

1289 (2) A provision of the articles of incorporation or bylaws adopted under subsection (1) shall
1290 not have the effect of conferring jurisdiction on any court or over any person or claim, and shall
1291 not apply if none of the courts specified by such provision has the requisite personal and subject
1292 matter jurisdiction. If the court or courts in this state specified in a provision adopted under
1293 subsection (1) do not have the requisite personal and subject matter jurisdiction and another court
1294 in this state does have such jurisdiction, then the internal corporate claim may be brought in such
1295 other court in this state, notwithstanding that such other court in this state is not specified in such
1296 provision, and in any other court specified in such provision that has the requisite jurisdiction.

1297 (3) No provision of the articles of incorporation or the bylaws may prohibit bringing an
1298 internal corporate claim in all courts in this state or require such claims to be determined by
1299 arbitration.

1300 (4) "Internal corporate claim" means, for the purposes of this section:

1301 (a) any claim that is based upon a violation of a duty under the laws of this state by a
1302 current or former director, officer, or shareholder in such capacity;

1303 (b) any derivative action or proceeding brought on behalf of the corporation;

1304 (c) any action asserting a claim arising pursuant to any provision of this chapter or the
1305 articles of incorporation or bylaws; or

1306 (d) any action asserting a claim governed by the internal affairs doctrine that is not
1307 included in subsections (a)-(c) above.

1308

1309 **Commentary to Section 607.0208:**

1310 New s. 607.0208 largely follows s. 2.08 of the Model Act. It authorizes a provision in either the
1311 articles of incorporation or the bylaws creating exclusive jurisdiction for internal corporate
1312 claims. Under section 607.0208(1), the provision to be valid must include all of the courts in this
1313 state or any specified court or courts of this state. The provision may also, but is not required to,
1314 include additional courts within this state (including federal courts) or in one or more additional
1315 jurisdictions with a reasonable relationship to the corporation.

1316 Although the Subcommittee believes that this type of provision is already permissible under existing
1317 s. 607.0206, because this provision is expressly set forth in the DGCL and in the Model Act, the
1318 decision was made to add this confirming section to the FBCA for clarity.

1319

1320 ARTICLE 3

1321 PURPOSES AND POWERS

1322

1323 607.0301 Purposes and application.

1324 ~~Corporations may be organized under this act for any lawful purpose or purposes,~~

1325 (1) Every corporation incorporated under this chapter has the purpose of engaging in any
1326 lawful business unless a more limited purpose is set forth in the articles of incorporation.

1327 (2) A corporation engaging in a business that is subject to regulation under another statute of
1328 this state may incorporate under this chapter only if permitted by, and subject to all limitations of,
1329 the other statute.

1330 (3) ~~and~~ The provisions of this chapter ~~act~~ extend to all corporations, whether chartered by
1331 special acts or general laws, except that special statutes for the regulation and control of types of
1332 business and corporations shall control when in conflict herewith.

1333

1334 **Commentary to Section 607.0301:**

1335 Although Florida's existing statute was very similar to the Model Act, it used different wording.
1336 Because the wording of the Model Act seemed clearer and more organized than the existing Florida
1337 statute, the existing language was replaced by the Model Act language in subsections (1) and (2).
1338 However, because the existing statute included language to the effect that Chapter 607 applied to
1339 corporations chartered by both special acts and general law, a decision was made to retain such
1340 language as subsection (3) to avoid an implication that such was not the case, even though there is
1341 possibly some overlap of coverage between subsections (2) and (3).

1342 607.0302 General powers.

1343 Unless its articles of incorporation provide otherwise, every corporation has perpetual
1344 duration and succession in its corporate name and has the same powers as an individual to do all
1345 things necessary or convenient to carry out its business and affairs, including ~~without limitation~~
1346 power:

1347 (1) To sue and be sued, complain, and defend in its corporate name;

1348 (2) To have a corporate seal, which may be altered at will and to use it or a facsimile of it,
1349 by impressing or affixing it or in any other manner reproducing it;

1350 (3) To purchase, receive, lease, or otherwise acquire, and own, hold, improve, use, and
1351 otherwise deal with real or personal property or any legal or equitable interest in property wherever
1352 located;

1353 (4) To sell, convey, mortgage, pledge, create a security interest in, lease, exchange, and
1354 otherwise dispose of all or any part of its property;

1355 (5) To lend money to, and use its credit to assist, its officers and employees in accordance
1356 with s. 607.0833;

1357 (6) To purchase, receive, subscribe for, or otherwise acquire; own, hold, vote, use, sell,
1358 mortgage, lend, pledge, or otherwise dispose of; and deal in and with shares or other interests in,
1359 or obligations of, any other entity;

1360 (7) To make contracts and guarantees, incur liabilities, borrow money, issue its notes, bonds,
1361 and other securities and obligations (which may be convertible into or include the option to
1362 purchase other securities of the corporation), and secure any of its obligations by mortgage or
1363 pledge of any of its property, franchises, ~~and~~ or income and make contracts of guaranty and
1364 suretyship which are necessary or convenient to the conduct, promotion, or attainment of the
1365 business of a corporation the majority of the outstanding stock of which is owned, directly or
1366 indirectly, by the contracting corporation; a corporation which owns, directly or indirectly, a
1367 majority of the outstanding stock of the contracting corporation; or a corporation the majority of
1368 the outstanding stock of which is owned, directly or indirectly, by a corporation which owns,
1369 directly or indirectly, the majority of the outstanding stock of the contracting corporation, which
1370 contracts of guaranty and suretyship shall be deemed to be necessary or convenient to the conduct,
1371 promotion, or attainment of the business of the contracting corporation, and make other contracts
1372 of guaranty and suretyship which are necessary or convenient to the conduct, promotion, or
1373 attainment of the business of the contracting corporation;

1374 (8) To lend money, invest and reinvest its funds, and receive and hold real and personal
1375 property as security for repayment;

1376 (9) To conduct its business, locate offices, and exercise the powers granted by this act within
1377 or without this state;

1378 (10) To elect directors and appoint officers, employees, and agents of the corporation and
1379 define their duties, fix their compensation, and lend them money and credit;

1380 (11) To make and amend bylaws, not inconsistent with its articles of incorporation or with
1381 the laws of this state, for managing the business and regulating the affairs of the corporation;

1382 (12) To make donations for the public welfare or for charitable, scientific, or educational
1383 purposes;

1384 (13) To transact any lawful business that will aid governmental policy;

1385 (14) To make payments or donations or do any other act not inconsistent with law that
1386 furthers the business and affairs of the corporation;

1387 (15) To pay pensions and establish pension plans, pension trusts, profit-sharing plans, share
1388 bonus plans, share option plans, and benefit or incentive plans for any or all of its current or former
1389 directors, officers, employees, and agents and for any or all of the current or former directors,
1390 officers, employees, and agents of its subsidiaries;

1391 (16) To provide insurance for its benefit on the life of any of its directors, officers, or
1392 employees, or on the life of any shareholder for the purpose of acquiring at his or her death shares
1393 of its stock owned by the shareholder or by the spouse or children of the shareholder; and

1394 (17) To be a promoter, incorporator, partner, member, associate, or manager of any
1395 corporation, partnership, joint venture, trust, or other entity.

1396

1397 **Commentary to Section 607.0302:**

1398 The FBCA and Model Act provisions are identical in most respects, but with certain additional
1399 items in Florida, many of which were based on pre-1989 Florida law and Delaware law. Those
1400 distinctions, principally in subsections (4), (5), (7), (15) and (16), were retained. Minor changes
1401 are also made to subsections (3) and (7) to match the language in the corollary sections of the
1402 Model Act, but without any intent to change the intended meaning.

1403

1404 607.0303 Emergency powers.

1405 (1) In anticipation of or during any emergency defined in subsection (5), the board of
1406 directors of a corporation may:

1407 (a) Modify lines of succession to accommodate the incapacity of any director,
1408 officer, employee, or agent; and

1409 (b) Relocate the principal office or designate alternative principal offices or
1410 regional offices or authorize the officers to do so.

1411 (2) During an emergency defined in subsection (5), unless emergency bylaws provide
1412 otherwise:

1413 (a) Notice of a meeting of the board of directors need be given only to those directors
1414 whom it is practicable to reach and may be given in any practicable manner, including by
1415 publication and radio;

1416 (b) One or more officers of the corporation present at a meeting of the board of
1417 directors may be deemed to be directors for the meeting, in order of rank and within the
1418 same rank in order of seniority, as necessary to achieve a quorum; and

1419 (c) The director or directors in attendance at a meeting, or any greater number affixed
1420 by the emergency bylaws, constitute a quorum.

1421 (3) Corporate action taken in good faith during an emergency under this section to further
1422 the ordinary business affairs of the corporation:

1423 (a) Binds the corporation; and

1424 (b) May not be used to impose liability on a ~~corporate~~ director, officer, employee, or
1425 agent of the corporation.

1426 (4) No officer, director, or employee acting in accordance with any emergency bylaws shall
1427 be liable except for willful or intentional misconduct.

1428 (5) An emergency exists for purposes of this section if a quorum of the ~~corporation's~~ board
1429 of directors cannot readily be assembled because of some catastrophic event.

1430 (6) To the extent not inconsistent with any emergency bylaws so adopted, the bylaws of the
1431 corporation shall remain in effect during any emergency, and upon termination of the emergency,
1432 the emergency bylaws will cease to be operative.

1433

1434 **Commentary to Section 607.0303:**

1435 Florida follows the Model Act for the most part, with certain differences in subsections (2)(c), (4)
1436 and (6).

1437

1438 607.0304 Lack of Power to Act ~~Ultra vires~~.

1439 (1) Except as provided in subsection (2), the validity of corporate action, including, but
1440 not limited to, any conveyance, transfer, or encumbrance of real or personal property to or by a
1441 corporation, may not be challenged on the ground that the corporation lacks or lacked power to
1442 act.

1443 (2) A corporation's power to act may be challenged:

1444 (a) In a proceeding by a shareholder against the corporation to enjoin the act;

1445 (b) In a proceeding by the corporation, directly, derivatively, or through a receiver,
1446 trustee, or other legal representative, or through shareholders in a representative suit, against
1447 an incumbent or former director, officer, employee, or agent of the corporation; or

1448 (c) In a proceeding by the ~~Attorney General~~ the Department of Legal Affairs, (i) under
1449 s. 607.1430(1) or (ii) as provided in this act, to dissolve the corporation or in a proceeding by
1450 ~~the Attorney General~~ to enjoin the corporation from the transaction of unauthorized business.

1451 (3) In a shareholder's proceeding under paragraph (2)(a) to enjoin an unauthorized corporate
1452 act, the court may enjoin or set aside the act, if equitable and if all affected persons are parties to
1453 the proceeding, and may award damages for loss (other than anticipated profits) suffered by the
1454 corporation or another party because of enjoining the unauthorized act.

1455

1456 **Commentary to Section 607.0304:**

1457 Except for minor differences, the Florida act mirrors the Model Act.

1458 The change in the title is not intended to be a change in the law or to change the meaning of this
1459 section. The change is merely to align the title with the title now used in the corollary Model Act
1460 provision.

1461 Subsection (2)(b) is amended to correct what appears to be an inadvertent omission of the word
1462 "directors".

1463 Subsection (2)(c) is amended (i) to reference the proper governmental agency (i.e., the Department
1464 of Legal Affairs, as opposed to the Attorney General) with power to bring the referenced actions,
1465 thus coordinating with the terminology in Section 607.1430, (ii) consistent with the language in
1466 the Model Act, to cross reference to the judicial dissolution provisions of Section 607.1430, and,
1467 (iii) to retain the right and power of the Department of Legal Affairs to pursue injunctive action so
1468 as to enjoin the corporation from the transaction of unauthorized business.

1469

1470 ARTICLE 4

1471
1472 CORPORATE NAMES

1473
1474
1475 607.0401 Corporate name.

1476 (1) A corporate name:

1477 (1a) Must contain the word "corporation," "company," or "incorporated" or the
1478 abbreviation "Corp.," or "Inc.," or "Co.," or the designation "Corp.," or "Inc.," or "Co.," as will
1479 clearly indicate that it is a corporation instead of a natural person, partnership, or other eligible
1480 ~~business~~ entity.⁹

1481 (2b) May not contain language stating or implying that the corporation is organized for
1482 a purpose other than that permitted in this chapter ~~act~~ and its articles of incorporation.

1483 (3c) May not contain language stating or implying that the corporation is connected
1484 with a state or federal government agency or a corporation or other entity chartered under the
1485 laws of the United States.

1486 (4d) Must be distinguishable from the names of all other entities or filings that are on
1487 file with the department ~~Division of Corporations~~, except fictitious name registrations
1488 pursuant to s. 865.09, general partnership registrations pursuant to s. 620.8105, and limited
1489 liability partnership statements pursuant to s. 620.9001 which are organized, registered, or
1490 reserved under the laws of this state. A name that is different from the name of another entity
1491 or filing due to any of the following is not considered distinguishable:

- 1492 1. A suffix.
- 1493 2. A definite or indefinite article.
- 1494 3. The word "and" and the symbol "&."
- 1495 4. The singular, plural, or possessive form of a word.

1496 (e) ~~A recognized abbreviation of a root word.~~¹⁰

⁹ DOS is requesting that the following language be added to subsection (1)(a) of s. 605.0112 and to subsection (3) of s. 620.1108: "as will clearly indicate that it is a [limited liability company/limited partnership] instead of a natural person, partnership, or other eligible entity." If this change is made, a grandfathering clause will need to be added to the referenced section of FRLCA and the referenced section of the Florida Revised Uniform Limited Partnership Act.

¹⁰ DOS is requesting that this same language be removed from s. 605.0112 and in s. 620.1108.

1497 5. A punctuation mark or a symbol.

1498 (e) Notwithstanding the foregoing, a corporation may register under a name that is not
1499 otherwise distinguishable on the records of the department with the written consent of the
1500 other entity¹¹ if the consent is filed with the department at the time of registration of such
1501 name and if such name is not identical to the name of the other entity.

1502 ~~(25)~~ As filed with the ~~D~~department of ~~S~~State, is for public notice only and does not alone create
1503 any presumption of ownership beyond that which is created under the common law.

1504 (3) This chapter does not control the use of fictitious names.

1505

¹¹ Correct s. 605.0112(1)(b) to change "owner entity" to "other entity" in conformity with this provision.

1506 **Commentary to Section 607.0401:**

1507 A new paragraph is added as subsection (1)(e). It permits, under certain circumstances, the use of
1508 names that are otherwise prohibited if appropriate consent in writing from the other entity is
1509 obtained and provided to the Department of State. The new paragraph mirrors the corollary
1510 language contained in s. 605.0112(1)(b) of FRLICA, but corrects an errant use of the word
1511 "owner."

1512 Subsection (1)(e), consistent with s. 607.1506(5) with respect to foreign corporations, allows a
1513 name otherwise unavailable to be used by consent. The section also provides that the department
1514 shall deny such a request if the name of the entity requested with consent is identical to the name
1515 of the other entity.

1516

1517 607.0402 Reserved Name.

1518 (1) A person may reserve the exclusive use of a corporate name, including a fictitious or
1519 alternate name for a foreign corporation whose corporate name is not available, by delivering an
1520 application to the department for filing. The application must set forth the name and address of the
1521 applicant and the name proposed to be reserved. If the department finds that the corporate name
1522 applied for is available, it shall reserve the name for the applicant's exclusive use for a
1523 nonrenewable 120-day period.

1524 (2) The owner of a reserved corporate name may transfer the reservation to another person
1525 by delivering to the department a signed notice of the transfer that states the name and address of
1526 the transferee.

1527 (3) The department may revoke any reservation if, after a hearing, it finds that the application
1528 therefor or any transfer thereof was not made in good faith.

1529

1530 **Commentary to Section 607.0402:**

1531 Section 607.0402, which addresses the reservation of a corporate name, is newly adopted and is
1532 modeled after s. 4.02 of the Model Act. The Florida parallel statute was removed from the FBCA
1533 in 1998 (according to available commentary, because of then budgetary concerns affecting the
1534 Department of State). Florida is one of only three jurisdictions (along with Delaware and Puerto
1535 Rico) that does not allow for name reservations.

1536 Unlike the Model Act, but consistent with most jurisdictions that allow for name reservations, new
1537 s. 607.0402 includes in subsection (2) an express authorization for transfers of a reserved name.

1538

1539 607.0403 Registered name; application; renewal; revocation.

1540 (1) A foreign corporation may register its corporate name, or its corporate name with the
1541 ~~any~~ addition of any word or abbreviation required by s. 607.1506, if the name is distinguishable
1542 upon the records of the ~~D~~department of State from the corporate names that are not available under
1543 s. 607.0401(4).

1544 (2) A foreign corporation registers its corporate name, or its corporate name with any
1545 addition permitted ~~required~~ by s. 607.1506, by delivering to the ~~D~~department of State for filing an
1546 application:

1547 (a) Setting forth that its corporate name, or its corporate name with any addition
1548 ~~required by s. 607.1506~~, the state or country and date of its incorporation, and a brief
1549 description of the nature of the business which is to be conducted in this state in which it is
1550 ~~engaged~~; and

1551 (b) Accompanied by a certificate of existence, or a certificate setting forth that such
1552 corporation is in good standing under the laws of the state or country wherein it is organized
1553 (or a document of similar import), from the state or country of incorporation.

1554 (3) The name is registered for the applicant's exclusive use upon the effective date of the
1555 application and shall be effective until the close of the calendar year in which the application for
1556 registration is filed.

1557 (4) A foreign corporation the registration of which is effective may renew it from year to
1558 year by annually filing a renewal application which complies with the requirements of subsection
1559 (2) between October 1 and December 31 of the preceding year. The renewal application when filed
1560 renews the registration for the following calendar year.

1561 (5) A foreign corporation the registration of which is effective may thereafter qualify as a
1562 foreign corporation under the registered name or consent in writing to the use of that name by a
1563 corporation thereafter incorporated under this chapter ~~act~~ or by another foreign corporation
1564 thereafter authorized to transact business in this state. The registration terminates when the
1565 domestic corporation is incorporated or the foreign corporation qualifies or consents to the
1566 qualification of another foreign corporation under the registered name.

1567 (6) The ~~D~~department of State may revoke any registration if, after a hearing, it finds that the
1568 application therefor or any renewal thereof was not made in good faith.

1569

1570 **Commentary to Section 607.0403:**

1571 No substantive changes have been made.

1572

1573 ARTICLE 5

1574 OFFICE AND AGENT

1575
1576 607.0501 Registered office and registered agent.

1577 (1) Each corporation shall ~~designate~~ have and continuously maintain in this state:

1578 (a) A registered office, which may be the same as its place of business in this state; and

1579 (b) A registered agent, which who may must be either:

1580 1. An individual who resides in this state whose business ~~address~~ office is identical
1581 to the address of the ~~with such~~ registered office; or

1582 2. Another domestic entity that is an authorized entity¹² and whose business
1583 address is identical to the address of the registered office, or a foreign entity authorized
1584 to transact business in this state that is an authorized entity and whose business address
1585 is identical to the address of the registered office. ~~Another corporation or not for profit~~
1586 ~~corporation as defined in chapter 617, authorized to transact business or conduct its affairs~~
1587 ~~in this state, having a business office identical with the registered office; or~~

1588 3. ~~A foreign corporation or not for profit foreign corporation authorized pursuant~~
1589 ~~to this chapter or chapter 617 to transact business or conduct its affairs in this state, having~~
1590 ~~a business office identical with the registered office.~~

1591 (2) This section does not apply to corporations which are required by law to designate the
1592 Chief Financial Officer as their attorney for the service of process, associations subject to the
1593 provisions of chapter 665, and banks and trust companies subject to the provisions of the financial
1594 institutions codes.

1595 (3) Each initial A-registered agent, and each appointed pursuant to this section or a successor
1596 registered agent that is appointed, pursuant to s. 607.0502 on whom process may be served shall
1597 each file a statement in writing with the Department of State, in the such form and manner as
1598 shall be prescribed by the department, accepting the appointment as a registered agent while
1599 simultaneously with his or her being designated as the registered agent. The Such statement of
1600 acceptance must provide shall state that the registered agent is familiar with, and accepts, the
1601 obligations of that position.

¹² Add "authorized entity" concept into s. 605.0113.

1602 (4) The duties of a registered agent are as follows:

1603 (a) To forward to the corporation at the address most recently supplied to the registered
1604 agent by the corporation, a process, notice or demand pertaining to the corporation which is
1605 served on or received by the registered agent;

1606 (b) If the registered agent resigns, to provide the notice required under s. 607.0503 to the
1607 corporation at the address most recently supplied to the registered agent by the corporation.

1608 (5) The Department of State shall maintain an accurate record of the registered agents and
1609 registered offices for the service of process and shall promptly furnish any information disclosed
1610 thereby promptly upon request and payment of the required fee.

1611 (6) A corporation may not prosecute or maintain any action in a court in this state until the
1612 corporation complies with the provisions of this section, pays to the department any amounts
1613 required under this chapter, and, to the extent ordered by a court of competent jurisdiction, pays to
1614 the department a penalty of \$5 for each day it has failed to so comply or \$500, whichever is less.¹³

1615 (7) A court may stay a proceeding commenced by a corporation until the corporation
1616 complies with this section.

1617

¹³ Additionally, the following changes should be made to s. 605.0113(5):

(5) A limited liability company and each foreign limited liability company that has a certificate of authority under s. 605.0902 may not prosecute or maintain or defend an action in a court in this state until the limited liability company complies with the provisions of this section, pays to the department any amounts required under this chapter, and, to the extent ordered by a court of competent jurisdiction, pays to the department a penalty of \$5 for each day it has failed to so comply or \$500, whichever is less.

1618 **Commentary to Section 607.0501:**

1619 The Florida statute contains the same elements as, but is significantly more expansive than the
1620 Model Act. The revisions to the statute are based on s. 605.0113 of FRLCA covering this same
1621 topic. Sections (2) through (6) of the Florida statute do not appear in the Model Act.

1622 The scope of the changes to subsection (6), which is modeled after the corresponding LLC
1623 statutory provision, has been modified to clarify that a domestic corporation cannot prosecute or
1624 maintain an action in this state unless it has complied with this section, but may defend an action
1625 in this state. This modification is also proposed to be made to s. 605.0113 for harmonization.
1626 Allowing a corporation to defend an action (even if the corporation is not in compliance with this
1627 provision) is consistent with the corollary Model Act provision and with s. 607.1502 relating to
1628 the consequences of transacting business in this state without authority.

1629 New subsection (6) is modeled after s. 607.1502(3) and allows a court to stay a proceeding
1630 commenced by a corporation until the corporation complies with this section. The change in
1631 subsection (6) relating to payment of a penalty reflects the current position of the Department of
1632 State not to collect this penalty unless required to do so by a court of competent jurisdiction.

1633

1634 607.0502 Change of registered office or registered agent. ; ~~resignation of registered~~
1635 agent

1636 (1) In order to change its registered agent or registered office address, aA corporation may
1637 deliver to the department for filing ~~change its registered office or its registered agent upon filing~~
1638 with the Department of State a statement of change containing the following setting forth:

1639 (a) The name of the corporation.

1640 (b) The name of its current registered agent.

1641 (c) If the current registered agent is to be changed, the name of the new registered
1642 agent.

1643 (d) The street address of its current registered office for its current registered agent.

1644 (e) If the street address of the current registered office is to be changed, the new street
1645 address of the registered office in this state.

1646 ~~(b) The street address of its current registered office;~~

1647 ~~(c) If the current registered office is to be changed, the street address of the new~~
1648 ~~registered office;~~

1649 ~~(d) The name of its current registered agent;~~

1650 ~~(e) If its current registered agent is to be changed, the name of the new registered~~
1651 ~~agent and the new agent's written consent (either on the statement or attached to it) to the~~
1652 ~~appointment;~~

1653 ~~(f) That the street address of its registered office and the street address of the~~
1654 ~~business office of its registered agent, as changed, will be identical;~~

1655 ~~(fg) That such change was authorized by resolution duly adopted by its board of~~
1656 ~~directors or by an officer of the corporation so authorized by the board of directors.~~

1657 (2) ~~Any registered agent may resign his or her agency appointment by signing and delivering~~
1658 ~~for filing with the Department of State a statement of resignation and mailing a copy of such~~
1659 ~~statement to the corporation at its principal office address shown in its most recent annual report~~
1660 ~~or, if none, filed in the articles of incorporation or other most recently filed document. The~~
1661 ~~statement of resignation shall state that a copy of such statement has been mailed to the corporation~~
1662 ~~at the address so stated. The agency is terminated as of the 31st day after the date on which the~~
1663 ~~statement was filed and unless otherwise provided in the statement, termination of the agency acts~~
1664 ~~as a termination of the registered office.~~

1665 (2) If the registered agent is changed, the written acceptance of the successor registered agent
1666 described in s. 607.0501(3) must also be included in or attached to the statement of change.

1667 (3) A statement of change is effective when filed by the department.

1668 (4) The changes described in this section may also be made on the corporation's annual
1669 report, in an application for reinstatement filed with the department under s. 607.1622, or in an
1670 amendment to or restatement of a company's articles of incorporation in accordance with ss.
1671 607.1006 or 607.1007.

1672 ~~(3) If a registered agent changes his or her business name or business address, he or she may~~
1673 ~~change such name or address and the address of the registered office of any corporation for which~~
1674 ~~he or she is the registered agent by:~~

1675 ~~(a) Notifying all such corporations in writing of the change ,~~

1676 ~~(b) Signing (either manually or in facsimile) and delivering to the Department of~~
1677 ~~State for filing a statement that substantially complies with the requirements of paragraphs~~
1678 ~~(1)(a) (f), setting forth the names of all such corporations represented by the registered~~
1679 ~~agent, and~~

1680 ~~(c) Reciting that each corporation has been notified of the change.~~

1681 ~~(4) Changes of the registered office or registered agent may be made by a change on the~~
1682 ~~corporation's annual report form filed with the Department of State.~~

1683 ~~(5) The Department of State shall collect a fee pursuant to s. 15.09(2) for the filings~~
1684 ~~authorized under this section.~~

1685

1686 **Commentary to Section 607.0502:**

1687 The Florida statute and Model Act statutes are very similar, although Florida's statute is more
1688 expansive. The language changes are largely derived from s. 605.0114 of FRLCA.

1689 Old subsection (2) has been replaced with new s. 607.0503 and subsection (3) has been replaced
1690 with new s. 607.05031. Both of these sections track the comparable provisions of FRLCA.

1691 A provision comparable to current subsection (1)(g) was not included in FRLCA and has been
1692 eliminated in this statute, even though it has been in the corporate statute since 1989.

1693

1694 607.0503 Resignation of registered agent.

1695 (1) A registered agent may resign as agent for a corporation by delivering to the department
1696 for filing a signed statement of resignation containing the name of the corporation.

1697 (2) After delivering the statement of resignation to¹⁴ the department for filing, the registered
1698 agent shall promptly mail a copy to the corporation at its current mailing address.

1699 (3) A registered agent is terminated upon the earlier of:

1700 (a) The 31st day after the department files the statement of resignation; or

1701 (b) When a statement of change or other record designating a new registered agent is
1702 filed by the department.

1703 (4) When a statement of resignation takes effect, the registered agent ceases to have
1704 responsibility for a matter thereafter tendered to it as agent for the corporation. The resignation
1705 does not affect contractual rights that the corporation has against the agent or that the agent has
1706 against the corporation.

1707 (5) A registered agent may resign from a corporation regardless of whether the corporation
1708 has active status.

1709

¹⁴ The corresponding LLC statute (s. 605.0115) should be changed to use the word "to" instead of the word "with."

1710 **Commentary to Section 607.0503:**

1711 This section is derived from s. 605.0115 of FRLCA. It replaces s. 607.0502(2). The
1712 corresponding section of the Model Act is s. 5.03.

1713

- 1714 607.05031 Change of name or address by registered agent.
- 1715 (1) If a registered agent changes his or her name or address, the agent may deliver to the
- 1716 department for filing a statement of change that provides the following:
- 1717 (a) The name of the corporation represented by the registered agent.
- 1718 (b) The name of the registered agent as currently shown in the records of the department
- 1719 for the corporation.
- 1720 (c) If the name of the registered agent has changed, its new name.
- 1721 (d) If the address of the registered agent has changed, the new address.
- 1722 (e) A statement that the registered agent has given the notice required under subsection
- 1723 (2).
- 1724 (2) A registered agent shall promptly furnish notice of the statement of change and the
- 1725 changes made by the statement filed with the department to the represented corporation.
- 1726

1727 **Commentary to Section 607.05031:**

1728 This section is derived from s. 605.0116 of FRLCA. It replaces s. 607.0502(3).

1729

1730 607.05032 Delivery of notice or other communication.

1731 (1) Except as otherwise provided in this chapter, permissible means of delivery of a notice
1732 or other communication includes delivery by hand, the United States Postal Service, a
1733 commercial delivery service, and electronic transmission, all as more particularly described in s.
1734 607.0141.

1735 (2) Except as provided in subsection (3), delivery to the department is effective only when
1736 a notice or other communication is received by the department.

1737 (3) If a check is mailed to the department for payment of an annual report fee or the annual
1738 supplemental¹⁵ fee required under s. 607.193, the check shall be deemed to have been received
1739 by the department as of the postmark date appearing on the envelope or package transmitting the
1740 check if the envelope or package is received by the department.

1741

¹⁵ The word "supplemental" referencing this annual fee should be added to s. 605.0118(3).

1742 **Commentary to Section 607.05032:**

1743 This section is derived from s. 605.0118 of FRLUCA. It is new to the corporate statute.

1744

1745 607.0504 Service of process, notice, or demand on a corporation.

1746 (1) A corporation may be served with process required or authorized by law by serving on
1747 its registered agent.

1748 (2) If a corporation ceases to have a registered agent or if its registered agent cannot with
1749 reasonable diligence be served, the process required or permitted by law may instead be served on
1750 the chair of the board, the president, any vice president, the secretary, or the treasurer of the
1751 corporation at the principal office of the corporation in this state.

1752 (3) If the process cannot be served on a corporation pursuant to subsection (1) or subsection
1753 (2), the process may be served on the secretary of state as an agent of the corporation.

1754 (4) Service of process on the secretary of state may be made by delivering to and leaving
1755 with the department duplicate copies of the process.

1756 (5) Service is effectuated under subsection (3) on the date shown as received by the
1757 department.

1758 (6) The department shall keep a record of each process served on the secretary of state
1759 pursuant to this section and record the time of and the action taken regarding the service.

1760 (7) Any notice or demand on a corporation under this chapter may be given or made to the
1761 chair of the board, the president, any vice president, the secretary, or the treasurer of the
1762 corporation; to the registered agent of the corporation at the registered office of the corporation in
1763 this state; or to any other address in this state that is in fact the principal office of the corporation
1764 in this state.¹⁶

1765 (8) This section does not affect the right to serve process, give notice, or make a demand in
1766 any other manner provided by law.

1767 ~~(1) Process against any corporation may be served in accordance with chapter 48 or chapter~~
1768 ~~49.~~

1769 ~~(2) Any notice to or demand on a corporation under this act may be made to the chair of the~~
1770 ~~board, the president, any vice president, the secretary, or the treasurer; to the registered agent of~~
1771 ~~the corporation at the registered office of the corporation in this state; or to any other address in~~
1772 ~~this state that is in fact the principal office of the corporation in this state.~~

¹⁶ Section 605.0117 needs to be modified consistent with this section of the FBCA to bifurcate between service of process and notices and demands on the company.

1773 ~~(3) This section does not prescribe the only means, or necessarily the required means, of~~
1774 ~~serving notice or demand on a corporation.~~

1775

1776 **Commentary to Section 607.0504:**

1777 This section is derived from s. 605.0117 of FRLCA, which establishes a "waterfall" approach to
1778 proper service on a limited liability company of any process, notice or demand. The provisions of
1779 this section as revised are also consistent with s. 504 of the Model Act.

1780 The one change made was to bifurcate between the statutory provisions relating to service of
1781 process and the provisions dealing with notices or demands on the corporation.

1782 Additionally, corollary changes are being proposed to s. 48.081 of the Florida Statutes dealing
1783 generally with service on a corporation. These changes will make this section consistent with s.
1784 48.062 of the Florida Statutes as amended in connection with the 2013 adoption of FRLCA.

1785 48.081 Service on corporation.¹⁷

1786
1787 (1) Process against any private corporation, domestic or foreign, may be served:

1788
1789 (a) ~~On the president or vice president, or other head of the corporation;~~

1790
1791 (b) ~~In the absence of any person described in paragraph (a), on the cashier,~~
1792 ~~treasurer, secretary, or general manager;~~

1793
1794 (c) ~~In the absence of any person described in paragraph (a) or paragraph (b),~~
1795 ~~on any director; or~~

1796
1797 (d) ~~In the absence of any person described in paragraph (a), paragraph (b), or~~
1798 ~~paragraph (c), on any officer or business agent residing in the state.~~

1799
1800 on the registered agent designated by the corporation under chapter 607. A person
1801 attempting to serve process pursuant to this subsection may serve the process on any
1802 employee of the registered agent during the first attempt at service even if the registered
1803 agent is a natural person and is temporarily absent from his or her office.

1804
1805 (2) ~~If a foreign corporation has none of the foregoing officers or agents in this state,~~
1806 ~~service may be made on any agent transacting business for it in this state.~~

1807
1808 (3)(a) ~~As an alternative to all of the foregoing, process may be served on the agent~~
1809 ~~designated by the corporation under s. 48.091. However, if service cannot be made on a~~
1810 ~~registered agent because of failure to comply with s. 48.091, service of process shall be~~
1811 ~~permitted on any employee at the corporation's principal place of business or on any~~
1812 ~~employee of the registered agent. A person attempting to serve process pursuant to this~~
1813 ~~paragraph may serve the process on any employee of the registered agent during the first~~
1814 ~~attempt at service even if the registered agent is temporarily absent from his or her office.~~

¹⁷ The Subcommittee is in discussion with members of the Business Litigation Committee of the Business Law Section of The Florida Bar regarding additional changes to Chapter 48.

1815
1816
1817
1818
1819
1820
1821
1822
1823
1824
1825
1826
1827
1828
1829
1830
1831
1832
1833
1834
1835
1836
1837
1838
1839
1840
1841
1842
1843
1844

(2) If service cannot be made on a registered agent of the corporation because of failure to comply with chapter 607 or because the corporation does not have a registered agent, or if its registered agent cannot with reasonable diligence be served, process against the corporation, domestic or foreign, may be served on the chair of the board, the president, any vice president, the secretary, or the treasurer at the principal office of the corporation in this state.

(3) If, after reasonable diligence, service of process cannot be served on a corporation pursuant to subsection (1) or subsection (2), the process may be served on the department as an agent of the company.

(4) If, after reasonable diligence, service of process cannot be completed under subsection (1) or subsection (2), service of process may be effected by service upon the secretary of state as agent of the corporation as provided for in s. 48.181.

(5) If the address provided for the registered agent ~~or, officer, director, or principal place of business~~ is a residence, a private mailbox, a virtual office, or an executive office or mini suite, service on the corporation may be made by serving the registered agent or ~~officer, or director~~ in accordance with s. 48.031.

(46) This section does not apply to service of process on insurance companies.

(57) When a corporation engages in substantial and not isolated activities within this state, or has a business office within the state and is actually engaged in the transaction of business therefrom, service upon any officer or business agent while on corporate business within this state may personally be made, pursuant to this section, and it is not necessary in such case that the action, suit, or proceeding against the corporation shall have arisen out of any transaction or operation connected with or incidental to the business being transacted within the state.

1845 607.0505 Registered agent; duties.

1846 (1) (a) Each corporation, foreign corporation, or alien business organization that owns real
1847 property located in this state, that owns a mortgage on real property located in this state, or
1848 that transacts business in this state shall have and continuously maintain in this state a
1849 registered office and a registered agent and shall file with the ~~D~~department of ~~S~~State notice of
1850 the registered office and registered agent as provided in ss. 607.0501 and 607.0502. The
1851 appointment of a registered agent in compliance with s. 607.0501 or s. 607.1507 is sufficient
1852 for purposes of this section provided the registered agent so appointed files, in such form and
1853 manner as prescribed by the ~~D~~department of ~~S~~State, an acceptance of the obligations provided
1854 for in this section.

1855 (b) Each such corporation, foreign corporation, or alien business organization which
1856 fails to have and continuously maintain a registered office and a registered agent as required
1857 in this section will be liable to this state for \$500 for each year, or part of a year, during which
1858 the corporation, foreign corporation, or alien business organization fails to comply with these
1859 requirements; but such liability will be forgiven in full upon the compliance by the
1860 corporation, foreign corporation, or alien business organization with the requirements of this
1861 subsection, even if such compliance occurs after an action to collect such liability is instituted.
1862 The Department of Legal Affairs may file an action in the circuit court for the judicial circuit
1863 in which the corporation, foreign corporation, or alien business organization is found or
1864 transacts business, or in which real property belonging to the corporation, foreign corporation,
1865 or alien business organization is located, to petition the court for an order directing that a
1866 registered agent be appointed and that a registered office be designated, and to obtain
1867 judgment for the amount owed under this subsection. In connection with such proceeding, the
1868 Department of Legal Affairs may, without prior approval by the court, file a lis pendens
1869 against real property owned by the corporation, foreign corporation, or alien business
1870 organization, which lis pendens shall set forth the legal description of the real property and
1871 shall be filed in the public records of the county where the real property is located. If the lis
1872 pendens is filed in any county other than the county in which the action is pending, the lis
1873 pendens which is filed must be a certified copy of the original lis pendens. The failure to
1874 comply timely or fully with an order directing that a registered agent be appointed and that a
1875 registered office be designated will result in a civil penalty of not more than \$1,000 for each
1876 day of noncompliance. A judgment or an order of payment entered pursuant to this subsection
1877 will become a judgment lien against any real property owned by the corporation, foreign
1878 corporation, or alien business organization when a certified copy of the judgment or order is
1879 recorded as required by s. 55.10. The Department of Legal Affairs will be able to avail itself
1880 of, and is entitled to use, any provision of law or of the Florida Rules of Civil Procedure to
1881 further the collecting or obtaining of payment pursuant to a judgment or order of payment.
1882 The state, through the Attorney General, may bid, at any judicial sale to enforce its judgment
1883 lien, any amount up to the amount of the judgment or lien obtained pursuant to this subsection.

1884 All moneys recovered under this subsection shall be treated as forfeitures under ss. 895.01-
1885 895.09 and used or distributed in accordance with the procedure set forth in s. 895.09. A
1886 corporation, foreign corporation, or alien business organization which fails to have and
1887 continuously maintain a registered office and a registered agent as required in this section may
1888 not defend itself against any action instituted by the Department of Legal Affairs or by any
1889 other agency of this state until the requirements of this subsection have been met.

1890 (2) Each corporation, foreign corporation, or alien business organization that owns real
1891 property located in this state, that owns a mortgage on real property located in this state, or that
1892 transacts business in this state shall, pursuant to subpoena served upon the registered agent of the
1893 corporation, foreign corporation, or alien business organization issued by the Department of Legal
1894 Affairs, produce, through its registered agent or through a designated representative within 30 days
1895 after service of the subpoena, testimony and records reflecting the following:

1896 (a) True copies of documents evidencing the legal existence of the entity, including the
1897 articles of incorporation and any amendments to the articles of incorporation or the legal
1898 equivalent of the articles of incorporation and such amendments.

1899 (b) The names and addresses of each current officer and director of the entity or persons
1900 holding equivalent positions.

1901 (c) The names and addresses of all prior officers and directors of the entity or persons
1902 holding equivalent positions, for a period not to exceed the 5 years previous to the date of
1903 issuance of the subpoena.

1904 (d) The names and addresses of each current shareholder, equivalent equitable owner,
1905 and ultimate equitable owner of the entity, the number of which names is limited to the names
1906 of the 100 shareholders, equivalent equitable owners, and ultimate equitable owners that, in
1907 comparison to all other shareholders, equivalent equitable owners, or ultimate equitable
1908 owners, respectively, own the largest number of shares of stock of the corporation, foreign
1909 corporation, or alien business organization or the largest percentage of an equivalent form of
1910 equitable ownership of the corporation, foreign corporation, or alien business organization.

1911 (e) The names and addresses of all prior shareholders, equivalent equitable owners, and
1912 ultimate equitable owners of the entity for the 12-month period preceding the date of issuance
1913 of the subpoena, the number of which names is limited to the 100 shareholders, equivalent
1914 equitable owners, and ultimate equitable owners that, in comparison to all other shareholders,
1915 equivalent equitable owners, or ultimate equitable owners, respectively, own the largest
1916 number of shares of stock of the corporation, foreign corporation, or alien business
1917 organization or the largest percentage of an equivalent form of equitable ownership of the
1918 corporation, foreign corporation, or alien business organization.

1919 (f) The names and addresses of the person or persons who provided the records and
1920 information to the registered agent or designated representative of the entity.

1921 (g) The requirements of paragraphs (d) and (e) do not apply to:

1922 1. A financial institution;

1923 2. A corporation, foreign corporation, or alien business organization the
1924 securities of which are registered pursuant to s. 12 of the Securities Exchange Act of
1925 1934, 15 U.S.C. ss. 78a-78kk, if such corporation, foreign corporation, or alien
1926 business organization files with the United States Securities and Exchange
1927 Commission the reports required by s. 13 of that act; or

1928 3. A corporation, foreign corporation, or alien business organization, the
1929 securities of which are regularly traded on an established securities market located
1930 in the United States or on an established securities market located outside the United
1931 States, if such non-United States securities market is designated by rule adopted by
1932 the Department of Legal Affairs;

1933 upon a showing by the corporation, foreign corporation, or alien business
1934 organization that the exception in subparagraph 1., subparagraph 2., or subparagraph
1935 3. applies to the corporation, foreign corporation, or alien business organization.
1936 Such exception in subparagraph 1., subparagraph 2., or subparagraph 3. does not,
1937 however, exempt the corporation, foreign corporation, or alien business organization
1938 from the requirements for producing records, information, or testimony otherwise
1939 imposed under this section for any period of time when the requisite conditions for
1940 the exception did not exist.

1941 (3) The time limit for producing records and testimony may be extended for good cause
1942 shown by the corporation, foreign corporation, or alien business organization.

1943 (4) A person, corporation, foreign corporation, or alien business organization designating
1944 an attorney, accountant, or spouse as a registered agent or designated representative shall, with
1945 respect to this state or any agency or subdivision of this state, be deemed to have waived any
1946 privilege that might otherwise attach to communications with respect to the information required
1947 to be produced pursuant to subsection (2), which communications are among such corporation,
1948 foreign corporation, or alien business organization; the registered agent or designated
1949 representative of such corporation, foreign corporation, or alien business organization; and the
1950 beneficial owners of such corporation, foreign corporation, or alien business organization. The
1951 duty to comply with the provisions of this section will not be excused by virtue of any privilege or
1952 provision of law of this state or any other state or country, which privilege or provision authorizes

1953 or directs that the testimony or records required to be produced under subsection (2) are privileged
1954 or confidential or otherwise may not be disclosed.

1955 (5) If a corporation, foreign corporation, or alien business organization fails without lawful
1956 excuse to comply timely or fully with a subpoena issued pursuant to subsection (2), the Department
1957 of Legal Affairs may file an action in the circuit court for the judicial circuit in which the
1958 corporation, foreign corporation, or alien business organization is found or transacts business or in
1959 which real property belonging to the corporation, foreign corporation, or alien business
1960 organization is located, for an order compelling compliance with the subpoena. The failure without
1961 a lawful excuse to comply timely or fully with an order compelling compliance with the subpoena
1962 will result in a civil penalty of not more than \$1,000 for each day of noncompliance with the order.
1963 In connection with such proceeding, the Department of Legal Affairs ~~department~~ may, without
1964 prior approval by the court, file a lis pendens against real property owned by the corporation,
1965 foreign corporation, or alien business organization, which lis pendens shall set forth the legal
1966 description of the real property and shall be filed in the public records of the county where the real
1967 property is located. If the lis pendens is filed in any county other than the county in which the
1968 action is pending, the lis pendens which is filed must be a certified copy of the original lis pendens.
1969 A judgment or an order of payment entered pursuant to this subsection will become a judgment
1970 lien against any real property owned by the corporation, foreign corporation, or alien business
1971 organization when a certified copy of the judgment or order is recorded as required by s. 55.10.
1972 The Department of Legal Affairs ~~department~~ will be able to avail itself of, and is entitled to use,
1973 any provision of law or of the Florida Rules of Civil Procedure to further the collecting or obtaining
1974 of payment pursuant to a judgment or order of payment. The state, through the Attorney General,
1975 may bid, at any judicial sale to enforce its judgment lien, an amount up to the amount of the
1976 judgment or lien obtained pursuant to this subsection. All moneys recovered under this subsection
1977 shall be treated as forfeitures under ss. 895.01-895.09 and used or distributed in accordance with
1978 the procedure set forth in s. 895.09.

1979 (6) Information provided to, and records and transcriptions of testimony obtained by, the
1980 Department of Legal Affairs pursuant to this section are confidential and exempt from the
1981 provisions of s. 119.07(1) while the investigation is active. For purposes of this section, an
1982 investigation shall be considered "active" while such investigation is being conducted with a
1983 reasonable, good faith belief that it may lead to the filing of an administrative, civil, or criminal
1984 proceeding. An investigation does not cease to be active so long as the Department of Legal Affairs
1985 ~~department~~ is proceeding with reasonable dispatch and there is a good faith belief that action may
1986 be initiated by the Department of Legal Affairs ~~department~~ or other administrative or law
1987 enforcement agency. Except for active criminal intelligence or criminal investigative information,
1988 as defined in s. 119.011, and information which, if disclosed, would reveal a trade secret, as defined
1989 in s. 688.002, or would jeopardize the safety of an individual, all information, records, and
1990 transcriptions become public record when the investigation is completed or ceases to be active.
1991 The Department of Legal Affairs ~~department~~ shall not disclose confidential information, records,

1992 or transcriptions of testimony except pursuant to the authorization by the Attorney General in any
1993 of the following circumstances:

1994 (a) To a law enforcement agency participating in or conducting a civil
1995 investigation under chapter 895, or participating in or conducting a criminal investigation.

1996 (b) In the course of filing, participating in, or conducting a judicial proceeding
1997 instituted pursuant to this section or chapter 895.

1998 (c) In the course of filing, participating in, or conducting a judicial proceeding
1999 to enforce an order or judgment entered pursuant to this section or chapter 895.

2000 (d) In the course of a criminal or civil proceeding.

2001 A person or law enforcement agency which receives any information, record, or
2002 transcription of testimony that has been made confidential by this subsection shall maintain the
2003 confidentiality of such material and shall not disclose such information, record, or transcription of
2004 testimony except as provided for herein. Any person who willfully discloses any information,
2005 record, or transcription of testimony that has been made confidential by this subsection, except as
2006 provided for herein, is guilty of a misdemeanor of the first degree, punishable as provided in s.
2007 775.082 or s. 775.083. If any information, record, or testimony obtained pursuant to subsection (2)
2008 is offered in evidence in any judicial proceeding, the court may, in its discretion, seal that portion
2009 of the record to further the policies of confidentiality set forth herein.

2010 (7) This section is supplemental and shall not be construed to preclude or limit the scope of
2011 evidence gathering or other permissible discovery pursuant to any other subpoena or discovery
2012 method authorized by law or rule of procedure.

2013 (8) It is unlawful for any person, with respect to any record or testimony produced pursuant
2014 to a subpoena issued by the Department of Legal Affairs under subsection (2), to knowingly and
2015 willfully falsify, conceal, or cover up a material fact by a trick, scheme, or device; make any false,
2016 fictitious, or fraudulent statement or representation; or make or use any false writing or document
2017 knowing the writing or document to contain any false, fictitious, or fraudulent statement or entry.
2018 A person who violates this provision is guilty of a felony of the third degree, punishable as
2019 provided in s. 775.082, s. 775.083, or s. 775.084.

2020 (9) In the absence of a written agreement to the contrary, a registered agent is not liable for
2021 the failure to give notice of the receipt of a subpoena under subsection (2) to the corporation,
2022 foreign corporation, or alien business organization which appointed such registered agent if such
2023 registered agent timely sends written notice of the receipt of such subpoena by first-class mail or
2024 domestic or international air mail, postage fees prepaid, to the last address that has been designated

2025 in writing to the registered agent by such appointing corporation, foreign corporation, or alien
2026 business organization.

2027 (10) The designation of a registered agent and a registered office as required by subsection
2028 (1) for a corporation, foreign corporation, or alien business organization which owns real property
2029 in this state or a mortgage on real property in this state is solely for the purposes of this ~~act~~ chapter;
2030 and, notwithstanding s. 48.181, s. 607.1502, s. 607.1503, or any other relevant section of the
2031 Florida Statutes, such designation shall not be used in determining whether the corporation, foreign
2032 corporation, or alien business organization is actually doing business in this state.

2033 (11) As used in this section, the term:

2034 (a) "Alien business organization" means:

2035 1. Any corporation, association, partnership, trust, joint stock company, or
2036 other entity organized under any laws other than the laws of the United States, of
2037 any United States territory or possession, or of any state of the United States; or

2038 2. Any corporation, association, partnership, trust, joint stock company, or
2039 other entity or device 10 percent or more of which is owned or controlled, directly
2040 or indirectly, by an entity described in subparagraph 1. or by a foreign natural
2041 person.

2042 (b) "Financial institution" means:

2043 1. A bank, banking organization, or savings association, as defined in s.
2044 220.62;

2045 2. An insurance company, trust company, credit union, or industrial savings
2046 bank, any of which is licensed or regulated by an agency of the United States or
2047 any state of the United States; or

2048 3. Any person licensed under part III of chapter 494.

2049 (c) "Mortgage" means a mortgage on real property situated in this state, except a
2050 mortgage owned by a financial institution.

2051 (d) "Real property" means any real property situated in this state or any interest in
2052 such real property.

2053 (e) "Ultimate equitable owner" means a natural person who, directly or indirectly,
2054 owns or controls an ownership interest in a corporation, foreign corporation, or alien
2055 business organization, regardless of whether such natural person owns or controls such

2056 ownership interest through one or other natural persons or one or more proxies, powers
2057 of attorney, nominees, corporations, associations, partnerships, trusts, joint stock
2058 companies, or other entities or devices, or any combination thereof.

2059 (12) Any alien business organization may withdraw its registered agent designation by
2060 delivering an application for certificate of withdrawal to the ~~D~~department of ~~S~~State for filing. Such
2061 application shall set forth:

2062 (a) The name of the alien business organization and the jurisdiction under the law of
2063 which it is incorporated or organized.

2064 (b) That it is no longer required to maintain a registered agent in this state.

2065

2066 **Commentary to Section 607.0505:**

2067 This section is not included in the Model Act. It is unique to Florida and was adopted in 1984 as
2068 part of the Florida RICO Act. It was intended to provide law enforcement officials with additional
2069 powers to fight organized crime.

2070 This section expands the registered agent and registered office requirements to foreign
2071 corporations and other types of entities that are not required to qualify to do business in Florida
2072 under the FBCA if such foreign corporations or other entities are "alien business organizations" as
2073 defined in subsection 11(a) of the section. Thus, the reach of this section is much broader than the
2074 other provisions of the FBCA insofar as the section attempts to impose registered agent and
2075 registered office requirements on entities that otherwise would not be subject to the FBCA. This
2076 section imposes substantial reporting, notification, waiver of immunity and disclosure
2077 requirements on registered agents of corporations, both domestic and foreign, as well as alien
2078 business organizations, and it includes criminal penalties for non-compliance with its terms.

2079 Because of the broad language in Section 607.0505 of the FBCA, although these provisions are
2080 not contained in Florida's other entity statutes, these provisions are likely to apply to other types
2081 of Florida entities.

2082 Minor changes have been made to reflect the use of the defined term "Department" as reference to
2083 the "Department of State, Division of Corporations" and to reflect when the use of the term
2084 "department" in this section means the "Department of Legal Affairs."

2085 This section contains some elements similar to, but does not seem to be analogous to, the Model
2086 Registered Agent's Act (MRAA), which was first drafted in 2004 by NCCUSL in association with
2087 the ABA and the International Association of Commercial Administrators (IACA). To date,
2088 MRAA has been adopted in twelve jurisdictions: The District of Columbia, Hawaii, Idaho, Maine,
2089 Montana, North Dakota, South Dakota, Utah, Arkansas, Maine, Wyoming, and Nevada.

2090

ARTICLE 6

SHARES AND DISTRIBUTIONS

2091
2092
2093
2094

2095 607.0601 Authorized shares.

2096 (1) The articles of incorporation must set forth any ~~prescribe the~~ classes of shares and
2097 series of shares within a class, and the number of shares of each class and series, that the
2098 corporation is authorized to issue. If more than one class or series of shares is authorized, the
2099 articles of incorporation must prescribe a distinguishing designation for each class or series and
2100 before ~~prior to~~ the issuance of shares of a class or series, describe the terms, including the
2101 preferences, limitations, and relative rights of that class or series ~~must be described in the articles~~
2102 ~~of incorporation~~. All shares of a class or series must have terms, including preferences, limitations,
2103 and relative rights identical with those of other shares of the same class or series, except to the
2104 extent otherwise permitted by this section, or s. 607.0602 or s. 607.0624.

2105 (2) The articles of incorporation must authorize:

2106 (a) One or more classes or series of shares that together have unlimited voting rights,
2107 and

2108 (b) One or more classes or series of shares (which may be the same class or
2109 series or classes or series as those with voting rights) that together are entitled to receive
2110 the net assets of the corporation upon dissolution.

2111 (3) The articles of incorporation may authorize one or more classes or series of shares
2112 that:

2113 (a) Have special, conditional, or limited voting rights, or no right to vote, except to
2114 the extent otherwise provided ~~prohibited~~ by this act;

2115 (b) Are redeemable or convertible as specified in the articles of incorporation:

2116 1. At the option of the corporation, the shareholder, or another person or upon
2117 the occurrence of a specified ~~designated~~ event;

2118 2. For cash, indebtedness, securities, or other property; or

2119 3. At prices and in an amount specified, or determined, in accordance with a
2120 formula ~~In a designated amount or in an amount determined in accordance with a~~
2121 ~~designated formula or by reference to extrinsic data or events;~~

2122 (c) Entitle the holders to distributions calculated in any manner, including dividends
2123 that may be cumulative, noncumulative, or partially cumulative;

2124 (d) Have preference over any other class or series of shares with respect to
2125 distributions, including ~~dividends and~~ distributions upon the dissolution of the corporation.

2126 (4) The description of the designations, preferences, limitations, and relative rights of
2127 share classes or series in subsection (3) is not exhaustive.

2128 (5) Terms of shares may be made dependent on facts ascertainable outside the articles
2129 of incorporation in accordance with s. 607.0120(11).

2130 (6) Shares which are entitled to preference in the distribution of dividends or assets shall
2131 not be designated as common shares. Shares which are not entitled to preference in the distribution
2132 of dividends or assets shall be common shares and shall not be designated as preferred shares.

2133

2134 **Commentary to Section 607.0601:**

2135 Clarifying changes are made in subsections (1) and (2) to add the concept of "series" to this section,
2136 consistent with the Model Act language. Since the FBCA already includes the concept of a "series"
2137 of shares, this change is viewed as non-substantive.

2138 The Model Act changes the word "unlimited" to "full" in the corollary Model Act provision to
2139 subsection (2). The commentary to this provision in the Model Act states that "the phrase "full
2140 voting rights" refers to the right to vote on all matters for which voting is required by either the
2141 Act or the corporation's articles of incorporation." The corollary Delaware provision, s. 151(a),
2142 also uses term "full" in this context. Nevertheless, because the Florida provision has been in place
2143 since 1989, has never been misinterpreted, and is believed to be substantively the same, the term
2144 "unlimited" has been retained.

2145 Subsection (3) of the Florida statute has been revised so that it is modeled after the better worded
2146 subsection (c) of the corollary applicable Model Act provision.

2147 Subsection (5) has been added to make clear, following the corollary Model Act section, that the
2148 terms of shares may be made dependent on facts ascertainable outside the articles of incorporation,
2149 so long as it is in accordance with s. 607.0120(11) dealing with this subject. However, the statute
2150 is revised to use the term "ascertainable" instead of the Model Act wording "objectively
2151 ascertainable." The corollary provision in the LLC statute (s. 605.1005), the corollary provision in
2152 RULLCA (s. 1005) and the corollary provision in the DGLC (s.102(d)), do not use the word
2153 "objectively." To harmonize the wording in FRLLCA and the FBCA, the word "ascertainable" is
2154 used in the revised statute, rather than the Model Act language ("objectively ascertainable").
2155 Notwithstanding, since reasonableness is generally required in interpreting a provision of this type,
2156 the words are believed to be substantively identical.

2157 Subsection (e) of Model Act s. 6.01, which provides that terms of shares may be varied among
2158 holders of the same class or series so long as such variations are expressly set forth in the articles
2159 of incorporation, has not been added to the statute. While the FBCA does allow limited variation
2160 in the terms of shares of the same class or series under s. 607.0624 with respect to rights, it
2161 historically has not been the general rule in Florida.

2162

2163 607.0602 Terms of class or series determined by board of directors.

2164 (1) If the articles of incorporation so provide, the board of directors ~~is authorized~~ ~~may~~
2165 ~~determine, in whole or in part, the preferences, limitations and relative rights (within the limits set~~
2166 ~~forth in s. 607.0601)~~ of, without shareholder approval, to:

2167 (a) ~~classify any class of unissued shares before the issuance of any shares of that~~
2168 ~~into one or more classes or into one or more series within a class; or~~

2169 (b) ~~one or more series within a class before the issuance of any shares of that series~~
2170 ~~reclassify any unissued shares of any class into one or more classes or into one or more~~
2171 ~~series within one or more classes; or~~

2172 (c) ~~reclassify any unissued shares of any series of any class into one or more classes~~
2173 ~~or into one or more series within a class.~~

2174 (2) If the board of directors acts pursuant to subsection (1), it shall determine the terms,
2175 including the preferences, limitations and relative rights, to the extent permitted under s. 607.0601,
2176 of:

2177 (a) Any class of shares before the issuance of any shares of that class, or

2178 (b) Any series within a class before the issuance of any shares of that series.

2179 (3) Each class and each series of a class must be given a distinguishing designation.

2180 (4) All shares of a series must have preferences, limitations, and relative rights identical
2181 with those of other shares of the same series and, except to the extent otherwise provided in the
2182 description of the series, of those of other series of the same class.

2183 (5) Before issuing any shares of a class or series created under this section, the
2184 corporation ~~shall~~ ~~must~~ deliver to the ~~D~~department of ~~S~~State for filing articles of amendment, which
2185 are effective without shareholder action, that set forth:

2186 (a) The name of the corporation;

2187 (b) The text of the amendment determining the terms of the class or series of shares;

2188 (c) The date the amendment was adopted; and

2189 (d) A statement that the amendment was duly adopted by the board of directors.

2190

2191 **Commentary to Section 607.0602:**

2192 The changes in this section are based on the 2003 changes to the Model Act. Although these
2193 changes are not considered to be substantive changes, the modern language is considered clearer
2194 and easier to understand.

2195 Subsection (5) has been in the FBCA since 1989 and includes substantively similar provisions to
2196 s. 607.1006 dealing generally with amendments to articles of incorporation. While there is some
2197 overlap between these sections, the statute retains this subsection in order that the provisions
2198 dealing with the required amendment to the articles of incorporation are easily found by users of
2199 this statute.

2200

2201 607.0603 Issued and outstanding shares.

2202 (1) A corporation may issue the number of shares of each class or series authorized by
2203 the articles of incorporation. Shares that are issued are outstanding shares until they are reacquired,
2204 redeemed, converted, or canceled, except as provided in s. 607.0631.

2205 (2) The reacquisition, redemption, or conversion of outstanding shares is subject to the
2206 limitations of subsection (3) and to s. 607.06401.

2207 (3) At all times that shares of the corporation are outstanding, one or more shares that
2208 together have unlimited voting rights and one or more shares that together are entitled to receive
2209 the net assets of the corporation upon dissolution must be outstanding.

2210

2211 **Commentary to Section 607.0603:**

2212 No changes have been made. Except for the reference to section 607.0631 at the end of subsection
2213 (1) dealing with treasury shares (which are not contemplated in the Model Act provision), this
2214 statute is identical to Section 6.03 of the Model Act.

2215

2216 607.0604 Fractional shares.

2217 (1) A corporation may:

2218 (a) Issue fractions of a share or, in lieu of doing so, pay in money the fair value of
2219 fractions of a share;

2220 (b) Make arrangements, or provide reasonable opportunity, for any person entitled
2221 to or holding a fractional interest in a share to sell such fractional interest or to purchase
2222 such additional fractional interests as may be necessary to acquire a full share;

2223 (c) Issue scrip in registered or bearer form, over the manual or facsimile signature
2224 of an officer of the corporation or its agent, entitling the holder to receive a full share
2225 upon surrendering enough scrip to equal a full share.

2226 (2) The board of directors may authorize the issuance of scrip subject to any condition
2227 ~~considered desirable~~, including that:

2228 (a) ~~That~~ The scrip will become void if not exchanged for full shares before a
2229 specified date; and

2230 (b) ~~That~~ The shares for which the scrip is exchangeable may be sold and the
2231 proceeds paid to the scrip holders.

2232 (3) Each certificate representing scrip must be conspicuously labeled "scrip" and must
2233 contain the information required by s. 607.0625.

2234 (4) The holder of a fractional share is entitled to exercise the rights of a shareholder,
2235 including the rights to vote, to receive dividends, and to receive distributions upon dissolution
2236 ~~participate in the assets of the corporation upon liquidation~~. The holder of scrip is not entitled to
2237 any of these rights unless the scrip provides for them.

2238 (5) ~~When a corporation is to pay in money the value of fractions of a share, the good~~
2239 ~~faith judgment of the board of directors as to the fair value shall be conclusive.~~

2240

2241 **Commentary to Section 607.0604:**

2242 Subsection (1)(b) differs from Section (a)(2) of the Model Act in that the Model Act provision
2243 only allows for the disposition of scrip. The current Florida statute allows for the purchase or sale
2244 of fractional interests. The broader language in the current Florida statute has been retained.

2245 Subsection (1)(c), which requires that scrip be in registered or bearer form "over the manual or
2246 facsimile signature of an officer of the corporation or its agent" is not Model Act language.
2247 However, it has been in the FBCA since 1989 and therefore has been retained.

2248 Subsection (5), which is not in the corollary section of the Model Act, has been eliminated. The
2249 board of directors of a corporation has fiduciary duties with respect to the valuation of fractional
2250 shares, and it is believed that those duties provide sufficient discretion to the board in making this
2251 determination. Further, there is a concern that the term "conclusive" as had been used in this section
2252 could have been deemed to inappropriately eliminate fiduciary duties under these circumstances
2253 or eliminate judicial oversight of this decision. Further, in the context of appraisal rights, no such
2254 conclusive presumption exists. As a result, it was decided to remove the conclusive presumption
2255 from this section of the statute.

2256

2257 607.0620 Subscriptions for shares.

2258 (1) A subscription for shares entered into before incorporation is irrevocable for 6 months
2259 unless the subscription agreement provides a longer or shorter period or all the subscribers agree
2260 to revocation.

2261 (2) A subscription for shares, whether made before or after incorporation, is not enforceable
2262 against the subscriber unless in writing and signed by the subscriber.

2263 (3) The board of directors may determine the payment terms of subscriptions for shares that
2264 were entered into before incorporation, unless the subscription agreement specifies them. A call
2265 for payment by the board of directors must be uniform as to all shares of the same class or series,
2266 unless the subscription agreement specifies otherwise.

2267 (4) Shares issued pursuant to subscriptions entered into before incorporation are fully paid
2268 and nonassessable when the corporation receives the consideration specified in the subscription
2269 agreement.

2270 (5) If a subscriber defaults in payment of money or property under a subscription agreement
2271 entered into before incorporation, the corporation may collect the amount owed as any other debt.
2272 Alternatively, unless the subscription agreement provides otherwise, the corporation may rescind
2273 the agreement and may sell the shares if the debt remains unpaid more than 20 days after the
2274 corporation delivers ~~sends~~ written demand for payment to the subscriber. ~~If mailed, such written~~
2275 ~~demand shall be deemed to be made when deposited in the United States mail in a sealed envelope~~
2276 ~~addressed to the subscriber at his or her last post office address known to the corporation, with~~
2277 ~~first class postage thereon prepaid. If the subscription agreement is rescinded and the shares sold,~~
2278 then notwithstanding the rescission, the defaulting subscriber or his or her legal representative
2279 shall be entitled to be paid the excess of the sale proceeds over the sum of the amount due and
2280 unpaid on the subscription and the reasonable expenses incurred in selling the shares, but in no
2281 event shall the defaulting subscriber or his or her legal representative be entitled to be paid an
2282 amount greater than the amount paid by the subscriber on the subscription.

2283 (6) A subscription agreement entered into after incorporation is also subject to s. 607.0621.

2284

2285 **Commentary to Section 607.0620:**

2286 The title to s. 6.20 of the Model Act adds the words "before incorporation" at the end of the title.
2287 However, because subsection (2) and new proposed subsection (6) deal with subscriptions after
2288 incorporation, the title to this section was not changed.

2289 Subsections (1) and (4) of the Florida statute are identical to Subsections (a) and (c) respectively,
2290 of s. 6.20 of the Model Act. Subsection (2) of the Florida statute puts Florida in a minority of states
2291 that require a subscription to be in writing. The Model Act does not require that subscriptions be
2292 in writing to be enforceable. However, when the FBCA was adopted in 1989, the drafters elected
2293 to leave this requirement in subsection (2) based on existing Florida law, and the statute retains
2294 that concept in the FBCA. Notwithstanding, this provision has been clarified to make clear that it
2295 only deals with the requirement that a subscription be in writing to be enforceable against the
2296 subscriber. This is consistent with case law in Florida and is not intended to apply to cases where
2297 a subscriber is seeking to enforce an oral subscription against the corporation.

2298 Subsection (3) of Florida's statute and Subsection (b) of the Model Act are substantially similar.
2299 However, Florida's statute requires that the call for payment by the board of directors "must be
2300 uniform as to all shares of that same class or series", while subsection (b) of the Model Act requires
2301 that the call for payment be uniform so far as practicable. While the "so far as practicable" language
2302 is used in approximately 30 jurisdictions, including the vast majority of Model Act jurisdictions,
2303 when the FBCA was adopted in 1989, the drafters stated that the provision was not included in
2304 order to incorporate the stricter requirement in the existing Florida law that the call be uniform
2305 without modification, with the view that this prevents favoritism or unfair treatment among
2306 subscribers. Therefore, the existing Florida language has been retained.

2307 Subsection (5) of the Florida statute and subsection (d) of the Model Act are similar, in that the
2308 first two sentences of the Florida Act are identical to subsection (d) of the Model Act. The last two
2309 sentences were added in 1989. The sentence dealing with mailing of the demand has been removed
2310 because it is already stated in s. 607.0141. The second sentence, however, dealing with repayment
2311 to the delinquent subscriber of any amounts paid if there are excess sale proceeds over the sum of
2312 the amount due plus expenses (which was intended to prevent the corporation from having a
2313 windfall gain if it is able to resell the shares without loss) and limiting what the defaulting
2314 subscriber can receive to what they paid on their subscription (which was intended to prevent the
2315 defaulting subscriber from having a windfall if the shares are resold at a higher price) has been
2316 retained.

2317 For completeness, new subsection (6) has been added to clarify that post-incorporation
2318 subscriptions are also subject to the requirements of s. 607.0621.

2319 607.0621 Issuance of shares.

2320 (1) The powers granted in this section to the board of directors may be reserved to the
2321 shareholders by the articles of incorporation.

2322 (2) The board of directors may authorize shares to be issued for consideration consisting of
2323 any tangible or intangible property or benefit to the corporation, including cash, promissory notes,
2324 services performed, promises to perform services evidenced by a written contract, or other
2325 securities of the corporation.

2326 (3) Before the corporation issues shares, the board of directors shall ~~must~~ determine that the
2327 consideration received or to be received for shares to be issued is adequate. That determination by
2328 the board of directors is conclusive insofar as the adequacy of consideration for the issuance of
2329 shares relates to whether the shares are validly issued, fully paid, and nonassessable. When it
2330 cannot be determined that outstanding shares are fully paid and nonassessable, there shall be a
2331 conclusive presumption that such shares are fully paid and nonassessable if the board of directors
2332 makes a good faith determination that there is no substantial evidence that the full consideration
2333 for such shares has not been paid.

2334 (4) When the corporation receives the consideration for which the board of directors
2335 authorized the issuance of shares, the shares issued therefor are fully paid and nonassessable.
2336 Consideration in the form of a promise to pay money or a promise to perform services is received
2337 by the corporation at the time of the making of the promise, unless the agreement specifically
2338 provides otherwise.

2339 (5) The corporation may place in escrow shares issued for a contract for future services or
2340 benefits or a promissory note, or make other arrangements to restrict the transfer of the shares, and
2341 may credit distributions in respect of the shares against their purchase price, until the services are
2342 performed, the note is paid, or the benefits received. If the services are not performed, the note is
2343 not paid or the benefits are not received, the shares escrowed or restricted and the distributions
2344 credited may be canceled in whole or part.

2345

2346 **Commentary to Section 607.0621:**

2347 Subsection (2) retains the existing Florida wording using the words "promises to perform services
2348 evidenced by a written contract" instead of the words "contracts for services to be performed"
2349 contained in s. 6.21(b) of the Model Act. The commentary to the 1989 Act, which proposed the
2350 current statutory language, stated as a rationale that requiring a written contract avoids differing
2351 recollections and can be more protective of the interests of the parties and the other shareholders.

2352 The last sentence of subsection (3), adding a conclusive presumption that shares are fully paid and
2353 nonassessable where the board of directors makes a good faith determination that there is no
2354 substantial evidence that the full consideration for such shares has not been paid, has been retained.
2355 The commentary to the 1989 Act stated that this provision was modeled after a similar provision
2356 contained in the Virginia corporate statute (s. 13.1-643.E.) and that this good faith determination
2357 is important, for example, for opinion letters of counsel, which rely on the board of directors' good
2358 faith determination.

2359 The last sentence of subsection (4) continues to include a provision that is peculiar to the Florida
2360 Statute clarifying that consideration in the form of a promise to pay money or a promise to perform
2361 services is received at the time of the making of the promise, unless the agreement specifically
2362 provides otherwise. The commentary to the 1989 Act states that this language was added to avoid
2363 the concern that the Model Act arguably creates confusion as to when consideration is received
2364 when it is in the form of promises for future payments or services.

2365 A non-substantive clarifying change is included in subsection (5).

2366 Subsection (f) of s. 6.21 of the Model Act, which requires shareholder approval of share issuances
2367 of more than 20% of the voting power outstanding immediately before the issuance, has not been
2368 added to the statute.

2369

2370 607.0622 Liability for shares issued before payment.

2371 (1) A holder of, or subscriber to, shares of a corporation shall be under no obligation to the
2372 corporation or its creditors with respect to such shares other than the obligation to pay to the
2373 corporation the full consideration for which such shares were issued or to be issued. Such an
2374 obligation may be enforced by the corporation and its successors or assigns; by a shareholder suing
2375 derivatively on behalf of the corporation; by a receiver, liquidator, or trustee in bankruptcy of the
2376 corporation; or by another person having the legal right to marshal the assets of such corporation.

2377 (2) Any person becoming an assignee or transferee of shares, or of a subscription for shares,
2378 in good faith and without knowledge or notice that the full consideration therefor has not been paid
2379 shall not be personally liable to the corporation or its creditors for any unpaid portion of such
2380 consideration, but the assignor or transferor shall continue to be liable therefor.

2381 (3) No pledgee or other holder of shares as collateral security shall be personally liable as a
2382 shareholder, but the pledgor or other person transferring such shares as collateral shall be
2383 considered the holder thereof for purposes of liability under this section.

2384 (4) An executor, administrator, conservator, guardian, trustee, assignee for the benefit of
2385 creditors, receiver, or other fiduciary shall not be personally liable to the corporation as a holder
2386 of, or subscriber to, shares of a corporation, but the estate and funds in her or his hands shall be so
2387 liable.

2388 (5) No liability under this section may be asserted more than 5 years after the earlier of:

2389 (a) The issuance of the stock, or

2390 (b) The date of the subscription upon which the assessment is sought.

2391

2392 **Commentary to Section 607.0622:**

2393 No changes have been made to this section of the FBCA.

2394 Section 607.0622 of the FBCA does not follow the corollary section of the Model Act. Current s.
2395 607.0622 is based on the pre-1989 Florida statute, which appears to have been based on earlier
2396 versions of the Model Act. The 1989 committee determined to include subsections (2), (3) and (4)
2397 in the corporate statute so that they were part of the corporate statute, despite, as pointed out in the
2398 Model Act commentary, these provisions are otherwise covered in Article 8 of the UCC.

2399 The 1989 committee, with respect to subsection (b) of s. 6.22 of the Model Act, decided not to
2400 adopt the provision because of a belief that it is unnecessary to confirm the limited liability
2401 concept. They were also concerned whether the "own acts or conduct" language was troublesome
2402 in its ambiguity.

2403 Subsection (5) was added to the FBCA in 1989 and is retained in the statute. It provides a five year
2404 statute of limitations for claims under this statute and is generally patterned after s. 162(e) of the
2405 DGCL.

2406

2407 607.0623 Share dividends.

2408 (1) Unless the articles of incorporation provide otherwise, shares may be issued pro rata and
2409 without consideration to the corporation's shareholders or to the shareholders of one or more
2410 classes or series of shares. An issuance of shares under this subsection is a share dividend.

2411 (2) Shares of one class or series may not be issued as a share dividend in respect of shares of
2412 another class or series unless:

2413 (a) The articles of incorporation so authorize,

2414 (b) A majority of the votes entitled to be cast by the class or series to be issued
2415 approves the issue, or

2416 (c) There are no outstanding shares of the class or series to be issued.

2417 (3) The board of directors may fix the record date for determining shareholders entitled to a
2418 share dividend, which date may not be retroactive. If the board of directors does not fix the record
2419 date for determining shareholders entitled to a share dividend, the record date ~~is~~ is the date the
2420 board of directors authorizes the share dividend.

2421

2422 **Commentary to Section 607.0623:**

2423 Non-substantive cleanup changes have been made to this section based on recent clean-up changes
2424 made to s. 6.23 of the Model Act.

2425

2426 607.0624 Share rights, options, warrants and awards.

2427 (1) Unless the articles of incorporation provide otherwise, a corporation may issue rights,
2428 options, or warrants for the purchase of shares of the corporation of any class or series, whether
2429 authorized but unissued shares of the corporation, treasury shares, or shares of the corporation to
2430 be purchased or acquired by the corporation. The board of directors shall determine the terms and and
2431 conditions upon which the rights, options, or warrants are issued, including the consideration for
2432 which the shares are to be issued. ~~The authorization by the board of directors for the corporation~~
2433 ~~to issue such rights, options, or warrants constitutes authorization for the issuance of the shares for~~
2434 ~~which the rights, options, or warrants are exercisable, their form and content, and the consideration~~
2435 ~~for which the shares are to be issued.~~

2436 (2) The terms and conditions of such stock rights, and options, or warrants, including those
2437 outstanding on the effective date of this section, which are created and issued by a corporation
2438 formed under this chapter, or its successor, and which entitle the holders thereof to purchase from
2439 the corporation shares of any class or series, whether authorized but unissued shares, treasury
2440 shares, or shares to be purchased or acquired by the corporation, may include, without limitation,
2441 restrictions or conditions that:

2442 (a) Preclude or limit the exercise, transfer or receipt or holding of such rights, options or
2443 warrants by any person or persons, including any person or persons owning or offering to
2444 acquire a specified number or percentage of the outstanding common shares or other securities
2445 of the corporation, owning or offering to acquire a specified number or percentage of the
2446 outstanding shares of the corporation or by any transferee or transferees of any such person or
2447 persons, or

2448 (b) Invalidate or void such rights, options or warrants held by any such person or persons
2449 or any such transferee or transferees.

2450 (3) The board of directors may authorize a board committee or the board of directors may
2451 authorize one or more officers, or a board committee so authorized by the board of directors may
2452 authorize one or more officers, to (A) designate the recipients of rights, options, warrants, or other
2453 equity compensation awards that involve the issuance of shares, and (B) determine, within an
2454 amount and subject to any other limitations established by the board of directors, a board
2455 committee, and, if applicable, the shareholders, the number of such rights, options, warrants, or
2456 other equity compensation awards and the terms and conditions of such rights, options, warrants
2457 or awards to be received by the recipients, provided that an officer may not use such authority to
2458 designate himself or herself or any other persons as the board of directors or a committee of the
2459 board may specify as a recipient of such rights, options, warrants or other equity compensation
2460 awards.

2461 (4) For purposes of this section, "shares" includes a security convertible into or carrying a
2462 right to subscribe for or acquire shares.

2463

2464 **Commentary to Section 607.0624:**

2465 Subsection (1) has been modernized based on the language contained in s. 6.24(a) of the 2016
2466 version of the Model Act.

2467 Subsection (2) allows the creation of rights required for adoption of a shareholders' rights plan
2468 (a/k/a a "poison pill"). The revised language adopts the more concise language in s. 6.24(b) of the
2469 2016 version of the Model Act. However, it does not change nor is it intended to change the
2470 substance of the provision.

2471 New subsection (3) follows the wording in s. 6.24(c) of the 2016 version of the Model Act. This
2472 language includes language similar to s. 157 of the DGCL and clarifies that not only the board of
2473 directors, but also committees of the board charged with dealing with these matters (such as a
2474 compensation committee under a stock incentive plan adopted by the board of directors and/or the
2475 shareholders), may be authorized by the board to make these equity compensation decisions.
2476 Unlike s. 607.0825, which requires limits to be specified for an authorization, the authorization
2477 under this new subsection, although limited to equity compensation, may be absolute rather than
2478 within specified limits. Nevertheless, as a matter of good corporate governance, boards choosing
2479 to delegate authorization under this new subsection would be well advised to specify limits in
2480 making any such delegation.

2481 Further, new subsection (3) allows delegations of authority to "officers" without imposing an
2482 obligation to set forth specified limits. In contrast, s. 607.0825, which relates to the right of the
2483 board of directors or a board committee to delegate authority to finalize the sale price of shares to
2484 be sold by the corporation, covers more than just equity compensation; but, in the realm of equity
2485 compensation, this new subsection is broader than s. 607.0825 in two key respects: (i) the new
2486 subsection authorizes delegation to "officers" rather than to just "senior executive officers" and
2487 (ii) the new subsection does not require limits to be specified in the delegation of authority to
2488 officers. Section 607.0825 is intended to operate independently of this new subsection and is not
2489 intended in any way to limit the equity compensation delegation authorized by this new subsection.
2490 Thus, for equity compensation, this new subsection makes clear that authorization to designate
2491 recipients of equity compensation can be delegated to a broader category of officers than would
2492 fall within the term "senior executive" officers in s. 607.0825 and that no limits need be specified
2493 in any such delegation.

2494

2495 607.0625 Form and content of certificates.

2496 (1) Shares may but need not be represented by certificates. Unless this ~~chapter~~ or another
2497 statute expressly provides otherwise, the rights and obligations of shareholders are identical
2498 regardless of whether ~~or not~~ their shares are represented by certificates.

2499 (2) At a minimum, each share certificate must state on its face:

2500 (a) The name of the ~~issuing~~ corporation and that the corporation is organized under the
2501 laws of this state;

2502 (b) The name of the person to whom issued; and

2503 (c) The number and class of shares and the designation of the series, if any, the
2504 certificate represents.

2505 (3) If the ~~issuing~~ corporation is authorized to issue different classes of shares or different
2506 series of shares within a class, the designations, relative rights, preferences, and limitations
2507 applicable to each class and the variations in rights, preferences, and limitations determined for
2508 each series (and the authority of the board of directors to determine variations for future series)
2509 must be summarized on the front or back of each certificate. Alternatively, each certificate may
2510 state conspicuously on its front or back that the corporation will furnish the shareholder a full
2511 statement of this information on request and without charge.

2512 (4) Each share certificate:

2513 (a) Must be signed (either manually or in facsimile) by an officer or officers
2514 designated in the bylaws or designated by the board of directors, and

2515 (b) May bear the corporate seal or its facsimile.

2516 (5) If the person who signed (either manually or in facsimile) a share certificate no longer
2517 holds office when the certificate is issued, the certificate is nevertheless valid.

2518 (6) Nothing in this section may be construed to invalidate any share certificate validly issued
2519 and outstanding under the general corporation law on July 1, 1990.

2520

2521 **Commentary to Section 607.0625:**

2522 The existing language in subsection (3) requiring a full statement of this information to be provided
2523 upon request (which language has been used in the FBCA since 1990) has been retained even
2524 though it is not in the corollary section of the Model Act (which simply uses the words "this
2525 information". Further, the language in s. 6.25(c) of the Model Act requiring this request to be in
2526 writing has not been adopted. This "writing" requirement was expressly considered and not
2527 adopted by the 1989 committee.

2528 Subsection (4)(a) continues to require the signature of one or more officers. The language used in
2529 s. 6.25(d) of the Model Act, which requires the signature of two officers on a share certificate, was
2530 expressly considered and not adopted by the 1989 committee.

2531 Section 607.0625(1) permits uncertificated shares. Uncertificated shares must comply with s.
2532 607.0626. Further, the issuance, transfer and registration of both certificated and uncertificated
2533 shares is subject to the detailed provisions of Article 8 of the Uniform Commercial Code (Chapter
2534 678).

2535

2536 607.0626 Shares without certificates.

2537 (1) Unless the articles of incorporation or bylaws provide otherwise, the board of directors
2538 of a corporation may authorize the issuance ~~issue~~ of some or all of the shares of any or all of its
2539 classes or series without certificates. The authorization does not affect shares already represented
2540 by certificates until they are surrendered to the corporation.

2541 (2) Within a reasonable time after the issuance ~~issue~~ or transfer of shares without certificates,
2542 the corporation shall deliver to ~~send~~ the shareholder a written statement of the information required
2543 on certificates by ss. 607.0625(2) and (3), and, if applicable, s. 607.0627.

2544

2545 **Commentary to Section 607.0626:**

2546 No substantive changes have been made to this section.

2547

2548 607.0627 Restriction on transfer of shares and other securities.

2549 (1) The articles of incorporation, the bylaws, an agreement among shareholders, or an
2550 agreement between shareholders and the corporation may impose restrictions on the transfer or
2551 registration of transfer of shares of the corporation. A restriction does not affect shares issued
2552 before the restriction was adopted unless the holders of such shares are parties to the restriction
2553 agreement or voted in favor of the restriction.

2554 (2) A restriction on the transfer or registration of transfer of shares is valid and enforceable
2555 against the holder or a transferee of the holder if the restriction is authorized by this section and its
2556 existence is noted conspicuously on the front or back of the certificate or is contained in the
2557 information statement required by s. 607.0626(2). Unless so noted, a restriction is not enforceable
2558 against a person without knowledge of the restriction.

2559 (3) A restriction on the transfer or registration of transfer of shares is authorized:

2560 (a) To maintain the corporation's status when it is dependent on the number or
2561 identity of its shareholders;

2562 (b) To preserve exemptions under federal or state securities law; or

2563 (c) For any other reasonable purpose.

2564 (4) A restriction on the transfer or registration of transfer of shares may:

2565 (a) Obligate the shareholder first to offer the corporation or other persons (separately,
2566 consecutively, or simultaneously) an opportunity to acquire the restricted shares;

2567 (b) Obligate the corporation or other persons (separately, consecutively, or
2568 simultaneously) to acquire the restricted shares;

2569 (c) Require the corporation, the holders of any class or series of its shares, or other
2570 persons ~~another person~~ to approve the transfer of the restricted shares, if the requirement is
2571 not manifestly unreasonable; or

2572 (d) Prohibit the transfer of the restricted shares to designated persons or classes of
2573 persons, if the prohibition is not manifestly unreasonable.

2574 (5) For purposes of this section, "shares" includes a security convertible into or carrying a
2575 right to subscribe for or acquire shares.

2576

2577 **Commentary to Section 607.0627:**

2578 The Florida statute and Model Act statute are virtually identical and no substantive changes have
2579 been made to this section of the FBCA. The Model Act provision is generally based on s. 202 of
2580 the DGCL, although s. 202 of the DGCL arguably expands the flexibility to include restraints on
2581 alienation with respect to shares beyond the current statute and corollary FBCA section.

2582 Share transfer restrictions are used by corporations for a variety of purposes. Subsection (3)
2583 enumerates certain purposes for which share transfer restrictions may be imposed, but does not
2584 limit the purposes, given that subsection (3) permits restrictions "for any other reasonable
2585 purpose." Examples of the "corporation's status" referred to in subsection (3)(a) include the
2586 subchapter S election under the Internal Revenue Code, and entitlement to a program or eligibility
2587 for a privilege administered by governmental agencies or national securities exchanges.

2588 Examples of the uses of share transfer restrictions include: (i) a corporation with few shareholders
2589 may impose share transfer restrictions to ensure that shareholders do not transfer their shares to a
2590 person not acceptable to the corporation or other shareholders; (ii) a corporation with few
2591 shareholders may impose share transfer restrictions to establish the value of the shares of deceased
2592 shareholders; (iii) a professional corporation may impose share transfer restrictions to ensure that
2593 its treatment of departing, retiring or deceased shareholders is consistent with rules applicable to
2594 the profession in question; (iv) a corporation may impose share transfer restrictions to ensure that
2595 its election of subchapter S treatment under the Internal Revenue Code, or its election to be treated
2596 as a real estate investment trust will not be unexpectedly terminated; (v) a corporation issuing
2597 securities pursuant to an exemption from federal or state securities registration may impose share
2598 transfer restrictions to ensure that subsequent transfers of shares will not result in the loss of the
2599 exemption being relied upon; and (vi) a corporation may impose restrictions to protect a valuable
2600 corporate asset that may be impacted by share transfers (such as a net operating loss).

2601 Subsection (4) describes the types of restrictions that may be imposed. The types of restrictions
2602 referred to in subsections (4)(a) (rights of first offer) and (b) (buy-sell agreements) are imposed as
2603 a matter of contractual negotiation and do not prohibit the outright transfer of shares. Rather, they
2604 designate to whom shares or other securities must be offered at a price established in the agreement
2605 or by a formula or method agreed to in advance. By contrast, the restrictions described in
2606 subsections (4)(c) and (d) may permanently limit the market for shares by disqualifying all or some
2607 potential purchasers. However, the restrictions imposed by these two provisions must not be
2608 "manifestly unreasonable."

2609

2610 607.0628 Expenses of issue.

2611 A corporation may pay the expenses of selling or underwriting its shares, and of organizing
2612 or reorganizing the corporation, from the consideration received for shares.

2613

2614 **Commentary to Section 607.0628:**

2615 This section contains a general authorization to the corporation to pay its expenses of formation
2616 and raising capital out of its original capitalization and is included in the FBCA and in a large
2617 number of state corporation statutes. While this section has recently been eliminated in the 2016
2618 version of the Model Act, it is retained in the FBCA to make clear that a corporation may pay its
2619 expenses of formation and raising capital out of its original capitalization.

2620

2621 607.0630 Shareholders' preemptive rights.

2622 (1) The shareholders of a corporation do not have a preemptive right to acquire the
2623 corporation's unissued shares or the corporation's treasury shares, except in each case to the extent
2624 the articles of incorporation so provide.

2625 (2) A statement included in the articles of incorporation that "the corporation elects to have
2626 preemptive rights" (or words of similar import) means that the following principles apply except
2627 to the extent the articles of incorporation expressly provide otherwise:

2628 (a) The shareholders of the corporation have a preemptive right, granted on uniform
2629 terms and conditions prescribed by the board of directors to provide a fair and reasonable
2630 opportunity to exercise the right, to acquire proportional amounts of the corporation's
2631 unissued shares and treasury shares upon the decision of the board of directors to issue them.

2632 (b) A shareholder may waive his or her preemptive right. A waiver evidenced by a
2633 writing is irrevocable even though it is not supported by consideration.

2634 (c) There is no preemptive right with respect to:

2635 1. Shares issued as compensation to directors, officers, agents, or employees of the
2636 corporation, ~~or~~ its subsidiaries or affiliates;

2637 2. Shares issued to satisfy conversion or option rights created to provide
2638 compensation to directors, officers, agents, or employees of the corporation, ~~or~~ its
2639 subsidiaries or affiliates;

2640 3. Shares authorized in the articles of incorporation that are issued within 6 months
2641 from the effective date of incorporation;

2642 4. Shares issued pursuant to a plan of reorganization approved by a court of
2643 competent jurisdiction pursuant to a law of this state or of the United States; or

2644 5. Shares issued for consideration other than money.

2645 (d) Holders of shares of any class or series without general voting rights but with
2646 preferential rights to distributions to receive the ~~or~~ net assets of the corporation upon
2647 dissolution ~~and liquidation~~ have no preemptive rights with respect to shares of any class or
2648 series.

2649 (e) Holders of shares of any class or series with general voting rights but without
2650 preferential rights to distributions ~~or net assets~~ upon dissolution ~~or liquidation~~ have no
2651 preemptive rights with respect to shares of any class or series with preferential rights to receive

2652 the net assets of the corporation upon dissolution ~~distributions or assets~~ unless the shares with
2653 preferential rights are convertible into or carry a right to subscribe for or acquire the shares
2654 without preferential rights.

2655 (f) Shares subject to preemptive rights that are not acquired by shareholders may be
2656 issued to any person for a period of 1 year after being offered to shareholders at a consideration
2657 set by the board of directors that is not lower than the consideration set for the exercise of
2658 preemptive rights. An offer at a lower consideration or after the expiration of 1 year is subject
2659 to the shareholders' preemptive rights.

2660 (3) For purposes of this section, "shares" includes a security convertible into or carrying a
2661 right to subscribe for or acquire shares.

2662 (4) In the case of any corporation in existence prior to January 1, 1976, shareholders of such
2663 corporation shall continue to have the preemptive rights in such corporation which they had
2664 immediately prior to that date, unless and until the articles of incorporation are amended to alter
2665 or terminate shareholders' preemptive rights.

2666

2667 **Commentary to Section 607.0630:**

2668 The Model Act, along with the corporate statutes in many jurisdictions (including Florida), contain
2669 "opt in" provisions with respect to preemptive rights under which a corporation's shareholder do
2670 not have statutory preemptive rights unless expressly granted in the articles of incorporation.

2671 For the most part, with minor language differences, the Florida statute is identical to the Model
2672 Act. There are two substantive differences between the statutes. The first, found in s.
2673 607.0630(2)(c)(4), exempts from preemptive rights shares that are issued pursuant to a court-
2674 approved reorganization. The second is a grandfather clause, retaining "opt out" preemptive rights
2675 for corporations in existence prior to January 1, 1976.

2676 Clarifying changes were made to subsections (2)(d) and (2)(e) in 2003 to make the language used
2677 (net assets upon dissolution) consistent with the corollary language used for the same purpose in
2678 s. 607.0601(2)(b) and s. 607.0603(3). However, further clean up changes have been made to
2679 subsections 2(d) and 2(e) to make the language consistent among these three statutory provisions.

2680

2681 607.0631 Corporation's acquisition of its own shares.

2682 (1) A corporation may acquire its own shares, and, unless otherwise provided in the articles
2683 of incorporation or except as provided in subsection (4) or subsection (5), shares so acquired
2684 constitute authorized but unissued shares of the same class but undesignated as to series.

2685 (2) If the articles of incorporation prohibit the reissue of acquired shares, the number of
2686 authorized shares is reduced by the number of shares acquired, effective upon amendment of the
2687 articles of incorporation.

2688 (3) Articles of amendment to effectuate a reduction in the authorized shares by the number
2689 of shares acquired by the corporation, may be adopted by the board of directors without
2690 shareholder action, shall be delivered to the ~~D~~department of State for filing, and shall set forth:

2691 (a) The name of the corporation;

2692 (b) The reduction in the number of authorized shares, itemized by class and series; and

2693 (c) The total number of authorized shares, itemized by class and series, remaining after
2694 reduction of the shares.

2695 (4) Shares of a corporation in existence on June 30, 1990, which are treasury shares under s.
2696 607.004(18), Florida Statutes (1987), shall be issued, but not outstanding, until canceled or
2697 disposed of by the corporation.

2698 (5) A corporation that has shares of any class or series which are ~~either~~ registered on a
2699 national securities exchange ~~or designated as a national market system security on an interdealer~~
2700 ~~quotation system by the National Association of Securities Dealers, Inc.,~~ may acquire such shares
2701 and designate, either in the bylaws or in the resolutions of its board, that shares so acquired by the
2702 corporation shall constitute treasury shares.

2703 (6) Shares that a corporation acquires in a fiduciary capacity for the benefit of any person
2704 other than the corporation directly or indirectly through an entity controlled by the corporation
2705 shall not be deemed to have been acquired by the corporation for purposes of this section.

2706

2707 **Commentary to Section 607.0631:**

2708 Florida takes a more expansive view of a corporation's re-acquisition of its own shares than the
2709 Model Act. The Model Act states only that a corporation may acquire its own shares and that the
2710 shares so acquired constitute authorized but unissued shares (similar to subsection (1) above,
2711 though Florida adds that (i) a corporation may provide otherwise in its articles of incorporation
2712 (which includes the ability to expressly provide in the articles of incorporation that shares acquired
2713 by the corporation shall become treasury shares rather than authorized but unissued shares), and
2714 (ii) adds the exemptions found in subsections (4) and (5) above) and that if the articles of
2715 incorporation prohibit the reissue of acquired shares, the number of authorized shares is reduced
2716 by the number of shares acquired (identical to subsection (2) above).

2717 Subsection (3) is identical to the corollary section contained in an earlier version of the Model Act.
2718 This section was removed from the Model Act in 1999, because it was believed that the required
2719 amendment to the articles was adequately covered in Article 10. However, because the language
2720 has been in the FBCA since 1989 and addresses the required amendment in the same section as
2721 the language addressing the reasons for the proposed amendment, this language has been retained.
2722 This is similar to the position taken in s. 607.0602(5).

2723 The grandfathering provision contained in subsection (4) for treasury shares outstanding prior to
2724 1990 (when the FBCA became effective) has been retained.

2725 Subsection (5), added to the FBCA in 1999, deals with the ability of a Florida corporation to
2726 designate shares reacquired by listed companies or companies whose shares are traded on the
2727 NASDAQ as treasury shares. Since NASDAQ listed companies are now
2728 "listed on a national securities exchange", the statutory language dealing with companies traded
2729 on the NASDAQ has been eliminated.

2730 New subsection (6), with respect to shares acquired by a corporation in a fiduciary capacity, is
2731 derived from a proposed change to s. 6.31 of the Model Act that is currently being considered by
2732 the Corporate Laws Committee. The change adds language consistent with the language contained
2733 in s. 607.0721(3).

2734

2735 607.06401 Distributions to shareholders.

2736 (1) A board of directors may authorize and the corporation may make distributions to its
2737 shareholders subject to restriction by the articles of incorporation and the limitations in subsection
2738 (3).

2739 (2) ~~The~~ ~~if the~~ board of directors may does not fix the record date for determining shareholders
2740 entitled to a distribution, which date may not be retroactive (~~other than one involving a purchase,~~
2741 ~~redemption, or other acquisition of the corporation's shares~~). If the , it is the date the board of
2742 directors does not fix a record date for determining shareholders entitled to a distribution (other
2743 than one involving a purchase, redemption or other acquisition of the corporation's shares), the
2744 record date is the date the board of directors authorizes the distribution.

2745 (3) No distribution may be made if, after giving it effect:

2746 (a) The corporation would not be able to pay its debts as they become due in the usual
2747 course of the corporation's activities and affairs ~~business~~; or

2748 (b) The corporation's total assets would be less than the sum of its total liabilities plus
2749 (unless the articles of incorporation permit otherwise) the amount that would be needed, if the
2750 corporation were to be dissolved and wound up at the time of the distribution, to satisfy the
2751 preferential rights upon dissolution and winding up of shareholders whose preferential rights
2752 are superior to those receiving the distribution.

2753 (4) The board of directors may base a determination that a distribution is not prohibited under
2754 subsection (3) on:

2755 (a) ~~either on~~ Financial statements prepared on the basis of accounting practices and
2756 principles that are reasonable under ~~in~~ the circumstances; or

2757 (b) ~~on~~ A fair valuation or other method that is reasonable under ~~in~~ the circumstances. In
2758 the case of any distribution based upon such a valuation, each such distribution shall be
2759 identified as a distribution based upon a current valuation of assets, and the amount per share
2760 paid on the basis of such valuation shall be disclosed to the shareholders concurrent with their
2761 receipt of the distribution.

2762 (5) If the articles of incorporation of a corporation engaged in the business of exploiting
2763 natural resources or other wasting assets so provide, distributions may be paid in cash out of
2764 depletion or similar reserves; and each such distribution shall be identified as a distribution based
2765 upon such reserves, and the amount per share paid on the basis of such reserves shall be disclosed
2766 to the shareholders concurrent with their receipt of the distribution.

2767 (6) Except as provided in subsection (8), the effect of a distribution under subsection (3) is
2768 measured:

2769 (a) In the case of a distribution by purchase, redemption, or other acquisition of the
2770 corporation's shares, as of the earlier of the date on which:

2771 1. ~~The date~~ Money or other property is transferred or the debt to a shareholder is
2772 incurred by the corporation, or

2773 2. ~~The date the~~ shareholder ceases to be a shareholder with respect to the acquired
2774 shares;

2775 (b) In the case of ~~a any other~~ distribution of indebtedness, as of the date on which the
2776 indebtedness is distributed;

2777 (c) In all other cases, as of the date on which:

2778 1. ~~The date the~~ distribution is authorized if the payment occurs within 120 days
2779 after that the date of authorization, or

2780 2. ~~The date the~~ payment is made if the payment is occurs more than 120 days after
2781 the date that the distribution is authorized ~~date of authorization~~.

2782 (7) A corporation's indebtedness to a shareholder incurred by reason of a distribution made
2783 in accordance with this section is at parity with the corporation's indebtedness to its general,
2784 unsecured creditors except to the extent provided otherwise ~~subordinated~~ by agreement. The
2785 obligation to pay such indebtedness may be secured by a lien on assets of the corporation if not
2786 prohibited under a law other than this chapter.

2787 (8) Indebtedness of a corporation, including indebtedness issued as a distribution, is not
2788 considered a liability for purposes of determinations under subsection (3) if the terms of the
2789 indebtedness ~~its terms~~ provide that payment of principal and interest is ~~are~~ made only if and to the
2790 extent that ~~payment of~~ a distribution to shareholders could then be made under this section. If such
2791 ~~the~~ indebtedness is issued as a distribution, and by its terms provides that the payments of each
2792 payment of principal or interest are made only to the extent a is treated as a distribution could be
2793 made under this section, then each payment of principal and interest of that indebtedness is treated
2794 as a distribution, the effect of which is measured on the date the payment is actually made.

2795 (9) This section shall not apply to distributions in liquidation under ss. 607.1401-607.14401.

2796

2797 **Commentary to Section 607.06401:**

2798 The cleanup changes in subsection (2) are based on language changes in the 2016 version of the
2799 Model Act and are non-substantive.

2800 The changes in subsection (3) are consistent with the language in s. 605.0405(1)(a) and are
2801 intended to harmonize the language in the FBCA and FRLCA on this provision.

2802 Subsection (4) has been modified to harmonize this section with the language contained in s.
2803 605.0405(2). This section also retains existing Florida language not found in the Model Act
2804 clarifying disclosure rules to shareholders where directors rely on statements of accountants to
2805 determine whether a corporation is authorized to make a distribution under this section. The 1989
2806 commentary to the FBCA provided that this language requires disclosure to shareholders of the
2807 fact that the dividend payment or other distribution is based on valuation in excess of standard
2808 accounting techniques. It also provides that this "[D]isclosure is appropriate to prevent
2809 shareholders from being misled about the reason or basis for their dividends."

2810 Subsection (5) retains existing Florida language not found in the Model Act, and relates to special
2811 situations involving distributions in corporations relying on the depletion of natural resources. This
2812 language was added to the FBCA in 1989 based on the then existing Florida statute. The 1989
2813 commentary provides that "[I]t is possible to read the "fair valuation or other method" language of
2814 s. 6.40(d) as broad enough to permit distributions out of depletion reserves." Rather than leave that
2815 question open, it is appropriate to adopt the clear provision in the Florida code."

2816 The changes in subsection (6) are intended to harmonize the language in the FBCA and FRLCA
2817 and are derived from the language contained in s. 605.0405(3).

2818 The language in subsection (7) has been modified to make clear that a corporation is not precluded
2819 from securing/collateralizing indebtedness which is owed to a shareholder and incurred by reason
2820 of a distribution, so long as it does not violate a law other than Chapter 607.

2821 The changes in subsection (8) are intended to harmonize the language in the FBCA and FRLCA
2822 and are derived from the language contained in s. 605.0405(5).

2823

2824 ARTICLE 7

2825 SHAREHOLDERS

2826
2827 607.0701 Annual meeting.

2828 (1) Unless directors are elected by written consent in lieu of an annual meeting as permitted
2829 by s. 607.0704, aA corporation shall hold a meeting of shareholders annually, for the election of
2830 directors and for the transaction of any proper business, at a time stated in or fixed in accordance
2831 with the bylaws.

2832 (2) Annual ~~shareholders'~~ meetings of shareholders may be held in or out of this state at a
2833 place stated in or fixed in accordance with the bylaws or, when not inconsistent with the bylaws,
2834 stated in the notice of the annual meeting. If no place is stated in or fixed in accordance with the
2835 bylaws, or stated in the notice of the annual meeting, annual meetings shall be held at the
2836 corporation's principal office.

2837 (3) The failure to hold the annual meeting at the time stated in or fixed in accordance with a
2838 corporation's bylaws or pursuant to this chapter ~~act~~ does not affect the validity of any corporate
2839 action and shall not work a forfeiture of or dissolution of the corporation.

2840 (4) Participation of shareholders and proxy holders at an annual meeting of shareholders by
2841 remote communication shall be governed by and subject to the provisions of s. 607.0709. If
2842 ~~authorized by the board of directors, and subject to such guidelines and procedures as the board of~~
2843 ~~directors may adopt, shareholders and proxy holders not physically present at an annual meeting~~
2844 ~~of shareholders may, by means of remote communication:~~

2845 (a) ~~Participate in an annual meeting of shareholders.~~

2846 (b) ~~Be deemed present in person and vote at an annual meeting of shareholders, whether~~
2847 ~~such meeting is to be held at a designated place or solely by means of remote communication,~~
2848 ~~provided that:~~

2849 1. ~~The corporation shall implement reasonable measures to verify that each person~~
2850 ~~deemed present and permitted to vote at the annual meeting by means of remote~~
2851 ~~communication is a shareholder or proxy holder;~~

2852 2. ~~The corporation shall implement reasonable measures to provide such~~
2853 ~~shareholders or proxy holders a reasonable opportunity to participate in the annual~~
2854 ~~meeting and to vote on matters submitted to the shareholders, including, without~~
2855 ~~limitation, an opportunity to communicate and to read or hear the proceedings of the~~
2856 ~~annual meeting substantially concurrently with such proceedings; and~~

2857 3. ~~If any shareholder or proxy holder votes or takes other action at the annual~~
2858 ~~meeting by means of remote communication, a record of such vote or other action shall~~
2859 ~~be maintained by the corporation.~~

2860

2861 **Commentary to Section 607.0701:**

2862 The revision clarifies that companies are allowed to hold an annual shareholders' meeting solely
2863 by remote communication or by way of a written consent under s. 607.0704, even if one or more
2864 shareholders object and would prefer to hold an in-person meeting.

2865 Although this language does not appear in the Model Act, the words "and shall not work a
2866 forfeiture of or dissolution of the corporation" were left in subsection (3). There was a belief that,
2867 even if the language were to be removed, the law would still be the same. However, a concern was
2868 expressed that removing this language might be misinterpreted as a change in the law. As a result,
2869 the language was retained in the statute.

2870 Subsection (4) was removed in favor of adding new s. 607.0709, which includes all provisions
2871 regarding participation in meetings of shareholders by remote communications.

2872

2873 607.0702 Special meeting.

2874 (1) A corporation shall hold a special meeting of shareholders:

2875 (a) On call of its board of directors or the person or persons authorized to do so by the
2876 articles of incorporation or bylaws; or

2877 (b) If shareholders holding ~~the holders of~~ not less than 10 percent, unless a greater
2878 percentage not to exceed 50 percent is required by the articles of incorporation, of all the votes
2879 entitled to be cast on any issue proposed to be considered at the proposed special meeting
2880 sign, date, and deliver to the corporation's secretary one or more written demands for the
2881 meeting describing the purpose or purposes for which it is to be held. Unless otherwise
2882 provided in the articles of incorporation, a written demand for a special meeting may be
2883 revoked by a writing to that effect received by the corporation prior to the receipt by the
2884 corporation of demands sufficient in number to require the holding of a special meeting.

2885 (2) Special meetings of shareholders' ~~meetings~~ may be held in or out of the state at a place
2886 stated in or fixed in accordance with the bylaws or, when not inconsistent with the bylaws, in the
2887 notice of the special meeting. If no place is stated in or fixed in accordance with the bylaws or in
2888 the notice of the special meeting, special meetings shall be held at the corporation's principal
2889 office.

2890 (3) Only business within the purpose or purposes described in the special meeting notice
2891 required by s. 607.0705 may be conducted at a special meeting of shareholders' ~~meeting~~.

2892 (4) Participation of shareholders and proxy holders at a special meeting of shareholders by
2893 remote communication shall be governed by and subject to the provisions of s. 607.0709. If
2894 authorized by the board of directors, and subject to such guidelines and procedures as the board of
2895 directors may adopt, shareholders and proxy holders not physically present at a special meeting of
2896 shareholders may, by means of remote communication:

2897 (a) ~~Participate in a special meeting of shareholders.~~

2898 (b) ~~Be deemed present in person and vote at a special meeting of shareholders, whether~~
2899 ~~such meeting is to be held at a designated place or solely by means of remote communication,~~
2900 ~~provided that:~~

2901 1. ~~The corporation shall implement reasonable measures to verify that each person~~
2902 ~~deemed present and permitted to vote at the special meeting by means of remote~~
2903 ~~communication is a shareholder or proxy holder;~~

2904 2. ~~The corporation shall implement reasonable measures to provide such~~
2905 ~~shareholders or proxy holders a reasonable opportunity to participate in the special~~
2906 ~~meeting and to vote on matters submitted to the shareholders, including, without~~

2907 ~~limitation, an opportunity to communicate and to read or hear the proceedings of the~~
2908 ~~special meeting substantially concurrently with such proceedings; and~~

2909 ~~3. If any shareholder or proxy holder votes or takes other action at the special~~
2910 ~~meeting by means of remote communication, a record of such vote or other action shall~~
2911 ~~be maintained by the corporation.~~

2912

2913 **Commentary to Section 607.0702:**

2914 Clarifying changes in subsection (1)(b), which are derived from the Model Act, are considered
2915 non-substantive.

2916 Subsection (4) was removed in favor of adding new s. 607.0709, which includes all provisions
2917 regarding participation in a meeting of shareholders by remote communications.

2918

2919 607.0703 Court-ordered meeting.

2920 (1) The circuit court ~~in the applicable of the county where a corporation's principal office is~~
2921 ~~located, if located in this state, or where a corporation's registered office is located if its principal~~
2922 ~~office is not located in this state, may, after notice to the corporation, summarily order a meeting~~
2923 to be held:

2924 (a) On application of any shareholder ~~of the corporation~~ entitled to vote ~~in~~ at an annual
2925 meeting if neither an annual meeting has not been held nor action by written consent in lieu
2926 thereof has become effective within any ~~13-15-~~month period; or

2927 (b) On application of one or more shareholders ~~a shareholder~~ who signed a demand for
2928 a special meeting valid under s. 607.0702, if:

2929 1. Notice of the special meeting was not given within 60 days after the first day on
2930 which the requisite number of demands have been ~~date the demand was~~ delivered to the
2931 corporation's secretary; or

2932 2. The special meeting was not held in accordance with the notice.

2933 (2) The court may fix the time and place of the meeting, determine the shares entitled to
2934 participate in the meeting, specify a record date or dates for determining shareholders entitled to
2935 notice of and to vote at the meeting, prescribe the form and content of the meeting notice, fix the
2936 quorum by voting group required for matters to be considered at the meeting (or direct that the
2937 votes of a voting group represented at the meeting constitute a quorum of such voting group for
2938 action on those matters), and enter other orders as may be appropriate necessary to accomplish the
2939 purpose or purposes of the meeting.

2940

2941 **Commentary to Section 607.0703:**

2942 The words "after notice to the corporation" is not in the Model Act and has been deleted in
2943 subsection (1). This change is not considered substantive, since the company will have to be
2944 notified of the action through the service of process in the lawsuit. Further, this change is not
2945 intended to authorize or allow an ex parte action.

2946 The word "summarily" has been added to the language at the end of subsection (1) regarding the
2947 Court's power to order a meeting. This language matches the language in s. 7.03(a) of the Model
2948 Act and corresponds with other existing similar references throughout Chapter 607 and in the
2949 Delaware corporate statute. The use of the word "summarily" is intended to urge courts to act
2950 quickly on this type of request, possibly through, within the applicable power and discretion of the
2951 court, expedited briefing and a quick decision.

2952 The words "of the corporation" were removed from (1)(a). This is not intended to be a substantive
2953 change, since the definition of "shareholder" in s. 607.0141(65) states that a shareholder is a holder
2954 of shares in the corporation.

2955 The time frame in subsection (1)(a) was changed from 13 months to 15 months so that it is
2956 consistent with s. 7.03(a)(1) of the Model Act. The 60 day provision in s. 607.0703(1)(b) was not
2957 changed, despite the shorter 30 day period contained in s. 7.03(a)(2) of the Model Act. This longer
2958 period was an intentional deviation from the Model Act adopted in 1989 and was intended to give
2959 public companies more time to comply with applicable Exchange Act requirements if a demand
2960 for a meeting has been received.

2961 Section 607.0703(1)(a) was amended to make clear that a court may not order an annual meeting
2962 if shareholders have acted by written consent to elect directors, in accordance with s. 607.0701(1),
2963 within the 15-month period.

2964 The words "or dates" was added to subsection (2) to recognize the ability of a corporation, at its
2965 option, to establish bi-furcated record dates. In addition, the broader Model Act language in s.
2966 7.03(b) replaces the language in current subsection (2). Further, language was added to make clear
2967 that courts have the authority to establish quorum requirements for separate voting groups.

2968 For clarity, this section is not intended to be overruled by an exclusive forum bylaws provision
2969 that selects a forum different from the circuit court identified in this section (the circuit court in
2970 the applicable county). Such circuit court continues to have jurisdiction for the matters described
2971 in this section, notwithstanding any validly adopted exclusive forum bylaw provision.

2972

2973 607.0704 Action by shareholders without a meeting.

2974 (1) Unless otherwise provided in the articles of incorporation or in subsection (8), action
2975 required or permitted by this chapter aet to be taken at an annual or special meeting of shareholders
2976 may be taken without a meeting, without prior notice, and without a vote if the action is taken by
2977 the holders of outstanding stock of each voting group entitled to vote thereon having not less than
2978 the minimum number of votes with respect to each voting group that would be necessary to
2979 authorize or take such action at a meeting at which all voting groups and shares entitled to vote
2980 thereon were present and voted. In order to be effective the action must be evidenced by one or
2981 more written consents describing the action taken, dated and signed by approving shareholders
2982 having the requisite number of votes of each voting group entitled to vote thereon, and delivered
2983 to the corporation by delivery to its principal office in this state, its principal place of business, the
2984 corporate secretary, or another officer or agent of the corporation having custody of the book in
2985 which proceedings of meetings of shareholders are recorded. No written consent shall be effective
2986 to take the corporate action referred to therein unless, within 60 days of the date of the earliest
2987 dated consent delivered in the manner required by this section, written consents signed by
2988 shareholders owning a sufficient number of shares ~~the number of shareholders~~ required to
2989 authorize or take the action have been ~~are~~ delivered to the corporation by delivery as set forth in
2990 this section.

2991 (2) Any written consent may be revoked prior to the date that the corporation receives the
2992 required number of consents to authorize the proposed action. No revocation is effective unless in
2993 writing and until received by the corporation at its principal office or received by the corporate
2994 secretary or other officer or agent of the corporation having custody of the book in which
2995 proceedings of meetings of shareholders are recorded.

2996 (3) Within 10 days after (i) written consents sufficient to authorize or take the action have
2997 been delivered to the corporation, or (ii) such later date that tabulation of consents is completed
2998 pursuant to an authorization under subsection (4) ~~obtaining such authorization by written consent~~,
2999 notice must be given to those shareholders who have not consented in writing or who are not
3000 entitled to vote on the action. The notice shall fairly summarize the material features of the
3001 authorized action and, if the action be such for which appraisal dissenters' rights are provided
3002 under this chapter aet, the notice shall contain a clear statement of the right of shareholders entitled
3003 to assert appraisal rights under this chapter with respect to the action ~~dissenting therefrom~~ to be
3004 paid the fair value of their shares upon compliance with further provisions of this act regarding the
3005 rights of ~~dissenting~~ shareholders entitled to assert appraisal rights under this chapter with respect
3006 to the action.

3007 (4) A consent signed under this section has the effect of a meeting vote and may be described
3008 as such in any document. Unless the articles of incorporation, bylaws or a resolution of the board
3009 of directors provides for a reasonable delay to permit tabulation of written consents, the action
3010 taken by written consent shall be effective when written consents signed by shareholders owning

3011 a sufficient number of shares required to authorize or take the action have been delivered to the
3012 corporation.

3013 (5) In the event that the action to which the shareholders consent is such as would have
3014 required the filing of a certificate under any other section of this chapter ~~act~~ if such action had been
3015 voted on by shareholders at a meeting thereof, the certificate filed under such other section shall
3016 state that written consent has been given in accordance with the provisions of this section.

3017 (6) Whenever action is taken pursuant to this section, the written consent of the shareholders
3018 consenting thereto or the written reports of inspectors appointed to tabulate such consents shall be
3019 filed with the minutes of proceedings of shareholders.

3020 (7) The notice requirements in subsection (3) shall not delay the effectiveness of actions
3021 taken by written consent, and a failure to comply with such notice requirement shall not invalidate
3022 actions taken by written consent, provided that this subsection shall not be deemed to limit judicial
3023 power to fashion any appropriate remedy in favor of a shareholder adversely affected by a failure
3024 to give such notice within the required time period.

3025 (8) If a corporation's articles of incorporation authorize shareholders to cumulate their votes
3026 when electing directors pursuant to s. 607.0728, directors may not be elected by written consent
3027 of the shareholders unless the consent is unanimous.

3028

3029 **Commentary to Section 607.0704:**

3030 Subsection (4) has been modified, following s. 7.04(d) of the Model Act, addressing an ability to
3031 delay effectiveness of a written consent for a reasonable period of time to permit tabulation of the
3032 written consents received. A parallel change has also been made in subsection (3) requiring notice
3033 of an action taken by written consent to non-consenting shareholders within ten days after
3034 authorization of the action. No specific outside time limit on the time to tabulate written consents
3035 has been added. However, this provision is not intended to allow a corporation to inappropriately
3036 delay effecting an action taken by the corporation's shareholders by written consent.

3037 The language in Model Act s. 7.04(g) was added as new s. 607.0704(7) (expressing that the failure
3038 to give the required notice does not delay the effectiveness of the action taken or invalidate the
3039 action taken, subject to the right of a court to fashion an appropriate remedy for failure to give
3040 such notice). It is believed that this new language merely codifies the existing state of court
3041 decisions relative to this issue.

3042 New subsection (8) clarifies that if a corporation's articles of incorporation authorize shareholders
3043 to cumulate their votes when electing directors pursuant to s. 607.0728, directors may only be elected
3044 by written consent of the shareholders if the consent is unanimous.

3045

3046 607.0705 Notice of meeting.

3047 (1) A corporation shall notify shareholders of the date, time, and place of each annual and
3048 special shareholders' meeting no fewer than 10 or more than 60 days before the meeting date. The
3049 notice shall include the record date for determining the shareholders entitled to vote at the meeting,
3050 if such date is different than the record date for determining shareholders entitled to notice of the
3051 meeting. If the board of directors has authorized participation by means of remote communication
3052 pursuant to s. 607.0709 for any class or series of shares, the notice to the holders of such class or
3053 series must describe the means of remote communication to be used. Unless this chapter æt or
3054 the articles of incorporation require otherwise, the corporation is required to give notice only to
3055 shareholders entitled to vote at the meeting as of the record date for determining the shareholders
3056 entitled to notice of the meeting. Notice shall be given in the manner provided in s. 607.0141, by
3057 or at the direction of the president, the secretary, or the officer or persons calling the meeting. If
3058 the notice is mailed at least 30 days before the date of the meeting, it may be done by a class of
3059 United States mail other than first class. Notwithstanding s. 607.0141, if mailed, such notice shall
3060 be deemed to be delivered when deposited in the United States mail addressed to the shareholder
3061 at her or his address as it appears in the record of shareholders of the corporation (maintained in
3062 accordance with s. 607.1601(4) on the stock transfer books of the corporation, with postage thereon
3063 prepaid.

3064 (2) Unless this chapter æt or the articles of incorporation require otherwise, notice of an
3065 annual meeting of shareholders need not include a description of the purpose or purposes for which
3066 the meeting is called.

3067 (3) Notice of a special meeting of shareholders must include a description of the purpose or
3068 purposes for which the meeting is called.

3069 (4) Unless the bylaws require otherwise, if an annual or special shareholders' meeting is
3070 adjourned to a different date, time, or place, or to add or modify the terms of participation by
3071 remote communication, notice need not be given of the new date, time, ~~or~~ place or terms of
3072 participation by remote communication if the new date, time, ~~or~~ place or terms of participation by
3073 remote communication is announced at the meeting before an adjournment is taken, and any
3074 business may be transacted at the adjourned meeting that might have been transacted on the
3075 original date of the meeting. If a new record date for the adjourned meeting is or must be fixed
3076 under s. 607.0707, however, notice of the adjourned meeting must be given under this section to
3077 persons who are shareholders as of the new record date who are entitled to notice of the meeting.

3078 (5) Notwithstanding the foregoing, whenever notice is required to be given to any
3079 shareholder under any provision of this chapter or the articles of incorporation or bylaws of any
3080 corporation to whom~~no notice of a shareholders' meeting need be given to a shareholder if:~~

3081 (a) Notice of two consecutive annual meetings, and all notices of meetings or the taking
3082 of action by written consent without a meeting to such person during the period between such

3083 ~~two consecutive annual meetings. An annual report and proxy statements for two consecutive~~
3084 ~~annual meetings of shareholders or~~

3085 (b) All, and at least two, ~~checks in payments~~ of dividends or interest on securities during
3086 a 12-month period,

3087 have been sent by first-class United States mail, addressed to the shareholder at ~~her or his~~ such
3088 person's address as it appears in the record of shareholders on the share transfer books of the
3089 corporation (maintained in accordance with s. 607.1601(4)), and returned undeliverable, then the
3090 giving of such notice to such person shall not be required. Any action or meeting which shall be
3091 taken or held without notice to such person shall have the same force and effect as if such notice
3092 has been duly given. The obligation of the corporation to give notice of a shareholders' meeting to
3093 any such shareholder shall be reinstated once the corporation has received a new address for such
3094 shareholder for entry on its share transfer books. If any such person shall deliver to the corporation
3095 a written notice setting forth such person's then current address, the requirement that a notice be
3096 given to such person with respect to future notices shall be reinstated.

3097

3098 **Commentary to Section 607.0705:**

3099 Language was added to subsection (1), with a cross reference to s. 607.0709 which now contains
3100 all of the provisions regarding attendance at shareholders' meetings, whether the meeting is an
3101 annual meeting or a special meeting, using remote communications, to the effect that if the board
3102 of directors has agreed to allow participation by remote communication at a shareholders' meeting,
3103 the notice shall be required to describe the means of remote communication to be used.

3104 Language has been added to subsection (4) to address the obligation to communicate the terms of
3105 remote communication for the continuation of an adjourned meeting.

3106 The language in subsection (5), which authorizes the corporation not to have to give notice to
3107 certain missing stockholders under certain circumstances, is modified to follow the language used
3108 in the current version of DGCL s. 230 (upon which this FBCA provision was originally based).

3109

3110 607.0706 Waiver of notice.

3111 (1) A shareholder may waive any notice required by this ~~chapter act~~, or the articles of
3112 incorporation, ~~or bylaws~~, before or after the date and time stated in the notice. The waiver must be
3113 in writing, be signed by the shareholder entitled to the notice, and be delivered to the corporation
3114 for filing by the corporation with inclusion in the minutes or ~~filing with the~~ corporate records.
3115 Neither the business to be transacted at nor the purpose of any regular or special meeting of the
3116 shareholders need be specified in any written waiver of notice unless so required by the articles of
3117 incorporation or the bylaws.

3118 (2) A shareholder's attendance at a meeting:

3119 (a) Waives objection to lack of notice or defective notice of the meeting, unless the
3120 shareholder at the beginning of the meeting objects to holding the meeting or transacting
3121 business at the meeting; or

3122 (b) Waives objection to consideration of a particular matter at the meeting that is not
3123 within the purpose or purposes described in the meeting notice, unless the shareholder objects
3124 to considering the matter when it is presented.

3125

3126 **Commentary to Section 607.0706:**

3127 The language at the end of subsection (1), which confirms that the purpose of the meeting need
3128 not be included in the waiver of notice in order for the waiver of notice to be valid, was retained.
3129 Although not in the Model Act, it derives from s. 229 of the DGCL.

3130

3131 607.0707 Record date.

3132 (1) The bylaws may fix or provide the manner of fixing the record date or dates for one or
3133 more voting groups ~~in order~~ to determine the shareholders entitled to notice of a shareholders'
3134 meeting, to demand a special meeting, to vote, or to take any other action. If the bylaws do not fix
3135 or provide for fixing such a record date, the board of directors ~~of the corporation~~ may fix the record
3136 date. In no event may a record date fixed by the board of directors be a date preceding the date
3137 upon which the resolution fixing the record date is adopted.

3138 (2) If not otherwise provided by or pursuant to the bylaws, the record date for determining
3139 shareholders entitled to demand a special meeting is the date the first shareholder delivers his or
3140 her demand to the corporation.

3141 (3) The bylaws may fix or provide the manner of fixing the record date for determining
3142 shareholders entitled to take action by the written consent of shareholders. If not otherwise
3143 provided by or pursuant to the bylaws, the board of directors of the corporation may set a record
3144 date for determining shareholders entitled to take action by the written consent of shareholders. In
3145 no event may a record date fixed by the board of directors be a date preceding the date upon which
3146 the resolution fixing the record date is adopted. If the bylaws do not fix or provide for the manner
3147 of fixing such a record date and if no such record date is fixed by the board of directors, the record
3148 date for determining shareholders entitled to take such action shall be ~~If not otherwise provided by~~
3149 ~~or pursuant to the bylaws and no prior action is required by the board of directors pursuant to this~~
3150 ~~act, the record date for determining shareholders entitled to take action without a meeting is the~~
3151 ~~date that the first signed written consent is delivered to the corporation under s. 607.0704. If not~~
3152 ~~otherwise fixed, and prior action is required by the board of directors pursuant to this chapter, the~~
3153 ~~record date for determining shareholders entitled to take action without a meeting is at the close of~~
3154 ~~business on the day on which the board of directors adopts the resolution taking such prior action.~~

3155 (4) If not otherwise provided by or pursuant to the bylaws, or by a court order pursuant to s.
3156 607.0703, the record date for determining shareholders entitled to notice of and to vote at an annual
3157 or special shareholders' meeting is the close of business on the day before the first notice is
3158 delivered to shareholders.

3159 (5) A record date for purposes of this section may not be more than 70 days before the
3160 meeting or action requiring a determination of shareholders.

3161 (6) A determination of shareholders entitled to notice of or to vote at a shareholders' meeting
3162 is effective for any adjournment of the meeting unless the board of directors fixes a new record
3163 date or dates, which it must do if the meeting is adjourned to a date more than 120 days after the
3164 date fixed for the original meeting.

3165 (7) If a court orders a meeting adjourned to a date more than 120 days after the date fixed for
3166 the original meeting, it may provide that the original record date or dates continues in effect or it
3167 may fix a new record date or dates.

3168 (8) The record date for a shareholders' meeting fixed by or in the manner provided in the
3169 bylaws or by the board of directors shall be the record date for determining shareholders entitled
3170 both to notice, of and to vote at, the shareholders' meeting, unless in the case of a record date fixed
3171 by the board of directors and to the extent not prohibited by the bylaws, the board, at the time it
3172 fixes the record date for shareholders entitled to notice of the meeting, fixes a later record date on
3173 or before the date of the meeting to determine the shareholders entitled to vote at the meeting.

3174 (9) Shares of a corporation's own stock acquired by the corporation between the record date
3175 for determining shareholders entitled to notice of or to vote at a meeting of shareholders and the
3176 time of the meeting may be voted at the meeting by the holder of record as of the record date and
3177 shall be counted in determining the total number of outstanding shares entitled to be voted at the
3178 meeting.

3179 (10) If not otherwise fixed under s. 607.0703, the record date for determining shareholders
3180 entitled to demand a special meeting shall be the first date on which a signed shareholder demand
3181 is delivered to the corporation. No written demand for a special meeting shall be effective unless,
3182 within 60 days of the earliest date on which such a demand delivered to the corporation as required
3183 by s. 607.0702 was signed, written demands signed by shareholders holding at least the percentage
3184 of votes specified in or fixed in accordance with s. 607.0702(1)(b) have been delivered to the
3185 corporation.

3186

3187 **Commentary to Section 607.0707:**

3188 The ability to establish bifurcated record dates has been added to this section (and to corresponding
 3189 places in other Article 7 sections) to provide corporations, if the directors so choose, with greater
 3190 flexibility to align shareholder ownership and voting by setting a record date for voting closer to
 3191 the meeting date. Delaware enacted similar provisions in 2009, and those provisions are contained
 3192 in s. 213 of the DGCL. This option to establish bifurcated record dates is likely to be used primary
 3193 by public companies. In light of this expectation, the Model Act commentary provides that
 3194 although corporate laws provide this flexibility, public corporations will need to consider the SEC's
 3195 proxy rules and the practicalities of proxy voting and vote counting mechanisms in using this
 3196 flexibility.

3197 The changes to subsection (3) are based (in part) on s. 213(b) of the DGCL, make clear that the
 3198 board may set a record date for determining shareholders entitled to take action by written consent
 3199 of shareholders, and set a default rule for determining the record date if the board doesn't set a
 3200 specific record date. However, the language for the bylaws override for fixing or establishing the
 3201 method for fixing such record date contained in this section has been changed to parallel the syntax
 3202 appearing in the lead-in to subsection (2). Finally, the last sentence of subsection (1) has also been
 3203 added to subsection (3).

3204 The "unless" language contained in new subsection (8), which is based on s. 7.07(e) of the Model
 3205 Act, is meant only to refer to bi-furcated record dates.

3206 New subsection (9) has been added to resolve an inconsistency between s. 607.0707(1), which
 3207 states that shareholders of record on the record date are to receive notice of and are authorized to
 3208 vote at a shareholders' meeting, and s. 607.0631, which provides that shares acquired by a
 3209 corporation shall become, when acquired by the corporation, authorized but not issued and
 3210 outstanding shares of the corporation (or authorized and issued but not outstanding, treasury shares
 3211 under the circumstances set forth in s. 607.0631(5)). Because of these inconsistent positions, a
 3212 Florida corporation might be reluctant to reacquire its shares between the record date and a meeting
 3213 date because of the uncertainty as to how to deal with voting of those shares given the fact that
 3214 under s. 607.0631(1) these shares would not be outstanding on the meeting date, even though they
 3215 were issued and outstanding on the record date. This provision is based on a similar provision
 3216 contained in Maryland's corporate statute.

3217

3218 Model Act s. 7.08 Conduct of the Meeting.

3219 Section 7.08 of the Model Act, which creates default rules regarding the conduct of shareholders'
3220 meetings, has not been added to the statute. It is believed that remedies already exist for dealing
3221 with manipulations of the shareholder voting machinery and that adding this section to the FBCA
3222 is therefore unnecessary.

3223 However, the poll closing provision that is contained in s. 7.08 of the Model Act has been added
3224 to s. 607.0729(6).

3225

3226 607.0709 Remote Participation in Annual and Special Meetings of Shareholders.

3227 (1) Shareholders of any voting group, other persons entitled to vote on behalf of shareholders
3228 pursuant to s. 607.0721, attorneys in fact for shareholders and holders of proxies appointed
3229 pursuant to s. 607.0722, may participate in any annual or special meeting of shareholders by means
3230 of remote communication to the extent the board of directors authorizes such participation for such
3231 voting group. Participation by means of remote communication shall be subject to such guidelines
3232 and procedures as the board of directors adopts, and shall be in conformity with subsection (2).

3233 (2) Shareholders, other persons entitled to vote on behalf of shareholders pursuant to s.
3234 607.0721, attorneys in fact for shareholders and holders of proxies appointed pursuant to s.
3235 607.0722, participating in a shareholders' meeting by means of remote communication authorized
3236 in conformity with subsection (1) shall be deemed present in person and may vote at such a
3237 meeting, whether such meeting is to be held at a designated place or solely by means of remote
3238 communication, if the corporation has implemented reasonable measures:

3239 (a) To verify that each person participating remotely as a shareholder is a shareholder,
3240 is another person entitled to vote on behalf of a shareholder pursuant to s. 607.0721, is an
3241 attorney in fact for a shareholder or is a holder of a proxy appointed pursuant to s. 607.0722,
3242 and

3243 (b) To provide such shareholders, such other persons entitled to vote on behalf of
3244 shareholders pursuant to s. 607.0721, such attorneys in fact for shareholders and such holders
3245 of proxies appointed pursuant to s. 607.0722, a reasonable opportunity to participate in the
3246 meeting and to vote on matters submitted to the shareholders, including an opportunity to
3247 communicate, and to read or hear the proceedings of the meeting, substantially concurrently
3248 with such proceedings.

3249 (3) If any shareholder, any other person entitled to vote on behalf of a shareholder pursuant
3250 to s. 607.0721, any attorney in fact for a shareholder or any holder of a proxy appointed pursuant
3251 to s. 607.0722, votes or takes action at a shareholder's meeting by means of remote communication
3252 authorized in conformity with this section, a record of such vote or other action shall be maintained
3253 by the corporation.

3254 (4) If the board of directors is authorized to determine the place of a shareholders' meeting,
3255 the board of directors may, in its sole discretion, determine that the meeting shall be held solely
3256 by means of remote communication.

3257

3258 **Commentary to Section 607.0709:**

3259 New s. 607.0709 replaces the language previously contained in ss. 607.0701 and 607.0702
3260 regarding participation in a shareholders meeting by remote communication. The language is based
3261 on Model Act s. 7.09.

3262 The language in subsection (1) that allows the corporation's board of directors to authorize remote
3263 participation for less than all shareholders (selecting between classes and series that can participate
3264 by remote participation) is based on subsection (1) of the Model Act provision. It is believed that
3265 the Board should have the flexibility to decide which classes or series of shares can participate in
3266 a meeting by remote participation, and that any abuse by the board in inappropriately using this
3267 provision should be able to be addressed by way of remedies available to shareholders for breaches
3268 of fiduciary duties.

3269 The term "voting groups" has been substituted for "classes and series" in subsection (1).

3270

3271 607.0720 Shareholders' list for meeting.

3272 (1) After fixing a record date for a meeting, a corporation shall prepare an alphabetical list of
3273 the names of all its shareholders who are entitled to notice of a shareholders' meeting, ~~arranged by~~
3274 ~~voting group with the address of, and the number and class and series, if any, of shares held by,~~
3275 ~~each.~~ If the board of directors fixes a different record date under s. 607.0707(8) to determine the
3276 shareholders entitled to vote at the meeting, the corporation shall also prepare an alphabetical list
3277 of the names of all its shareholders who are entitled to vote at the meeting. Each list must be
3278 arranged by voting group (and within each voting group by class or series of shares) and show the
3279 address of and number of shares held by each shareholder. Nothing contained in this subsection
3280 shall require the corporation to include on such list the electronic mail address or other electronic
3281 contact information of a shareholder.

3282 (2) The shareholders' list for notice must be available for inspection by any shareholder for
3283 a period of 10 days prior to the meeting or such shorter time as exists between the record date and
3284 the meeting and continuing through the meeting at the corporation's principal office, at a place
3285 identified in the meeting notice in the city where the meeting will be held, or at the office of the
3286 corporation's transfer agent or registrar. Any separate shareholders' list for voting, if different,
3287 must be similarly available for inspection promptly after the record date for voting. A shareholder
3288 or the shareholder's agent or attorney is entitled on written demand to inspect and, ~~the list~~ (subject
3289 to the requirements of s. 607.1602(3)), copy a list during regular business hours and at his or her
3290 expense, during the period it is available for inspection.

3291 (3) The corporation shall make the ~~shareholders'~~ shareholders' list of shareholders entitled to vote available
3292 at the meeting, and any shareholder or the shareholder's agent or attorney is entitled to inspect the
3293 list at any time during the meeting or any adjournment.

3294 (4) The shareholders' list is prima facie evidence of the identity of shareholders entitled to
3295 examine the shareholders' list or to vote at a meeting of shareholders.

3296 (5) If the requirements of this section have not been substantially complied with or if the
3297 corporation refuses to allow a shareholder or the shareholder's agent or attorney to inspect ~~a the~~
3298 ~~shareholders' list~~ (or copy a list as permitted by subsection (2)) before or at the meeting, the
3299 meeting shall be adjourned until such requirements are complied with on the demand of any
3300 shareholder in person or by proxy who failed to get such access, or, if not adjourned upon such
3301 demand and such requirements are not complied with, the circuit court in the applicable ~~of the~~
3302 ~~county where a corporation's principal office (or, if none in this state, its registered office) is~~
3303 ~~located,~~ on application of the shareholder, may summarily order the inspection or copying at the
3304 corporation's expense and may postpone the meeting for which the list was prepared until the
3305 inspection or copying is complete.

3306 (6) Refusal or failure to comply with the requirements of this section shall not affect the
3307 validity of any action taken at such meeting.

3308 (7) A shareholder may not sell or otherwise distribute any information or records inspected
3309 under this section, except to the extent that such use is for a proper purpose as defined in s.
3310 607.1602(3). ~~Any person who violates this provision shall be subject to a civil penalty of \$5,000.~~

3311

3312 **Commentary to Section 607.0720:**

3313 Subsection (1) was modified to make it clear that the corporation need not include electronic mail
3314 addresses in its shareholder list.

3315 Subsection (2) was modified to make clear that shareholders have an absolute right to inspect the
3316 corporation's shareholders' list in connection with a meeting of shareholders, but that the right to
3317 obtain a copy of the shareholders' list is subject to the requirements of s. 607.1602 (requiring a
3318 demand made in good faith and with a proper purpose).

3319 Language was added to subsection (2) to correspond with the addition of the possibility of a bi-
3320 furcated record date. Such additional new language deals with the requirement to have a separate
3321 list of those entitled to vote in those cases where a bi-furcated record date has been established.

3322 Subsection (4), which subsection sets forth that the shareholder' list is prima facie evidence as to
3323 the identity of shareholders entitled to examine the list or to vote at the meeting, was retained, even
3324 though this subsection is not in the corresponding section of the Model Act.

3325 While not in the Model Act, the language in subsection (7), which has been in the Florida statute
3326 since 1994, was retained. However, the second sentence in subsection (7), which provides that any
3327 person who violates this provision shall be subject to a civil penalty of \$5,000, was removed. By
3328 removing this sentence, the penalty for improperly selling a shareholders' list is left to the courts
3329 to determine.

3330

3331 607.0721 Voting entitlement of shares.

3332 (1) Except as provided in subsections (2), (3), and (4) or unless the articles of incorporation
3333 or this ~~chapter~~ æ provides otherwise, each outstanding share, regardless of class or series, is
3334 entitled to one vote on each matter submitted to a vote at a meeting of shareholders. Only shares
3335 are entitled to vote. If the articles of incorporation provide for more or less than one vote for any
3336 share on any matter, every reference in this ~~chapter~~ æ to a majority or other proportion of shares
3337 shall refer to such a majority or other proportion of votes entitled to be cast.

3338 (2) ~~The S~~shares of a corporation are not entitled to vote if they are owned by or otherwise
3339 belong to the corporation directly or indirectly through an entity of which a majority of the voting
3340 power is held directly or indirectly by the corporation or which is otherwise controlled by the
3341 ~~domestic or foreign, and the first corporation owns, directly or indirectly, a majority of the shares~~
3342 entitled to vote for directors of the second corporation.

3343 (3) Shares held by the corporation in a fiduciary capacity for the benefit of any person are
3344 entitled to vote unless they are held for the benefit of, or otherwise belong to, the corporation
3345 directly, or indirectly through an entity of which a majority of the voting power is held directly or
3346 indirectly by the corporation or which is otherwise controlled by the corporation ~~Subsection (2)~~
3347 ~~does not limit the power of a corporation to vote any shares, including its own shares, held by it in~~
3348 ~~a fiduciary capacity. For purposes of this subsection, "voting power" means the current power to~~
3349 vote in the election of directors of a corporation or to elect, select or appoint those persons who
3350 will govern another entity.

3351 (4) Redeemable shares are not entitled to vote on any matter, and shall not be deemed to be
3352 outstanding, after delivery of a written notice of redemption is effective ~~mailed to the holders~~
3353 ~~thereof~~ and a sum sufficient to redeem such shares has been deposited with a bank, trust company,
3354 or other financial institution upon an irrevocable obligation to pay the holders the redemption price
3355 upon surrender of the shares.

3356 (5) Shares standing in the name of another corporation, domestic or foreign, may be voted
3357 by such officer, agent, or proxy as the bylaws of the corporate shareholder may prescribe or, in the
3358 absence of any applicable provision, by such person as the board of directors of the corporate
3359 shareholder may designate. In the absence of any such designation or in case of conflicting
3360 designation by the corporate shareholder, the chair of the board, the president, any vice president,
3361 the secretary, and the treasurer of the corporate shareholder, in that order, shall be presumed to be
3362 fully authorized to vote such shares.

3363 (6) Shares held by an administrator, executor, guardian, personal representative, or
3364 conservator may be voted by him or her, either in person or by proxy, without a transfer of such
3365 shares into his or her name. Shares standing in the name of a trustee may be voted by him or her,
3366 either in person or by proxy, but no trustee shall be entitled to vote shares held by him or her
3367 without a transfer of such shares into his or her name or the name of his or her nominee.

3368 (7) Shares held by or under the control of a receiver, a trustee in bankruptcy proceedings, or
3369 an assignee for the benefit of creditors may be voted by him or her without the transfer thereof into
3370 his or her name.

3371 (8) If a share or shares stand of record in the names of two or more persons, whether
3372 fiduciaries, members of a partnership, joint tenants, tenants in common, tenants by the entirety, or
3373 otherwise, or if two or more persons have the same fiduciary relationship respecting the same
3374 shares, unless the secretary of the corporation is given notice to the contrary and is furnished with
3375 a copy of the instrument or order appointing them or creating the relationship wherein it is so
3376 provided, then acts with respect to voting have the following effect:

3377 (a) If only one votes, in person or by proxy, his or her act binds all;

3378 (b) If more than one vote, in person or by proxy, the act of the majority so voting binds
3379 all;

3380 (c) If more than one vote, in person or by proxy, but the vote is evenly split on any
3381 particular matter, each faction is entitled to vote the share or shares in question proportionally;

3382 (d) If the instrument or order so filed shows that any such tenancy is held in unequal
3383 interest, a majority or a vote evenly split for purposes of this subsection shall be a majority or
3384 a vote evenly split in interest;

3385 (e) The principles of this subsection shall apply, insofar as possible, to execution of
3386 proxies, waivers, consents, or objections and for the purpose of ascertaining the presence of a
3387 quorum.

3388 (9) Subject to s. 607.0723, nothing herein contained shall prevent trustees or other fiduciaries
3389 holding shares registered in the name of a nominee from causing such shares to be voted by such
3390 nominee as the trustee or other fiduciary may direct. Such nominee may vote shares as directed by
3391 a trustee or other fiduciary without the necessity of transferring the shares to the name of the trustee
3392 or other fiduciary.

3393

3394 **Commentary to Section 607.0721:**

3395 Clarifying changes were made in subsections (1) – (4) based on changes made in the 2016 version
3396 of the Model Act, none of which are considered substantive. Subsections (5) – (9) are not in the
3397 Model Act, but have been in the FBCA since 1989 and are retained.

3398

3399 607.0722 Proxies.

3400 (1) A shareholder, other person entitled to vote on behalf of a shareholder pursuant to s.
3401 607.0721, or attorney in fact for a shareholder may vote the shareholder's shares in person or by
3402 proxy.

3403 (2) (a) A shareholder, other person entitled to vote on behalf of a shareholder pursuant to s.
3404 607.0721, or attorney in fact for a shareholder may appoint a proxy to vote or otherwise act
3405 for the shareholder by signing an appointment form or by electronic transmission. Any type
3406 of electronic transmission appearing to have been, or containing or accompanied by such
3407 information or obtained under such procedures to reasonably ensure that the electronic
3408 transmission was, transmitted by such person is a sufficient appointment, subject to the
3409 verification requested by the corporation under s. 607.0724.

3410 (b) Without limiting the manner in which a shareholder, other person entitled to vote on
3411 behalf of a shareholder pursuant to s. 607.0721, or attorney in fact for a shareholder may
3412 appoint a proxy to vote or otherwise act for the shareholder pursuant to paragraph (a), a
3413 shareholder, other person entitled to vote on behalf of a shareholder pursuant to s. 607.0721,
3414 or attorney in fact for a shareholder may make such an appointment by:

3415 1. Signing an appointment form, with the signature affixed, by any reasonable
3416 means including, but not limited to, facsimile or electronic signature.

3417 2. Transmitting or authorizing the transmission of an electronic transmission to the
3418 person who will be appointed as the proxy or to a proxy solicitation firm, proxy support
3419 service organization, registrar, or agent authorized by the person who will be designated
3420 as the proxy to receive such transmission. However, any electronic transmission must set
3421 forth or be submitted with information from which it can be determined that the electronic
3422 transmission was authorized by the shareholder, other person entitled to vote on behalf of
3423 a shareholder pursuant to s. 607.0721, or attorney in fact for a shareholder. If it is
3424 determined that the electronic transmission is valid, the inspectors of election or, if there
3425 are no inspectors, such other persons making that determination shall specify the
3426 information upon which they relied.

3427 (3) An appointment of a proxy is effective when a signed appointment form or an electronic
3428 transmission of the appointment is received by the inspector of election or by the secretary or other
3429 officer or agent authorized to count tabulate votes. An appointment is valid for the term up to 11
3430 months unless a longer period is expressly provided in the appointment form and, if no term is
3431 provided, is valid for 11 months unless the appointment is irrevocable under subsection (5).

3432 (4) The death or incapacity of the shareholder appointing a proxy does not affect the right of
3433 the corporation to accept the proxy's authority unless notice of the death or incapacity is received

3434 by the secretary or other officer or agent authorized to tabulate votes before the proxy exercises
3435 his or her authority under the appointment.

3436 (5) An appointment of a proxy is revocable by the shareholder unless the appointment form
3437 or electronic transmission conspicuously states that it is irrevocable and the appointment is coupled
3438 with an interest. Appointments coupled with an interest include the appointment of:

3439 (a) A pledgee;

3440 (b) A person who purchased or agreed to purchase the shares;

3441 (c) A creditor of the corporation who extended credit to the corporation under terms
3442 requiring the appointment;

3443 (d) An employee of the corporation whose employment contract requires the
3444 appointment; or

3445 (e) A party to a voting agreement created under s. 607.0731.

3446 (6) An appointment made irrevocable under subsection (5) becomes revocable when the
3447 interest with which it is coupled is extinguished.

3448 (7) Unless it otherwise provides, an appointment made irrevocable under subsection (5)
3449 continues in effect after a transfer of the shares and a transferee takes subject to the appointment,
3450 except that a~~A~~ transferee for value of shares subject to an irrevocable appointment may revoke the
3451 appointment if the transferee did not know of its existence when he or she acquired the shares and
3452 the existence of the irrevocable appointment was not noted conspicuously on the certificate
3453 representing the shares or on the information statement for shares without certificates.

3454 (8) Subject to s. 607.0724 and to any express limitation on the proxy's authority appearing
3455 on the face of the appointment form or in the electronic transmission, a corporation is entitled to
3456 accept the proxy's vote or other action as that of the shareholder making the appointment.

3457 (9) If an appointment form expressly provides, any proxy holder may appoint, in writing, a
3458 substitute to act in his or her place.

3459 (10) Any copy, facsimile transmission, or other reliable reproduction of the writing or
3460 electronic transmission created under subsection (2) may be substituted or used in lieu of the
3461 original writing or electronic transmission for any purpose for which the original writing or
3462 electronic transmission could be used if the copy, facsimile transmission, or other reproduction is
3463 a complete reproduction of the entire original writing or electronic transmission.

3464 (11) A corporation may adopt bylaws authorizing additional means or procedures for
3465 shareholders to use in exercising rights granted by this section.

3466 **Commentary to Section 607.0722:**

3467 Changes to subsection (3) follow the recently adopted changes to s. 7.22(c) of the Model Act. The
3468 new language clarifies that a proxy is valid for the period specified in the appointment form (which
3469 can be less than 11 months, 11 months or more than 11 months), and that if no term is specified,
3470 the term would be defaulted to 11 months unless such appointment is irrevocable under (5)
3471 (because it is coupled with an interest).

3472 The language added to subsection (7) follows recently adopted changes to s. 7.22 of the Model
3473 Act. This language makes clear that unless the appointment otherwise provides, an appointment
3474 made irrevocable under subsection (5) continues in effect after a transfer of the shares and a
3475 transferee takes subject to the appointment, except if such transferee is a transferee for value who
3476 did not know (or have reason to know from a notation on the certificate or in a related information
3477 statement) that there was an irrevocable appointment associated with such shares. This clarifying
3478 change is not believed to be substantive.

3479

3480 607.0723 Shares held by intermediaries and nominees.

3481 (1) A corporation's board of directors may establish a procedure ~~under~~ by which a person on
3482 whose behalf ~~the beneficial owner~~ of shares that are registered in the name of an intermediary or
3483 a nominee may elect to be treated ~~is recognized~~ by the corporation as the record shareholder by
3484 filing with the corporation a beneficial ownership certificate. ~~The extent of this recognition may~~
3485 ~~be determined in the procedure~~ terms, conditions, and limitations of this treatment shall be
3486 specified in the procedure. To the extent such person is treated under such procedure as having
3487 rights or privileges that the record shareholder otherwise would have, the record shareholder shall
3488 not have those rights or privileges.

3489 (2) The procedure ~~shall specify~~ may set forth:

3490 (a) The types of intermediaries or nominees to which it applies;

3491 (b) The rights or privileges that the corporation recognizes in a person with respect to
3492 whom a beneficial owner ownership certificate is filed;

3493 (c) The manner in which the procedure is selected ~~by the nominee, which shall include~~
3494 that the beneficial ownership certificate be signed or assented to by or on behalf of the record
3495 shareholder and the person or persons on whose behalf the shares are held;

3496 (d) The information that must be provided when the procedure is selected;

3497 (e) The period for which selection of the procedure is effective; ~~and~~

3498 (f) Requirements for notice to the corporation with respect to the arrangement; and

3499 (g) the form and contents of the beneficial ownership certificate.

3500 (3)(f) The procedure may specify any oOther aspects of the rights and duties created by the
3501 filing of a beneficial ownership certificate.

3502

3503 **Commentary to Section 607.0723:**

3504 The changes follow the recently adopted changes to s. 7.23 of the Model Act. The new language
3505 modernizes this provision of the FBCA to better deal with issues of beneficial ownership of shares.

3506

3507 607.0724 Corporation's Acceptance of votes and other instruments.

3508 (1) If the name signed on a vote, ballot, consent, waiver, shareholder demand, or proxy
3509 appointment corresponds to the name of a shareholder, the corporation if acting in good faith is
3510 entitled to accept the vote, ballot, consent, waiver, shareholder demand, or proxy appointment and
3511 give it effect as the act of the shareholder.

3512 (2) If the name signed on a vote, ballot, consent, waiver, shareholder demand, or proxy
3513 appointment does not correspond to the name of its shareholder, the corporation if acting in good
3514 faith is nevertheless entitled to accept the vote, ballot, consent, waiver, shareholder demand, or
3515 proxy appointment and give it effect as the act of the shareholder if:

3516 (a) The shareholder is an entity and the name signed purports to be that of an officer or
3517 agent of the entity;

3518 (b) The name signed purports to be that of an administrator, executor, guardian, personal
3519 representative, or conservator representing the shareholder and, if the corporation requests,
3520 evidence of fiduciary status acceptable to the corporation has been presented with respect to
3521 the vote, ballot, consent, waiver, shareholder demand, or proxy appointment;

3522 (c) The name signed purports to be that of a receiver, trustee in bankruptcy, or assignee
3523 for the benefit of creditors of the shareholder and, if the corporation requests, evidence of this
3524 status acceptable to the corporation has been presented with respect to the vote, ballot, consent,
3525 waiver, shareholder demand, or proxy appointment;

3526 (d) The name signed purports to be that of a pledgee, beneficial owner, or attorney in
3527 fact of the shareholder and, if the corporation requests, evidence acceptable to the corporation
3528 of the signatory's authority to sign for the shareholder has been presented with respect to the
3529 vote, ballot, consent, waiver, shareholder demand, or proxy appointment; or

3530 (e) Two or more persons are the shareholder as co-tenants or fiduciaries and the name
3531 signed purports to be the name of at least one of the co-owners and the person signing appears
3532 to be acting on behalf of all the co-owners.

3533 (3) The corporation is entitled to reject a vote, ballot, consent, waiver, shareholder demand,
3534 or proxy appointment if the ~~secretary or other officer or agent~~ person authorized to accept or reject
3535 such instrument ~~tabulate votes~~, acting in good faith, has reasonable basis for doubt about the
3536 validity of the signature on it or about the signatory's authority to sign for the shareholder.

3537 (4) ~~The corporation and its officer or agent who~~ Neither the corporation or any person
3538 authorized by it, nor an inspector of election under s. 607.0729, that accepts or rejects a vote, ballot,
3539 consent, waiver, shareholder demand, or proxy appointment in good faith and in accordance with
3540 the standards of this section ~~are not~~ is liable in damages to the shareholder for the consequences
3541 of the acceptance or rejection.

3542 (5) Corporate action based on the acceptance or rejection of a vote, ballot, consent, waiver,
3543 shareholder demand, or proxy appointment under this section is valid unless a court of competent
3544 jurisdiction determines otherwise.

3545 (6) If an inspector of election has been appointed under s. 607.0729, the inspector of election
3546 also has the authority to request information and make determinations under subsections (1), (2),
3547 and (3). Any determination made by the inspector of election under those subsections is
3548 controlling.

3549

3550 **Commentary to Section 607.0724:**

3551 Clarifying changes have been made following recent changes to s. 7.24 of the Model Act, including
3552 references to "ballot" and "shareholder demand" and language designed to coordinate with the
3553 inspector of election provisions in s. 607.0729.

3554

3555 607.0725 Quorum and voting requirements for voting.

3556 (1) Shares entitled to vote as a separate voting group may take action on a matter at a meeting
3557 only if a quorum of those shares exists with respect to that matter. Unless the articles of
3558 incorporation or this chapter ~~aet~~ provides otherwise, a majority of the votes entitled to be cast on
3559 the matter by the voting group constitutes a quorum of that voting group for action on that matter.

3560 (2) Once a share is represented for any purpose at a meeting, it is deemed present for quorum
3561 purposes for the remainder of the meeting and for any adjournment of that meeting unless a new
3562 record date is or must be fixed ~~set~~ for that adjourned meeting.

3563 (3) If a quorum exists, action on a matter (other than the election of directors) by a voting
3564 group is approved if the votes cast within the voting group favoring the action exceed the votes
3565 cast opposing the action, unless the articles of incorporation or this chapter ~~aet~~ requires a greater
3566 number of affirmative votes.

3567 (4) The holders of a majority of the shares represented, and who would be entitled to vote at
3568 a meeting if a quorum were present, where a quorum is not present, may adjourn such meeting
3569 from time to time.

3570 (5) The articles of incorporation may provide for a greater voting requirement or a greater or
3571 lesser quorum requirement for shareholders, or voting groups of shareholders, than is provided by
3572 this chapter ~~aet~~, but in no event shall a quorum consist of less than one-third of the shares entitled
3573 to vote.

3574 (6) An amendment to the articles of incorporation that adds, changes, or deletes a greater or
3575 lesser quorum or voting requirement shall meet the same quorum requirement and be adopted by
3576 the same vote and voting groups required to take action under the quorum and voting requirements
3577 then in effect or proposed to be adopted, whichever is greater.

3578 (7) The election of directors is governed by s. 607.0728.

3579 (8) Whenever a provision of this chapter provides for voting of classes or series as separate
3580 voting groups, the rules provided in s. 607.1004 for amendments of articles of incorporation apply
3581 to that provision.

3582

3583 **Commentary to Section 607.0725:**

3584 The language in subsection (4), dealing with the ability of the holders of a majority of the shares
3585 in attendance at a meeting for which a quorum is not present to adjourn the meeting (which has
3586 been in the statute since 1989 but is not in the Model Act) has been retained.

3587 Subsections (5) and (6) are derived from s. 7.27 of the Model Act.

3588 Practitioners are reminded that the best way to avoid the possibility that a separate vote of each
3589 voting group will be required under particular circumstances is to expressly and clearly state in the
3590 corporation's articles of incorporation that all shares will vote together as a single voting group on
3591 such matters.

3592

3593 607.0726 Action by single and multiple voting groups.

3594 (1) If the articles of incorporation or this chapter ~~act~~ provides for voting by a single voting
3595 group on a matter, action on that matter is taken when voted upon by that voting group as provided
3596 in s. 607.0725.

3597 (2) If the articles of incorporation or this chapter ~~act~~ provides for voting by two or more
3598 voting groups on a matter, action on that matter is taken only when voted upon by each of those
3599 voting groups counted separately as provided in s. 607.0725. Action may be taken by different ~~one~~
3600 voting groups on a matter ~~even though no action is taken by another voting group entitled to vote~~
3601 ~~on the matter~~ at different times.

3602

3603 **Commentary to Section 607.0726:**

3604 Clarifying changes based on the most recent versions of the corollary section of the Model Act
3605 have been made. None of these changes are considered substantive.

3606

3607 607.0728 Voting for directors; cumulative voting.

3608 (1) Unless otherwise provided in the articles of incorporation, or in a bylaw that fixes a
3609 greater voting requirement for the election of directors and that is adopted by the board of directors
3610 or shareholders of a corporation having shares registered pursuant to section 12 of the Securities
3611 Exchange Act of 1934 ~~listed on a national securities exchange~~ at the time of adoption, directors
3612 are elected by a plurality of the votes cast by the shares entitled to vote in the election at a meeting
3613 at which a quorum is present. A bylaw provision or amendment adopted by shareholders which
3614 specifies the votes necessary for the election of directors may not be further amended or repealed
3615 by the board of directors.

3616 (2) Each shareholder who is entitled to vote at an election of directors has the right to vote
3617 the number of shares owned by him or her for as many persons as there are directors to be elected
3618 and for whose election the shareholder has a right to vote. Shareholders do not have a right to
3619 cumulate their votes for directors unless the articles of incorporation so provide.

3620 (3) A statement included in the articles of incorporation that "all or a designated voting group
3621 of shareholders are entitled to cumulate their votes for directors," or words of similar import, means
3622 that the shareholders designated are entitled to multiply the number of votes they are entitled to
3623 cast by the number of directors for whom they are entitled to vote and cast the product for a single
3624 candidate or distribute the product among two or more candidates.

3625

3626 **Commentary to Section 607.0728:**

3627 Subsection (1), which was added to the Florida statute in 2009, allows directors of a public
3628 company to amend the corporation's bylaws to fix a greater voting requirement for the election of
3629 directors without requiring action by the shareholders. The definition of public company used in
3630 this section has been modified to provide that the board of directors of any company with a class
3631 of shares registered pursuant to section 12 of the Securities Exchange Act of 1934 (whether or not
3632 on a national securities exchange) may adopt a majority voting standard.

3633 The language in the first sentence of subsection (2) is not included in Model Act s. 7.28(b).
3634 However, this language is believed to be the general rule with respect to shares entitled to vote for
3635 the election of directors, and therefore the language has been retained.

3636 The language in s. 7.28(d) of the Model Act dealing with the rules for cumulative voting was
3637 determined not to be necessary and thus has not been included.

3638 Concern was expressed that the language allowing the board of directors of a public company to
3639 adopt a majority voting standard could be viewed as in conflict with the language in s. 607.1021
3640 (although it was agreed that the drafters of the 2009 change did not intend for Section 607.1021 to
3641 override the authority granted to directors to act alone to fix the greater voting requirement). The
3642 subcommittee considered whether to add a cross reference to s. 607.1021 so as to eliminate any
3643 potential for conflict. However, it was concluded that the cross reference was unnecessary.

3644

3645 607.0729 Voting Procedures; Inspectors of Election.

3646 (1) A corporation that has a class of shares registered pursuant to section 12 of the Securities
3647 Exchange Act of 1934 shall, and any other corporation may, appoint one or more inspectors to act
3648 at a meeting of shareholders in connection with determining voting results. Each inspector will
3649 faithfully execute the duties of inspector with strict impartiality and according to the best of the
3650 inspector's ability. An inspector may be an officer or employee of the corporation. The inspectors
3651 may appoint or retain other persons to assist the inspectors in the performance of the duties of
3652 inspector under subsection (2), and may rely on information provided by such persons and other
3653 persons, including those appointed to count votes, unless the inspectors believe reliance is
3654 unwarranted.

3655 (2) The inspectors shall:

3656 (a) Ascertain the number of shares outstanding and the voting power of each;

3657 (b) Determine the shares represented at a meeting;

3658 (c) Determine the validity of proxy appointments and ballots;

3659 (d) Count the votes; and

3660 (e) Make a written report of the results.

3661 (3) In performing their duties, the inspectors may examine (i) the proxy appointment forms
3662 and any other information provided in accordance with s. 607.0722(2), (ii) any envelope or related
3663 writing submitted with those appointment forms, (iii) any ballots, (iv) any evidence or other
3664 information specified in s. 607.0724, and (v) the relevant books and records of the corporation
3665 relating to its shareholders and their entitlement to vote, including any securities position list
3666 provided by a depository clearing agency.

3667 (4) The inspectors also may consider other information that they believe is relevant and
3668 reliable for the purpose of performing any of the duties assigned to them pursuant to subsection
3669 (2), including for the purpose of evaluating inconsistent, incomplete or erroneous information and
3670 reconciling information submitted on behalf of banks, brokers, their nominees or similar persons
3671 that indicates more votes being cast than a proxy is authorized by the record shareholder to cast or
3672 more votes being cast than the record shareholder is entitled to cast. If the inspectors consider
3673 other information allowed by this subsection, they shall, in their report under subsection (2),
3674 specify the information considered by them, including the purpose or purposes for which the
3675 information was considered, the person or persons from whom they obtained the information,
3676 when the information was obtained, the means by which the information was obtained, and the
3677 basis for the inspectors' belief that such information is relevant and reliable.

3678 (5) Determinations of law by the inspectors of election are subject to de novo review by a
3679 court in a judicial proceeding challenging the inspector's activities under this section.

3680 (6) The chair of the meeting shall announce at the meeting when the polls close for each
3681 matter voted upon. If no announcement is made, the polls shall be deemed to have closed upon
3682 the final adjournment of the meeting. After the polls close, no ballots, proxies or votes nor any
3683 revocations or changes thereto may be accepted.

3684

3685 **Commentary to Section 607.0729:**

3686 This new section of the FBCA adopts the current version of s. 7.29 of the Model Act dealing with
3687 inspectors of election. Section 7.29(a) of the Model Act applies this provision to all companies
3688 with a class of shares registered pursuant to section 12 of the Securities Exchange Act of 1934 and
3689 to "any other corporation" that appoints an inspector to act at a meeting of directors (compared to
3690 s. 231 of the DGCL, which, in covering this subject, only applies this provision to public
3691 companies). This statute follows the approach taken on this issue in the Model Act. However, the
3692 provision has been changed to a requirement to faithfully execute the duties of an inspector with
3693 strict impartiality rather than a provision that requires an inspector to "certify in writing" that they
3694 will faithfully execute the duties of inspector with strict impartiality. While best practices might
3695 be to arrange for a certification in writing, requiring a written certification was viewed as a
3696 potential trap for companies that may not get it technically right, even though their inspectors
3697 appropriately execute their duties.

3698 Subsection (5) is believed to reflect the current law on this topic.

3699 New subsection (6) laying out the impact of the closing of the polls at a shareholders meeting, has
3700 been added. The language is derived from s. 7.08(d) of the Model Act and is consistent with a
3701 similar provision in s. 231 of the DGCL.

3702

3703 607.0730 Voting trusts.

3704

3705 (1) One or more shareholders may create a voting trust, conferring on a trustee the right to
3706 vote or otherwise act for him or her or for them, by signing an agreement setting out the provisions
3707 of the trust (which may include anything consistent with its purpose) and transferring their shares
3708 to the trustee. When a voting trust agreement is signed, the trustee shall prepare a list of the names
3709 and addresses of all voting trust beneficial owners ~~of beneficial interests in the trust~~, together with
3710 the number and class of shares each transferred to the trust, and deliver copies of the list and
3711 agreement to the corporation's at its principal office. After filing a copy of the list and agreement
3712 in the corporation's principal office, such copy shall be open to inspection by any shareholder of
3713 the corporation (subject to the requirements of s. 607.1602(3)) or by any beneficiary of the trust
3714 under the agreement, during business hours.

3715 (2) A voting trust becomes effective on the date the first shares subject to the trust are
3716 registered in the trustee's name.

3717

3718 **Commentary to Section 607.0730:**

3719 Subsection (1) was modified to include clean-up language from s. 7.30 of the Model Act ("shall
3720 prepare a list of the names and addresses of all voting trust beneficial owners". This change uses
3721 the new definition of "voting trust beneficial owner" contained in s. 607.01401(78).

3722 Although not in the corollary section of the Model Act, the language in the last sentence of
3723 subsection (1), dealing with the requirement that a copy of the trust needs to be made available to
3724 beneficial holders of an interest in the trust and, subject to the requirements of Section 607.0602(3),
3725 to shareholders of the company, has been retained.

3726 The language in the first sentence of section (c) of Model Act Section 7.30, which provides that
3727 the duration of a voting trust shall be as set forth in the voting trust agreement, has not been added.
3728 The question of whether a voting trust without an expiration date can continue indefinitely is left
3729 to the courts to decide.

3730 Since Florida law has not included a ten-year limitation on the duration of a voting trust since this
3731 statute was modified back in 1998, the transition language contained in s. 7.30(c) of the Model Act
3732 has not been added to this section of the FBCA.

3733

3734 607.0731 Shareholders' Voting agreements.

3735 (1) Two or more shareholders may provide for the manner in which they will vote their shares
3736 by signing an agreement for that purpose. A ~~shareholders'~~voting agreement created under this
3737 section is not subject to the provisions of s. 607.0730.

3738 (2) A ~~shareholders'~~voting agreement created under this section is specifically enforceable.

3739 (3) A transferee of shares in a corporation the shareholders of which have entered into an
3740 agreement authorized by subsection (1) shall be bound by such agreement if the transferee takes
3741 shares subject to such agreement with notice thereof. A transferee shall be deemed to have notice
3742 of any such agreement or any ~~such~~renewal thereof if the existence of such agreement ~~thereof~~ is
3743 noted on the face or back of the certificate or certificates representing such shares or on the
3744 information statement for uncertificated shares required by s. 607.0626(2).

3745

3746 **Commentary to Section 607.0731:**

3747 The name of this section has been changed to "Voting Agreements," since this section only deals
3748 with voting agreements and the current heading ("Shareholders' Agreements") is misleading and
3749 creates confusion with s. 607.0732. A corresponding change has been made to the language in
3750 subsections (1) and (2) to change the words "shareholders' agreement" in each subsection to
3751 "voting agreements."

3752 The language in subsection (3), dealing with the issue of whether transferees take their shares
3753 subject to a voting agreement, has been retained, even though this language is not in the
3754 corresponding section of the Model Act. There is a concern that taking this subsection out could
3755 possibly be misconstrued by judges as a change in the law, when confronted with addressing
3756 whether a holder in due course who is not aware of a voting agreement should take free of the
3757 agreement. However, the language has been modernized.

3758 Users of the statute are reminded that as a matter of good practice, legends with respect to voting
3759 agreements placed on stock certificates should be carefully worded so that the legend not only
3760 covers the particular agreement, but also all extensions, amendments or renewals of such
3761 agreement.

3762

3763 607.0732 Shareholder agreements.

3764 (1) An agreement among the shareholders of a corporation ~~with 100 or fewer shareholders at~~
3765 ~~the time of the agreement,~~ that complies with this section, is effective among the shareholders and
3766 the corporation, even though it is inconsistent with one or more other provisions of this chapter, if
3767 it:

3768 (a) Eliminates the board of directors or restricts the discretion or powers of the board of
3769 directors;

3770 (b) Governs the authorization or making of distributions regardless of whether ~~or not~~
3771 they are in proportion to ownership of shares, subject to the limitations in s. 607.06401;

3772 (c) Establishes who shall be directors or officers of the corporation, or their terms of
3773 office or manner of selection or removal;

3774 (d) Governs, in general or in regard to specific matters, the exercise or division of voting
3775 power by the shareholders and directors or by or among any of them, including use of
3776 weighted voting rights or director proxies;

3777 (e) Establishes the terms and conditions of any agreement for the transfer or use of
3778 property or the provision of services between the corporation and any shareholder, director,
3779 officer, or employee of the corporation or among any of them;

3780 (f) Transfers to any shareholder or other person any authority to exercise the corporate
3781 powers or to manage the business and affairs of the corporation, including the resolution of
3782 any issue about which there exists a deadlock among directors or shareholders; ~~or~~

3783 (g) Requires dissolution of the corporation at the request of one or more of the
3784 shareholders or upon the occurrence of a specified event or contingency;

3785 (h) Imposes liability on a shareholder for the attorneys' fees or expenses of the
3786 corporation or any other party in connection with an internal corporate claim, as defined in s.
3787 607.0208(4); or

3788 (ih) Otherwise governs the exercise of the corporate powers or the management of the
3789 business and affairs of the corporation or the relationship between the shareholders, the
3790 directors, and ~~of~~ the corporation, or among any of them, and is not contrary to public policy.
3791 ~~For purposes of this paragraph, agreements contrary to public policy include, but are not~~
3792 ~~limited to, agreements that reduce the duties of care and loyalty to the corporation as required~~
3793 ~~by ss. 607.0830 and 607.0832, exculpate directors from liability that may be imposed under~~
3794 ~~s. 607.0831, adversely affect shareholders' rights to bring derivative actions under s.~~
3795 ~~607.07401, or abrogate appraisal dissenters' rights under ss. 607.1301-607.1320.~~

3796 (2) An agreement authorized by this section shall be:

3797 (a) 1. Set forth in the articles of incorporation or bylaws and approved by all
3798 persons who are shareholders at the time the agreement; or

3799 2. Set forth in a written agreement that is signed by all persons who are
3800 shareholders at the time of the agreement and such written agreement is made known
3801 to the corporation; and-

3802 (b) Subject to termination or amendment only by all persons who are shareholders
3803 at the time of the termination or amendment, unless the agreement provides otherwise
3804 ~~with respect to termination and with respect to amendments that do not change the~~
3805 ~~designation, rights, preferences, or limitations of any of the shares of a class or series.~~

3806 (3) The existence of an agreement authorized by this section shall be noted conspicuously on
3807 the front or back of each certificate for outstanding shares or on the information statement required
3808 with respect to uncertificated shares by s. 607.0626(2). If at the time of the agreement the
3809 corporation has shares outstanding which are represented by certificates, the corporation shall
3810 recall such certificates and issue substitute certificates that comply with this subsection. The failure
3811 to note the existence of the agreement on the certificate or information statement shall not affect
3812 the validity of the agreement or any action taken pursuant to it. Any purchaser of shares who, at
3813 the time of purchase, did not have knowledge of the existence of the agreement shall be entitled to
3814 rescission of the purchase. A purchaser shall be deemed to have knowledge of the existence of the
3815 agreement if its existence is noted on the certificate or information statement for the shares in
3816 compliance with this subsection and, if the shares are not represented by a certificate, the
3817 information statement is delivered to the purchaser at or before ~~prior to~~ the time of the purchase of
3818 the shares. An action to enforce the right of rescission authorized by this subsection must be
3819 commenced within the earlier of 90 days after discovery of the existence of the agreement or 2
3820 years after the time of purchase of the shares.

3821 (4) An agreement authorized by this section shall cease to be effective when shares of the
3822 corporation are registered pursuant to section 12 of the Securities Exchange Act of 1934 ~~are listed~~
3823 ~~on a national securities exchange or regularly quoted in a market maintained by one or more~~
3824 ~~members of a national or affiliated securities association.~~ If the agreement ceases to be effective
3825 for any reason, the board of directors may, if the agreement is contained or referred to in the
3826 corporation's articles of incorporation or bylaws, adopt an amendment to the articles of
3827 incorporation or bylaws, without shareholder action, to delete the agreement and any references to
3828 it.

3829 (5) An agreement authorized by this section that limits the discretion or powers of the board
3830 of directors shall relieve the directors of, and impose upon the person or persons in whom such
3831 discretion or powers are vested, liability for acts or omissions imposed by law on directors to the
3832 extent that the discretion or powers of the directors are limited by the agreement.

3833 (6) The existence or performance of an agreement authorized by this section shall not be a
3834 ground for imposing personal liability on any shareholder for the acts or debts of the corporation
3835 even if the agreement or its performance treats the corporation as if it were a partnership or results
3836 in failure to observe the corporate formalities otherwise applicable to the matters governed by the
3837 agreement.

3838 (7) Incorporators or subscribers for shares may act as shareholders with respect to an
3839 agreement authorized by this section if no shares have been issued when the agreement is made.

3840 (8) This section shall not apply to, limit or invalidate agreements that are otherwise valid or
3841 authorized without regard to this section, including shareholder agreements between or among
3842 some or all of the shareholders or agreement between or among the corporation and one or more
3843 shareholders.

3844

3845 **Commentary to Section 607.0732:**

3846 Subsection (1) currently limits the use of this section to corporations that have 100 or fewer
3847 shareholders at the time of the agreement. The comparable Model Act provision does not contain
3848 this limitation. The 100 or fewer shareholder limitation has been removed based on the belief that
3849 the limitation is an artificial limitation on the definition of what is a closely held entity and that, in
3850 an era of providing flexibility for corporations and other entities to agree upon how they will
3851 operate, this distinction no longer makes sense.

3852 Subsection (1)(h) (now (i)), has been modified to remove the examples of provisions that are
3853 contrary to public policy. These examples are not in subsection (a)(8) of the corollary section of
3854 the Model Act. Whether particular provisions of a shareholders' agreement are contrary to public
3855 policy is a decision to be made by the courts.

3856 Although the limits of this subsection of the Model Act are left uncertain, the commentary to the
3857 2016 version of the Model Act provides that provisions of the Act may not be overridden if they
3858 reflect core principles of public policy with respect to corporate affairs. For example, a provision of
3859 a shareholder agreement that purports to eliminate all of the standards of conduct established under
3860 s. 607.0830 may be viewed as contrary to public policy and thus not validated under subsection
3861 (1)(h). On the other hand, a provision that modifies standards of conduct under certain circumstances
3862 may be acceptable.

3863 Further, the validity of some provisions may depend upon the circumstances. For example, a
3864 provision of a shareholder agreement that limits inspection rights under s. 607.1602 or the right to
3865 financial statements under s. 607.1620 might, as a general matter, be valid, but that provision might
3866 not be given effect if it prevented shareholders from obtaining information necessary to determine
3867 whether directors of the corporation have satisfied the standards of conduct under s. 607.0830.

3868 This change is not intended to suggest that one or more of the items that were previously enumerated
3869 in subsection (1)(h) as agreements that are contrary to public policy should no longer be considered
3870 to be contrary to public policy. Rather, as noted above, whether any such agreements are contrary to
3871 public policy will be determined by a court based on the particularities of each agreement and the
3872 circumstances, and in some cases these items may be contrary to public policy and in other
3873 circumstances they may not.

3874 Subsection (8) was added to make clear that a shareholders' agreement which is not executed by
3875 all persons who are shareholders at the time the agreement is entered into may still be enforceable
3876 against the shareholders who are parties to such agreement and against the corporation under
3877 certain circumstances. This is in addition to the two sections of the FBCA that expressly permit
3878 enforcement of these types of agreements: (i) Sections 607.0731 (Voting Agreements) and (ii)
3879 Section 607.0627 (Restriction on Transfer of Shares and Other Securities). The addition of
3880 subsection (8) with respect to shareholder agreements that do not cover the topics contained in
3881 Section 607.0731(1) is not considered a change in the law and reflects what is considered to be the

3882 current state of the common law on this issue. It is added to eliminate any ambiguity in that regard
3883 and to provide express supporting language.

3884 Practitioners are cautioned that if they want certainty as to whether an agreement covering one or
3885 more of the topics contained in s. 607.0732(1) is enforceable, they should follow the requirements
3886 of this section of the FBCA.

3887 A shareholder agreement otherwise validated by s. 607.0732 is not legally binding on the state, on
3888 creditors, or on other third parties. For example, an agreement that dispenses with the need to make
3889 corporate filings required by the FBCA would be ineffective. Similarly, an agreement among
3890 shareholders that provides that only the president has authority to enter into contracts for the
3891 corporation would not, without more, be binding against third parties – and ordinary principles of
3892 agency, including the concept of apparent authority, would continue to apply.

3893

3894 607.07401—Shareholders' derivative actions.

3895 ~~(1) A person may not commence a proceeding in the right of a domestic or foreign~~
3896 ~~corporation unless the person was a shareholder of the corporation when the transaction~~
3897 ~~complained of occurred or unless the person became a shareholder through transfer by operation~~
3898 ~~of law from one who was a shareholder at that time.~~

3899 ~~(2) A complaint in a proceeding brought in the right of a corporation must be verified and~~
3900 ~~allege with particularity the demand made to obtain action by the board of directors and that the~~
3901 ~~demand was refused or ignored by the board of directors for a period of at least 90 days from the~~
3902 ~~first demand unless, prior to the expiration of the 90 days, the person was notified in writing that~~
3903 ~~the corporation rejected the demand, or unless irreparable injury to the corporation would result~~
3904 ~~by waiting for the expiration of the 90-day period. If the corporation commences an investigation~~
3905 ~~of the charges made in the demand or complaint, the court may stay any proceeding until the~~
3906 ~~investigation is completed.~~

3907 ~~(3) The court may dismiss a derivative proceeding if, on motion by the corporation, the court~~
3908 ~~finds that one of the groups specified below has made a determination in good faith after~~
3909 ~~conducting a reasonable investigation upon which its conclusions are based that the maintenance~~
3910 ~~of the derivative suit is not in the best interests of the corporation. The corporation shall have the~~
3911 ~~burden of proving the independence and good faith of the group making the determination and the~~
3912 ~~reasonableness of the investigation. The determination shall be made by:~~

3913 ~~(a) A majority vote of independent directors present at a meeting of the board of~~
3914 ~~directors, if the independent directors constitute a quorum;~~

3915 ~~(b) A majority vote of a committee consisting of two or more independent directors~~
3916 ~~appointed by a majority vote of independent directors present at a meeting of the board of~~
3917 ~~directors, whether or not such independent directors constitute a quorum; or~~

3918 ~~(c) A panel of one or more independent persons appointed by the court upon motion by~~
3919 ~~the corporation.~~

3920 ~~(4) A proceeding commenced under this section may not be discontinued or settled without~~
3921 ~~the court's approval. If the court determines that a proposed discontinuance or settlement will~~
3922 ~~substantially affect the interest of the corporation's shareholders or a class, series, or voting group~~
3923 ~~of shareholders, the court shall direct that notice be given to the shareholders affected. The court~~
3924 ~~may determine which party or parties to the proceeding shall bear the expense of giving the notice.~~

3925 ~~(5) On termination of the proceeding, the court may require the plaintiff to pay any~~
3926 ~~defendant's reasonable expenses, including reasonable attorney's fees, incurred in defending the~~
3927 ~~proceeding if it finds that the proceeding was commenced without reasonable cause.~~

3928 ~~(6) The court may award reasonable expenses for maintaining the proceeding, including~~
3929 ~~reasonable attorney's fees, to a successful plaintiff or to the person commencing the proceeding~~
3930 ~~who receives any relief, whether by judgment, compromise, or settlement, and require that the~~
3931 ~~person account for the remainder of any proceeds to the corporation; however, this subsection does~~
3932 ~~not apply to any relief rendered for the benefit of injured shareholders only and limited to a~~
3933 ~~recovery of the loss or damage of the injured shareholders.~~

3934 ~~(7) For purposes of this section, "shareholder" includes a beneficial owner whose shares are~~
3935 ~~held in a voting trust or held by a nominee on his or her behalf.~~

3936

3937 **Commentary to Section 607.07401:**

3938 The FBCA includes all of the derivative action sections in a single statutory section. On the other
3939 hand, the Model Act breaks this topic into multiple sections (ss. 7.41-7.47). The revisions follow
3940 the approach of the Model Act and thus break the derivative action provisions into multiple
3941 sections in a manner similar to the Model Act.

3942 Florida's corporate statute follows the Model Act and its LLC and partnership statutes follow the
3943 Uniform Acts, and the Model Act and the respective Uniform Acts often differ in procedure and
3944 substance for valid reasons. In many instances in the various Florida entity statutes, these
3945 differences have been respected, in whole or in part; yet in certain other instances where the same
3946 concept is addressed and where deemed appropriate, efforts have been made to harmonize the
3947 approach by using the same language with the same general structure. The process sections of the
3948 derivative action provisions of the FBCA are an example of provisions where efforts have been
3949 made to harmonize the FBCA with the most recent uniform act adopted in Florida (FRLLCA). On
3950 the other hand, there are other sections within the FBCA derivative action provisions where,
3951 because of the different nature of the different types of entities, trying to achieve harmonization of
3952 language and approach could actually end up defeating the intended differences of the respective
3953 entities (for example, in Section 607.0742). In those cases, the language and structure were not
3954 harmonized, even though the subject matter of the provision was comparable. As a general matter,
3955 wherever possible, efforts were made to follow the model on which the FBCA is based (the Model
3956 Act) and not to stray from that model unless there was a compelling reason to do so.

3957

3958 607.0741 Standing.

3959 (1) A shareholder may not commence¹⁸ a derivative proceeding unless the shareholder is a
3960 shareholder at the time the action is commenced and:

3961 (a) Was a shareholder when the conduct giving rise to the action occurred; or

3962 (b) Whose status as a shareholder devolved on the person through transfer or by
3963 operation of law from one who was a shareholder when the conduct giving rise to the action
3964 occurred.

3965 (2) In ss. 607.0741 through 607.0747, the term "shareholder" means a record shareholder, a
3966 beneficial shareholder, and an unrestricted voting trust beneficial owner.

3967

¹⁸ Make corollary changes to s. 605.0803 in FRLCA to remove the word "maintain" from that section.

3968 **Commentary to Section 607.0741:**

3969 Under s. 607.0741(1), a person may not commence a derivative action proceeding unless the
3970 person was a shareholder of the corporation when the transaction complained of occurred or unless
3971 the person became a shareholder through transfer by operation of law from one who was a
3972 shareholder at that time. Section 7.41 of the Model Act provides that a shareholder may not
3973 commence or maintain a derivative action proceeding unless the shareholder was a shareholder of
3974 the corporation at the time of the act or omission complained of or became a shareholder through
3975 transfer by operation of law from one who was a shareholder at that time. Section 7.41 also adds
3976 a requirement that "the shareholder must fairly and adequately represent the interests of the
3977 corporation in enforcing the rights of the corporation" to maintain a derivative action proceeding.
3978 Section 605.0803 of FRLCA is substantively similar to the current FBCA section regarding who
3979 is a proper plaintiff, except that it adds the requirement that the member must also be a member at
3980 the time the action is commenced.

3981 The revised standing provision does not add any specific language to the effect that a shareholder
3982 must remain a shareholder throughout the derivative action proceeding in order to continue to
3983 proceed with an otherwise properly brought derivative action. Imposing any such condition to
3984 continuing to maintain such an action should be based on the equities in each respective situation
3985 and thus should be left to the courts to decide. Further, the Model Act concept contained in s.
3986 7.41(b) requiring that the shareholder fairly and adequately represent the interests of the
3987 corporation in enforcing the rights of the corporation was not included in the statute out of a
3988 concern that this additional standing requirement is an invitation to litigation that would be costly
3989 and would unduly delay the process, thus operating as an inappropriate hindrance to derivative
3990 actions. Any such determination should be based on the equities in each respective situation and
3991 thus should be left to the courts to decide.

3992 The revised standing provision does not adopt the "maintain" language from s. 7.41 of the Model
3993 Act because the concept is implicit in the current statute and tends to give courts more leeway.

3994 An expanded definition of "shareholder" for purposes of the derivative action provisions of the
3995 FBCA has been added.

3996

3997 607.0742 Demand.

3998 No shareholder may commence a derivative proceeding until:

3999 (1) A written demand has been made upon the corporation to take suitable action; and

4000 (2) 90 days have expired from the date delivery of the demand was made unless the
4001 shareholder has earlier been notified that the demand has been rejected by the corporation or
4002 unless irreparable injury to the corporation would result by waiting for the expiration of the
4003 90 day period.

4004

4005 **Commentary to Section 607.0742:**

4006 Under current s. 607.07401(2), a derivative proceeding cannot be brought unless the complainant
4007 alleges that demand was made to obtain action of the Board of Directors and the demand was
4008 refused or ignored by the Board of Directors for a period of at least 90 days from the first demand,
4009 unless irreparable injury to the corporation would result from waiting the 90 days. The Model Act
4010 continues to include a required universal demand before a derivative action may be brought.

4011 On the other hand, FRLUCA, in Section 605.0802(2), contemplates that if making a demand on
4012 the other members (in a member-managed LLC) or on the other managers (in a manager managed
4013 LLC) would be futile or would cause irreparable injury to the company, then such demand shall
4014 not be required in order to maintain a derivative proceeding against the LLC. The FRLUCA
4015 provision follows RULLCA on this issue. Further, while not in the DGCL, the case law that has
4016 developed in Delaware dealing with derivative actions excuses the requirement of making a
4017 demand based upon futility.

4018 Consideration was given to the following items:

- 4019 • the reasons why futility might or might not be an appropriate excuse to demand in
4020 the LLC context and in the corporate context;
- 4021 • the reasons why futility was not adopted in the FBCA when it was originally
4022 adopted in 1989 and why it has not been added to the FBCA as the Delaware law
4023 on the subject has continued to develop; and
- 4024 • whether because of acknowledged harmonization efforts to rationalize among
4025 entity statutes in Florida, either demand futility should be added to the FBCA or
4026 FRLUCA should be modified to remove demand futility.

4027 After taking an analysis of these items into account, the revised demand provision retains a
4028 universal demand requirement and does not add the concept of demand futility.

4029 The demand need not set forth the basis for the demand in detail, since the corporation can contact
4030 the shareholder for clarification if there are any questions, but the demand must set forth facts
4031 concerning share ownership and must be sufficiently specific to apprise the corporation of the
4032 action sought to be taken and the grounds for that action so that the demand can be evaluated.

4033

4034 607.0743 Stay of proceedings.

4035 If the corporation commences an inquiry into the allegations made in the demand or complaint,
4036 the court may stay any derivative proceeding for such period as the court deems appropriate.

4037

4038 **Commentary to Section 607.0743:**

4039 The language is identical to the last sentence of subsection (2) of prior s. 607.07401.

4040

4041 607.0744 Dismissal.

4042 (1) A derivative proceeding may be dismissed, in whole or in part, by the court on motion by
4043 the corporation if a group specified in subsections (2) or (3) has determined in good faith, after
4044 conducting a reasonable inquiry upon which its conclusions are based, that the maintenance of the
4045 derivative proceeding is not in the best interests of the corporation, the corporation having in all
4046 cases the burden of proof regarding the qualifications, good faith and reasonable inquiry of the
4047 group making the determination.

4048 (2) Unless a panel is appointed pursuant to subsection (3), the determination required in
4049 subsection (1) shall be made by:

4050 (a) A majority of qualified directors present at a meeting of the board of directors if the
4051 qualified directors constitute a quorum; or

4052 (b) A majority vote of a committee consisting of two or more qualified directors
4053 appointed by majority vote of qualified directors present at a meeting of the board of directors,
4054 regardless of whether such qualified directors constitute a quorum.

4055 (3) Upon motion by the corporation, the court may appoint a panel consisting of one or more
4056 disinterested and independent individuals to make a determination required in subsection (1).

4057 (4) This s. 607.0744 does not prevent the court from:

4058 (a) Enforcing a person's rights under the corporation's articles of incorporation, bylaws
4059 or this chapter, including the person's rights to information under s. 607.1602; or

4060 (b) Exercising its equitable or other powers, including granting extraordinary relief in
4061 the form of a temporary restraining order or preliminary injunction.

4062

4063 **Commentary to Section 607.0744:**

4064 Section 607.07401(3) currently states that a court may dismiss a derivative proceeding under
4065 certain circumstances. Similarly, s. 605.0804(5) of FRLCA gives the court discretion to dismiss
4066 a derivative action based on the recommendation of a disinterested litigation committee in a
4067 situation where the committee is disinterested and independent and the committee has acted in
4068 good faith, independently and with reasonable care. Both of these provisions are different from
4069 the Model Act, which requires a court to dismiss the derivative action on the recommendation of
4070 a disinterested special litigation committee (s. 7.44 – "A derivative proceeding shall be
4071 dismissed...." under certain enumerated circumstances).

4072 Given the complexities that may exist within derivative actions, and the multiplicity of issues, and
4073 to maintain consistency with the approach taken in both the current FBCA and in the recently-
4074 enacted FRLCA, maintaining court discretion with regard to a motion to dismiss is warranted.
4075 The use of the more discretionary term "may" does not preclude a court from granting a motion
4076 where it finds the report to be well-founded. See, e.g. *Atkins v. Topp Telecom, Inc.*, 874 So. 2d 626
4077 (4th DCA 2004). However, there often may be circumstances where a court should not be bound
4078 to accept or reject in toto the report of a special litigation committee, and Florida cases have not
4079 revealed any problem with the current standard that grants judicial discretion.

4080 Subsections (1), (2) and (3) are largely based on s. 7.44 of the Model Act.

4081 New subsection (4) is adapted from s. 605.0804(1) of FRLCA.

4082 Although the "group" referred to in this section as making the determination as to whether the
4083 maintenance of the derivative proceeding is in the best interests of the corporation is not referred
4084 to herein as a "special litigation committee," it is recognized that some practitioners and some
4085 courts may well use that nomenclature to define or identify the group making the determination.
4086 In all respects, any such use of the term "special litigation committee" to refer to the group making
4087 the determination does not change the application or meaning of this provision.

4088

4089 607.0745 Discontinuance or settlement; notice.

4090 (1) A derivative action on behalf of a corporation may not be discontinued or settled without
4091 the court's approval.

4092 (2) If the court determines that a proposed discontinuance or settlement will substantially
4093 affect the interest of the corporation's shareholders or a class, series, or voting group of
4094 shareholders, the court shall direct that notice be given to the shareholders affected. The court
4095 may determine which party or parties to the derivative action shall bear the expense of giving the
4096 notice.

4097

4098 **Commentary to Section 607.0745:**

4099 This provision is substantially the same as s. 607.07401(4). The language is modeled on the
4100 language in s. 605.0806 of FRLCA and, except as noted below, is substantively similar to s. 7.45
4101 of the Model Act.

4102 The language in the last sentence of subsection (2) which allows the court to determine which
4103 party or parties to the derivative action shall bear the expense of giving the notice is not in the
4104 corresponding Model Act provision, but is in the current Florida statute, and has been carried
4105 forward.

4106

4107 607.0746 Proceeds and expenses.

4108 On termination of the derivative proceeding the court may:

4109 (1) order the corporation to pay from the amount recovered in the derivative proceeding by
4110 the corporation the plaintiff's reasonable expenses, including reasonable attorneys' fees and costs,
4111 incurred in the derivative proceeding if it finds that, in the derivative proceeding, the plaintiff was
4112 successful in whole or in part; or

4113 (2) order the plaintiff to pay any defendant's reasonable expenses, including reasonable
4114 attorneys' fees and costs, incurred in defending the proceeding if it finds that the proceeding was
4115 commenced or maintained without reasonable cause or for an improper purpose.

4116

4117 **Commentary to Section 607.0746:**

4118 The current Florida derivative action statute on this subject includes the following language:

4119 (6) The court may award reasonable expenses for maintaining the proceeding, including
4120 reasonable attorney's fees, to a successful plaintiff or to the person commencing the
4121 proceeding who receives any relief, whether by judgment, compromise, or settlement, and
4122 require that the person account for the remainder of any proceeds to the corporation; however,
4123 this subsection does not apply to any relief rendered for the benefit of injured shareholders
4124 only and limited to a recovery of the loss or damage of the injured shareholders.

4125 The substance of s. 607.0746 as drafted is, for the most part, similar to the existing statute, but is
4126 different than Model Act s. 7.46 (which states that any payment to plaintiff requires a "substantial
4127 benefit" to the corporation). "Substantial" is an ambiguous term and could well lead to extensive
4128 argumentation. Settlements of derivative actions often deal principally with procedural matters,
4129 and may involve only a small amount of monetary recovery and non-monetary elements.
4130 Defendants may argue that the term "substantial" precludes a plaintiff from recovering expenses
4131 in many instances. As a result, such arguments should be avoided and, instead, judicial discretion
4132 should be allowed.

4133 While not covered in the current statute, the language in Model Act s. 7.46(2) allowing the
4134 plaintiffs to pay the defendant's fees if the action was filed without reasonable cause or for an
4135 improper purpose has been added.

4136 Subsection (3) of s. 7.46 of the Model Act has not been added to the FBCA. The Model Act
4137 language, which addresses other abuses in the conduct of derivative litigation, is believed
4138 unnecessary, since these types of abuses are believed to be already addressed under applicable
4139 rules of civil procedure and other Florida statutory provisions.

4140

4141 607.0747 Applicability to foreign corporations.

4142 In any derivative proceeding in the right of a foreign corporation brought in the courts of this
4143 state, the matters covered by this subchapter shall be governed by the laws of the jurisdiction of
4144 incorporation of the foreign corporation except for ss. 607.0743, 607.0745 and 607.0746.

4145

4146 **Commentary to Section 607.0747:**

4147 There is currently no analogous provision in the FBCA. The section carve outs relate to judicial
4148 discretionary decisions that are appropriately governed by Florida local standards and do not
4149 implicate the internal affairs doctrine.

4150

4151 607.0748 Shareholder action to appoint custodian or receiver.

4152

4153 (1) A circuit court may appoint one or more persons to be custodians or receivers of and for
4154 a corporation in a proceeding by a shareholder where it is established that:

4155

4156 (a) The directors are deadlocked in the management of the corporate affairs, the
4157 shareholders are unable to break the deadlock, and irreparable injury to the corporation is
4158 threatened or being suffered; or

4159

4160 (b) The directors or those in control of the corporation are acting fraudulently and
4161 irreparable injury to the corporation is threatened or being suffered.

4162

4163 (2) The court:

4164

4165 (a) May issue injunctions, appoint a temporary custodian or temporary receiver with
4166 all the powers and duties the court directs, take other action to preserve the corporate assets
4167 wherever located, and carry on the business of the corporation until a full hearing is held;

4168

4169 (b) Shall hold a full hearing, after notifying all parties to the proceeding and any
4170 interested persons designated by the court, before appointing a custodian or receiver; and

4171

4172 (c) Has jurisdiction over the corporation and all of its property, wherever located.

4173

4174 (3) The court may appoint an individual or domestic or foreign corporation (authorized to
4175 transact business in this state) as a custodian or receiver and may require the custodian or receiver
4176 to post bond, with or without sureties, in an amount the court directs.

4177

4178 (4) The court shall describe the powers and duties of the custodian or receiver in its appointing
4179 order, which may be amended from time to time. Among other powers,

4180

4181 (a) A custodian may exercise all of the powers of the corporation, through or in place of
4182 its board of directors, to the extent necessary to manage the business and affairs of the
4183 corporation; and

4184

4185 (b) A receiver (i) may dispose of all or any part of the assets of the corporation wherever
4186 located, at a public or private sale, if authorized by the court; and (ii) may sue and defend in
4187 the receiver's own name as receiver in all courts of this state.

4188

4189 (5) The court during a custodianship may redesignate the custodian a receiver, and during a
4190 receivership may redesignate the receiver a custodian, if doing so is in the best interests of the
4191 corporation.

4192

4193 (6) The court from time to time during the custodianship or receivership may order
4194 compensation paid and expense disbursements or reimbursements made to the custodian or
4195 receiver from the assets of the corporation or proceeds from the sale of its assets.

4196

4197 **Commentary to Section 607.0748:**

4198 Section 607.0748 is based on Section 7.48 of the Model Act. Section 607.0748 provides a basis
4199 for shareholders of any corporation to obtain the appointment of a receiver or custodian in two
4200 situations arising outside the context of seeking a judicial dissolution: (i) when directors are
4201 deadlocked in the management of the corporate affairs, the shareholders are unable to break the
4202 deadlock and irreparable injury to the corporation is threatened or is being suffered, or (ii) when
4203 the directors or those in control of the corporation are acting fraudulently and irreparable injury to
4204 the corporation is threatened or being suffered.

4205 This section is also designed to provide guidance to the courts relative to the latitude of the court's
4206 authority to make such appointments in these situations. Without this section, the express statutory
4207 power and authority to appoint a receiver or custodian is only available ancillary to an action for
4208 judicial dissolution (although Florida courts, through common law equitable powers, may be able
4209 to fashion, and have from time to time fashioned, such a remedy under current law).

4210 Section 607.0748 is in addition to other shareholder remedies provided by this Chapter or
4211 otherwise available under principles of law or equity, including common law principles relating to
4212 the appointment of custodians and receivers, and could, but only for example, be relied upon by a
4213 shareholder of a nonpublic corporation in lieu of involuntary dissolution under s. 607.1430(1)(b).

4214 The Model Act provision upon which this statute is based is itself based on Section 226 of the
4215 DGCL.

4216

4217 607.0749 Provisional director.

4218 (1) In a proceeding by a shareholder, a provisional director may be appointed in the
4219 discretion of the court if it appears that such action by the court will remedy a situation in which
4220 the directors are deadlocked in the management of the corporate affairs and the shareholders are
4221 unable to break the deadlock. A provisional director may be appointed notwithstanding the
4222 absence of a vacancy on the board of directors, and such director shall have all the rights and
4223 powers of a duly elected director, including the right to notice of and to vote at meetings of
4224 directors, until such time as the provisional director is removed by order of the court or, unless
4225 otherwise ordered by a court, removed by a vote of the shareholders sufficient either to elect a
4226 majority of the board of directors or, if greater than majority voting is required by the articles of
4227 incorporation or the bylaws, to elect the requisite number of directors needed to take action. A
4228 provisional director shall be an impartial person who is neither a shareholder nor a creditor of the
4229 corporation or of any subsidiary or affiliate of the corporation, and whose further qualifications,
4230 if any, may be determined by the court.

4231 (2) A provisional director shall report from time to time to the court concerning the matter
4232 complained of, or the status of the deadlock, if any, and of the status of the corporation's
4233 business, as the court shall direct. No provisional director shall be liable for any action taken or
4234 decision made, except as directors may be liable under s. 607.0831. In addition, the provisional
4235 director shall submit to the court, if so directed, recommendations as to the appropriate
4236 disposition of the action. Whenever a provisional director is appointed, any officer or director of
4237 the corporation may, from time to time, petition the court for instructions clarifying the duties
4238 and responsibilities of such officer or director.

4239 (3) In any proceeding under this section, the court shall allow reasonable compensation to
4240 the provisional director for services rendered and reimbursement or direct payment of reasonable
4241 costs and expenses, which amounts shall be paid by the corporation.

4242

4243 **Commentary to Section 607.0749:**

4244 Section 607.0749 is new and is not a Model Act provision. This section is a corollary to s. 607.1435
4245 of the FBCA dealing with the appointment of a provisional director outside the context of seeking
4246 a judicial dissolution when the directors are deadlocked in the management of the corporate affairs
4247 and the shareholders are unable to break the deadlock. Without this section, the express statutory
4248 power and authority to appoint a provisional director is only available ancillary to an action for
4249 judicial dissolution (although Florida courts, through common law equitable powers, may be able
4250 to fashion, and have from time to time fashioned, such a remedy under current law).

4251

4252 Section 7.49 of the Model Act – Judicial determination of corporate offices and review of
4253 elections and shareholder votes

4254

4255 Section 7.49 of the Model Act establishes procedures for judicial resolution of disputes with respect
4256 to the identity of the corporation's directors or officers, the identity of the members of any committee
4257 of its board of directors, the validity of nominations for director or the results or validity of
4258 shareholder votes. It confers subject matter jurisdiction on the specified court to resolve these
4259 disputes. That jurisdiction may be exercised either in a new proceeding or by an application made in
4260 an already pending proceeding. Model Act s. 7.49 also requires an expedited review of disputes to
4261 prevent them from immobilizing the corporation. There is currently no comparable provision in the
4262 FBCA.

4263 The Subcommittee believes that Florida courts in equity have always had the power to deal with
4264 (and have dealt with) election disputes of the type covered by this section. As a result, the decision
4265 was made not to include this Model Act section in the FBCA.

4266

ARTICLE 8

DIRECTORS AND OFFICERS

4267 607.0801 Requirement for and duties of board of directors.

4268 (1) Except as may be provided in an agreement authorized under s. 607.0732(1), each
4269 corporation must have a board of directors.

4270 (2) All corporate powers shall be exercised by or under the authority of the board of directors
4271 of the corporation, and the business and affairs of the corporation shall be managed by or under
4272 the direction of, and subject to the oversight of, its board of directors, subject to any limitation set
4273 forth in the articles of incorporation or in an agreement authorized under s. 607.0732.

4274

4275 **Commentary to Section 607.0801:**

4276 No substantive changes have been made.

4277

4278 607.0802 Qualifications of directors.

4279 (1) Directors must be natural persons who are 18 years of age or older but need not be
4280 residents of this state or shareholders of the corporation unless the articles of incorporation or
4281 bylaws so require. The articles of incorporation or bylaws may prescribe additional qualifications
4282 for directors or nominees for directors.

4283 (2) A qualification for nomination for director prescribed before a person's nomination shall
4284 apply to such person at the time of nomination. A qualification for nomination for director
4285 prescribed after a person's nomination shall not apply to such person with respect to such
4286 nomination.

4287 (3) A qualification for director prescribed before a director has been elected or appointed
4288 may apply only at the time an individual becomes a director or may apply during a director's term.
4289 A qualification prescribed after a director has been elected or appointed shall not apply to that
4290 director before the end of that director's term.

4291 (42) In the event that the eligibility to serve as a member of the board of directors of a
4292 condominium association, cooperative association, homeowners' association, or mobile home
4293 owners' association is restricted to membership in such association and membership is appurtenant
4294 to ownership of a unit, parcel, or mobile home, a grantor of a trust described in s. 733.707(3), or a
4295 qualified beneficiary as defined in s. 736.0103 of a trust which owns a unit, parcel, or mobile home
4296 shall be deemed a member of the association and eligible to serve as a director of the condominium
4297 association, cooperative association, homeowners' association, or mobile home owners'
4298 association, provided that said beneficiary occupies the unit, parcel, or mobile home.

4299

4300 **Commentary to Section 607.0802:**

4301 The language in the last sentence of s. 8.02(a) of the Model Act, which provides that "qualifications
4302 must be reasonable as applied to the corporation and must be lawful," has not been added to the
4303 FBCA. Similarly, s. 802(b) of the Model Act, which limits the qualifications that may be adopted
4304 under particular circumstances, was not added. Determinations as to what particular qualifications
4305 are appropriate or inappropriate under particular circumstances should be left to the courts to
4306 decide.

4307 The language in subsection (2) follows the exact wording contained in s. 8.02(d) of the Model Act;
4308 however, the reference to a "person's nomination" in the second sentence presumes that such
4309 person's nomination was proper, even though the word "proper" is not expressly set forth.

4310 Although new subsection (2) and (3) are being added to incorporate the language from subsections
4311 (d) and (e) of s. 8.02 of the Model Act, the intent of these additions is to follow the plain language
4312 of the added sections. In that regard, a disagreement is noted with respect to the aspect of the
4313 commentary to this section of the Model Act which states that if a director meets a qualification at
4314 the beginning of his or her term, but later circumstances change and such director no longer meets
4315 such qualification, such director would no longer be entitled to continue as a director from and
4316 after such date. The determination of whether such a director should be allowed to continue to
4317 hold the director position under such circumstances should be left to the corporation and to the
4318 courts to determine, rather than there being a hard and fast rule of that director automatically losing
4319 the right to continue as a director.

4320

4321 607.0803 Number of directors.

4322 (1) A board of directors must consist of one or more individuals, with the number specified
4323 in or fixed in accordance with the articles of incorporation or bylaws.

4324 (2) The number of directors may be increased or decreased from time to time by amendment
4325 to, or in the manner provided in, the articles of incorporation or the bylaws.

4326 (3) Directors are elected at the first annual shareholders' meeting and at each annual
4327 shareholders' meeting thereafter, unless elected by written consent in lieu of an annual
4328 shareholders' meeting as permitted by s. 607.0704 or unless their terms are staggered under s.
4329 607.0806.

4330

4331 **Commentary to Section 607.0803:**

4332 The changes are non-substantive clarifying changes based on changes made in the 2016 version of
4333 the Model Act.

4334

4335 607.0804 Election of directors by certain voting groups; special voting rights of certain
4336 directors if applicable.

4337 The articles of incorporation may confer upon holders of any voting group the right to elect
4338 one or more directors who shall serve for such term and have such voting powers as are stated in
4339 the articles of incorporation. The terms of office and voting powers of the directors elected in the
4340 manner provided in the articles of incorporation may be greater than or less than those of any other
4341 director or class of directors. If the articles of incorporation provide that directors elected by the
4342 holders of a voting group shall have more or less than one vote per director on any matter, every
4343 reference in this chapter ~~æt~~ to a majority or other proportion of directors shall refer to a majority
4344 or other proportion of the votes of such directors. Further, if a shareholders' agreement meeting
4345 the requirements of s. 607.0732 provides that directors shall have more or less than one vote per
4346 director on any matter, every reference in this chapter to a majority or other proportion of directors
4347 shall refer to a majority or other proportion of the votes of such directors.

4348

4349 **Commentary to Section 607.0804:**

4350 Despite certain differences between language in the current version of s. 8.04 of the Model Act
4351 and s. 607.0804 of the FBCA, no conforming changes were made. The FBCA's reference to
4352 "voting group", as defined in s. 607.01401(77) of the FBCA, is believed to be more appropriate
4353 than the Model Act's use of the term "class." Although the FBCA language is considered more
4354 precise, the Model Act language and the FBCA language on this subject are believed to mean
4355 essentially the same thing.

4356 Although the concept of weighted proportional director voting (if permitted in the articles of
4357 incorporation) in s. 8.04 of the FBCA does not appear in the Model Act, it has been in the FBCA
4358 for more than 20 years (and was originally adopted based upon section 141(d) of the DGCL) and
4359 such concept should continue to remain in this section of the FBCA.

4360 The title to this section is being changed to reflect the fact that this section not only addresses the
4361 authorization of election of certain directors by separate voting groups but also the authority for
4362 such designated directors to maintain voting rights that are "weighted" if permitted in the articles
4363 of incorporation. It is important to recognize that this provision in s. 607.0804 authorizes certain
4364 specific changes to traditional corporate norms that can be implemented without the need to follow
4365 the requirements and conditions of s. 607.0732 of the FBCA.

4366 To eliminate any ambiguity, language is being added to make it clear that if a shareholders'
4367 agreement has been adopted in compliance with s. 607.0732 which changes the weight of director
4368 votes, then all references in Chapter 607 to a majority or other proportion of directors shall refer
4369 to a majority or other proportion of the votes of such directors.

4370

4371 607.0805 Terms of directors generally.

4372 (1) The terms of the initial directors of a corporation expire at the first shareholders' meeting
4373 at which directors are elected.

4374 (2) The terms of all other directors expire at the next annual shareholders' meeting following
4375 their election, except to the extent (i) provided in s. 607.0806, (ii) provided in s. 607.1023 if a
4376 bylaw electing to be governed by that section is in effect or (iii) that a shorter term is specified in
4377 the articles of incorporation in the event of a director nominee failing to receive a specified vote
4378 for election, unless their terms are staggered under s. 607.0806.

4379 (3) A decrease in the number of directors does not shorten an incumbent director's term.

4380 (4) The term of a director elected to fill a vacancy expires at the next shareholders' meeting
4381 at which directors are elected.

4382 (5) Except to the extent otherwise provided in the articles of incorporation or under s.
4383 607.1023, if a bylaw electing to be governed by that section is in effect, dDespite the expiration of
4384 a director's term, the director continues to serve until his or her successor is elected and qualifies
4385 or until there is a decrease in the number of directors.

4386

4387 **Commentary to Section 607.0805:**

4388 Clarifying language was added to subsection (2) to address when the term of directors expire if
4389 director terms are staggered under s. 607.0806. Based on subsections 8.05 (b) and (e) of the Model
4390 Act, a cross reference has been added to each of the corresponding subsections in this s. 607.0805
4391 to provide that s. 607.0805 shall not apply to the extent provided in s. 607.1023 of the FBCA.

4392

4393 607.0806 Staggered terms for directors.

4394 (1) ~~The directors of any corporation organized under this act may, by the articles of~~
4395 ~~incorporation, the or by an initial bylaws, or by a bylaw adopted by a vote of the shareholders,~~
4396 ~~may provide for staggering the terms of directors by dividing the total number of directors be~~
4397 ~~divided into one, two, or three groups, with each group containing half or one-third of the total, as~~
4398 ~~near as may be practicable. In that event, the terms of the first group expire at the first annual~~
4399 ~~shareholders' meeting after their election, the terms of the second group expire at the second annual~~
4400 ~~shareholders' meeting after their election, and the terms of the third group, if any, expire at the~~
4401 ~~third annual shareholders' meeting after their election. At each annual shareholders meeting held~~
4402 ~~thereafter, directors shall be elected for a term of two years or three years, as the case may be, to~~
4403 ~~succeed those whose terms expire. classes with the number of directors in each class being as~~
4404 ~~nearly equal as possible; the term of office of those of the first class to expire at the annual meeting~~
4405 ~~next ensuing; of the second class 1 year thereafter; of the third class 2 years thereafter; and at each~~
4406 ~~annual election held after such classification and election, directors shall be chosen for a full term,~~
4407 ~~as the case may be, to succeed those whose terms expire. If the directors have staggered terms,~~
4408 ~~then any increase or decrease in the number of directors shall be so apportioned among the classes~~
4409 ~~as to make all classes as nearly equal in number as possible.~~

4410 (2) In the case of any Florida corporation in existence prior to July 1, 1990, directors of such
4411 corporation divided into four classes may continue to serve staggered terms as the articles of
4412 incorporation or bylaws of such corporation provided immediately prior to the effective date of
4413 this act, unless and until the articles of incorporation or bylaws are amended to alter or terminate
4414 such classes.

4415

4416 **Commentary to Section 607.0806:**

4417 The changes are not intended to be and should not in any way be viewed as substantive changes.
4418 Rather, these changes are wordsmithing designed to (i) eliminate a reference (i.e., to the word
4419 "one"), which makes no sense under the circumstances of a staggered board, and (ii) clarify the
4420 applicable terms of office and specified dates of expiration of term upon the initial classification
4421 and then upon subsequent annual elections when a staggered board is in place. The language is
4422 modeled after the language in s. 8.06 of the Model Act.

4423 The language in s. 607.0806(1) of the FBCA dealing with apportioning increase or decreases in
4424 the number of directors among classes to make classes as nearly equal in number as possible was
4425 retained, even though such language is not included in s. 8.06 of the Model Act. Although such
4426 language may be implicit in the Model Act language, because this language has been in the FBCA
4427 for many years, the language dealing with this subject has been retained.

4428

4429 607.0807 Resignation of directors.

4430 (1) A director may resign at any time by delivering written notice of resignation to the board
4431 of directors or its chair or to the secretary of the corporation.

4432 (2) A resignation is effective when the notice of resignation is delivered unless the notice of
4433 resignation specifies a later effective date or an effective date determined upon the subsequent
4434 happening of an event or events. If a resignation is made effective at a later date or upon the
4435 subsequent happening of an event or events, the board of directors may fill the pending vacancy
4436 before the effective date occurs if the board of directors provides that the successor does not take
4437 office until the effective date.

4438 (3) A resignation that specifies a later effective date or that is conditioned upon the
4439 subsequent happening of an event or events or upon failing to receive a specified vote for election
4440 as a director may provide that the resignation is irrevocable.

4441

4442 **Commentary to Section 607.0807:**

4443 The FBCA requirement that any resignation must be in writing was continued, although such
4444 requirement of a writing is not included in either the corresponding Model Act provision or the
4445 corresponding DGCL provision. The language in s. 607.0807(1) of the FBCA was modified to
4446 better coordinate with language in the corresponding Model Act provision and for clarity by using
4447 the words "notice of resignation " (as opposed to simply using the word "notice" or simply using
4448 the word "resignation").

4449 The language additions in subsections (2) and (3) are derived from s. 8.07(b) of the Model Act and
4450 are intended to update and modernize these sections. These changes are clarifying and not
4451 substantive. However, one of those changes (i.e., adding the Model Act language that a resignation
4452 "conditioned upon failing to receive a specified vote for as a director" can be irrevocable) has
4453 somewhat of a substantive aspect; this change is designed to coordinate with the majority voting
4454 (as provided in s. 607.0728) issue for public companies that adopt such provisions.

4455

4456 607.0808 Removal of directors by shareholders.

4457 (1) The shareholders may remove one or more directors with or without cause unless the
4458 articles of incorporation provide that directors may be removed only for cause.

4459 (2) If a director is elected by a voting group of shareholders, only the shareholders of that
4460 voting group may participate in the vote to remove him or her.

4461 (3) A director may be removed if the number of votes cast to remove exceeds the number of
4462 votes cast not to remove the director, except to the extent the articles of incorporation or bylaws
4463 require a greater number; provided that if cumulative voting is authorized, a director may not be
4464 removed if, in the case of a meeting, the number of votes sufficient to elect the director under
4465 cumulative voting is voted against removal and, if action is taken by less than unanimous written
4466 consent, voting shareholders entitled to the number of votes sufficient to elect the director under
4467 cumulative voting do not consent to the removal. ~~If cumulative voting is not authorized, a director~~
4468 ~~may be removed only if the number of votes cast to remove exceeds the number of votes cast not~~
4469 ~~to remove the director.~~

4470 (4) A director may be removed by the shareholders only at a meeting of shareholders called
4471 for the purpose of removing the director and the meeting notice must state that, ~~provided the notice~~
4472 ~~of the meeting states that the purpose, or one of the purposes of the meeting is the removal of the~~
4473 director is a purpose of the meeting.

4474

4475 **Commentary to Section 607.0808:**

4476 The changes to subsections (3) and (4) are non-substantive clarifying changes based on changes
4477 to the Model Act made in the 2016 version of the Model Act.

4478

4479 607.08081 Removal of directors by judicial proceedings.

4480 (1) The circuit court in the applicable county may remove a director from office, and may order
4481 other relief, including barring the director from reelection for a period prescribed by the court, in a
4482 proceeding commenced by or in the right of the corporation if the court finds that:

4483 (a) The director engaged in fraudulent conduct with respect to the corporation or its
4484 shareholders, grossly abused the position of director, or intentionally inflicted harm on the
4485 corporation; and

4486 (b) Considering the director's course of conduct and the inadequacy of other available
4487 remedies, removal or such other relief would be in the best interest of the corporation.

4488 (2) A shareholder proceeding on behalf of the corporation under subsection (a) shall comply
4489 with all of the requirements of ss. 607.0741 through 607.0747, except s. 607.0741(1).

4490

4491 **Commentary to Section 607.08081:**

4492

4493 The section is modeled after Model Act s. 8.09. This Model Act section was originally adopted in
4494 2001 and the language was substantially revised in the 2016 version of the Model Act. It is intended
4495 to apply in limited circumstances where other remedies are inadequate to address serious
4496 misconduct by a director and it is impracticable for shareholders to invoke the usual remedy of
4497 removal under s. 8.08 of the Model Act (s. 607.0808). While there was a general view that courts
4498 already have this power in equity and in an injunction proceeding, having this power expressly set
4499 forth in the statute is considered a good policy decision, particularly when more than 30 states
4500 (including Delaware, in DGCL section 225(c)) have included some form of judicial remedy to
4501 remove directors in their statute.

4502 This new section is not intended to restrict a court from exercising its equitable powers under
4503 particular circumstances.

4504

4505 607.0809 Vacancy on board.

4506 (1) Unless the articles of incorporation provide otherwise, if ~~Whenever~~ a vacancy occurs on
4507 a board of directors, including a vacancy resulting from an increase in the number of directors;~~it~~
4508 ~~may be filled by the affirmative vote of a majority of the remaining directors, though less than a~~
4509 ~~quorum of the board of directors, or by the shareholders, unless the articles of incorporation~~
4510 ~~provide otherwise.~~

4511 (a) the shareholders may fill the vacancy;

4512 (b) the board of directors may fill the vacancy; or

4513 (c) if the directors remaining in office are less than a quorum, the vacancy may be filled
4514 by the affirmative vote of a majority of all the directors then remaining in office.

4515 (2) If the vacant office was held by a director elected by a voting group of shareholders,
4516 only the holders of shares of that voting group are entitled to vote to fill the vacancy if it is filled
4517 by the shareholders, and only the remaining directors elected by that voting group, even if less
4518 than a quorum, are entitled to fill the vacancy if it is filled by the directors. ~~Whenever the holders~~
4519 ~~of shares of any voting group are entitled to elect a class of one or more directors by the provisions~~
4520 ~~of the articles of incorporation, vacancies in such class may be filled by holders of shares of that~~
4521 ~~voting group or by a majority of the directors then in office elected by such voting group or by a~~
4522 ~~sole remaining director so elected. If no director elected by such voting group remains in office,~~
4523 ~~unless the articles of incorporation provide otherwise, directors not elected by such voting group~~
4524 ~~may fill vacancies as provided in subsection (1).~~

4525 (3) A vacancy that ~~will~~ may occur at a specified later date (~~under s. 607.0807(2)~~ by reason
4526 of a resignation effective at a later date under s. 607.0807(2) or otherwise) ~~or upon the subsequent~~
4527 ~~happening of an event or events or otherwise~~) may be filled before the vacancy occurs, but the new
4528 director may not take office until the vacancy occurs.

4529

4530 **Commentary to Section 607.0809:**

4531 With one exception, the changes to this section are non-substantive clarifying changes based on
4532 changes to the Model Act made in the 2016 version of the Model Act.

4533 Subsection (2) now provides that if a particular director is to be elected by a particular voting
4534 group, only the remaining directors elected by that particular voting group or the shareholders in
4535 that particular voting group may fill that director vacancy. Thus, if there are no remaining directors
4536 elected by that voting group, the other remaining directors no longer have the ability to fill the
4537 vacancy (and, in that case, only the shareholders in the particular voting group will be able to fill
4538 the vacancy).

4539

4540 607.08101 Compensation of directors.

4541 Unless the articles of incorporation or bylaws provide otherwise, the board of directors may
4542 fix the compensation of directors.

4543

4544 **Commentary to Section 607.08101:**

4545 No changes have been made to this section of the FBCA.

4546

4547 607.0820 Meetings.

4548 (1) The board of directors may hold regular or special meetings in or out of this state.

4549 (2) A majority of the directors present, whether or not a quorum exists, may adjourn any
4550 meeting of the board of directors to another time and place. Unless the bylaws otherwise provide,
4551 notice of any such adjourned meeting shall be given to the directors who were not present at the
4552 time of the adjournment and, unless the time and place of the adjourned meeting are announced at
4553 the time of the adjournment, to the other directors.

4554 (3) Meetings of the board of directors may be called by the chair of the board or by the
4555 president unless otherwise provided in the articles of incorporation or the bylaws.

4556 (4) Unless the articles of incorporation or bylaws provide otherwise, the board of directors
4557 may permit any or all directors to participate in any a regular or special meeting of the board of
4558 directors by, or conduct the meeting through the use of, any means of communication by which all
4559 directors participating may simultaneously hear each other during the meeting. A director
4560 participating in a meeting by this means is deemed to be present in person at the meeting.

4561

4562 **Commentary to Section 607.0820:**

4563 Although minor clean up changes were made to this section to conform the language to certain of
4564 the language in the 2016 version of the Model Act, no substantive changes are have been made.
4565 Although subsections (2) and (3) of s. 607.0820 of the FBCA (which deal with who may call a
4566 meeting of the board and with respect to adjournments of board meetings) are not contained in the
4567 Model Act, because these subsections have been in the FBCA since 1989, they are retained in the
4568 statute.

4569

4570 607.0821 Action by directors without a meeting.

4571 (1) Unless the articles of incorporation or bylaws provide otherwise, action required or
4572 permitted by this ~~chapter~~ act to be taken at a board of directors' meeting or committee meeting
4573 may be taken without a meeting if the action is taken by all members of the board or of the
4574 committee. The action must be evidenced by one or more written consents describing the action
4575 taken, ~~and~~ signed by each director or committee member and delivered to the corporation.

4576 (2) Action taken under this section is effective when the last director signs the consent and
4577 delivers the consent to the corporation, unless the consent specifies a different effective date. A
4578 director's consent may be withdrawn by a revocation signed by the director and delivered to the
4579 corporation prior to delivery to the corporation of unrevoked written consents signed by all the
4580 directors.

4581 (3) A consent signed under this section has the effect of a meeting vote and may be described
4582 as such in any document.

4583

4584 **Commentary to Section 607.0821:**

4585 The concept of required delivery of the board consent to the corporation has been added to the
4586 statute in subsections (1) and (2). This is not intended to be a substantive change, since the concept
4587 of delivery was believed to be implicit under existing law.

4588 The last sentence of s. 8.21(b) of the Model Act has been added to s. 607.0821(2) of the FBCA.
4589 This sentence deals with revocation of consents before a board action by written consent becomes
4590 effective (i.e., upon delivery of unrevoked written consents signed by all directors).

4591 The revised statute does not specify where and how delivery to the corporation of a written consent
4592 shall be made. This issue is left to the determination of courts as to whether delivery was
4593 appropriate under particular circumstances. Cross references are noted to (i) s. 607.08401(3)
4594 providing that the board or the bylaws shall delegate to one or more officers the responsibility for
4595 authenticating records of the corporation, (ii) s. 607.0141, which defines the term "notice," and
4596 (iii) s. 607.1601, which requires the corporation to keep a record of items such as written consents
4597 of directors. However, based on concepts of apparent authority, delivery to the corporation's
4598 secretary or the corporation's president should, in most cases, be considered proper delivery to the
4599 corporation.

4600

4601 607.0822 Notice of meetings.

4602 (1) Unless the articles of incorporation or bylaws provide otherwise, regular meetings of the
4603 board of directors may be held without notice of the date, time, place, or purpose of the meeting.

4604 (2) Unless the articles of incorporation or bylaws provide for a longer or shorter period,
4605 special meetings of the board of directors must be preceded by at least 2 days' notice of the date,
4606 time, and place of the meeting. The notice need not describe the purpose of the special meeting
4607 unless required by the articles of incorporation or bylaws.

4608

4609 **Commentary to Section 607.0822:**

4610 No changes have been made to this section of the FBCA.

4611

4612 607.0823 Waiver of notice.

4613 Notice of a meeting of the board of directors need not be given to any director who signs a
4614 waiver of notice either before or after the meeting. Attendance of a director at a meeting shall
4615 constitute a waiver of notice of such meeting and a waiver of any and all objections to the date,
4616 time, place or purpose of the meeting, ~~the time of the meeting,~~ or the manner in which it has been
4617 called or convened, except when a director states, at the beginning of the meeting or promptly
4618 upon arrival at the meeting, any objection to holding the meeting or to the transaction of business
4619 because the meeting is not lawfully called or convened and where the director, after objecting,
4620 does not vote for or consent to action taken at the meeting.

4621

4622 **Commentary to Section 607.0823:**

4623 The statute has been clarified to reflect that a director's attendance at a meeting constitutes a waiver
4624 of not only the place and time of the meeting, but also the date and purpose of the meeting, unless
4625 the director properly objects.

4626 The language contained in s. 8.23(a) of the Model Act requiring that a waiver be "filed with the
4627 minutes or corporate records" of the corporation in order for the waiver to be effective has not
4628 been added. Although such practice is considered good corporate practice and may even be an
4629 obligation of the corporation under s. 607.1601(1), this technical requirement for effectiveness of
4630 the waiver should not be mandated (leaving it to the corporation to determine whether it has
4631 received proper evidence of a waiver). However, whether or not such a requirement is included in
4632 the statutory language, since the corporation likely has the burden of proving that a waiver has
4633 been provided, it behooves the corporation to obtain the waiver in writing and place it in the
4634 corporation's records.

4635 Clarifying language has been added (i) to allow for objecting to the holding of the meeting, in
4636 addition to the ability to object to the transaction of business at the meeting, and (ii) to require not
4637 only that the director object to the transaction of business at the meeting (for failure to give notice)
4638 at the start of the meeting, but also not to vote for or consent to the action(s) taken thereafter at the
4639 meeting. Through this change, s. 607.0823 of the FBCA is brought into conformity with the
4640 language in s. 8.23(b) of the Model Act. The Model Act commentary on this section provides that
4641 this additional provision presumes that a director has waived his or her objection to the meeting if
4642 he or she votes for or assents to the action taken at the meeting.

4643

4644 607.0824 Quorum and voting.

4645 (1) Unless the articles of incorporation or bylaws provide for a greater or lesser ~~require a~~
4646 ~~different number or unless otherwise expressly provided in this chapter~~, a quorum of a board of
4647 directors consists of a majority of the number of directors specified in or fixed in accordance with
4648 ~~prescribed by~~ the articles of incorporation or the bylaws.

4649 (2) The quorum of the board of directors specified in or fixed in accordance with the articles
4650 of incorporation or bylaws may not consist of less ~~authorize a quorum of a board of directors to~~
4651 ~~consist of less than a majority but no fewer than one-third of the~~ specified or fixed ~~prescribed~~
4652 number of directors ~~determined under the articles of incorporation or the bylaws.~~

4653 (3) If a quorum is present when a vote is taken, the affirmative vote of a majority of directors
4654 present is the act of the board of directors unless the articles of incorporation or bylaws require the
4655 vote of a greater number of directors or unless otherwise expressly provided in this chapter.

4656 (4) A director of a corporation who is present at a meeting of the board of directors when
4657 corporate action is taken is deemed to have assented to the action taken unless the director:

4658 (a) Objects at the beginning of the meeting (or promptly upon his or her arrival) to
4659 holding it or transacting specified business at the meeting; or

4660 (b) Votes against or abstains from the action taken.

4661

4662 **Commentary to Section 607.0824:**

4663 The changes in subsections (1) and (2) of s. 607.0824 of the FBCA bring this section of the FBCA
4664 into conformity with s. 8.24 of the 2016 version of the Model Act. The language in the Model Act
4665 provision is viewed as doing a better job than subsections (1) and (2) of existing s. 607.0824 of
4666 expressing the default rule regarding a quorum of the board of directors for the transaction of
4667 business.

4668 The revised language also provides greater clarity by including an exception, in the lead in portion
4669 of subsection (1) of s. 607.0824, for other sections of the FBCA that may, under certain
4670 circumstances, require a different quorum or voting of the board on a particular issue.

4671 The words "or a committee of the board of directors" contained in subsection (4) of s. 607.0824
4672 have been deleted. However, this is not a substantive change because this concept is now addressed
4673 generally in subsection (3) of s. 607.0825.

4674 The language of subsection (4)(b) of s. 607.0824 was retained and the requirement from the
4675 corresponding provision of the Model Act that a negative vote must be contained in a writing
4676 delivered by the director to the corporation to avoid the implicit assent to the action by a director
4677 who is present at a board meeting was not added.

4678

4679 607.0825 Committees.

4680 (1) ~~Unless this chapter, the articles of incorporation or the bylaws provide otherwise provide,~~
4681 ~~the board of directors, by resolution adopted by a majority of the full board of directors, may~~
4682 ~~designate from among its members~~ establish an executive committee and one or more other board
4683 committees to perform functions of the board of directors. Such committees shall be composed
4684 exclusively of one or more directors, each of which, to the extent provided in such resolution or in
4685 the articles of incorporation or the bylaws of the corporation, shall have and may exercise all the
4686 authority of the board of directors, except that no such committee shall have the authority to:

4687 (a) ~~Approve or recommend to shareholders actions or proposals required by this act to~~
4688 ~~be approved by shareholders~~

4689 (b) ~~Fill vacancies on the board of directors or any committee thereof.~~

4690 (c) ~~Adopt, amend, or repeal the bylaws.~~

4691 (d) ~~Authorize or approve the reacquisition of shares unless pursuant to a general~~
4692 ~~formula or method specified by the board of directors.~~

4693 (e) ~~Authorize or approve the issuance or sale or contract for the sale of shares, or~~
4694 ~~determine the designation and relative rights, preferences, and limitations of a voting group~~
4695 ~~except that the board of directors may authorize a committee (or a senior executive officer of~~
4696 ~~the corporation) to do so within limits specifically prescribed by the board of directors.~~

4697 (2) Unless this chapter, the articles of incorporation or bylaws provide otherwise, the
4698 establishment of a board committee, the appointment of members to it, the dissolution of a
4699 previously created board committee, and the removal of members from a previously created board
4700 committee must be approved by a majority of all the directors in office when the action is taken.

4701 (23) ~~Unless the articles of incorporation or bylaws provide otherwise, Sections ss. 607.0820,~~
4702 ~~6070.822, 607.0823 and through 607.0824 which govern meetings, notice and waiver of notice,~~
4703 ~~and quorum and voting requirements of the board of directors apply to board committees and their~~
4704 ~~members as well.~~

4705 (4) A board committee may exercise the powers of the board of directors under s. 607.0801,
4706 except that a board committee may not:

4707 (a) Authorize or approve the reacquisition of shares unless pursuant to a formula or
4708 method, or within limits, prescribed by the board of directors.

4709 (b) Approve, recommend to shareholders, or propose to shareholders action that this
4710 chapter requires be approved by shareholders.

4711 (c) Fill vacancies on the board of directors or on any board committee.

4712 (d) Adopt, amend, or repeal bylaws.

4713 (25) The establishment of, delegation of authority to, or action by a committee does not
4714 alone constitute compliance by a director with the standards of conduct described in s. 607.0830.

4715 (36) ~~Each committee must have two or more members who serve at the pleasure of the board~~
4716 ~~of directors. The board of directors, by resolution adopted in accordance with subsection (1), may~~
4717 ~~designate~~ appoint one or more directors as alternate members of any board such committee to fill
4718 a vacancy on the committee or who may act in the place and stead of to replace any absent or or
4719 disqualified member of such committee or members at any meeting of such committee during the
4720 member's absence or disqualification. If the articles of incorporation, the bylaws, or the resolution
4721 creating the board committee so provide, the member or members present at any board committee
4722 meeting and not disqualified from voting, by unanimous action, may appoint another director to act
4723 in place of an absent or disqualified member during that member's absence or disqualification.

4724 (4) ~~Neither the designation of any such committee, the delegation thereto of authority, nor~~
4725 ~~action by such committee pursuant to such authority shall alone constitute compliance by any~~
4726 ~~member of the board of directors not a member of the committee in question with his or her~~
4727 ~~responsibility to act in good faith, in a manner he or she reasonably believes to be in the best~~
4728 ~~interests of the corporation, and with such care as an ordinarily prudent person in a like position~~
4729 ~~would use under similar circumstances.~~

4730

4731 **Commentary to Section 607.0825:**

4732 The language in subsection (1), in subsection (2), in the first sentence of subsection (3), and in
 4733 subsection (4) has been replaced with language from subsections (a), (b), (c), and (d), of s. 8.25 of
 4734 the Model Act, except to the extent discussed below. Of note, this change now allows board
 4735 committees to be comprised of only one member, unless a greater number is otherwise required in
 4736 the chapter (such as, for example, in ss. 607.0741 and 607.0832) or in the particular corporation's
 4737 articles of incorporation or bylaws. The prior law (s. 607.0825(3)) required at least two persons
 4738 to comprise each board committee.

4739 The matters that may not be delegated to a committee have been changed (i) to retain subsection
 4740 (1)(d) of the current statute relative to delegation to committees of the right to authorize and
 4741 approve reacquisition of shares (i.e., redemption payments), to redesignate it as subsection (4)(a)
 4742 and not to extend that exception to follow the language of subsection (e)(1) of s. 8.25 of the Model
 4743 Act (covering all "distributions"), (ii) to follow the second, third and fourth matters set forth in
 4744 subsection (d) of s. 8.25 of the Model Act (which is mostly a reordering of what already appeared
 4745 in subsection (1)(a) through (c) of the current statute), except that the limited override for filling
 4746 committee vacancies reflected in the Model Act is added. By retaining subsection (1)(d) of the
 4747 current statute (now subsection (4)(a)) relative to delegation to committees of the right to authorize
 4748 and approve reacquisition of shares (i.e., redemption payments) and not covering all
 4749 "distributions," a board of a Florida corporation continues to have the ability to delegate to a
 4750 committee of the board the right to approve a dividend distribution (subject to any limitations and
 4751 restrictions applicable to the board itself), without the board having to approve the particular
 4752 distribution or to approve any formula or other parameters with respect to any distribution before
 4753 it is authorized by a committee.

4754 The Florida only provision, subsection (1)(e), limiting the ability to delegate to a board committee
 4755 the issuance or sale of shares, or the designation of relative rights, preferences, and limitations of
 4756 a voting group, other than in situations where limits on such issuances are specifically prescribed
 4757 by the board of directors has been eliminated. The removal of this exception also eliminates the
 4758 ability to delegate all such issuances (within proscribed limits) to a senior executive officer of the
 4759 corporation. This provision is not in the Model Act, the DGCL or the corporate statutes of many
 4760 other states, including New York, California and Texas.

4761 Old subsection (4) has been deleted. The duties of members of board committees are left to the
 4762 provisions governing the duties of directors under s. 607.0830. A cross reference to this effect has
 4763 been added in new subsection (5).

4764 By way of clarifying language from s. 8.25 of the Model Act, this section confirms the intent of
 4765 prior s. 607.0825 to the effect that this section relates only to board committees exercising one or
 4766 more board functions. This section does not apply to other committees set up by the board that
 4767 may include officers, employees, or others who are not board members and that might be created

4768 to deal with non-board issues or to make recommendations for the board or a board committee to
4769 consider. Moreover, it does not limit the board's power to designate non-board member observers
4770 to attend meetings of board committees. However, no such non-board member observer can be a
4771 voting member of a board committee.

4772

4773 607.0826 Submission of matters for a shareholder vote.

4774 A corporation may agree to submit a matter to a vote of its shareholders even if, after
4775 approving the matter, the board of directors determines it no longer recommends the matter.

4776

4777 **Commentary to Section 607.0826:**

4778 This section, which is new to the FBCA, follows the language of Model Act s. 8.26 added in 2008.
4779 This section expressly authorizes a corporation to enter into an agreement (such as a merger
4780 agreement) with a "force the vote" provision. The Model Act commentary notes, however, that
4781 this provision is not intended to relieve the board of directors from its duty to carefully consider a
4782 proposed transaction and the interests of its shareholders. Thirteen states, including Delaware,
4783 have statutes similar to s. 8.26. Of these states, six (i.e., Connecticut, Georgia, Maine,
4784 Massachusetts, Mississippi and Washington) are Model Act states.

4785

4786 607.0830 General standards for directors.

4787 (1) Each member of the board of directors, when discharging the duties of a director,
4788 including in discharging his or her duties as a member of a board committee, shall act:~~A director~~
4789 ~~shall discharge his or her duties as a director, including his or her duties as a member of a~~
4790 ~~committee:~~

4791 (a) In good faith; and

4792 (b) ~~With the care an ordinarily prudent person in a like position would exercise~~
4793 ~~under similar circumstances; and~~

4794 (c) ~~In a manner he or she reasonably believes to be in the best interests of the~~
4795 ~~corporation.~~

4796 (2) The members of the board of directors or a board committee, when becoming
4797 informed in connection with a decision-making function or devoting attention to an oversight
4798 function, shall discharge their duties with the care that an ordinary prudent person in a like position
4799 would reasonably believe appropriate under similar circumstances. ~~In discharging his or her~~
4800 ~~duties, a director is entitled to rely on information, opinions, reports, or statements, including~~
4801 ~~financial statements and other financial data, if prepared or presented by:~~

4802 (a) ~~One or more officers or employees of the corporation whom the director~~
4803 ~~reasonably believes to be reliable and competent in the matters presented;~~

4804 (b) ~~Legal counsel, public accountants, or other persons as to matters the director~~
4805 ~~reasonably believes are within the persons' professional or expert competence; or~~

4806 (c) ~~A committee of the board of directors of which he or she is not a member if the~~
4807 ~~director reasonably believes the committee merits confidence.~~

4808 (3) In discharging board or board committee duties, a director who does not have
4809 knowledge that makes reliance unwarranted is entitled to rely on the performance by any of the
4810 persons specified in subsection (5)(a) or subsection (5)(b) to whom the board may have delegated,
4811 formally or informally by course of conduct, the authority or duty to perform one or more of the
4812 board's functions that are delegable under applicable law.

4813 (4) In discharging board or board committee duties, a director who does not have
4814 knowledge that makes reliance unwarranted is entitled to rely on information, opinions, reports or
4815 statements, including financial statements and other financial data, prepared or presented by any
4816 of the persons specified in subsection (5).

4817 (5) A director is entitled to rely, in accordance with subsection (3) or (4), on:

4818 (a) One or more officers or employees of the corporation whom the director
4819 reasonably believes to be reliable and competent in the functions performed or the
4820 information, opinions, reports or statements provided;

4821 (b) Legal counsel, public accountants, or other persons retained by the corporation
4822 or by a committee of the board of the corporation as to matters involving skills or
4823 expertise the director reasonably believes are matters (i) within the particular person's
4824 professional or expert competence or (ii) as to which the particular person merits
4825 confidence; or

4826 (c) A committee of the board of directors of which the director is not a member if
4827 the director reasonably believes the committee merits confidence.

4828 (36) In discharging board or board committee ~~his or her~~ duties, a director may consider
4829 such factors as the director deems relevant, including the long-term prospects and interests of the
4830 corporation and its shareholders, and the social, economic, legal, or other effects of any action on
4831 the employees, suppliers, customers of the corporation or its subsidiaries, the communities and
4832 society in which the corporation or its subsidiaries operate, and the economy of the state and the
4833 nation.

4834 ~~(4) A director is not acting in good faith if he or she has knowledge concerning the matter~~
4835 ~~in question that makes reliance otherwise permitted by subsection (2) unwarranted.~~

4836 ~~(5) A director is not liable for any action taken, as a director, if he or she performed the~~
4837 ~~duties of his or her office in compliance with this section.~~

4838

4839 **Commentary to Section 607.0830:**

4840 This Section has been modified to follow the organization and the wording of Model Act s. 8.30,
4841 although for the most part the change in language does not change the substance of standards
4842 applicable to directors.

4843 Unlike s. 8.30(a) of the Model Act, s. 607.0830(1) retains the clarifying reference from the prior
4844 Florida statute that these standards apply to directors whether they are acting as members of the
4845 board or as members of a committee of the board. The applicability to service as a board committee
4846 member is believed to be implicit under the Model Act provision, but this express concept was
4847 retained because it was included in the prior Florida statute and there was concern that deleting it
4848 might be interpreted as taking that standard and its protections away from directors when acting in
4849 their capacity as a committee member of a board committee.

4850 The "prudent person" standard of care in subsection (1) of the existing statute was replaced in
4851 subsection (2) with a standard of care that "a person in a like position would reasonably believe
4852 appropriate under similar circumstances" standard, thus incorporating into the standard the concept
4853 of a "reasonable belief" under the circumstances. The new language is derived from the Model
4854 Act provision, and is not believed to change the standard in any meaningful way, but rather to give
4855 better guidance to courts about how to consider this standard under various circumstances and to
4856 allow courts to consider case law in other Model Act states that have adopted this Model Act
4857 provision as their standard of care for directors.

4858 The provisions that previously appeared in subsection (2) are now found, with substantially similar
4859 language, in subsections (3), (4) and (5).

4860 Subsection 8.30(c) of the Model Act, which was added to the Model Act in 2005, was not adopted
4861 for inclusion in the FBCA. Subsection (c), dealing with a director's obligations of disclosure to
4862 the board under various circumstances, was one of several Model Act changes that flowed from
4863 the Enron/WorldCom scandals, and the work of the ABA Task Force on Corporate Responsibility
4864 and the group addressing revisions to the conflict of interest provisions of the Model Act. This
4865 concept of disclosure is believed to already be the standard in Florida. Silence on this issue will
4866 allow Florida courts the latitude to determine the scope of a director's obligation to disclose under
4867 each particular circumstance that may arise from time to time.

4868 In subsection (5)(b), language not found in the Model Act is added in an effort to more clearly
4869 recognize that, under certain circumstances, a committee of the board, rather the corporation itself,
4870 may engage its own legal counsel, accountants and/or other advisors.

4871 Old subsection (5) has been removed, based on the view that the topic is adequately covered in s.
4872 607.0831 and that the language in this section is ambiguous. However, the elimination of old
4873 subsection (5) is not intended to be a substantive change in the law. See s. 607.0831(1)(a).

4874 607.0831 Liability of directors.

4875 (1) A director is not personally liable for monetary damages to the corporation or any other
4876 person for any statement, vote, decision to take or not to take action, or any failure to take any
4877 action, or failure to act, regarding corporate management or policy, as by a director, unless:

4878 (a) The director breached or failed to perform his or her duties as a director; and

4879 (b) The director's breach of, or failure to perform, those duties constitutes any of the
4880 following:

4881 1. A violation of the criminal law, unless the director had reasonable cause to
4882 believe his or her conduct was lawful or had no reasonable cause to believe his or her
4883 conduct was unlawful. A judgment or other final adjudication against a director in any
4884 criminal proceeding for a violation of the criminal law estops that director from contesting
4885 the fact that his or her breach, or failure to perform, constitutes a violation of the criminal
4886 law; but does not estop the director from establishing that he or she had reasonable cause
4887 to believe that his or her conduct was lawful or had no reasonable cause to believe that
4888 his or her conduct was unlawful;

4889 2. A circumstance under which the a transaction at issue is one from which the
4890 director derived an improper personal benefit, either directly or indirectly;

4891 3. A circumstance under which the liability provisions of s. 607.0834 are
4892 applicable;

4893 4. In a proceeding by or in the right of the corporation to procure a judgment in its
4894 favor or by or in the right of a shareholder, conscious disregard for the best interest of the
4895 corporation, or willful or intentional misconduct; or

4896 5. In a proceeding by or in the right of someone other than the corporation or a
4897 shareholder, recklessness or an act or omission which was committed in bad faith or with
4898 malicious purpose or in a manner exhibiting wanton and willful disregard of human
4899 rights, safety, or property.

4900 (2) For the purposes of this section, the term "recklessness" means the action, or omission
4901 to act, in conscious disregard of a risk:

4902 (a) Known, or so obvious that it should have been known, to the director; and

4903 (b) Known to the director, or so obvious that it should have been known, to be so great
4904 as to make it highly probable that harm would follow from such action or omission.

4905 (3) A director is deemed not to have derived an improper personal benefit from any
4906 transaction if the transaction and the nature of any personal benefit derived by the director are not
4907 prohibited by state or federal law or regulation and, without further limitation:

4908 (a) In an action other than a derivative suit regarding a decision by the director to
4909 approve, reject, or otherwise affect the outcome of an offer to purchase the stock of, or to
4910 effect a merger of, the corporation, the transaction and the nature of any personal benefits
4911 derived by a director are disclosed or known to all directors voting on the matter, and the
4912 transaction was authorized, approved, or ratified by at least two directors who comprise a
4913 majority of the disinterested directors (whether or not such disinterested directors constitute a
4914 quorum);

4915 (b) ~~The transaction and the nature of any personal benefits derived by a director are~~ was
4916 authorized, approved or ratified as set forth in s. 607.0832(3)(a)1. or 2.; ~~disclosed or known~~
4917 ~~to the shareholders entitled to vote, and the transaction was authorized, approved, or ratified~~
4918 ~~by the affirmative vote or written consent of such shareholders who hold a majority of the~~
4919 ~~shares, the voting of which is not controlled by directors who derived a personal benefit from~~
4920 ~~or otherwise had a personal interest in the transaction; or~~

4921 (c) The transaction was fair and reasonable to the corporation at the time it was
4922 authorized, approved or ratified by the board, a committee, or the shareholders,
4923 notwithstanding that a director received a personal benefit.

4924 (4) The circumstances set forth in subsection (3) are not exclusive and do not preclude the
4925 existence of other circumstances under which a director will be deemed not to have derived an
4926 improper benefit.

4927

4928 **Commentary to Section 607.0831:**

4929 This section does not follow the structure and approach of Model Act s. 8.31. Rather, it continues
4930 with the structure and approach of the current s. 607.0831; however, certain language and concepts
4931 from Model Act s. 8.31 have been incorporated into the changes to this section. Two of the key
4932 reasons for staying with the current statute as the base was the consensus that the provisions of the
4933 current statute (i) work well and (ii) are grafted by cross-reference into other Florida statutes such
4934 as Florida's not-for-profit statute (Chapter 617).

4935 In that regard:

4936 1. The phrase "is not personally liable for monetary damages" has not been removed
4937 even though such language does not appear in Model Act s. 8.31. The phrase was retained in
4938 order to be clear that this provision is about monetary damages and not about equitable relief.

4939 2. The words "or any other person" were not changed to the language in the Model Act
4940 corollary, "or its shareholders". The 1989 commentary to the proposed FBCA included this
4941 provision and expressly stated that this provision was intentionally adopted to limit personal
4942 liability of directors to third parties in the manner set forth in the statute when they are acting
4943 in their capacity as directors.

4944 3. The phrase "regarding corporate management or policy" was deleted as being too
4945 limiting.

4946 4. The reference to "by a director" was changed to "as a director" to match the Model
4947 Act approach and to make it clear that the exculpation is available only when the director is
4948 acting in the capacity of a director.

4949 5. The description of decisions and actions that are covered by the exculpation
4950 provision in this Section was changed to match the Model Act approach (i.e., "to take or not
4951 take action or any failure to take action") because the Model Act approach was viewed as
4952 being clearer. Similar language has been added in s. 607.0830(7).

4953 6. The burden of proof language in the Model Act language providing that a director
4954 has no liability unless "the party asserting liability establishes that:" has not been added and
4955 leaves the issue of who has the burden of proof in appropriate circumstances to the courts.

4956 The language in Model Act subsections 8.31(b)(1), (2) and (3) was not added to the statute.

4957 Revised s. 607.0831 retains the "self-executing" nature of the existing Florida statute under which
4958 a director is generally not personally liable to the corporation, instead of following the Model Act's
4959 "opt-in" language. Because the exculpation in s. 607.0831 remains self-executing, the provisions
4960 in the Model Act language cross referencing to the ability to add authorization language in a
4961 corporation's Articles of Incorporation in s. 8.31(a)(1) was not added.

4962 In subsection (3)(b), rather than repeating how an interested party transaction is to be approved,
4963 the statute provides a cross reference to the applicable standard for approval contained in s.
4964 607.0832(3)(a)1. or 2.

4965

4966 607.0832 Director conflicts of interest.

4967 (1) ~~No contract or other transaction between a corporation and one or more of its directors~~
4968 ~~or any other corporation, firm, association, or entity in which one or more of its directors are~~
4969 ~~directors or officers or are financially interested shall be either void or voidable because of such~~
4970 ~~relationship or interest, because such director or directors are present at the meeting of the board~~
4971 ~~of directors or a committee thereof which authorizes, approves, or ratifies such contract or~~
4972 ~~transaction, or because his or her or their votes are counted for such purpose, if:~~

4973 (a) ~~The fact of such relationship or interest is disclosed or known to the board of~~
4974 ~~directors or committee which authorizes, approves, or ratifies the contract or transaction by a~~
4975 ~~vote or consent sufficient for the purpose without counting the votes or consents of such~~
4976 ~~interested directors;~~

4977 (b) ~~The fact of such relationship or interest is disclosed or known to the shareholders~~
4978 ~~entitled to vote and they authorize, approve, or ratify such contract or transaction by vote or~~
4979 ~~written consent; or~~

4980 (c) ~~The contract or transaction is fair and reasonable as to the corporation at the time it~~
4981 ~~is authorized by the board, a committee, or the shareholders.~~

4982 (2) ~~For purposes of paragraph (1)(a) only, a conflict of interest transaction is authorized,~~
4983 ~~approved, or ratified if it receives the affirmative vote of a majority of the directors on the board~~
4984 ~~of directors, or on the committee, who have no relationship or interest in the transaction described~~
4985 ~~in subsection (1), but a transaction may not be authorized, approved, or ratified under this section~~
4986 ~~by a single director. If a majority of the directors who have no such relationship or interest in the~~
4987 ~~transaction vote to authorize, approve, or ratify the transaction, a quorum is present for the purpose~~
4988 ~~of taking action under this section. The presence of, or a vote cast by, a director with such~~
4989 ~~relationship or interest in the transaction does not affect the validity of any action taken under~~
4990 ~~paragraph (1)(a) if the transaction is otherwise authorized, approved, or ratified as provided in that~~
4991 ~~subsection, but such presence or vote of those directors may be counted for purposes of~~
4992 ~~determining whether the transaction is approved under other sections of this act.~~

4993 (3) ~~For purposes of paragraph (1)(b), a conflict of interest transaction is authorized,~~
4994 ~~approved, or ratified if it receives the vote of a majority of the shares entitled to be counted under~~
4995 ~~this subsection. Shares owned by or voted under the control of a director who has a relationship or~~
4996 ~~interest in the transaction described in subsection (1) may not be counted in a vote of shareholders~~
4997 ~~to determine whether to authorize, approve, or ratify a conflict of interest transaction under~~
4998 ~~paragraph (1)(b). The vote of those shares, however, is counted in determining whether the~~
4999 ~~transaction is approved under other sections of this act. A majority of the shares, whether or not~~
5000 ~~present, that are entitled to be counted in a vote on the transaction under this subsection constitutes~~
5001 ~~a quorum for the purpose of taking action under this section.~~

5002 (1) As used in this section, the following terms and definitions apply:

5003 (a) A director is "indirectly" a party to a transaction if that director has a material
5004 financial interest in or is a director, officer, member, manager, or partner of a person, other
5005 than the corporation, who is a party to the transaction.

5006 (b) A director has an "indirect material financial interest" if a family member has
5007 a material financial interest in the transaction, other than having an indirect interest as a
5008 shareholder of the corporation, or if the transaction is with an entity, other than the
5009 corporation, which has a material financial interest in the transaction and controls, or is
5010 controlled by, the director or another person specified in this subsection.

5011 (c) "Director's conflict of interest transaction" means a transaction between a
5012 corporation and one or more of its directors, or another entity in which one or more of the
5013 corporation's directors is directly or indirectly a party to the transaction, other than being
5014 an indirect party as a result of being a shareholder of the corporation, and has a direct or
5015 indirect material financial interest or other material interest.

5016 (d) "Fair to the corporation" means that the transaction, as a whole, is beneficial
5017 to the corporation and its shareholders, taking into appropriate account whether it is:

5018 1. Fair in terms of the director's dealings with the corporation in connection
5019 with that transaction; and

5020 2. Comparable to what might have been obtainable in an arm's length
5021 transaction.

5022 (e) "Family member" includes (i) the director's spouse, or (ii) a child, stepchild,
5023 parent, step parent, grandparent, sibling, step sibling or half sibling of the director or the
5024 director's spouse.

5025 (f) "Material financial interest" means a financial interest in the transaction that
5026 would reasonably be expected to impair the objectivity of the director's judgment when
5027 participating in the action on the authorization of the transaction.

5028 (2) If a director's conflict of interest transaction is fair to the corporation at the time it is
5029 authorized, approved, effectuated, or ratified:

5030 (a) Such transaction is not void or voidable; and

5031 (b) The fact that the transaction is a director's conflict of interest transaction is
5032 not grounds for any equitable relief, an award of damages or other sanctions.

5033 because of that relationship or interest, because such director or directors are present at the meeting
5034 of the board of directors or a committee thereof which authorizes, approves, or ratifies such
5035 transaction, or because his or her or their votes are counted for such purpose.

5036 (3)(a) In a proceeding challenging the validity of a director's conflict of interest
5037 transaction or seeking equitable relief, award of damages or other sanctions with respect to a
5038 director's conflict of interest transaction, the person challenging the validity or seeking
5039 equitable relief, award of damages or other sanctions has the burden of proving the lack of
5040 fairness of the transaction if:

5041 1. The material facts of the transaction and the director's interest in the
5042 transaction were disclosed or known to the board of directors or committee which
5043 authorizes, approves, or ratifies the transaction and the transaction was authorized,
5044 approved or ratified by a vote of a majority of the qualified directors even if the
5045 qualified directors constitute less than a quorum of the board or the committee;
5046 however, the transaction cannot be authorized, approved, or ratified under this
5047 subsection solely by a single director; or

5048 2. The material facts of the transaction and the director's interest in the
5049 transaction were disclosed or known to the shareholders who voted upon such
5050 transaction and the transaction was authorized, approved, or ratified by a majority of
5051 the votes cast by disinterested shareholders or by the written consent of disinterested
5052 shareholders representing a majority of the votes that could be cast by all
5053 disinterested shareholders. Shares owned by or voted under the control of a director
5054 who has a relationship or interest in the director's conflict of interest transaction shall
5055 not be considered shares owned by a disinterested shareholder and thus may not be
5056 counted in a vote of shareholders to determine whether to authorize, approve, or
5057 ratify a director's conflict of interest transaction under this subsection (3)(a)2. The
5058 vote of those shares, however, is counted in determining whether the transaction is
5059 approved under other sections of this chapter. A majority of the shares, whether or
5060 not present, that are entitled to be counted in a vote on the transaction under this
5061 subsection constitutes a quorum for the purpose of taking action under this section.

5062 (b) If neither of the conditions provided in paragraph (a) has been satisfied, the
5063 person defending or asserting the validity of a director's conflict of interest transaction
5064 has the burden of proving its fairness in a proceeding challenging the validity of the
5065 transaction.

5066 (4) The presence of or a vote cast by a director with an interest in the transaction does not
5067 affect the validity of an action taken under paragraph (3)(a) if the transaction is otherwise
5068 authorized, approved, or ratified as provided in subsection (3), but the presence or vote of the

5069 director may be counted for purposes of determining whether the transaction is approved under
5070 other sections of this chapter.

5071 (5) In addition to other grounds for challenge, a party challenging the validity of the
5072 transaction is not precluded from asserting and proving that a particular director or shareholder
5073 was not disinterested on grounds of financial or other interest for purposes of the vote on, consent
5074 to, or approval of the transaction.

5075 (6) Where directors' action under this section does not otherwise satisfy a quorum or
5076 voting requirement applicable to the authorization of the transaction by directors as required by
5077 the articles of incorporation, the bylaws, this chapter or any other provision of law, an action to
5078 satisfy those authorization requirements, whether as part of the same action or by way of another
5079 action, must be taken by the board of directors or a committee in order to authorize the transaction.
5080 In such action, the vote or consent of directors who are not disinterested may be counted.

5081 (7) Where shareholders' action under this section does not satisfy a quorum or voting
5082 requirement applicable to the authorization of the transaction by shareholders as required by the
5083 articles of incorporation, the bylaws, this chapter or any other provision of law, an action to satisfy
5084 those authorization requirements, whether as part of the same action or by way of another action,
5085 must be taken by the shareholders in order to authorize the transaction. In such action, the vote or
5086 consent of shareholders who are not disinterested shareholders may be counted.

5087

5088 **Commentary to Section 607.0832:**

5089 Section 607.0832 is revised to follow the approach taken in and to parallel the language appearing
5090 in s. 605.04092 of FRLCA, in an effort to harmonize the two entity statutes and because the
5091 FRLCA provision does a good job of answering the two key questions that need to be covered
5092 by the director conflicts of interest transactions section of the FBCA, as follows:

5093 (i) can an unfair conflict of interest transaction that is approved by disinterested directors or
5094 disinterested shareholders get clearance under the statute; and
5095

5096 (ii) if, under all circumstances, the conflict of interest transaction must be fair, should
5097 approval by disinterested directors or disinterested shareholders shift the burden of proof to the
5098 persons challenging the transaction.
5099

5100 Current s. 607.0832 can be read to provide that an "unfair" director conflict of interest transaction
5101 would not be void or voidable if it were approved by disinterested directors or disinterested
5102 shareholders. The revised statute expressly removes that ambiguity from the statute.

5103 The changes made to this section are as follows:

5104 1. Following the approach taken by s. 605.04092, and based on a view that "contracts"
5105 are a subset of "transactions," the "contracts and other transactions" language has not been
5106 retained; instead all references are instead to just "transactions." The removal of the references
5107 to "contracts" is not intended to be a substantive change; but rather is consistent with the belief
5108 that "contracts" are a subset of "transactions" and thus the references to "contracts" are
5109 considered superfluous. Furthermore, the removal of the references to "contracts" eliminates
5110 the risk that the transactions (including contracts) covered by s. 607.0832 of FBCA should be
5111 in any way different from the transactions (including contracts) covered by s. 605.04092 of
5112 FRLCA.

5113 2. With respect to "indirect interests," the FRLCA construct is followed. Section
5114 607.0832 defines an "indirect interest" as one where the "director has an indirect material
5115 financial interest in or is a director, officer, member, manager or partner of a person, other
5116 than the corporation, who is a party to the transaction."

5117 3. The word "control," which is defined in the Model Act, is not being defined in s.
5118 607.0832, following the approach taken in the predecessor s. 607.0832 and in s. 605.04092 of
5119 FRLCA.

5120 4. In subsection (3), the words "at the time it is authorized" are continued to be used
5121 rather than the Model Act concept of "relevant time."

5122

5123 5. The word "material" as set forth in s. 605.04092 of FRLCA is used in s. 607.0832.
5124 Although it could be argued that the Model Act definition may be better worded, it is believed
5125 that the FRLCA terminology is perfectly acceptable; using the FRLCA terminology
5126 respects consistency and avoids the potential that a court might give undue meaning to
5127 differences in wording, where no difference in meaning was intended.

5128 6. A definition of the term "related person" has not been added. Instead, the term
5129 "indirect material financial interest" is defined and used in this statute.

5130 7. A definition of the phrase "fair to the corporation" is added, mirroring the defined
5131 phrase as it currently appears in s. 605.04092.

5132 8. A decision was made not to define what is meant by "required disclosure," based on
5133 the view that the concept of required disclosure is already built into the language of s.
5134 605.04092(4), which language has now been mirrored in s. 607.0832.

5135 9. A decision was made to leave it to the courts to determine who may challenge an
5136 interested director transaction and not to expressly address this subject in the statute. Both the
5137 predecessor s. 607.0832 and s. 605.04092 of FRLCA are silent on this issue; however, s.
5138 605.04092, because of the way the burden of proof is now defined, might imply that there is
5139 a broader group of persons who could seek to challenge a conflict of interest transaction.

5140 10. In an attempt to streamline the language used throughout the statute, a definition of
5141 "director's conflict of interest transaction" has been added, but the approach taken is different
5142 from the approach taken in the Model Act. By adding this definition and using this term in
5143 subsection 607.0832(3), the confusion created in parallel subsections 605.04092(4)(a) and (b)
5144 by the cross references used in those subsections is eliminated, with clarity provided as to
5145 which transactions are being referenced. **Conforming changes are being recommended for s.**
5146 **605.04092 so as to eliminate the confusion caused by what appears to be incorrect cross**
5147 **references in subsections 605.04092(4)(a) and (b).**

5148 11. Although not defined, the term "disinterested shareholder" has been used, and
5149 continues to be used, throughout the statute. With respect to board approval, the statute now
5150 uses the defined term "qualified directors."

5151 12. In securing approval from "qualified directors," s. 607.0832 continues to require that
5152 more than one qualified director on the board or board committee considering the transaction
5153 must approve the transaction in order for the transaction to be approved under subsection
5154 607.0832(4)(a)1.

5155 13. In subsection (3)(a)1., the vote to approve the transaction must be by "a majority of
5156 the qualified directors." However, because the reference did not deal with the possibility that
5157 director votes might be weighted under s. 607.0804, there was some confusion as to how the

5158 majority was to be determined in cases where director votes were weighted under s. 607.0804.
5159 The issue was resolved by adding language to s. 607.0804 of the FBCA to make it clear that
5160 if a shareholders' agreement has been adopted in compliance with s. 607.0732 which changes
5161 the weight of director votes, then all references in Chapter 607 to a majority or other
5162 proportion of directors shall refer to a majority or other proportion of the votes of such
5163 directors. Based on this change, it was determined that there was no need to also make a
5164 change in s. 607.0824(3).

5165

5166 607.0833 Loans to officers, directors, and employees; guaranty of obligations.

5167 Any corporation may lend money to, guarantee any obligation of, or otherwise assist any
5168 officer, director, or employee of the corporation or of a subsidiary, whenever, in the judgment of
5169 the board of directors, such loan, guaranty, or assistance may reasonably be expected to benefit
5170 the corporation. The loan, guaranty, or other assistance may be with or without interest and may
5171 be unsecured or secured in such manner as the board of directors shall approve, including, ~~without~~
5172 ~~limitation~~, a pledge of shares of stock of the corporation. Nothing in this section shall be deemed
5173 to deny, limit, or restrict the powers of guaranty or warranty of any corporation at common law or
5174 under any statute. Loans, guarantees, or other types of assistance are subject to s. 607.0832.

5175

5176 **Commentary to Section 607.0833:**

5177 This section is identical to DGCL Section 143 and was in the predecessor Florida corporate statute
5178 prior to the adoption of the FBCA (old s. 607.141). Although the provision does not appear in the
5179 Model Act, the provision is retained in the FBCA.

5180

5181 607.0834 Directors' liability for unlawful distributions.

5182 (1) A director who votes for or assents to a distribution made in violation of s. 607.06401,
5183 s. 607.1410(1) or the articles of incorporation is personally liable to the corporation for the amount
5184 of the distribution that exceeds what could have been distributed without violating s. 607.06401,
5185 s. 607.1410(1), or the articles of incorporation if it is established that the director did not perform
5186 his or her duties in compliance with s. 607.0830. In any proceeding commenced under this section,
5187 a director has all of the defenses ordinarily available to a director.

5188 (2) A director held liable under subsection (1) for an unlawful distribution is entitled to
5189 contribution:

5190 (a) From every other director who could be liable under subsection (1) for the unlawful
5191 distribution; and

5192 (b) From each shareholder for the amount the shareholder accepted knowing the
5193 distribution was made in violation of s. 607.06401 or the articles of incorporation.

5194 (3) A proceeding under this section is barred unless it is commenced:

5195 (a) Within ~~2~~ two years after the date on which the effect of the distribution was measured
5196 under s. 607.06401(6) or (8);

5197 (b) Within two years after the date as of which the violation of s. 607.06401 occurred as
5198 the consequence of disregard of a restriction in the articles of incorporation;

5199 (c) Within two years after the date on which the distribution of assets to shareholders
5200 under s. 607.1410(1) was made; or

5201 (c) With regard to contribution or recoupment under subsection (2) above, within one
5202 year after the liability of the claimant has been finally adjudicated under subsection (1).

5203

5204 **Commentary to Section 607.0834:**

5205 The changes to subsection (3) (adding new subsections (b) and (c)) follow s. 8.33(c)(1) and (2) of
5206 the Model Act that was added to the Model Act in 2000. Subsection (3)(b) adds a two-year statute
5207 of limitations based upon the date on which the violation of s. 607.06401 occurs in circumstances
5208 where the violation is in disregard of a restriction contained in the articles of incorporation. For
5209 actions brought under s. 607.0834(2) for contribution or recoupment, subsection (3)(d) establishes
5210 a one year statute of limitation from when the liability of the claimant has been finally adjudicated
5211 under subsection (1). Addressing the issue of whether there was an overlap between subsections
5212 (3)(a), (b), (c) and (d), it was determined that because the word "or" is used at the end of subsection
5213 (3)(b), the applicable statute of limitations becomes the last to expire of the three applicable
5214 periods.

5215

5216 607.08401 Required officers.

5217 (1) A corporation shall have the officers described in its bylaws or appointed by the board
5218 of directors in accordance with the bylaws.

5219 (2) A duly appointed officer may appoint one or more officers or assistant officers if
5220 authorized by the bylaws or the board of directors.

5221 (3) The bylaws or the board of directors shall ~~delegate~~ assign to one of the officers
5222 responsibility for preparing minutes of the directors' and shareholders' meetings and for
5223 authenticating the records of the corporation required to be kept under sections 607.1601(1) and
5224 607.1601(5).

5225 (4) The same individual may simultaneously hold more than one office in a corporation.

5226

5227 **Commentary to Section 607.08401:**

5228 Subsection (1) was left unchanged, despite the fact that there is a slight difference in its wording
5229 as compared to s. 8.40 of the Model Act. No change was made because it is believed that the
5230 language is substantively the same and because the language in subsection (1) has been in place
5231 since before adoption of the FBCA in 1989.

5232 Subsection (2) was left in its current form, even though, unlike the corresponding provision of the
5233 Model Act, it uses the words "duly appointed" instead of the words "duly authorized" and adds the
5234 possibility of appointing "assistant officers."

5235 The lead-in sentence from s. 8.40(b) of the Model Act, which states that "The board of directors
5236 may elect individuals to fill one or more offices if authorized by the bylaws or the board of
5237 directors," was not added. This first sentence has been part of the Model Act provision since
5238 before 1989 but was not adopted by Florida in 1989 presumably because its substance was
5239 considered implicit in the Florida statute as written. Because the substance of this initial sentence
5240 from the Model Act was still considered implicit, the decision to not add the sentence was
5241 reaffirmed.

5242 The word "delegate" in subsection (3) was changed to "assign" to be consistent with the wording
5243 used in the Model Act and because the change in wording was viewed as being more reflective of
5244 how such obligations are imposed on officers.

5245 Similarly, to be consistent with the wording of the Model Act and to make clear which of the
5246 records identified in Chapter 607 are to be the subject of authentication, subsection (3) was further
5247 changed. It was noted that the Delaware statute does not provide expressly for the appointment of
5248 an officer to authenticate records, since as a practical matter when records must be authenticated
5249 an officer will be assigned to handle that function even if not required by the statute. However,
5250 since this provision for authentication has been in this section of the FBCA since 1989, the decision
5251 was made to leave this concept of assigning the "authentication" function in the statute, but to add
5252 the parallel qualifying language from the Model Act.

5253

5254 607.0841 Duties of officers.

5255 Each officer has the authority and shall perform the duties set forth in the bylaws or, to the
5256 extent consistent with the bylaws, the duties prescribed by the board of directors or by direction of
5257 any officer authorized by the bylaws or the board of directors to prescribe the duties of other
5258 officers.

5259

5260 **Commentary to Section 607.0841:**

5261 While the Model Act, in s. 8.41, uses the term "function" instead of "duties" in the four places
5262 where the word appears in this section, since the corollary section of the DGCL uses the term
5263 "duties" in this context, and since this provision has been in the FBCA in this form since 1989
5264 and is believed adequate to describe the duties (or functions) of officers, the Model Act wording
5265 has not been added to this section of the FBCA.

5266

5267 607.08411 General standards for officers.

5268 (1) An officer, when performing in such capacity, has the duty to act:

5269 (a) In good faith; and

5270 (b) In a manner the officer reasonably believes to be in the best interests of the
5271 corporation.

5272 (2) An officer, when becoming informed in connection with a decision-making function,
5273 shall discharge his or her duties with the care that an ordinary prudent person in a like position
5274 would reasonably believe appropriate under similar circumstances.

5275 (3) The duty of an officer includes the obligation:

5276 (a) To inform the superior officer to whom, or the board of directors or the committee to
5277 which, the officer reports of information about the affairs of the corporation known to the
5278 officer, within the scope of the officer's functions, and known or should be known to the
5279 officer to be material to such superior officer, board or committee; and

5280 (b) To inform his or her superior officer, or another appropriate person within the
5281 corporation, or the board of directors, or a committee thereof, of any actual or probable
5282 material violation of law involving the corporation or material breach of duty to the
5283 corporation by an officer, employee, or agent of the corporation, that the officer believes has
5284 occurred or is likely to occur.

5285 (4) In discharging his or her duties, an officer who does not have knowledge that makes
5286 reliance unwarranted is entitled to rely on the performance by any of the persons specified in
5287 subsection (6) to whom the responsibilities were properly delegated, formally or informally by
5288 course of conduct.

5289 (5) In discharging his or her duties, an officer who does not have knowledge that makes
5290 reliance unwarranted is entitled to rely on information, opinions, reports or statements, including
5291 financial statements and other financial data, prepared or presented by any of the persons
5292 specified in subsection (6).

5293 (6) An officer is entitled to rely, in accordance with subsection (4) or (5), on:

5294 (a) One or more other officers of the corporation or one or more employees of the
5295 corporation whom the officer reasonably believes to be reliable and competent in the
5296 functions performed or the information, opinions, reports or statements provided;

5297 (b) Legal counsel, public accountants, or other persons retained by the corporation as to
5298 matters involving skills or expertise the officer reasonably believes are matters (i) within the

5299 particular person's professional or expert competence or (ii) as to which the particular person
5300 merits confidence.
5301

5302 **Commentary to Section 607.08411:**

5303 While this new section of the FBCA is modeled after s. 8.42 of the Model Act, it includes language
5304 intended to make it consistent with the language used in s. 607.0830 (general standards for
5305 directors).

5306 Section 8.42 first became part of the Model Act in 1984 and was amended in 1999 and again in
5307 2005. This section was excluded from the FBCA as adopted in 1989. The following commentary
5308 explained the rationale for the omission of this section in 1989:

5309 "Currently, Florida does not have a statute dictating standards of conduct for officers.
5310 These standards are currently imposed under common law and general contract law.
5311 Although Georgia has recently adopted a statute that is similar to Model Act Section 8.42,
5312 the Committee believes there is no need to adopt a similar statute at this time".

5313 Today, 28 of the 34 Model Act jurisdictions, including Georgia, Massachusetts, North Carolina,
5314 Oregon, Pennsylvania, Washington DC, and Washington State, have adopted either the 1984 or
5315 updated versions of this Model Act provision. Further, the current version of the Model Act is far
5316 more robust than it was in the 1984 version of the Model Act, and the commentary is lengthy and
5317 detailed on this topic.

5318 As a result, this provision has been added to the FBCA. It provides clear guidance to its audience
5319 (counselors to corporate officers and directors) with as little as possible left to interpretation,
5320 including a roadmap for courts as to the duties of officers. It replaces common law principles of
5321 an agent's duties, which arguably do not provide clear guidance. Further, the more specific
5322 guidance provided by this section could be helpful in determining an officer's entitlement to
5323 indemnification and in providing offensive and defensive arguments when an officer is named as
5324 a defendant in litigation (derivative or otherwise). Other aspects of this new provision that are
5325 considered to be of some significance are the specific requirements for "up the line" reporting and
5326 transparency, and the very specific (and corporate structure-related) definitions of reasonable
5327 "reliance", the latter of which is not necessarily believed to be part of traditional agency rules.

5328 In some cases, the failure to observe relevant standards of conduct may give rise to an officer's
5329 liability to the corporation or its shareholders. A court review of challenged conduct will involve
5330 an evaluation of the particular facts and circumstances in light of applicable law. In this connection,
5331 a court may consider whether the relevant principles of s. 607.0831, such as duties to deal fairly
5332 with the corporation and its shareholders and the challenger's burden of establishing proximately
5333 caused harm, should be taken into account. In addition, a court may find that the business judgment
5334 rule applies to decisions within an officer's discretionary authority. Liability to others can also
5335 arise from an officer's own acts or omissions (*e.g.*, violations of law or tort claims) and, in some
5336 cases, an officer with supervisory responsibilities can have risk exposure in connection with the
5337 acts or omissions of others.

5338 607.0842 Resignation and removal of officers.

5339 (1) An officer may resign at any time by delivering a written notice to the corporation. A
5340 resignation is effective as provided in s. 607.0141(5) when the notice is delivered unless the notice
5341 provides for a delayed effectiveness, including effectiveness determined upon a future event or
5342 events specifies a later effective date. If effectiveness of a resignation is stated to be delayed and
5343 the corporation board of directors or appointing officer made effective at a later date accepts the
5344 delay future effective date, the its board of directors or the appointing officer may fill the pending
5345 vacancy before the delayed effectiveness effective date if the board of directors or the appointing
5346 officer provides that the successor does not take office until the vacancy occurs effective date.

5347 (2) ~~A board of directors may remove any officer at any time with or without cause. Any~~
5348 ~~officer or assistant officer, if appointed by another officer, may likewise be removed by such~~
5349 ~~officer.~~ An officer may be removed at any time with or without cause by: (i) the board of directors,
5350 (ii) the appointing officer, unless the bylaws or the board of directors provide otherwise, or (iii)
5351 any other officer, if authorized by the bylaws or the board of directors.

5352 (3) In this section, "appointing officer" means the officer (including any successor to that
5353 officer) who appointed the officer resigning or being removed.

5354

5355 **Commentary to Section 607.0842:**

5356 Changes to this section of the FBCA update this section for wording changes made in Model Act
5357 s. 8.43 in 2000. These changes are believed to be better wording and clarifying/cleanup changes,
5358 but are not intended to change the substance of the statute.

5359

5360 607.0843 Contract rights of officers.

5361 (1) The election or appointment of an officer does not itself create contract rights.

5362 (2) An officer's removal does not affect the officer's contract rights, if any, with the
5363 corporation. An officer's resignation does not affect the corporation's contract rights, if any, with
5364 the officer.

5365

5366 **Commentary to Section 607.0843:**

5367 A minor language change was made to conform subsection (1) to the 2016 version of the Model
5368 Act. Otherwise, no changes were made.

5369

5370 607.0850 Definitions. Indemnification of officers, directors, employees, and agents.

5371 (1) ~~A corporation shall have power to indemnify any person who was or is a party to any~~
 5372 ~~proceeding (other than an action by, or in the right of, the corporation), by reason of the fact that~~
 5373 ~~he or she is or was a director, officer, employee, or agent of the corporation or is or was serving~~
 5374 ~~at the request of the corporation as a director, officer, employee, or agent of another corporation,~~
 5375 ~~partnership, joint venture, trust, or other enterprise against liability incurred in connection with~~
 5376 ~~such proceeding, including any appeal thereof, if he or she acted in good faith and in a manner he~~
 5377 ~~or she reasonably believed to be in, or not opposed to, the best interests of the corporation and;~~
 5378 ~~with respect to any criminal action or proceeding, had no reasonable cause to believe his or her~~
 5379 ~~conduct was unlawful. The termination of any proceeding by judgment, order, settlement, or~~
 5380 ~~conviction or upon a plea of nolo contendere or its equivalent shall not, of itself, create a~~
 5381 ~~presumption that the person did not act in good faith and in a manner which he or she reasonably~~
 5382 ~~believed to be in, or not opposed to, the best interests of the corporation or, with respect to any~~
 5383 ~~criminal action or proceeding, had reasonable cause to believe that his or her conduct was~~
 5384 ~~unlawful.~~

5385 (2) ~~A corporation shall have power to indemnify any person, who was or is a party to any~~
 5386 ~~proceeding by or in the right of the corporation to procure a judgment in its favor by reason of~~
 5387 ~~the fact that the person is or was a director, officer, employee, or agent of the corporation or is or~~
 5388 ~~was serving at the request of the corporation as a director, officer, employee, or agent of another~~
 5389 ~~corporation, partnership, joint venture, trust, or other enterprise, against expenses and amounts~~
 5390 ~~paid in settlement not exceeding, in the judgment of the board of directors, the estimated expense~~
 5391 ~~of litigating the proceeding to conclusion, actually and reasonably incurred in connection with~~
 5392 ~~the defense or settlement of such proceeding, including any appeal thereof. Such indemnification~~
 5393 ~~shall be authorized if such person acted in good faith and in a manner he or she reasonably~~
 5394 ~~believed to be in, or not opposed to, the best interests of the corporation, except that no~~
 5395 ~~indemnification shall be made under this subsection in respect of any claim, issue, or matter as to~~
 5396 ~~which such person shall have been adjudged to be liable unless, and only to the extent that, the~~
 5397 ~~court in which such proceeding was brought, or any other court of competent jurisdiction, shall~~
 5398 ~~determine upon application that, despite the adjudication of liability but in view of all~~
 5399 ~~circumstances of the case, such person is fairly and reasonably entitled to indemnity for such~~
 5400 ~~expenses which such court shall deem proper.~~

5401 (3) ~~To the extent that a director, officer, employee, or agent of a corporation has been~~
 5402 ~~successful on the merits or otherwise in defense of any proceeding referred to in subsection (1)~~
 5403 ~~or subsection (2), or in defense of any claim, issue, or matter therein, he or she shall be~~
 5404 ~~indemnified against expenses actually and reasonably incurred by him or her in connection~~
 5405 ~~therewith.~~

5406 (4) ~~Any indemnification under subsection (1) or subsection (2), unless pursuant to a~~
 5407 ~~determination by a court, shall be made by the corporation only as authorized in the specific case~~

5408 upon a determination that indemnification of the director, officer, employee, or agent is proper in
5409 the circumstances because he or she has met the applicable standard of conduct set forth in
5410 subsection (1) or subsection (2). Such determination shall be made:

5411 (a) — By the board of directors by a majority vote of a quorum consisting of directors
5412 who were not parties to such proceeding;

5413 (b) — If such a quorum is not obtainable or, even if obtainable, by majority vote of a
5414 committee duly designated by the board of directors (in which directors who are parties may
5415 participate) consisting solely of two or more directors not at the time parties to the
5416 proceeding;

5417 (c) — By independent legal counsel:

5418 1. — Selected by the board of directors prescribed in paragraph (a) or the committee
5419 prescribed in paragraph (b); or

5420 2. — If a quorum of the directors cannot be obtained for paragraph (a) and the
5421 committee cannot be designated under paragraph (b), selected by majority vote of the
5422 full board of directors (in which directors who are parties may participate); or

5423 (d) — By the shareholders by a majority vote of a quorum consisting of shareholders
5424 who were not parties to such proceeding or, if no such quorum is obtainable, by a majority
5425 vote of shareholders who were not parties to such proceeding.

5426 (5) — Evaluation of the reasonableness of expenses and authorization of indemnification
5427 shall be made in the same manner as the determination that indemnification is permissible.
5428 However, if the determination of permissibility is made by independent legal counsel, persons
5429 specified by paragraph (4)(c) shall evaluate the reasonableness of expenses and may authorize
5430 indemnification.

5431 (6) — Expenses incurred by an officer or director in defending a civil or criminal proceeding
5432 may be paid by the corporation in advance of the final disposition of such proceeding upon
5433 receipt of an undertaking by or on behalf of such director or officer to repay such amount if he or
5434 she is ultimately found not to be entitled to indemnification by the corporation pursuant to this
5435 section. Expenses incurred by other employees and agents may be paid in advance upon such
5436 terms or conditions that the board of directors deems appropriate.

5437 (7) — The indemnification and advancement of expenses provided pursuant to this section
5438 are not exclusive, and a corporation may make any other or further indemnification or
5439 advancement of expenses of any of its directors, officers, employees, or agents, under any bylaw,
5440 agreement, vote of shareholders or disinterested directors, or otherwise, both as to action in his or
5441 her official capacity and as to action in another capacity while holding such office. However,
5442 indemnification or advancement of expenses shall not be made to or on behalf of any director,

5443 officer, employee, or agent if a judgment or other final adjudication establishes that his or her
5444 actions, or omissions to act, were material to the cause of action so adjudicated and constitute:

5445 (a) ~~A violation of the criminal law, unless the director, officer, employee, or agent had~~
5446 ~~reasonable cause to believe his or her conduct was lawful or had no reasonable cause to~~
5447 ~~believe his or her conduct was unlawful;~~

5448 (b) ~~A transaction from which the director, officer, employee, or agent derived an~~
5449 ~~improper personal benefit;~~

5450 (c) ~~In the case of a director, a circumstance under which the liability provisions of s.~~
5451 ~~607.0834 are applicable; or~~

5452 (d) ~~Willful misconduct or a conscious disregard for the best interests of the~~
5453 ~~corporation in a proceeding by or in the right of the corporation to procure a judgment in its~~
5454 ~~favor or in a proceeding by or in the right of a shareholder.~~

5455 (8) ~~Indemnification and advancement of expenses as provided in this section shall~~
5456 ~~continue as, unless otherwise provided when authorized or ratified, to a person who has ceased to~~
5457 ~~be a director, officer, employee, or agent and shall inure to the benefit of the heirs, executors, and~~
5458 ~~administrators of such a person, unless otherwise provided when authorized or ratified.~~

5459 (9) ~~Unless the corporation's articles of incorporation provide otherwise, notwithstanding~~
5460 ~~the failure of a corporation to provide indemnification, and despite any contrary determination of~~
5461 ~~the board or of the shareholders in the specific case, a director, officer, employee, or agent of the~~
5462 ~~corporation who is or was a party to a proceeding may apply for indemnification or advancement~~
5463 ~~of expenses, or both, to the court conducting the proceeding, to the circuit court, or to another~~
5464 ~~court of competent jurisdiction. On receipt of an application, the court, after giving any notice~~
5465 ~~that it considers necessary, may order indemnification and advancement of expenses, including~~
5466 ~~expenses incurred in seeking court ordered indemnification or advancement of expenses, if it~~
5467 ~~determines that:~~

5468 (a) ~~The director, officer, employee, or agent is entitled to mandatory indemnification~~
5469 ~~under subsection (3), in which case the court shall also order the corporation to pay the~~
5470 ~~director reasonable expenses incurred in obtaining court ordered indemnification or~~
5471 ~~advancement of expenses;~~

5472 (b) ~~The director, officer, employee, or agent is entitled to indemnification or~~
5473 ~~advancement of expenses, or both, by virtue of the exercise by the corporation of its power~~
5474 ~~pursuant to subsection (7); or~~

5475 (c) ~~The director, officer, employee, or agent is fairly and reasonably entitled to~~
5476 ~~indemnification or advancement of expenses, or both, in view of all the relevant~~

5477 circumstances, regardless of whether such person met the standard of conduct set forth in
5478 subsection (1), subsection (2), or subsection (7).

5479 (10) ~~For purposes of this section, the term "corporation" includes, in addition to the~~
5480 ~~resulting corporation, any constituent corporation (including any constituent of a constituent)~~
5481 ~~absorbed in a consolidation or merger, so that any person who is or was a director, officer,~~
5482 ~~employee, or agent of a constituent corporation, or is or was serving at the request of a~~
5483 ~~constituent corporation as a director, officer, employee, or agent of another corporation,~~
5484 ~~partnership, joint venture, trust, or other enterprise, is in the same position under this section with~~
5485 ~~respect to the resulting or surviving corporation as he or she would have with respect to such~~
5486 ~~constituent corporation if its separate existence had continued.~~

5487 (11) ~~For purposes of this section:~~

5488 (a) ~~The term "other enterprises" includes employee benefit plans;~~

5489 (b) ~~The term "expenses" includes counsel fees, including those for appeal;~~

5490 (c) ~~The term "liability" includes obligations to pay a judgment, settlement, penalty,~~
5491 ~~fine (including an excise tax assessed with respect to any employee benefit plan), and~~
5492 ~~expenses actually and reasonably incurred with respect to a proceeding;~~

5493 (d) ~~The term "proceeding" includes any threatened, pending, or completed action, suit,~~
5494 ~~or other type of proceeding, whether civil, criminal, administrative, or investigative and~~
5495 ~~whether formal or informal;~~

5496 (e) ~~The term "agent" includes a volunteer;~~

5497 (f) ~~The term "serving at the request of the corporation" includes any service as a~~
5498 ~~director, officer, employee, or agent of the corporation that imposes duties on such persons,~~
5499 ~~including duties relating to an employee benefit plan and its participants or beneficiaries;~~
5500 ~~and~~

5501 (g) ~~The term "not opposed to the best interest of the corporation" describes the actions~~
5502 ~~of a person who acts in good faith and in a manner he or she reasonably believes to be in the~~
5503 ~~best interests of the participants and beneficiaries of an employee benefit plan.~~

5504 (12) ~~A corporation shall have power to purchase and maintain insurance on behalf of any~~
5505 ~~person who is or was a director, officer, employee, or agent of the corporation or is or was~~
5506 ~~serving at the request of the corporation as a director, officer, employee, or agent of another~~
5507 ~~corporation, partnership, joint venture, trust, or other enterprise against any liability asserted~~
5508 ~~against the person and incurred by him or her in any such capacity or arising out of his or her~~
5509 ~~status as such, whether or not the corporation would have the power to indemnify the person~~
5510 ~~against such liability under the provisions of this section.~~

5511 In ss. 607.0850 through 607.0859:

5512 (1) "Agent" includes a volunteer.

5513 (2) "Corporation" includes, in addition to the resulting corporation, any constituent
5514 corporation (including any constituent of a constituent) absorbed in a merger, so that any person
5515 who is or was a director or officer of a constituent corporation, or is or was serving at the request
5516 of a constituent corporation as a director or officer, member, manager, partner, trustee, employee
5517 or agent of another corporation, limited liability company, partnership, joint venture, trust, or other
5518 enterprise, is in the same position under this section with respect to the resulting or surviving
5519 corporation as he or she would have been with respect to such constituent corporation if its separate
5520 existence had continued.

5521 (3) "Director" or "officer" means an individual who is or was a director or officer,
5522 respectively, of a corporation or who, while a director or officer of the corporation, is or was
5523 serving at the corporation's request as a director or officer, manager, partner, trustee, employee or
5524 agent of another domestic or foreign corporation, limited liability company, partnership, joint
5525 venture, trust, employee benefit plan, or another enterprise or entity. A director or officer is
5526 considered to be serving an employee benefit plan at the corporation's request if the individual's
5527 duties to the corporation or such plan also impose duties on, or otherwise involve services by, the
5528 individual to the plan or to participants in or beneficiaries of the plan. "Director" or "officer"
5529 includes, unless the context requires otherwise, the estate, heirs, executors, administrators and
5530 personal representatives of a director or officer.

5531 (4) "Expenses" includes reasonable counsel fees and expenses, including those incurred in
5532 connection with any appeal.

5533 (5) "Liability" means the obligation to pay a judgment, settlement, penalty, fine (including
5534 an excise tax assessed with respect to an employee benefit plan), or reasonable expenses incurred
5535 with respect to a proceeding.

5536 (6) "Party" means an individual who was, is, or is threatened to be made, a defendant or
5537 respondent in a proceeding.

5538 (7) "Proceeding" means any threatened, pending, or completed action, suit, or proceeding,
5539 whether civil, criminal, administrative, arbitative, or investigative and whether formal or
5540 informal.

5541 (8) "Serving at the corporation's request" includes any service as a director, officer,
5542 employee, or agent of the corporation that imposes duties on such persons, including duties relating
5543 to an employee benefit plan and its participants or beneficiaries.

5544 **Commentary to Section 607.0850:**

5545 Subsection (2) is derived from the definition of corporation in s. 607.0850(10).

5546 Subsections (1), (4), (5), (7) and (8) are derived from existing s. 607.0850(11).

5547 The definition of "official capacity" from s. 8.50 of the Model Act was not included because the
5548 proposal does not include different standards for indemnification when a director is acting in an
5549 official capacity or otherwise.

5550 The last sentence of subsection (3) states that "[D]irector" or "officer" includes, unless the
5551 context requires otherwise, the estate, heirs, executors, administrators and personal
5552 representatives of a director or officer. Although this adds slightly to the list of parties who
5553 receive the benefits of indemnity that are currently included in s. 607.0850(8), the changes are
5554 believed to be consistent with the intent of the current statute.

5555 While a definition of "expenses" was added in s. 607.01401(32) (including within that definition
5556 the concept of reasonableness of such expenses), the definition of expenses in subsection (4)
5557 deals with reasonable expenses of counsel, so it is retained.

5558

5559 607.0851 Permissible indemnification.

5560 (1) Except as otherwise provided in this section and in s. 607.0859, and not in limitation of
5561 indemnification permitted under s. 607.0858(1), a corporation may indemnify an individual who
5562 is a party to a proceeding because the individual is or was a director or officer against liability
5563 incurred in the proceeding if:

5564 (a) The director or officer acted in good faith; and

5565 (b) The director or officer acted in a manner he or she reasonably believed to be in, or
5566 not opposed to, the best interests of the corporation; and

5567 (c) In the case of any criminal proceeding, the director or officer had no reasonable cause
5568 to believe his or her conduct was unlawful.

5569 (2) The conduct of a director or officer with respect to an employee benefit plan for a purpose
5570 the director or officer reasonably believed to be in the best interest of the participants in, and the
5571 beneficiaries of, the plan is conduct that satisfies the requirement of subsection (1)(b).

5572 (3) The termination of a proceeding by judgment, order, settlement, or conviction, or upon a
5573 plea of nolo contendere or its equivalent, does not, of itself, create a presumption that the director
5574 or officer did not meet the relevant standard of conduct described in this section.

5575 (4) Unless ordered by a court under s. 607.0854(1)(c), a corporation may not indemnify an
5576 officer or director in connection with a proceeding by or in the right of the corporation except for
5577 expenses and amounts paid in settlement not exceeding, in the judgment of the board of directors,
5578 the estimated expense of litigating the proceeding to conclusion, actually and reasonably incurred
5579 in connection with the defense or settlement of such proceeding, including any appeal thereof,
5580 where such person acted in good faith and in a manner he or she reasonably believed to be in, or
5581 not opposed to, the best interests of the corporation.

5582

5583 **Commentary to Section 607.0851:**

5584 The Model Act leaves indemnity of employees and agents to the laws of agency. Although the
5585 Florida statute in effect prior to this revision included employees and agents in the applicable
5586 sections of s. 607.0850 that provided for permissible and mandatory indemnification, the new
5587 structure of which this new section is a part follows the Model Act structure and elects to cover
5588 employees and agents under the laws of agency. Notwithstanding, this change is not believed or
5589 intended to substantively cut back on the power of a corporation to indemnify its employees or
5590 agents. Section 607.0858(6) states that nothing in s. 607.0850-607.0859 limits the power of the
5591 corporation to indemnify agents and employees.

5592 Section 8.56 of the Model Act provides for indemnification of officers. However, the new structure
5593 of which this new section is a part includes officers as covered persons directly in the applicable
5594 sections of s. 607.0851, s. 607.0852 and s. 607.0853, thus eliminating the need for inclusion of a
5595 parallel of Model Act s. 8.56.

5596 Section 8.51(a)(2) of the Model Act, dealing with indemnity beyond the statutory provisions that
5597 is included in the corporation's articles of incorporation, has not been included. Further, s.
5598 607.0202 of the FBCA does not include the Model Act language which would expressly authorize
5599 indemnity beyond the statutory provisions, only in circumstances where authorization is set forth
5600 in the corporation's articles of incorporation.

5601 This section acknowledges that, subject to the limitations contained in s. 607.0859(1), s.
5602 607.0858(1) allows the corporation to provide any other or further indemnification or advancement
5603 of expenses beyond that permitted in the statute. However, in comparison to the corollary Model
5604 Act provisions, s. 607.0858(1), consistent with the Florida statute in effect prior to this revision,
5605 allows this expanded indemnification to be included in the corporation's articles of incorporation,
5606 in its bylaws or in any agreement, or to be approved by a vote of shareholders or disinterested
5607 directors, or otherwise. See commentary to s. 607.0858(1).

5608 The statute does not follow the Model Act construct that creates a different standard of what needs
5609 to be established for indemnification of directors when they are acting in an "official capacity"
5610 compared to when they are not acting in an "official capacity." Under s. 8.51(a)(1)(ii) of the Model
5611 Act, if a director is acting in his or her official capacity, to obtain indemnification he or she must
5612 establish that he or she reasonably believed that his or her conduct was in the best interest of the
5613 corporation, and in all other cases, to obtain indemnification, he or she must establish that he or
5614 she reasonably believed that his or her conduct was at least not opposed to the best interests of the
5615 corporation.

5616

5617 607.0852 Mandatory indemnification.

5618 A corporation shall indemnify an individual who is or was a director or officer who was
5619 wholly successful, on the merits or otherwise, in the defense of any proceeding to which the
5620 individual was a party because he or she is or was a director or officer of the corporation against
5621 expenses incurred by the individual in connection with the proceeding.

5622

5623 **Commentary to Section 607.0852:**

5624 The standard for statutory mandatory indemnification under the new structure of which this new
 5625 section is a part follows the Model Act requirement that an officer or director must be "wholly
 5626 successful" to be entitled to mandatory indemnification. This is in contrast with the "successful"
 5627 standard in s. 607.0850(3) that was in effect prior to this revision. The commentary to s. 8.52 of
 5628 the Model Act provides:

5629 A defendant is "wholly successful" only if the entire proceeding is disposed of on a basis
 5630 which does not involve a finding of liability. A director who is precluded from mandatory
 5631 indemnification by this requirement may still be entitled to permissible indemnification
 5632 under section 8.51(a) [s. 607.0851(1)] or court-ordered indemnification under section
 5633 8.54(a)(3) [s. 607.0854(1)(c)].

5634 Under the structure of the statute, those corporations that desire to continue to be obligated to
 5635 provide mandatory indemnification based on some other standard, such as the "successful"
 5636 standard in s. 607.0850(3) that was in effect prior to this revision, are entitled to do so by way of
 5637 provisions in articles, bylaws, agreements or otherwise, consistent with the authorization in new s.
 5638 607.0858, but subject to the restrictions provided for in new s. 607.0859.

5639 In *Banco Industrial de Venezuela C.A., Miami Agency v. De Saad*, 68 S.3d 895 (Fla. 2011), the
 5640 Florida Supreme Court, in *dicta*, grafted a good faith requirement into s. 607.0850(3) dealing with
 5641 mandatory indemnification, despite the fact that no such express requirement appears to be
 5642 required under the current statute in the context of mandatory indemnification. The *Banco* case
 5643 appeared to base its grafting of the good faith requirement, in significant part, on the cross
 5644 reference in s. 607.0850(3) to subsections (1) and (2) of s. 607.0850.

5645 Because of the concerns about the *Banco* court's reading of the intent of the cross reference, a
 5646 comparable cross reference to s. 607.0851 has not been included in s. 607.0852. The decision not
 5647 to bring forward such cross reference is designed to more clearly reflect that any such cross
 5648 reference was intended to merely identify the type of proceeding to which mandatory
 5649 indemnification applied and not to link to the good faith requirement that applies to permissive
 5650 indemnification. It is also believed that the change in the standard for mandatory indemnification
 5651 from "successful" to "wholly successful" makes it unlikely that a situation such as the *Banco* case
 5652 will arise in the future. However, if there were to be such a case where, for technical reasons, a
 5653 defendant (who had not necessarily acted in good faith) were to have been wholly successful by
 5654 virtue of some procedural grounds rather than on the merits, it is the view of the Subcommittee
 5655 that such defendant would have a right to mandatory indemnification, with no requirement under
 5656 s. 607.0853 to demonstrate good faith on the part of the defendant. As set forth in the Model Act
 5657 commentary to s. 8.52:

5658 While this standard may result in an occasional defendant becoming entitled to indemnification
5659 because of procedural defenses not related to the merits, *e.g.* the statute of limitations or
5660 disqualification of the plaintiff, it is unreasonable to require a defendant with a valid procedural
5661 defense to undergo a possible prolonged and expensive trial on the merits in order to establish
5662 eligibility for mandatory indemnification.

5663

5664 607.0853 Advance for expenses.

5665 (1) A corporation may, before final disposition of a proceeding, advance funds to pay for or
5666 reimburse expenses incurred in connection with the proceeding by an individual who is a party to
5667 the proceeding because that individual is or was a director or an officer if the director or officer
5668 delivers to the corporation a signed written undertaking of the director or officer to repay any funds
5669 advanced if

5670 (a) The director or officer is not entitled to mandatory indemnification under s.
5671 607.0852, and

5672 (b) It is ultimately determined under s. 607.0854 or s. 607.0855 that the director has not
5673 met the relevant standard of conduct described in s. 607.0851 or the director or officer is not
5674 entitled to indemnification by virtue of s. 607.0859.

5675 (2) The undertaking required by subsection (1)(b) must be an unlimited general obligation of
5676 the director or officer but need not be secured and may be accepted without reference to the
5677 financial ability of the director or officer to make repayment.

5678 (3) Authorizations under this section shall be made:

5679 (a) By the board of directors:

5680 1. If there are two or more qualified directors, by a majority vote of all of the
5681 qualified directors (a majority of whom shall for such purpose constitute a quorum) or by
5682 a majority of the members of a committee appointed by such vote and comprised of two
5683 or more qualified directors; or

5684 2. If there are fewer than two qualified directors, by the vote necessary for action
5685 by the board of directors under s. 607.0824(3), in which authorization vote directors who
5686 are not qualified directors may participate; or

5687 (b) By the shareholders, but shares owned by or voted under the control of a director or
5688 officer who at the time of the authorization is not a qualified director or an officer who is a
5689 party to the proceeding may not be counted as a vote in favor of the authorization.

5690

5691 **Commentary to Section 607.0853:**

5692 Subsection (2) is intended to mean that the undertaking may, but need not, be secured and may,
5693 but need not, be accepted without reference to the financial ability of the director or officer to make
5694 the repayment. It is up to the board of directors to decide whether these issues should or should
5695 not be considered in agreeing to advance expenses in the proper exercise of their fiduciary duties.

5696 Subsection (3) expressly provides that a decision to advance expenses on behalf of a director or
5697 officer is to be made by the board of directors or the shareholders. Although the statute in effect
5698 prior to this revision (s. 607.0850(6)) does not specifically state who makes this decision, it is
5699 believed to be implied under the statute in effect prior to this revision.

5700 The provisions in Model Act s. 8.53(c), which establish how advancement of expenses is to be
5701 determined when there are directors who are parties to the proceeding at the time of authorization,
5702 has been included in the statute to clearly reflect how this decision is to be made under different
5703 circumstances. The language on shareholder votes in subsection (3)(b) is modeled on the language
5704 in the Model Act, and not the language in s. 607.0850(4)(d) that was in effect prior to this revision.
5705 Further, the term "qualified director" as defined in s. 607.0143 is used to reflect true independent
5706 directors making the decision as to advancement of expenses.

5707 Model Act s. 8.53(a)(1) regarding advancement of expenses if the proceeding involves conduct
5708 for which liability has been eliminated under a provision of the articles of incorporation as
5709 authorized by s. 2.02 of the Model Act has not been included. See Commentary regarding s.
5710 607.0851 above.

5711

5712 607.0854 Court-ordered indemnification and advance for expenses.

5713 (1) Unless the corporation's articles of incorporation provide otherwise, notwithstanding the
5714 failure of a corporation to provide indemnification, and despite any contrary determination of the
5715 board of directors or of the shareholders in the specific case, a director or officer of the corporation
5716 who is a party to a proceeding because he or she is or was a director or officer may apply for
5717 indemnification or an advance for expenses, or both, to a court having jurisdiction over the
5718 corporation that is conducting the proceeding, or to a circuit court of competent jurisdiction. After
5719 receipt of an application and after giving any notice it considers necessary, the court may:

5720 (a) Order indemnification if the court determines that the director or officer is entitled to
5721 mandatory indemnification under s. 607.0852;

5722 (b) Order indemnification or advance for expenses if the court determines that the
5723 director or officer is entitled to indemnification or advance for expenses pursuant to a
5724 provision authorized by s. 607.0858(1); or

5725 (c) Order indemnification or advance for expenses if the court determines, in view of all
5726 the relevant circumstances, that it is fair and reasonable:

5727 1. To indemnify the director or officer, or

5728 2. To advance expenses to the director or officer;

5729 even if, in the case of subsection (1) and (2) above, he or she has not met the relevant
5730 standard of conduct set forth in s. 607.0851(1), failed to comply with s. 607.0853 or was
5731 adjudged liable in a proceeding referred to in s. 607.0859, but if the director or officer was
5732 adjudged so liable, indemnification shall be limited to expenses incurred in connection with
5733 the proceeding.

5734 (2) If the court determines that the director or officer is entitled to indemnification under
5735 subsection (1)(a) or to indemnification or advance for expenses under subsection (1)(b), it shall
5736 also order the corporation to pay the director's or officer's expenses incurred in connection with
5737 obtaining court-ordered indemnification or advance for expenses. If the court determines that the
5738 director or officer is entitled to indemnification or advance for expenses under subsection (1)(c),
5739 it may also order the corporation to pay the director's or officer's expenses to obtain court-ordered
5740 indemnification or advance for expenses.

5741

5742 **Commentary to Section 607.0854:**

5743 The lead in language that has been added to subsection (1) is derived from existing s. 607.0850(9).
5744 Further, language has been added to subsection (1) to make clear that the corporation must be a
5745 party to the proceeding in which indemnification is ordered (which, while not expressly stated in
5746 the statute that was in effect prior to this revision, is believed to be the rule under that statute).

5747 In subsection (1), the word "shall" in Model Act s. 8.54 was changed to "may" based on the view
5748 that such action is within the discretion of the court.

5749 Subsection (2) is consistent with existing s. 607.0850(9).

5750

5751 607.0855 Determination and authorization of indemnification.

5752 (1) Unless ordered by a court under s. 607.0854(1)(c), a corporation may not indemnify a
5753 director or officer under s. 607.0851 unless authorized for a specific proceeding after a
5754 determination has been made that indemnification is permissible because the director or officer
5755 has met the relevant standard of conduct set forth in s. 607.0851.

5756 (2) The determination shall be made:

5757 (a) If there are two or more qualified directors, by the board of directors by a majority
5758 vote of all of the qualified directors (a majority of whom shall for such purposes constitute a
5759 quorum), or by a majority of the members of a committee of two or more qualified directors
5760 appointed by such a vote; or

5761 (b) By independent special legal counsel:

5762 1. Selected in the manner prescribed in paragraph (a); or

5763 2. If there are fewer than two qualified directors, selected by the board of directors
5764 (in which selection directors who are not qualified directors may participate); or

5765 (c) by the shareholders, but shares owned by or voted under the control of a director or
5766 officer who, at the time of the determination, is not a qualified director or an officer who is a
5767 party to the proceeding may not be counted as votes in favor of the determination.

5768 (3) Authorization of indemnification shall be made in the same manner as the determination
5769 that indemnification is permissible, except that if the determination of permissibility has been
5770 made by independent special legal counsel under subsection (2)(b), any authorization of
5771 indemnification associated with such determination shall be made by either such independent
5772 special legal counsel or by those who otherwise would be entitled to select independent special
5773 legal counsel under subsection (2)(b).

5774

5775 **Commentary to Section 607.0855:**

5776 This section combines the substance and the wording of Model Act s. 8.55 with the existing
5777 language contained in s. 607.0850(4) and (5) of the FBCA. It uses the term "qualified director" as
5778 defined in s. 607.0143 so that the decision is clearly made by independent directors.

5779

5780 Model Act § 8.56 Indemnification of officers.

5781 This section of the Model Act has not been included since officers remain within the scope of
5782 coverage under ss. 607.0851, 607.0852 and 607.0853. See commentary to s. 607.0851.

5783

5784 607.0857 Insurance.

5785 A corporation shall have the power to purchase and maintain insurance on behalf of and for
5786 the benefit of an individual who is or was a director or officer of the corporation, or who, while a
5787 director or officer of the corporation, is or was serving at the corporation's request as a director,
5788 officer, manager, member, partner, trustee, employee, or agent of another domestic or foreign
5789 corporation, limited liability company, partnership, joint venture, trust, employee benefit plan, or
5790 other enterprise or entity, against liability asserted against or incurred by the individual in that
5791 capacity or arising from his or her status as a director or officer, whether or not the corporation
5792 would have power to indemnify or advance expenses to the individual against the same liability
5793 under this chapter.

5794

5795 **Commentary to Section 607.0857:**

5796 The language contained in s. 607.0850(12) that was in effect prior to this revision has been largely
5797 followed in this s. 607.0857. Minor changes have been made to add limited liability companies to
5798 the types of entities to which a director or officer can be serving at the corporation's request and to
5799 eliminate employees and agents from the coverage of this provision (with respect to this second
5800 issue, see the commentary to s. 607.0851).

5801

5802 607.0858 Variation by corporate action; Application of subchapter.

5803 (1) The indemnification provided pursuant to s. 607.0851 and 607.0852 and the advancement
5804 of expenses provided pursuant to s. 607.0853 are not exclusive, and a corporation may, by a
5805 provision in its articles of incorporation, bylaws or any agreement, or by vote of shareholders or
5806 disinterested directors, or otherwise, obligate itself in advance of the act or omission giving rise to
5807 a proceeding to provide any other or further indemnification or advancement of expenses to any
5808 of its directors or officers. Any such obligatory provision shall be deemed to satisfy the
5809 requirements for authorization referred to in s. 607.0853(3) and in s. 607.0855(3). Any such
5810 provision that obligates the corporation to provide indemnification to the fullest extent permitted
5811 by law shall be deemed to obligate the corporation to advance funds to pay for or reimburse
5812 expenses in accordance with s. 607.0853 to the fullest extent permitted by law, unless the provision
5813 specifically provides otherwise.

5814 (2) A right of indemnification or to advance for expenses created by this chapter or under
5815 subsection (1) and in effect at the time of an act or omission shall not be eliminated or impaired
5816 with respect to such act or omission by an amendment of the articles of incorporation or bylaws or
5817 a resolution of the directors or shareholders, adopted after the occurrence of such act or omission,
5818 unless, in the case of a right created under subsection (1), the provision creating such right and in
5819 effect at the time of such act or omission explicitly authorizes such elimination or impairment after
5820 such act or omission has occurred.

5821 (3) Any provision pursuant to subsection (1) shall not obligate the corporation to indemnify
5822 or advance for expenses to a director or officer of a predecessor of the corporation, pertaining to
5823 conduct with respect to the predecessor, unless otherwise specifically provided. Any provision for
5824 indemnification or advance for expenses in the articles of incorporation, bylaws, or a resolution of
5825 the board of directors or shareholders of a predecessor of the corporation in a merger or in a
5826 contract to which the predecessor is a party, existing at the time the merger takes effect, shall be
5827 governed by s. 607.1106(1)(d).

5828 (4) Subject to subsection (2), a corporation may, by a provision in its articles of incorporation,
5829 limit any of the rights to indemnification or advance for expenses created by or pursuant to this
5830 chapter.

5831 (5) Sections 607.0850-607.0859 do not limit a corporation's power to pay or reimburse
5832 expenses incurred by a director, an officer, an employee or an agent in connection with appearing
5833 as a witness in a proceeding at a time when he or she is not a party.

5834 (6) Sections 607.0850-607.0859 do not limit a corporation's power to indemnify, advance
5835 expenses to or provide or maintain insurance on behalf of or for the benefit of an individual who
5836 is or was an employee or agent.

5837 **Commentary to Section 607.0858:**

5838 This statute follows the construct of s. 8.57(f) of the Model Act and leaves the issue of
5839 indemnification of employees and agents to the laws of agency and related principles. See the
5840 commentary to s. 607.0851.

5841 The wording of s. 607.0850(7) that was in effect prior to this revision, which sets forth how a
5842 corporation may obligate itself to provide indemnification beyond the provisions contained in s.
5843 607.0851-607.0853, has been retained in s. 607.0858(1) rather than following the more limited
5844 corollary provision contained in the Model Act. However, even under this subsection, as in the
5845 FBCA provision that was in effect prior to this revision, indemnification cannot be provided under
5846 the circumstances described in s. 607.0859.

5847 The elimination of the wording from s. 607.0850 that was in effect prior to this revision, which
5848 references both acting in an official capacity or acting in any other capacity, is not intended in any
5849 way to limit the ability of a corporation to vary or expand indemnification. The broad language
5850 contained in subsection (1) is intended to operate as broadly as the language in s. 607.0850 that
5851 was in effect prior to this revision, thus allowing a corporation to indemnify and to advance
5852 expenses for an action taken by a director or officer, in whatever capacity (whether official or
5853 otherwise). No substantive change from the broad authorization provided in the statute that was in
5854 effect prior to this revision is intended.

5855

5856 607.0859 Overriding restrictions on indemnification.

5857 (1) Unless ordered by a court under s. 607.0854(1)(c), a corporation may not indemnify a
5858 director or officer under s. 607.0851 or s. 607.0858 or advance expenses to a director or officer
5859 under s. 607.0853 or s. 607.0858 if a judgment or other final adjudication establishes that his or
5860 her actions, or omissions to act, were material to the cause of action so adjudicated and constitute:

5861 (a) Willful or intentional misconduct or a conscious disregard for the best interests of
5862 the corporation in a proceeding by or in the right of the corporation to procure a judgment in
5863 its favor or in a proceeding by or in the right of a shareholder; or

5864 (b) A transaction in which a director or officer derived an improper personal benefit; or

5865 (c) A violation of the criminal law, unless the director or officer had reasonable cause to
5866 believe his or her conduct was lawful or had no reasonable cause to believe his or her conduct
5867 was unlawful; or

5868 (d) In the case of a director, a circumstance under which the liability provisions of s.
5869 607.0834 are applicable.

5870 (2) A corporation may provide indemnification or advance expenses to a director or an officer
5871 only as permitted by ss. 607.0850 - 607.0859.

5872

5873 **Commentary to Section 607.0859:**

5874 The limits of permitted indemnification are contained in subsection (1). They are derived from s.
5875 607.0850(7) that was in effect prior to this revision. These limits are intentionally not applicable
5876 to mandatory indemnification. It is believed that if a director or officer is able to satisfy the
5877 relatively high threshold conditions of being entitled to mandatory indemnification under s.
5878 607.0852, it is highly unlikely that the limitations set forth in s. 607.0859 will have been exceeded.
5879 The choice that has been made, consistent with s. 607.0850 that was in effect prior to this revision,
5880 was to always mandate indemnification where the requirements of s. 607.0852 are met, rather than
5881 to impose on the director or officer or on the corporation an obligation to further establish that
5882 none of the limits in s. 607.0859 were exceeded. It is recognized that, at least in theory, there
5883 could be those very rare cases where the facts would otherwise support having exceeded the limits
5884 in s. 607.0859, but meet the requirements for mandatory indemnification under s. 607.0852.

5885 In conformity with s. 8.59 of the Model Act, ss. 607.0850-607.8059 are expressly stated to be the
5886 exclusive source for the power of a corporation to indemnify or advance expenses to a director or
5887 officer. While this exclusivity was not expressly stated in the current statute, this is not believed
5888 to be a substantive change.

5889

5890 ARTICLE 9

5891 AFFILIATED TRANSACTIONS AND CONTROL-SHARE ACQUISITIONS

5892 **NOTE:** Article 9 of the FBCA was adopted in 1987 as part of a panoply of statutes designed to
5893 prevent perceived abuses in hostile takeovers of publicly held companies, with the aim of
5894 protecting Florida-based and their employees from unwanted hostile takeover attempts. It is not a
5895 Model Act provision. Article 9 includes two statutory provisions, (i) the "affiliated transaction"
5896 statute (s. 607.0901), and (ii) the control share acquisition statute (s. 607.0902). Each of these
5897 sections, or their counterpart in the statutes of other states, has withstood attacks on constitutional
5898 grounds.

5899 For reference, the other provisions added to the FBCA as part of these anti-takeover statutes
5900 included (a) s. 607.0624, validating shareholders' rights plans, and (b) s. 607.0830(3), the
5901 "stakeholders" or other constituencies provision.

5902
5903 *A proposed revised version of s. 607.0901 that will be considered at the upcoming meeting of*
5904 *the Drafting Subcommittee is attached for review at the end of this Master Draft of the proposed*
5905 *modifications to Chapter 607.*

5906 607.0901 Affiliated transactions.

5907 (1) For purposes of this section:

5908
5909 (a) "Affiliate" means a person who directly, or indirectly through one or more
5910 intermediaries, controls or is controlled by, or is under common control with, a specified
5911 person.

5912
5913 (b) "Affiliated transaction," when used in reference to the corporation and any
5914 interested shareholder, means:

5915
5916 1. Any merger or consolidation of the corporation or any subsidiary of the
5917 corporation with:

5918
5919 a. The interested shareholder; or

5920
5921 b. Any other corporation (whether or not itself an interested shareholder)
5922 which is, or after such merger or consolidation would be, an affiliate or associate
5923 of the interested shareholder;

5924
5925
5926
5927
5928
5929
5930
5931
5932
5933
5934
5935
5936
5937
5938
5939
5940
5941
5942
5943
5944
5945
5946
5947
5948
5949
5950
5951
5952
5953
5954
5955
5956
5957
5958
5959
5960
5961
5962
5963

2. Any sale, lease, exchange, mortgage, pledge, transfer, or other disposition (in one transaction or a series of transactions) to or with the interested shareholder or any affiliate or associate of the interested shareholder of assets of the corporation or any subsidiary of the corporation:

a. Having an aggregate fair market value equal to 5 percent or more of the aggregate fair market value of all the assets, determined on a consolidated basis, of the corporation;

b. Having an aggregate fair market value equal to 5 percent or more of the aggregate fair market value of all the outstanding shares of the corporation; or

c. Representing 5 percent or more of the earning power or net income, determined on a consolidated basis, of the corporation;

3. The issuance or transfer by the corporation or any subsidiary of the corporation (in one transaction or a series of transactions) of any shares of the corporation or any subsidiary of the corporation which have an aggregate fair market value equal to 5 percent or more of the aggregate fair market value of all the outstanding shares of the corporation to the interested shareholder or any affiliate or associate of the interested shareholder except pursuant to the exercise of warrants or rights to purchase stock offered, or a dividend or distribution paid or made, pro rata to all shareholders of the corporation;

4. The adoption of any plan or proposal for the liquidation or dissolution of the corporation proposed by, or pursuant to any agreement, arrangement, or understanding (whether or not in writing) with, the interested shareholder or any affiliate or associate of the interested shareholder;

5. Any reclassification of securities (including, without limitation, any stock split, stock dividend, or other distribution of shares in respect of shares, or any reverse stock split) or recapitalization of the corporation, or any merger or consolidation of the corporation with any subsidiary of the corporation, or any other transaction (whether or not with or into or otherwise involving the interested shareholder), with the interested shareholder or any affiliate or associate of the interested shareholder, which has the effect, directly or indirectly (in one transaction or a series of transactions during any 12-month period), of increasing by more than 5 percent the percentage of the outstanding voting shares of the corporation or any subsidiary of the corporation beneficially owned by the interested shareholder; or

5964 6. Any receipt by the interested shareholder or any affiliate or associate of the
5965 interested shareholder of the benefit, directly or indirectly (except proportionately as a
5966 shareholder of the corporation), of any loans, advances, guaranties, pledges, or other
5967 financial assistance or any tax credits or other tax advantages provided by or through the
5968 corporation.

5969
5970 (c) "Announcement date," when used in reference to any affiliated transaction, means
5971 the date of the first general public announcement of the proposed affiliated transaction or of
5972 the intention to propose an affiliated transaction, or the date on which the proposed affiliated
5973 transaction or the intention to propose an affiliated transaction is first communicated generally
5974 to the shareholders of the corporation, whichever is earlier.

5975
5976 (d) "Associate," when used to indicate a relationship with any person, means any entity,
5977 other than the corporation or any of its subsidiaries, of which such person is an officer,
5978 director, or partner or is, directly or indirectly, the beneficial owner of 10 percent or more of
5979 any class of voting shares; any trust or other estate in which such person has a substantial
5980 beneficial interest or as to which such person serves as trustee or in a similar fiduciary
5981 capacity; and any relative or spouse of such person, or any relative of such spouse, who has
5982 the same home as such person or who is an officer or director of the corporation or any of its
5983 affiliates.

5984
5985 (e) A person is deemed to be a "beneficial owner" of voting shares as to which such
5986 person and such person's affiliates and associates, individually or in the aggregate, have or
5987 share directly, or indirectly through any contract, arrangement, understanding, relationship, or
5988 otherwise:

5989
5990 1. Voting power, which includes the power to vote or to direct the voting of the
5991 voting shares;

5992
5993 2. Investment power, which includes the power to dispose of or to direct the
5994 disposition of the voting shares; or

5995
5996 3. The right to acquire the voting power or investment power, whether such right
5997 is exercisable immediately or only after the passage of time, pursuant to any contract,
5998 arrangement, or understanding, upon the exercise of conversion rights, exchange rights,
5999 warrants, or options, or otherwise; however, in no case shall a director of the corporation
6000 be deemed to be the beneficial owner of voting shares beneficially owned by another
6001 director of the corporation solely by reason of actions undertaken by such persons in their
6002 capacity as directors of the corporation.

6003

6004 (f) "Control" means the possession, directly or indirectly, through the ownership of
6005 voting shares, by contract, arrangement, understanding, relationship, or otherwise, of the
6006 power to direct or cause the direction of the management and policies of a person.
6007 Notwithstanding the foregoing, a person shall not be deemed to have control of a corporation
6008 if such person holds voting shares, in good faith and not for the purpose of circumventing this
6009 section, as an agent, bank, broker, nominee, custodian, or trustee for one or more beneficial
6010 owners who do not individually or as a group have control of such corporation.

6011
6012 (g) "Determination date" means the date on which an interested shareholder became an
6013 interested shareholder.

6014
6015 (h) Unless otherwise specified in the articles of incorporation initially filed with the
6016 Department of State, a "disinterested director" means as to any particular interested
6017 shareholder:

6018
6019 1. Any member of the board of directors of the corporation who was a member
6020 of the board of directors before the later of January 1, 1987, or the determination date; and
6021

6022 2. Any member of the board of directors of the corporation who was
6023 recommended for election by, or was elected to fill a vacancy and received the affirmative
6024 vote of, a majority of the disinterested directors then on the board.

6025
6026 (i) "Exchange Act" means the Act of Congress known as the Securities Exchange Act
6027 of 1934, as the same has been or hereafter may be amended from time to time.

6028
6029 (j) "Fair market value" means:

6030
6031 1. In the case of shares, the highest closing sale price of a share quoted during the
6032 30-day period immediately preceding the date in question on the composite tape for shares
6033 listed on the New York Stock Exchange; or, if such shares are not quoted on the composite
6034 tape on the New York Stock Exchange or if such shares are not listed on such exchange,
6035 the highest closing sale price quoted during such period on the principal United States
6036 securities exchange registered under the Exchange Act on which such shares are listed; or,
6037 if such shares are not listed on any such exchange, the highest closing bid quotation with
6038 respect to a share during the 30-day period preceding the date in question on the National
6039 Association of Securities Dealers, Inc., automated quotations system or any similar system
6040 then in general use; or, if no such quotations are available, the fair market value of a share
6041 on the date in question as determined by a majority of disinterested directors; and
6042

6043 2. In the case of property other than cash or shares, the fair market value of such
6044 property on the date in question as determined by a majority of the disinterested directors.
6045

6046 (k) "Interested shareholder" means any person who is the beneficial owner of more than
6047 10 percent of the outstanding voting shares of the corporation. However, the term "interested
6048 shareholder" shall not include the corporation or any of its subsidiaries; any savings, employee
6049 stock ownership, or other employee benefit plan of the corporation or any of its subsidiaries;
6050 or any fiduciary with respect to any such plan when acting in such capacity. For the purpose
6051 of determining whether a person is an interested shareholder, the number of voting shares
6052 deemed to be outstanding shall include shares deemed owned by the interested shareholder
6053 through application of subparagraph (e)3. but shall not include any other voting shares that
6054 may be issuable pursuant to any contract, arrangement, or understanding, upon the exercise
6055 of conversion rights, exchange rights, warrants, or options, or otherwise.
6056

6057 (l) "Shares" means the units into which the proprietary interests in an entity are divided
6058 and includes:
6059

6060 1. Any stock or similar security, any certificate of interest, any participation in
6061 any profit-sharing agreement, any voting trust certificate, or any certificate of deposit for
6062 shares; and
6063

6064 2. Any security convertible, with or without consideration, into shares; or any
6065 warrant, call, or other option or privilege of buying shares without being bound to do so;
6066 or any other security carrying any right to acquire, subscribe to, or purchase shares.
6067

6068 (m) "Subsidiary" means, as to any corporation, any other corporation of which it owns,
6069 directly or indirectly through one or more subsidiaries, a majority of the voting shares.
6070

6071 (n) "Valuation date" means, if the affiliated transaction is voted upon by shareholders,
6072 the day before the date of the vote of shareholders or, if the affiliated transaction is not voted
6073 upon by shareholders, the date of the consummation of the affiliated transaction.
6074

6075 (o) "Voting shares" means the outstanding shares of all classes or series of the
6076 corporation entitled to vote generally in the election of directors.
6077

6078 (2) Except as provided in subsection (4), in addition to any affirmative vote required by any
6079 other section of this act or by the articles of incorporation, an affiliated transaction shall be
6080 approved by the affirmative vote of the holders of two-thirds of the voting shares other than the
6081 shares beneficially owned by the interested shareholder.
6082

6083 (3) A majority of the disinterested directors shall have the power to determine for the
6084 purposes of this section:

6085 (a) Whether a person is an interested shareholder;

6086 (b) The number of voting shares beneficially owned by any person;

6087 (c) Whether a person is an affiliate or associate of another; and

6088 (d) Whether the securities to be issued or transferred by the corporation or any of its
6089 subsidiaries to any interested shareholder or any affiliate or associate of the interested
6090 shareholder have an aggregate fair market value equal to or greater than 5 percent of the
6091 aggregate fair market value of all of the outstanding voting shares of the corporation or any
6092 of its subsidiaries.

6093 (4) The voting requirements set forth in subsection (2) do not apply to a particular affiliated
6094 transaction if all of the conditions specified in any one of the following paragraphs are met:

6095 (a) The affiliated transaction has been approved by a majority of the disinterested
6096 directors;

6097 (b) The corporation has not had more than 300 shareholders of record at any time during
6098 the 3 years preceding the announcement date;

6099 (c) The interested shareholder has been the beneficial owner of at least 80 percent of
6100 the corporation's outstanding voting shares for at least 5 years preceding the announcement
6101 date;

6102 (d) The interested shareholder is the beneficial owner of at least 90 percent of the
6103 outstanding voting shares of the corporation, exclusive of shares acquired directly from the
6104 corporation in a transaction not approved by a majority of the disinterested directors;

6105 (e) The corporation is an investment company registered under the Investment
6106 Company Act of 1940; or

6107 (f) In the affiliated transaction, consideration shall be paid to the holders of each class
6108 or series of voting shares and all of the following conditions shall be met:

6109 1. The aggregate amount of the cash and the fair market value as of the valuation
6110 date of consideration other than cash to be received per share by holders of each class or
6111

6123 series of voting shares in such affiliated transaction are at least equal to the highest of the
6124 following:

6125
6126 a. If applicable, the highest per share price, including any
6127 brokerage commissions, transfer taxes, and soliciting dealers' fees, paid by
6128 the interested shareholder for any shares of such class or series acquired by
6129 it within the 2-year period immediately preceding the announcement date
6130 or in the transaction in which it became an interested shareholder,
6131 whichever is higher;

6132
6133 b. The fair market value per share of such class or series on the
6134 announcement date or on the determination date, whichever is higher;

6135
6136 c. If applicable, the price per share equal to the fair market value
6137 per share of such class or series determined pursuant to sub-subparagraph
6138 b., multiplied by the ratio of the highest per share price, including any
6139 brokerage commissions, transfer taxes, and soliciting dealers' fees, paid by
6140 the interested shareholder for any shares of such class or series acquired by
6141 it within the 2-year period immediately preceding the announcement date,
6142 to the fair market value per share of such class or series on the first day in
6143 such 2-year period on which the interested shareholder acquired any shares
6144 of such class or series; and

6145
6146 d. If applicable, the highest preferential amount, if any, per share
6147 to which the holders of such class or series are entitled in the event of any
6148 voluntary or involuntary dissolution of the corporation.

6149
6150 2. The consideration to be received by holders of outstanding shares shall
6151 be in cash or in the same form as the interested shareholder has previously paid for
6152 shares of the same class or series, and if the interested shareholder has paid for
6153 shares with varying forms of consideration, the form of the consideration shall be
6154 either cash or the form used to acquire the largest number of shares of such class or
6155 series previously acquired by the interested shareholder.

6156
6157 3. During such portion of the 3-year period preceding the announcement
6158 date that such interested shareholder has been an interested shareholder, except as
6159 approved by a majority of the disinterested directors:

6160

6161 a. There shall have been no failure to declare and pay at the regular
6162 date therefor any full periodic dividends, whether or not cumulative, on any
6163 outstanding shares of the corporation;

6164
6165 b. There shall have been:

6166
6167 (I) No reduction in the annual rate of dividends paid on any
6168 class or series of voting shares, except as necessary to reflect any
6169 subdivision of the class or series; and

6170
6171 (II) An increase in such annual rate of dividends as
6172 necessary to reflect any reclassification, including any reverse stock
6173 split, recapitalization, reorganization, or similar transaction which
6174 has the effect of reducing the number of outstanding shares of the
6175 class or series; and

6176
6177 c. Such interested shareholder shall not have become the
6178 beneficial owner of any additional voting shares except as part of the
6179 transaction which results in such interested shareholder becoming an
6180 interested shareholder.

6181
6182 4. During such portion of the 3-year period preceding the announcement
6183 date that such interested shareholder has been an interested shareholder, except as
6184 approved by a majority of the disinterested directors, such interested shareholder
6185 shall not have received the benefit, directly or indirectly (except proportionately as
6186 a shareholder), of any loans, advances, guaranties, pledges, or other financial
6187 assistance or any tax credits or other tax advantages provided by the corporation,
6188 whether in anticipation of or in connection with such affiliated transaction or
6189 otherwise.

6190
6191 5. Except as otherwise approved by a majority of the disinterested
6192 directors, a proxy or information statement describing the affiliated transaction and
6193 complying with the requirements of the Exchange Act and the rules and regulations
6194 thereunder has been mailed to holders of voting shares of the corporation at least
6195 25 days before the consummation of such affiliated transaction, whether or not such
6196 proxy or information statement is required to be mailed pursuant to the Exchange
6197 Act or such rules or regulations.

6198
6199 (5) The provisions of this section do not apply:
6200

6201 (a) To any corporation the original articles of incorporation of which contain a
6202 provision expressly electing not to be governed by this section;

6203
6204 (b) To any corporation which adopted an amendment to its articles of incorporation
6205 prior to January 1, 1989, expressly electing not to be governed by this section, provided that
6206 such amendment does not apply to any affiliated transaction of the corporation with an
6207 interested shareholder whose determination date is on or prior to the effective date of such
6208 amendment;

6209
6210 (c) To any corporation which adopts an amendment to its articles of incorporation or
6211 bylaws, approved by the affirmative vote of the holders, other than interested shareholders
6212 and their affiliates and associates, of a majority of the outstanding voting shares of the
6213 corporation, excluding the voting shares of interested shareholders and their affiliates and
6214 associates, expressly electing not to be governed by this section, provided that such
6215 amendment to the articles of incorporation or bylaws shall not be effective until 18 months
6216 after such vote of the corporation's shareholders and shall not apply to any affiliated
6217 transaction of the corporation with an interested shareholder whose determination date is on
6218 or prior to the effective date of such amendment; or

6219
6220 (d) To any affiliated transaction of the corporation with an interested shareholder of the
6221 corporation which became an interested shareholder inadvertently, if such interested
6222 shareholder, as soon as practicable, divests itself of a sufficient amount of the voting shares
6223 of the corporation so that it no longer is the beneficial owner, directly or indirectly, of 10
6224 percent or more of the outstanding voting shares of the corporation, and would not at any time
6225 within the 5-year period preceding the announcement date with respect to such affiliated
6226 transaction have been an interested shareholder but for such inadvertent acquisition.

6227
6228 (6) Any corporation that elected not to be governed by this section, either through a
6229 provision in its original articles of incorporation or through an amendment to its articles of
6230 incorporation or bylaws may elect to be bound by the provisions of this section by adopting an
6231 amendment to its articles of incorporation or bylaws that repeals the original article or the
6232 amendment. In addition to any requirements of this act, or the articles of incorporation or bylaws
6233 of the corporation, any such amendment shall be approved by the affirmative vote of the holders
6234 of two-thirds of the voting shares other than shares beneficially owned by any interested
6235 shareholder.

6237 **Commentary to s. 607.0901:**

6238 The purpose of s. 607.0901 is to deter coercive "two-step, front-end loaded" tender offers that are
6239 not approved by the disinterested directors of the target company (i.e., tender offers that are hostile
6240 and not friendly). It accomplishes this purpose by regulating the exercise, as opposed to the
6241 acquisition, of corporate control in a way that makes the acquisition unpalatable to the bidder.

6242 Section 607.0901 requires that any "affiliated transaction" with an "interested shareholder" receive
6243 the approval of either "disinterested directors" or a supermajority vote of disinterested
6244 shareholders, or, absent either such approval, that a statutory "fair price" be paid to the shareholders
6245 in the transaction. The shareholder vote requirement is in addition to any shareholder vote required
6246 under any other section of the FBCA or the corporation's articles of incorporation. For a publicly
6247 traded corporation, this supermajority vote will be difficult, if not impossible, to obtain because
6248 the votes of the shares beneficially owned by the "interested shareholder" are not counted. In
6249 addition, the "fair price" alternative to the special shareholder vote requirement is likewise difficult
6250 to satisfy because the formula for determining the price will often result in a higher price being
6251 paid to the non-tendering shareholder in any "back-end" or "affiliated transaction" that was paid
6252 in the "front-end" tender offer.

6253 Generally, s. 607.0901 will only apply to publicly held companies because of the 300-record
6254 shareholders condition in subsection 4(b). However, the section may also apply to private
6255 companies which, at any time in the prior three years preceding the affiliated transaction, had more
6256 than 300 shareholders.

6257 [Add discussion of changes made to this section]

6258

6259 607.0902 Control-share acquisitions.

6260 (1) "Control shares." As used in this section, "control shares" means shares that, except for
6261 this section, would have voting power with respect to shares of an issuing public corporation that,
6262 when added to all other shares of the issuing public corporation owned by a person or in respect
6263 to which that person may exercise or direct the exercise of voting power, would entitle that person,
6264 immediately after acquisition of the shares, directly or indirectly, alone or as a part of a group, to
6265 exercise or direct the exercise of the voting power of the issuing public corporation in the election
6266 of directors within any of the following ranges of voting power:

- 6267
- 6268 (a) One-fifth or more but less than one-third of all voting power.
 - 6269
 - 6270 (b) One-third or more but less than a majority of all voting power.
 - 6271
 - 6272 (c) A majority or more of all voting power.
 - 6273

6274 (2) "Control-share acquisition."

6275 (a) As used in this section, "control-share acquisition" means the acquisition, directly
6276 or indirectly, by any person of ownership of, or the power to direct the exercise of voting
6277 power with respect to, issued and outstanding control shares.

6278

6279 (b) For purposes of this section, all shares, the beneficial ownership of which is acquired
6280 within 90 days before or after the date of the acquisition of the beneficial ownership of shares
6281 which result in a control share acquisition, and all shares the beneficial ownership of which is
6282 acquired pursuant to a plan to make a control-share acquisition shall be deemed to have been
6283 acquired in the same acquisition.

6284

6285 (c) For purposes of this section, a person who acquires shares in the ordinary course of
6286 business for the benefit of others in good faith and not for the purpose of circumventing this
6287 section has voting power only of shares in respect of which that person would be able to
6288 exercise or direct the exercise of votes without further instruction from others.

6289

6290 (d) The acquisition of any shares of an issuing public corporation does not constitute a
6291 control-share acquisition if the acquisition is consummated in any of the following
6292 circumstances:

- 6293
- 6294 1. Before July 2, 1987.
 - 6295
 - 6296 2. Pursuant to a contract existing before July 2, 1987.
 - 6297

6298 3. Pursuant to the laws of intestate succession or pursuant to a gift or
6299 testamentary transfer.

6300
6301 4. Pursuant to the satisfaction of a pledge or other security interest created in
6302 good faith and not for the purpose of circumventing this section.

6303
6304 5. Pursuant to a merger or share exchange effected in compliance with s.
6305 607.1101, s. 607.1102, s. 607.1103, s. 607.1104, or s. 607.1107, if the issuing public
6306 corporation is a party to the agreement of merger or plan of share exchange.

6307
6308 6. Pursuant to any savings, employee stock ownership, or other employee
6309 benefit plan of the issuing public corporation or any of its subsidiaries or any
6310 fiduciary with respect to any such plan when acting in such fiduciary capacity.

6311
6312 7. Pursuant to an acquisition of shares of an issuing public corporation if the
6313 acquisition has been approved by the board of directors of such issuing public
6314 corporation before acquisition.

6315
6316 (e) The acquisition of shares of an issuing public corporation in good faith and not for
6317 the purpose of circumventing this section by or from:

6318
6319 1. Any person whose voting rights had previously been authorized by
6320 shareholders in compliance with this section; or

6321
6322 2. Any person whose previous acquisition of shares of an issuing public
6323 corporation would have constituted a control-share acquisition but for paragraph (d),

6324
6325 does not constitute a control-share acquisition, unless the acquisition entitles any person,
6326 directly or indirectly, alone or as a part of a group, to exercise or direct the exercise of voting
6327 power of the corporation in the election of directors in excess of the range of the voting power
6328 otherwise authorized.

6329
6330 (f) For the purpose of this section, persons shall not be deemed to be part of a "group"
6331 if such persons join together to exercise or direct the exercise of the voting power of an issuing
6332 public corporation (whether through a voting trust, a shareholder agreement, or through other
6333 arrangements), and the voting trustee of any voting trust shall not be deemed to be an
6334 "acquiring person" if such persons or all the parties to the voting trust:

6335
6336 1. Are related by blood or marriage or are the personal representatives or trustees
6337 of such persons; and

6338
6339
6340
6341
6342
6343
6344
6345
6346
6347
6348
6349
6350
6351
6352
6353
6354
6355
6356
6357
6358
6359
6360
6361
6362
6363
6364
6365
6366
6367
6368
6369
6370
6371
6372
6373
6374
6375
6376

2. Such persons were shareholders (or the beneficial owners of shares) of the issuing public corporation (or were trustees, personal representatives, or heirs of such shareholders or beneficial owners) on July 1, 1987, and have continued to be shareholders (or the beneficial owners of shares) of the issuing public corporation (or have been trustees, personal representatives, or heirs of such shareholders or beneficial owners) since that time.

(3) "Interested shares." As used in this section, "interested shares" means the shares of an issuing public corporation in respect of which any of the following persons may exercise or direct the exercise of the voting power of the corporation in the election of directors:

(a) An acquiring person or member of a group with respect to a control-share acquisition.

(b) Any officer of the issuing public corporation.

(c) Any employee of the issuing public corporation who is also a director of the corporation.

(4) "Issuing public corporation."

(a) As used in this section, "issuing public corporation" means a corporation that has:

1. One hundred or more shareholders;
2. Its principal place of business, its principal office, or substantial assets within this state; and
3. Either:
 - a. More than 10 percent of its shareholders resident in this state;
 - b. More than 10 percent of its shares owned by residents of this state; or
 - c. One thousand shareholders resident in this state.

(b) The residence of a shareholder is presumed to be the address appearing in the records of the corporation.

6377 (c) Shares held by banks (except as trustee or guardian), brokers, or nominees shall be
6378 disregarded for purposes of calculating the percentages or numbers described in this
6379 subsection.
6380

6381 (5) Law applicable to control-share voting rights. Unless the corporation's articles of
6382 incorporation or bylaws provide that this section does not apply to control-share acquisitions of
6383 shares of the corporation before the control-share acquisition, control shares of an issuing public
6384 corporation acquired in a control-share acquisition have only such voting rights as are conferred
6385 by subsection (9).
6386

6387 (6) Notice of control-share acquisition. Any person who proposes to make or has made a
6388 control-share acquisition may at the person's election deliver an acquiring person statement to the
6389 issuing public corporation at the issuing public corporation's principal office. The acquiring person
6390 statement must set forth all of the following:
6391

6392 (a) The identity of the acquiring person and each other member of any group of which
6393 the person is a part for purposes of determining control shares.
6394

6395 (b) A statement that the acquiring person statement is given pursuant to this section.
6396

6397 (c) The number of shares of the issuing public corporation owned, directly or
6398 indirectly, by the acquiring person and each other member of the group.
6399

6400 (d) The range of voting power under which the control-share acquisition falls or would,
6401 if consummated, fall.
6402

6403 (e) If the control-share acquisition has not taken place:
6404

6405 1. A description in reasonable detail of the terms of the proposed control-share
6406 acquisition; and
6407

6408 2. Representations of the acquiring person, together with a statement, in
6409 reasonable detail of the facts upon which they are based, that the proposed control-share
6410 acquisition, if consummated, will not be contrary to law and that the acquiring person
6411 has the financial capacity to make the proposed control-share acquisition.
6412

6413 (7) Shareholder meeting to determine control-share voting rights.
6414

6415 (a) If the acquiring person so requests at the time of delivery of an acquiring person
6416 statement and gives an undertaking to pay the corporation's expenses of a special meeting,

6417 within 10 days thereafter, the directors of the issuing public corporation or others authorized
6418 to call such a meeting under the issuing public corporation's articles of incorporation or
6419 bylaws shall call a special meeting of shareholders of the issuing public corporation for the
6420 purpose of considering the voting rights to be accorded the shares acquired or to be acquired
6421 in the control-share acquisition.

6422
6423 (b) Unless the acquiring person agrees in writing to another date, the special meeting of
6424 shareholders shall be held within 50 days after receipt by the issuing public corporation of the
6425 request.

6426
6427 (c) If the acquiring person so requests in writing at the time of delivery of the acquiring
6428 person statement, the special meeting must not be held sooner than 30 days after receipt by
6429 the issuing public corporation of the acquiring person statement.

6430
6431 (d) If no request is made, the voting rights to be accorded the shares acquired in the
6432 control-share acquisition shall be presented to the next special or annual meeting of the
6433 shareholders.

6434
6435 (8) Notice of shareholder meeting.

6436 (a) If a special meeting is requested, notice of the special meeting of shareholders shall
6437 be given as promptly as reasonably practicable by the issuing public corporation to all
6438 shareholders of record as of the record date set for the meeting, whether or not entitled to vote
6439 at the meeting.

6440
6441 (b) Notice of the special or annual shareholder meeting at which the voting rights are
6442 to be considered must include or be accompanied by each of the following:

6443
6444 1. A copy of the acquiring person statement delivered to the issuing public
6445 corporation pursuant to this section.

6446
6447 2. A statement by the board of directors of the corporation, authorized by its
6448 directors, of its position or recommendation, or that it is taking no position or making no
6449 recommendation, with respect to the proposed control-share acquisition.

6450
6451 (9) Resolution granting control-share voting rights.

6452
6453 (a) Control shares acquired in a control-share acquisition have the same voting rights as
6454 were accorded the shares before the control-share acquisition only to the extent granted by
6455 resolution approved by the shareholders of the issuing public corporation.

6456

6457 (b) To be approved under this subsection, the resolution must be approved by:
6458

6459 1. Each class or series entitled to vote separately on the proposal by a
6460 majority of all the votes entitled to be cast by the class or series, with the holders
6461 of the outstanding shares of a class or series being entitled to vote as a separate
6462 class if the proposed control-share acquisition would, if fully carried out, result in
6463 any of the changes described in s. 607.1004; and
6464

6465 2. Each class or series entitled to vote separately on the proposal by a
6466 majority of all the votes entitled to be cast by that group, excluding all interested
6467 shares.
6468

6469 (c) Any control shares that do not have voting rights because such rights were not
6470 accorded to such shares by approval of a resolution by the shareholders pursuant to paragraph
6471 (b) shall regain voting rights and shall no longer be deemed control shares upon a transfer to
6472 a person other than the acquiring person or associate or affiliate, as defined in s. 607.0901, of
6473 the acquiring person unless the acquisition of the shares by the other person constitutes a
6474 control-share acquisition, in which case the voting rights of the shares remain subject to the
6475 provisions of this section.
6476

6477 (10) Redemption of control-shares.
6478

6479 (a) If authorized in a corporation's articles of incorporation or bylaws before a control-
6480 share acquisition has occurred, control shares acquired in a control-share acquisition with
6481 respect to which no acquiring person statement has been filed with the issuing public
6482 corporation may, at any time during the period ending 60 days after the last acquisition of
6483 control shares by the acquiring person, be subject to redemption by the corporation at the fair
6484 value thereof pursuant to the procedures adopted by the corporation.
6485

6486 (b) Control shares acquired in a control-share acquisition are not subject to redemption
6487 after an acquiring person statement has been filed unless the shares are not accorded full voting
6488 rights by the shareholders as provided in subsection (9).
6489

6490 **Commentary to s. 607.0902:**

6491 Like the affiliated transaction section (s. 607.0901), the control-share acquisition section is
6492 intended to deter hostile takeovers of publicly-held Florida corporations. It does this by regulating
6493 the acquisition of control of an "issuing public corporation", which is defined in the section as a
6494 corporation that has a more than 100 shareholders and a substantial nexus to Florida. The statute
6495 is based on a similar statute adopted in Indiana that was held to be constitutional by the United
6496 States Supreme Court in *CTS v. Dynamics Corporation of America*, 481 U.S. 69, 107 S. Ct. 1637,
6497 95 L. Ed. 2d 67 (1987).

6498
6499 Under s. 607.0902, "control shares" acquired in a "control-share acquisition" have voting rights
6500 only if, and to the extent, granted in a resolution of the shareholders of the corporation approved
6501 by (1) a majority of all the votes entitled to be cast by each class or series entitled, by virtue of s.
6502 607.1004, to vote on the proposed control-share acquisition, and (2) a majority of all shares of
6503 each class or series entitled to vote separately on the proposal, excluding all "interested shares".
6504 "Interested shares" are shares that are owned by the acquiring person or persons, each officer of
6505 the corporation, and each employee of the corporation who is also a director of the corporation.
6506 These voting provisions are formidable obstacles to completion of a hostile takeover attempt.

6507
6508 Subsection (2)(d)7., which was added in 1994, permits "friendly" acquisitions of a corporation,
6509 or of a significant block of a corporation's issued shares (i.e. "control shares"), without the
6510 necessity of complying with the convoluted shareholder voting requirements of the section. The
6511 provision permits the board of directors of the corporation, by its approval of the transaction, to
6512 remove the acquisition from the definition of "control-share acquisition", which takes the
6513 acquisition out of the purview of the statute. The provision was further amended in 1997 to
6514 require that any such board approval must come *before* the control share acquisition occurs.

6515
6516 The definitions of "control shares" and "control-share acquisition" in the section limit the scope
6517 of the section and create ambiguities that have not been resolved by amendment or court
6518 construction. For example, the acquisition of, e.g. 12% of the voting shares, followed one year
6519 later by the acquisition of an additional 8%, triggers the control share provisions, but it is not
6520 clear whether the loss of voting rights applies to the entire 20% or only to the 8% portion that
6521 triggered the provision. The definition of a control-share acquisition in s. 607.0902(2)(b) applies
6522 to all shares acquired within 90 days and those acquired pursuant to a plan to make a control-
6523 share acquisition. If neither of those elements is present, do previously acquired shares of less
6524 than 20% lose their voting power when the acquiror subsequently exceeds the 20% threshold? It
6525 could be argued that all shares become non-voting, as all shares are totaled for purposes of
6526 determining the 20% threshold. On the other hand, if the earlier acquisitions were not control-
6527 share acquisitions, and if the statute (as it does) permits voting power up to 19%, perhaps it is
6528 only the latter-acquired shares that lose voting power. There appear to be arguments supporting
6529 conflicting interpretations within the statutory provision.

6530

6531 Subsection 10 grants a redemption right to the corporation with respect to control shares acquired
6532 in a control-share acquisition if either (i) no 'acquiring person statement' is filed by the acquiring
6533 person or (ii) if an acquiring person statement has been filed, the control shares are not accorded
6534 full voting rights by shareholders as provided in subs. (9). Subsection 10(b) is curiously worded
6535 and has raised interpretative issues, particularly with regard to the length of the permitted
6536 redemption period after the shareholders meeting in which the acquiring person's shares are not
6537 accorded full voting rights. This was the central issue in *H.T.E., Inc. v. Tyler Technologies, Inc.*,
6538 217 F.Supp.2d 1255 (Dist. Ct., M.D. Fla., 2002), in which the court held that the 60—day time
6539 limit in subs. 10(a) must be read into subs. 10(b), with the effect that a corporation only has 60
6540 days following the shareholders meeting at which voting rights are not accorded to the acquiring
6541 person's shares in which to redeem those shares. Although not at issue in that case, the court
6542 noted that the 'fair value' requirement of subs. 10(a) should also be read into subs. 10(b).

6543

6544 Subsection 9(c) was added in 2003 to clarify that control shares lose their "taint" under the control
6545 share acquisition provisions, and regain any voting rights, once they are sold or transferred in a
6546 non-control share acquisition transaction. This allows for marketability of control shares, which
6547 might not otherwise be able to be sold or transferred if the restrictions of Section 607.0902
6548 remained on the shares. The amendment is regarded as a clarification of existing law.

6549

6550 [Add discussion of changes made to this section]

6551

6552 **ARTICLE 10**

6553 **AMENDMENT OF ARTICLES OF INCORPORATION AND BYLAWS**

6554

6555 607.1001 Authority to amend the articles of incorporation.

6556

6557 (1) A corporation may amend its articles of incorporation at any time to add or change a
6558 provision that is required or permitted in the articles of incorporation or to delete a provision not
6559 required to be contained in the articles of incorporation. Whether a provision is required or
6560 permitted in the articles of incorporation is determined as of the effective date of the amendment.

6561

6562 (2) A shareholder of the corporation does not have a vested property right resulting from any
6563 provision in the articles of incorporation, including provisions relating to management, control,
6564 capital structure, dividend entitlement, or purpose or duration of the corporation.

6565

6566 **Commentary to Section 607.1001:**

6567 This section of the FBCA follows the prior version of the Model Act. Although minor, non-
6568 substantive changes were made to the language in the Model Act, the current language was
6569 considered clearer. The clarifying change made to this section is not considered substantive.
6570 Thirty-one jurisdictions, including Connecticut, Georgia, and Massachusetts, have similar
6571 sections. Other states, like Delaware (in DGCL s. 242) provide a shortened "laundry list" of
6572 possible subjects of amendments.

6573 Subsection (2) expressly rejects the concept that an otherwise lawful amendment to the articles of
6574 incorporation might be restricted or invalidated because it modified particular rights conferred on
6575 shareholders by the original or prior version of the articles of incorporation. At the same time,
6576 subsection (2) does not override contracts by a corporation outside its articles of incorporation
6577 which might be violated by an otherwise lawful amendment to the articles of incorporation or
6578 invalidate provisions in articles of incorporation that require procedures for approval of
6579 amendments that limit the power to amend the articles of incorporation without particular
6580 shareholder consent.

6581

6582 607.1002 Amendment by board of directors.

6583 Unless the articles of incorporation provide otherwise, a corporation's board of directors
6584 may adopt one or more amendments to the corporation's articles of incorporation without
6585 shareholder ~~action~~ approval:

6586 (1) To extend the duration of the corporation if it was incorporated at a time when limited
6587 duration was required by law;

6588 (2) To delete the names and addresses of the initial directors;

6589 (3) To delete the name and address of the initial registered agent or registered office, if a
6590 statement of change is on file with the ~~D~~epartment of State;

6591 (4) To delete any other information contained in the articles of incorporation that is solely of
6592 historical interest;

6593 (5) To delete the authorization for a class or series of shares authorized pursuant to s.
6594 607.0602, if no shares of such class or series are issued.

6595 (6) To change the corporate name by substituting the word "corporation," "incorporated," or
6596 "company," or the abbreviation "corp.," "Inc.," or "Co.," for a similar word or abbreviation in the
6597 name, or by adding, deleting, or changing a geographical attribution for the name;

6598 (7) To change the par value for a class or series of shares;

6599 (8) To provide that if the corporation acquires its own shares, such shares belong to the
6600 corporation and constitute treasury shares until disposed of or canceled by the corporation;

6601 (9) To reflect a reduction in authorized shares, as a result of the operation of s. 607.0631(2),
6602 when the corporation has acquired its own shares and the articles of incorporation prohibit the
6603 reissue of the acquired shares;

6604 (10) To delete a class of shares from the articles of incorporation, as a result of the operation
6605 of s. 607.0631(2), when there are no remaining shares of the class because the corporation has
6606 acquired all shares of the class and the articles of incorporation prohibit the reissue of the acquired
6607 shares; or

6608 (11 ~~9~~) To make any other change expressly permitted by this ~~aet~~ chapter to be made without
6609 shareholder ~~action~~ approval.

6610

6611 **Commentary to Section 607.1002:**

6612 The changes to the articles of incorporation may be made by the board of directors without
6613 shareholder approval because they are routine and ministerial and are not believed to affect the
6614 substantive rights of shareholders in a meaningful way.

6615 Section 607.1002 compares to the corollary section of the Model Act (s. 10.05) as follows:

6616 Subsections (1), (2), and (3) of Florida's statute match subsections (a)(1), (2), and (3) of the Model
6617 Act.

6618 Subsection (4) was added to this section of the FBCA in 1989. It is not in the corollary section of
6619 the Model Act.

6620 New subsection (d) of the Model Act has not been added because of the inclusion of s. 607.10025
6621 in the FBCA.

6622 Subsection (6) of Florida's statute substantially matches subsection (e) of the corollary provision
6623 of the Model Act. The FBCA provision, when adopted in 1989, did not to include the use of the
6624 word "limited" or the abbreviation "Ltd." for a corporation, and this limitation has been carried
6625 forward in current proposed version of the FBCA.

6626 Subsection (7) of the FBCA does not appear in the Model Act, but has been retained to allow the
6627 ministerial task of changing par value to be undertaken by the directors, without shareholder
6628 approval, in those cases where the corporation continues to have shares that have a par value.

6629 Subsection (8) was added in 1997. It was added to permit the board of directors of any corporation
6630 (not just public companies) on its own to amend the articles of incorporation to treat reacquired
6631 shares as treasury shares.

6632 New subsections (9) and (10) follow subsections (f) and (g) of the corollary Model Act provision
6633 and relate to changes made in light of s. 607.0631.

6634 Subsection (9) of Florida's statute (renumbered subsection (11) matches the pre-1999 version of
6635 the Model Act. Cleanup changes matching the current version of this section to the current version
6636 of the Model Act have been made to the statute.

6637 In the 1999 amendments to Article 10 of the Model Act, this section was renumbered from s. 10.02
6638 to s. 10.05. However, since this concept has been numbered as s. 607.1002 since 1982, this section
6639 was not moved from its current place in Article 10.

6640

6641 607.10025 Shares; combination or division.

6642 (1) A corporation may effect a division or combination of its shares in the manner as provided
6643 in this section. For purposes of this section, the terms "division" and "combination" mean dividing
6644 or combining shares of any issued and outstanding class or series into a greater or lesser number
6645 of shares of the same class or series.

6646 (2) Unless the articles of incorporation provide otherwise, a division or combination may be
6647 effected solely by the action of the board of directors. In effecting a share combination or division,
6648 the board shall have authority to amend the articles to:

6649 (a) Increase or decrease the par value of shares;

6650 (b) Increase or decrease the number of authorized shares; or

6651 (c) Make any other changes necessary or appropriate to assure that the rights or
6652 preferences of each holder of outstanding shares of all classes and series will not be adversely
6653 affected by the combination or division.

6654 The board shall not have the authority to amend the articles, and shareholder approval of any
6655 amendment shall be required pursuant to s. 607.1003, if, as a result of the amendment, the rights
6656 or preferences of the holders of any outstanding class or series will be adversely affected, or the
6657 percentage of authorized shares remaining unissued after the share division or combination will
6658 exceed the percentage of authorized shares that was unissued before the division or combination.

6659 (3) Fractional shares created by a division or combination effected under this section may
6660 not be redeemed for cash under s. 607.0604.

6661 (4) If a division or combination is effected by a board action without shareholder approval
6662 and includes an amendment to the articles of incorporation, there shall be signed ~~executed~~ in
6663 accordance with s. 607.0120 on behalf of the corporation and filed in the office of the ~~D~~Department
6664 ~~of State~~ articles of amendment which shall set forth:

6665 (a) The name of the corporation.

6666 (b) The date of adoption by the board of directors of the resolution approving the
6667 division or combination.

6668 (c) That the amendment to the articles of incorporation does not adversely affect the
6669 rights or preferences of the holders of outstanding shares of any class or series and does not result
6670 in the percentage of authorized shares that remain unissued after the division or combination
6671 exceeding the percentage of authorized shares that were unissued before the division or
6672 combination.

6673 (d) The class or series and number of shares subject to the division or combination
6674 and the number of shares into which the shares are to be divided or combined.

6675 (e) The amendment of the articles of incorporation made in connection with the division
6676 or combination.

6677 (f) If the division or combination is to become effective at a time subsequent to the
6678 time of filing, the date, which may not exceed 90 days after the date of filing, when the division
6679 or combination becomes effective.

6680 (5) Within 30 days after effecting a division or combination without shareholder approval,
6681 the corporation shall give written notice to its shareholders setting forth the material terms of the
6682 division or combination.

6683 (6) If a division or combination is effected by action of the board and of the shareholders,
6684 there shall be signed ~~executed~~ on behalf of the corporation and filed with the ~~D~~department of State
6685 articles of amendment as provided in s. 607.1006, which articles shall set forth, in addition to the
6686 information required by s. 607.1006, the information required in subsection (4).

6687 (7) Upon the effectiveness of a combination, the authorized shares of the classes or series
6688 affected by the combination shall be reduced by the same percentage by which the issued shares
6689 of such class or series were reduced as a result of the combination, unless the articles of
6690 incorporation otherwise provide or the combination was approved by the shareholders pursuant to
6691 s. 607.1003.

6692 ~~(8) This section applies only to corporations with more than 35 shareholders of record.~~

6693

6694 **Commentary to Section 607.10025:**

6695 This section of the FBCA was added to the statute in 1993. It is not in the Model Act. It was added
6696 to the FBCA to allow forward stock splits and reverse stock splits without shareholder approval.
6697 The statute contains protective provisions to avoid squeeze-outs, forced buy-outs of fractional
6698 shares, and dilution, along with a provision in subsection (2)(c) precluding the board from acting
6699 without shareholder approval where the division or combination would adversely affect pre-
6700 existing shareholder rights.

6701 Section (8) has been eliminated. Since the protective provisions of this statute (particularly
6702 subsections (3) and (7) make it impossible for this statute to be used for squeeze out transactions
6703 or to dilute the interests of minority shareholders, the limitation of this provision to use in
6704 corporations with more than 35 shareholders of record is no longer believed to serve a useful
6705 purpose.

6706

6707 607.1003 Amendment by board of directors and shareholders.

6708 ~~(1) A corporation's board of directors may propose one or more amendments to the~~
6709 ~~articles of incorporation for submission to the shareholders. If a corporation has issued shares, an~~
6710 ~~amendment to the articles of incorporation shall be adopted in the following manner:~~

6711 (1) the proposed amendment shall first be adopted by the board of directors.

6712 (2) Except as provided in ss. 607.1002, 607.10025, 607.1007 (with respect to
6713 restatements that do not require shareholder approval under that section), and 607.1008, the
6714 amendment shall then be approved by the shareholders. In submitting the proposed amendment to
6715 the shareholders for approval, the board of directors shall recommend that the shareholders
6716 approve the amendment unless (a) the board of directors makes a determination that because of a
6717 conflict of interest or other special circumstances it should not make such a recommendation, or
6718 (b) s. 607.0826 applies. If either (a) or (b) applies, the board must inform the shareholders of the
6719 basis for its proceeding without such recommendation.

6720 For the amendment to be adopted:

6721 ~~(a)The board of directors must recommend the amendment to the shareholders,~~
6722 ~~unless the board of directors determines that because of conflict of interest or other special~~
6723 ~~circumstances it should make no recommendation and communicates the basis for its~~
6724 ~~determination to the shareholders with the amendment; and~~

6725 ~~(b)The shareholders entitled to vote on the amendment must approve the~~
6726 ~~amendment as provided in subsection (5).~~

6727 (3) The board of directors may set conditions for the approval of the amendment by the
6728 shareholders or the effectiveness of the amendment ~~its submission of the proposed amendment on~~
6729 ~~any basis.~~

6730 (4) If the amendment is required to be approved by the shareholders, and the approval is to
6731 be given at a meeting, the corporation must notify each shareholder, whether or not entitled to
6732 vote, of the meeting of shareholders at which the amendment is to be submitted for approval. The
6733 notice must be given in accordance with s. 607.0705 and must state that the purpose, or one of the
6734 purposes, of the meeting is to consider the amendment, and must contain or be accompanied by a
6735 copy of the amendment. The corporation shall notify each shareholder, whether or not entitled to
6736 vote, of the proposed shareholders' meeting in accordance with s. 607.0705. The notice of meeting
6737 must also state that the purpose, or one of the purposes, of the meeting is to consider the proposed
6738 amendment and contain or be accompanied by a copy or summary of the amendment.

6739 (5) Unless this chapter aet, the articles of incorporation, or the board of directors (acting
6740 pursuant to subsection (3)), requires a greater vote or a greater quorum ~~vote by voting groups~~, the

6741 ~~amendment to be adopted must be approved by~~ approval of the amendment requires the approval
6742 of the shareholders at a meeting at which a quorum consisting of at least a majority of the shares
6743 entitled to be cast on the amendment exists, and, if any class or series of shares is entitled to vote
6744 as a separate group on the amendment, except as provided in s. 607.1004(3), the approval of each
6745 such separate voting group at a meeting at which a quorum of the voting group exists consisting
6746 of at least a majority of the votes entitled to be cast on the amendment by that voting group.

6747 ~~(a) A majority of the votes entitled to be cast on the amendment by any voting group~~
6748 ~~with respect to which the amendment would create dissenters' rights; and~~

6749 ~~(b) The votes required by ss. 607.0725 and 607.0726 by every other voting group~~
6750 ~~entitled to vote on the amendment.~~

6751 (6) If the amendment by any voting group would create appraisal rights, approval of the
6752 amendment shall also require the vote of a majority of the votes entitled to be cast by such voting
6753 group.

6754 ~~(67)~~ Unless otherwise provided in the articles of incorporation, the shareholders of a
6755 corporation having 35 or fewer shareholders may amend the articles of incorporation without an
6756 act of the directors at a meeting for which notice of the changes to be made is given. For purposes
6757 of this subsection, the term "shareholder" means a record shareholder, a beneficial shareholder,
6758 and an unrestricted voting trust beneficial owner.

6759 (8) If as a result of an amendment of the articles of incorporation one or more shareholders of
6760 a domestic corporation would become subject to new interest holder liability, approval of the
6761 amendment requires the signing in connection with the amendment, by each such shareholder, of a
6762 separate written consent to become subject to such new interest holder liability, unless in the case of
6763 a shareholder that already has interest holder liability the terms and conditions of the new interest
6764 holder liability (i) are substantially identical to those of the existing interest holder liability, or (ii)
6765 are substantially identical to those of the existing interest holder liability (other than changes that
6766 eliminate or reduce such interest holder liability).

6767 (9) For purposes of subsection (8) and s. 607.1009, "new interest holder liability" means
6768 interest holder liability of a person resulting from an amendment of the articles of incorporation if
6769 (i) the person did not have interest holder liability before the amendment becomes effective, or (ii)
6770 the person had interest holder liability before the amendment becomes effective, the terms and
6771 conditions of which are changed when the amendment becomes effective.

6772

6773 **Commentary to Section 607.1003:**

6774 Subsections (1) through (5) were modified to reflect language changes to the current version of
6775 the Model Act. These provisions substantially clean up the language of the statute, but are not
6776 considered substantive. The language in subsection (6) also continues the bifurcated required vote
6777 in Florida in situations where a voting group will receive appraisal rights as a result of the
6778 amendment.

6779 In line with the Model Act, subsection (4) has been modified to require that a copy of the amendment
6780 be provided, rather than allowing, as an alternative, a summary of the amendment to be provided (as
6781 is permitted in the current version of this section of the FBCA). Allowing just a summary to be
6782 presented to shareholders raises the issue of whether the summary is complete, and, as a result, it
6783 is believed best that shareholders receive a full copy of the amendment so they can read and make
6784 their own decisions on the entire provision. It is also not believed to be an onerous burden to
6785 provide a copy of the full amendment.

6786 Subsection (7) is not a Model Act provision. It was included in the FBCA in 1989 and represented
6787 a compromise between those that believed that the provisions of this section should apply to all
6788 amendments regardless of the size of the corporation and those who believed that shareholders
6789 should have more control in a closely held corporation. While this provision has been retained in
6790 the FBCA, the definition of "shareholder" for purposes of this subsection has been modified so
6791 that this provision only applies in true closely held corporations.

6792 New subsections (8) and (9) are derived from s. 10.3 of the Model Act. These new sections add the
6793 concept of separate approval by interest holders on amendments where the interest holder will have
6794 interest holder liability following the transaction.

6795

6796 607.1004 Voting on amendments by voting groups.

6797 (1) If the corporation has more than one class of shares outstanding, the holders of the
6798 outstanding shares of a class are entitled to vote as a separate voting group class (if shareholder
6799 voting is otherwise required by this chapter ~~act~~) upon a proposed amendment to the articles of
6800 incorporation, if the amendment would:

6801 (a) Effect an exchange or reclassification of all or part of the shares of the class into
6802 shares of another class.;

6803 (b) Effect an exchange or reclassification, or create a right of exchange, of all or part
6804 of the shares of another class into the shares of the class.;

6805 (c) Change the designation, rights, preferences, or limitations of all or part of the
6806 shares of the class.;

6807 (d) Change the shares of all or part of the class into a different number of shares of
6808 the same class.;

6809 (e) Create a new class of shares having rights or preferences with respect to
6810 distributions or to dissolution that are prior or superior to the shares of the class.;

6811 (f) Increase the rights, preferences, or number of authorized shares of any class that,
6812 after giving effect to the amendment, have rights or preferences with respect to distributions
6813 or to dissolution that are prior or superior to the shares of the class.;

6814 (g) Limit or deny an existing preemptive right of all or part of the shares of the class.;

6815 (h) Cancel or otherwise affect rights to distributions or dividends that have
6816 accumulated but not yet been declared on all or part of the shares of the class.

6817 (2) If a proposed amendment would affect a series of a class of shares in one or more of the
6818 ways described in subsection (1), the shares of that series are entitled to vote as a separate voting
6819 group class on the proposed amendment.

6820 (3) If a proposed amendment that entitles the holders of two or more classes or series of
6821 shares to vote as separate voting groups under this section would affect those two or more classes
6822 or series in the same or substantially similar way, the holders of ~~the~~ shares of all the classes or
6823 series so affected must vote together as a single voting group on the proposed amendment, unless
6824 otherwise provided in the articles of incorporation or added as a condition by the board of directors
6825 pursuant to s. 607.1003(3).

6826 (4) A class or series of shares is entitled to the voting rights granted by this section even if
6827 ~~although~~ the articles of incorporation provide that the shares are nonvoting shares.

6828

6829 **Commentary to Section 607.1004:**

6830 This section substantially follows the Model Act. Cleanup changes were made to conform to the
6831 current version of the corollary section of the Model Act. One minor change was to retain the
6832 words "or to dissolution" in subsections (1)(e) and (1)(f). While it can be argued that the statutory
6833 term "distribution" includes all forms of distribution, including payments in liquidation or
6834 dissolution, there was a concern that there may be cases where there are rights or preferences
6835 triggered upon dissolution that are not in the nature of distributions.

6836

6837 607.1005 Amendment before issuance of shares.

6838 If a corporation has not yet issued shares, its board of directors or ~~its~~ a majority of its
6839 incorporators, if it has no ~~or~~ board of directors, may adopt, one or more amendments to the
6840 corporation's articles of incorporation.

6841

6842 **Commentary to Section 607.1005:**

6843 This section is substantively similar to s. 10.02 of the Model Act. Although not in the Model Act,
6844 language requiring that the vote of the incorporators or the directors approving an such amendment
6845 be a majority vote of the incorporators or the board of directors, as applicable, has been retained.

6846 In the 1999 amendments to Article 10 of the Model Act, this section was renumbered from s. 10.05
6847 to s. 10.02.¹⁹

6848

¹⁹ The co-chairs intend to discuss with bill drafting whether s. 607.1002 and 607.1005 can be put in the Model Act order without violating a bill drafting convention, since that is a more logical sequence for these sections. If such a reordering is made, s. 607.10025 will need to be renumbered as s. 607.10055.

6849 607.1006 Articles of Amendment.

6850 (1) ~~After an amendment to the A corporation amending its~~ After an amendment to the A corporation amending its articles of incorporation has
6851 been adopted and approved in the manner required by this chapter, the corporation shall deliver to
6852 the Department of State for filing articles of amendment which shall be signed executed in
6853 accordance with s. 607.0120 and which shall set forth:

6854 (a~~1~~) The name of the corporation;

6855 (b~~2~~) The text of each amendment adopted, or the information required by s.
6856 607.0120(11)(e), if applicable;

6857 (c~~3~~) If an amendment provides for an exchange, reclassification, or cancellation
6858 of issued shares, provisions for implementing the amendment if not contained in the
6859 amendment itself, which may be made dependent upon facts objectively ascertainable
6860 outside of the articles of amendment in accordance with s. 607.0120(11);

6861 (d~~4~~) The date of each amendment's adoption; and

6862 (e~~5~~) If an amendment:

6863 1. was adopted by the incorporators or board of directors without
6864 shareholder approval action, a statement that the amendment was duly adopted by
6865 the incorporators or by the board of directors, as the case may be, to that effect and
6866 that shareholder approval action was not required;

6867 (6)~~2.~~ If an amendment was approved required approval by the
6868 shareholders, a statement that the number of votes cast for the amendment by the
6869 shareholders in the manner required by the chapter and by the articles of
6870 incorporation was sufficient for approval and, if more than one voting group was
6871 entitled to vote on the amendment, a statement designating each voting group
6872 entitled to vote separately on the amendment, and a statement that the number of
6873 votes cast for the amendment by the shareholders in each voting group was
6874 sufficient for approval by that voting group; or

6875 3. is being filed pursuant to s. 607.0120(11)(e), a statement to that effect.

6876 2. Articles of amendment shall take effect at the effective date determined in accordance
6877 with s. 607.0123.

6878

6879 **Commentary to Section 607.1006:**

6880 With some exceptions, the current Florida statute follows the pre-1999 version of the Model Act,
6881 except that Florida (in current subsection (6) is unique in requiring a broad statement regarding
6882 what voting groups had a separate vote on the amendment. The revised statute modifies the
6883 wording of this provision to bring it in line with the language in the 2016 version of the Model
6884 Act. With two exceptions (noted below), these are not substantive changes.

6885 While the vast majority of state corporate statutes require only a statement that the amendment
6886 was duly approved by the shareholders in the manner required by the act and by the articles of
6887 incorporation, Florida has always required a statement in the amendment as filed as to what voting
6888 groups had a separate vote on the amendment. While this difference pre-dates the 1989 statute, it
6889 is believed that this language adds meaningfully to the public information about the corporation
6890 available in the filed articles of incorporation and forces practitioners to consider this issue in
6891 interpreting the statute.

6892 Conforming language has been added to the text of this section to implement the changes to s.
6893 607.0120(11) that allow a filed document to be dependent on facts objectively ascertainable
6894 outside a filed document.

6895

6896 607.1007 Restated articles of incorporation.

6897 (1) A corporation's board of directors may restate its articles of incorporation at any time
6898 ~~with or without shareholder action~~ approval, subject to subsection (2).

6899 (2) ~~The restatement may~~ If the restated articles include one or more new amendments to the
6900 articles. If the restatement includes an amendment requiring that require shareholder approval, it
6901 the amendments must be adopted and approved as provided in s. 607.1003.

6902 (3) If, notwithstanding subsection (1), the board of directors submits a restatement for
6903 shareholder approval action, and the approval is to be given at a meeting, the corporation must
6904 shall notify each shareholder, whether or not entitled to vote, of the meeting of shareholders at
6905 which the restatement is to be submitted for approval. The notice must be given of the proposed
6906 shareholders' meeting in accordance with s. 607.0705 and. ~~The notice must also state that the~~
6907 purpose, or one of the purposes, of the meeting is to consider the ~~proposed~~ restatement and must
6908 contain or be accompanied by a copy of the restatement ~~that identifies any amendment or other~~
6909 ~~change it would make in the articles.~~

6910 (4) A corporation ~~restating that restates~~ its articles of incorporation shall execute and deliver
6911 to the ~~Department of State~~ for filing articles of restatement, that comply with the provisions of s.
6912 607.0120, and to the extent applicable, s. 607.0202, setting forth:

6913 (a) the name of the corporation,

6914 (b) ~~and~~ the text of the restated articles of incorporation,

6915 (c) ~~together with a certificate setting forth:~~ a statement that the restated articles
6916 consolidate all amendments into a single document, and,

6917 (d) if one or more new amendments are included in the restated articles, the
6918 statements required under s. 607.1006 with respect to each new amendment.

6919 (a) ~~Whether the restatement contains an amendment to the articles requiring~~
6920 ~~shareholder approval and, if it does not, that the board of directors adopted the restatement;~~
6921 ~~or~~

6922 (b) ~~If the restatement contains an amendment to the articles requiring shareholder~~
6923 ~~approval, the information required by s. 607.1006.~~

6924 (5) Duly adopted restated articles of incorporation supersede the original articles of
6925 incorporation and all amendments to ~~them~~ the articles of incorporation.

6926 (6) The ~~D~~department of State may certify restated articles of incorporation, as the articles of
6927 incorporation currently in effect, without including the statements ~~certificate information~~ required
6928 by subsection (4).

6929

6930 **Commentary to Section 607.1007:**

6931 Florida's current statute was identical to the pre-1999 version of the Model Act. The changes
6932 proposed to be made to this section add confirming language to bring this section into line with
6933 the current version of the Model Act. These changes are not believed to be substantive.

6934 Subsection (3), which is not in the Model Act, but is in the current Florida statute, has been
6935 retained, but the language has been modified to make it consistent with s. 607.1003(4).

6936

6937 607.1008 Amendment pursuant to reorganization.

6938 (1) A corporation's articles of incorporation may be amended without action by the board of
6939 directors or shareholders to carry out a plan of reorganization ordered or decreed by a court of
6940 competent jurisdiction under ~~any federal or Florida statute if the articles of incorporation after~~
6941 ~~amendment contain only provisions required or permitted by s. 607.0202~~ the authority of a law of
6942 the United States or of the State of Florida.

6943 (2) The individual or individuals designated by the court shall deliver to the ~~D~~department of
6944 ~~State~~ for filing articles of amendment setting forth:

6945 (a) The name of the corporation;

6946 (b) The text of each amendment approved by the court;

6947 (c) The date of the court's order or decree approving the articles of amendment;

6948 (d) The title of the reorganization proceeding in which the order or decree was
6949 entered; and

6950 (e) A statement that the court had jurisdiction of the proceeding under a federal or
6951 Florida statute.

6952 (3) Shareholders of a corporation undergoing reorganization do not have appraisal dissenters'
6953 rights except as and to the extent provided in the reorganization plan.

6954 (4) This section does not apply after entry of a final decree in the reorganization proceeding
6955 even though the court retains jurisdiction of the proceeding for limited purposes unrelated to
6956 consummation of the reorganization plan.

6957

6958 **Commentary to Section 607.1008:**

6959 Changes made to subsection (1) mirror clarifying changes in the Model Act. These changes are
6960 not believed to be substantive.

6961 The Model Act only references reorganizations under federal law. The concept of a Florida state
6962 law reorganization was added to the FBCA in 1989 and has been retained.

6963 Subsection (3) has been retained, notwithstanding its removal from the Model Act in 1999.

6964

6965 607.1009 Effect of amendment.

6966 (1) An amendment to articles of incorporation does not affect a cause of action existing
6967 against or in favor of the corporation, a proceeding to which the corporation is a party, or the
6968 existing rights of persons other than shareholders of the corporation. An amendment changing a
6969 corporation's name does not ~~affect~~ ~~abate~~ a proceeding brought by or against the corporation in its
6970 former name.

6971 (2) A shareholder who becomes subject to new interest holder liability in respect of the
6972 corporation as a result of an amendment to the articles of incorporation shall have that new interest
6973 holder liability only in respect of interest holder liabilities that arise after the amendment becomes
6974 effective.

6975 (3) Except as otherwise provided in the articles of incorporation of the corporation, the
6976 interest holder liability of a shareholder who had interest holder liability in respect of the corporation
6977 before the amendment becomes effective and has new interest holder liability after the amendment
6978 becomes effective shall be as follows:

6979 (a) The amendment does not discharge that prior interest holder liability with respect
6980 to any interest holder liabilities that arose before the amendment becomes effective.

6981 (b) The provisions of the articles of incorporation of the corporation relating to
6982 interest holder liability as in effect immediately prior to the amendment shall continue to apply
6983 to the collection or discharge of any interest holder liabilities preserved by subsection (3)(a), as
6984 if the amendment had not occurred.

6985 (c) The shareholder shall have such rights of contribution from other persons as are
6986 provided by the articles of incorporation relating to interest holder liability as in effect
6987 immediately prior to the amendment with respect to any interest holder liabilities preserved by
6988 subsection (3)(a), as if the amendment had not occurred.

6989 (d) The shareholder shall not, by reason of such prior interest holder liability, have
6990 interest holder liability with respect to any interest holder liabilities that arise after the
6991 amendment becomes effective.

6992

6993 **Commentary to Section 607.1009:**

6994 This section mirrors the Model Act.

6995 New subsections (2) and (3) govern the effects of amendments to the articles of incorporation that
6996 impose or change interest holder liability.

6997

6998 607.1020 Amendment of bylaws by board of directors or shareholders.

6999 (1) A corporation's board of directors may amend or repeal the corporation's bylaws unless:

7000 (a) ~~The articles of incorporation or this chapter act, reserves the that power to amend~~
7001 ~~the bylaws generally or a particular bylaw provision~~ exclusively to the shareholders in
7002 whole or in part; or

7003 (b) Except as provided in s. 607.0206(5), ~~the~~ shareholders, in amending, ~~or~~
7004 ~~repealing, or adopting~~ the bylaws generally or a particular bylaw provision, ~~provide~~
7005 expressly provide that the board of directors may not amend, ~~or~~ repeal, adopt or reinstate
7006 the bylaws generally or that particular bylaw provision.

7007 (2) A corporation's shareholders may amend or repeal the corporation's bylaws even though
7008 the bylaws may also be amended or repealed by its board of directors.

7009 (3) A shareholder does not have a vested property right resulting from any provision in the
7010 bylaws.

7011

7012 **Commentary to Section 607.1020:**

7013 Except for the fact that subsections (1) and (2) in the FBCA are reversed, this section mirrors the
7014 Model Act. The changes made do not affect the substance of these provisions.

7015 Florida is among thirty-eight jurisdictions that authorize both the board of directors and the
7016 shareholders to amend the bylaws, and one of 36 that allow this to be restricted by the articles of
7017 incorporation. This is in opposition to the Delaware model, followed by six jurisdictions other than
7018 Delaware, which authorize the shareholders to amend the bylaws but allow for board amendment
7019 as allowed by the articles of incorporation.

7020 Subsection (3) was added to this section of the FBCA. It follows the language in s. 10.20(c) of the
7021 Model Act. Like s. 607.1001(2) dealing with the same issue with respect to articles of
7022 incorporation, it expressly rejects the concept that an otherwise lawful amendment to the bylaws
7023 might be restricted or invalidated because it modified particular rights conferred on shareholders
7024 by the original or prior version of the bylaws. At the same time, subsection (3) does not override
7025 contracts by a corporation outside its bylaws which might be violated by an otherwise lawful
7026 amendment to the bylaws or invalidate provisions in bylaws that require procedures for approval
7027 of amendments that limit the power to amend the articles of incorporation without particular
7028 shareholder consent.

7029

7030 607.1021 Bylaw increasing quorum or voting requirements for shareholders.

7031 (1) If authorized by the articles of incorporation, the shareholders may adopt or amend a
7032 bylaw that fixes a greater quorum or voting requirement for shareholders (or voting groups of
7033 shareholders) than is required by this chapter ~~act~~. The adoption or amendment of a bylaw that adds,
7034 changes, or deletes a greater quorum or voting requirement for shareholders must meet the same
7035 quorum requirement and be adopted by the same vote and voting groups required to take action
7036 under the quorum and voting requirement then in effect or proposed to be adopted, whichever is
7037 greater.

7038 (2) A bylaw that fixes a greater quorum or voting requirement for shareholders under
7039 subsection (1) may not be adopted, amended, or repealed by the board of directors.

7040

7041 **Commentary to Section 607.1021:**

7042 The 1984 version of the Model Act included Section 10.21, which deals with quorum or voting
7043 requirements for shareholders, and Section 10.22, which deals with quorum or voting requirements
7044 for directors. In the 1999 amendments, Section 10.21, regarding quorum and voting requirements
7045 for shareholders, was deleted. Section 10.22, regarding quorum and voting requirements for
7046 directors, was amended and renumbered as s. 10.21. A new section 10.22, relating to bylaw
7047 provisions dealing with the election of directors, was added to the Model Act in 2006 as a way to
7048 help corporations and shareholder groups who want to alter the traditional plurality vote for
7049 electing directors (renumbered s. 607.1023 in the FBCA).

7050 This section, which has been in the FBCA since 1989, has been retained.

7051

7052 607.1022 Bylaw increasing quorum or voting requirements for directors.

7053 (1) A bylaw that increases ~~fixes~~ a ~~greater~~ quorum or voting requirement for the board of
7054 directors may be amended or repealed:

7055 (a) If originally adopted by the shareholders, only by the shareholders, unless the
7056 bylaw otherwise provides; or

7057 (b) If originally adopted by the board of directors, either by the shareholders or by
7058 the board of directors.

7059 (2) A bylaw adopted or amended by the shareholders that increases ~~fixes~~ a ~~greater~~ quorum
7060 or voting requirement for the board of directors may provide that it may be amended or repealed
7061 only by a specified vote of either the shareholders or the board of directors.

7062 (3) Action by the board of directors under subsection ~~paragraph~~ (1) to ~~adopt or amend or~~ or
7063 repeal a bylaw that changes the quorum or voting requirement for the board of directors must meet
7064 the same quorum requirement and be adopted by the same vote required to take action under the
7065 quorum and voting requirement then in effect or proposed to be adopted, whichever is greater.

7066

7067 **Commentary to Section 607.1022:**

7068 See commentary to s. 607.0121 above.

7069 The changes bring the FBCA section into conformity with the corollary provision in the Model
7070 Act (s. 10.21).

7071

7072 607.1023 Bylaw Provisions Relating to the Election of Directors.

7073 (1) Unless the articles of incorporation (x) specifically prohibit the adoption of a bylaw
7074 pursuant to this section, (y) alter the vote specified in s. 607.0728(1), or (z) provide for cumulative
7075 voting, a corporation may elect in its bylaws to be governed in the election of directors as follows:

7076 (a) each vote entitled to be cast may be voted for or against up to that number of
7077 candidates that is equal to the number of directors to be elected, or a shareholder may
7078 indicate an abstention, but without cumulating the votes;

7079 (b) to be elected, a nominee must have received a plurality of the votes cast by
7080 holders of shares entitled to vote in the election at a meeting at which a quorum is present,
7081 provided that a nominee who is elected but receives more votes against than for election
7082 shall serve as a director for a term that shall terminate on the date that is the earlier of (x)
7083 90 days from the date on which the voting results are determined pursuant to s.
7084 607.0729(2)(e) or (y) the date on which an individual is selected by the board of directors
7085 to fill the office held by such director, which selection shall be deemed to constitute the
7086 filling of a vacancy by the board to which s. 607.0809 applies. Subject to clause (c) of this
7087 section, a nominee who is elected but receives more votes against than for election shall
7088 not serve as a director beyond the 90-day period referenced above; and

7089 (c) the board of directors may select any qualified individual to fill the office held
7090 by a director who received more votes against than for election.

7091 (2) Subsection (1) does not apply to an election of directors by a voting group if (a) at
7092 the expiration of the time fixed under a provision requiring advance notification of director
7093 candidates, or (b) absent such a provision, at a time fixed by the board of directors which is not
7094 more than 14 days before notice is given of the meeting at which the election is to occur, there are
7095 more candidates for election by the voting group than the number of directors to be elected, one or
7096 more of whom are properly proposed by shareholders. An individual shall not be considered a
7097 candidate for purposes of this subsection if the board of directors determines before the notice of
7098 meeting is given that such individual's candidacy does not create a bona fide election contest.

7099 (3) A bylaw electing to be governed by this section may be repealed:

7100 (a) if originally adopted by the shareholders, only by the shareholders, unless the
7101 bylaw otherwise provides;

7102 (b) if adopted by the board of directors, by the board of directors or the
7103 shareholders.

7104 **Commentary to Section 607.1023:**

7105 This new section was added to the Model Act in 2006, as new s. 10.22. It deals with bylaws relating
7106 to the election of directors and concepts of majority voting and holdover directors. It has to be
7107 expressly adopted into a corporation's bylaws for this statutory provision to apply to a particular
7108 corporation, and is largely for use by public companies, although all corporations can elect to be
7109 governed by this provision.

7110

7111 ARTICLE 11

7112 PART A – MERGERS AND SHARE EXCHANGES

7113
7114 607.1101 Merger.

7115 (1) By complying with this chapter, including adopting of a plan of merger in accordance
7116 with subsection (3) and complying with s. 607.1103:

7117 (a) One or more domestic corporations may merge with one or more domestic or
7118 foreign corporations entities pursuant to a plan of merger, resulting in a survivor if the
7119 board of directors of each corporation adopts and its shareholders (if required by s.
7120 607.1103) approve a plan of merger; and

7121 (b) Any two or more entities, each of which is either a domestic eligible entity or a
7122 foreign eligible entity may merge, resulting in a survivor that is a domestic corporation
7123 created in the merger.

7124 (2) A domestic eligible entity that is not a corporation may be a party to a merger with a
7125 domestic corporation, or may be created as the survivor in a merger in which a domestic
7126 corporation is a party, but only if the parties to the merger comply with the applicable provisions
7127 of this chapter and the merger is permitted by the organic law of the domestic eligible entity that
7128 is not a corporation. A foreign eligible entity may be a party to a merger with a domestic
7129 corporation, or may be created as the survivor in a merger in which a domestic corporation is a
7130 party, but only if the parties to the merger comply with the applicable provisions of this chapter
7131 and the merger is permitted by the organic law of the foreign eligible entity.

7132 (23) The plan of merger must shall set forth:

7133 (a) The As to each party to the merger, its name, jurisdiction of formation, and type
7134 of entity name of each corporation planning to merge and the name of the surviving
7135 corporation into which each other corporation plans to merge, which is hereinafter
7136 designated as the surviving corporation;

7137 (b) The survivor's name, jurisdiction of formation, and type of entity, and, if the
7138 survivor is to be created in the merger, a statement to that effect;

7139 (c) The terms and conditions of the proposed merger; and

7140 (d) The manner and basis of converting;

7141 1. The shares of each domestic or foreign corporation and the eligible
7142 interests of each merging domestic or foreign eligible entity into (i) shares or
7143 other securities, (ii) eligible interests, (iii) obligations, (iv) rights to acquire
7144 shares, other securities or eligible interests, (v) cash, (vi) other property, or (vii)
7145 any combination of the foregoing, and

7146 2. Rights to acquire shares of each merging domestic or foreign
7147 corporation and rights to acquire eligible interests of each merging domestic or
7148 foreign eligible entity into rights to acquire (i) shares or other securities, (ii)
7149 eligible interests, (iii) obligations, (iv) rights to acquire shares, other securities
7150 or eligible interests, (v) cash, (vii) other property, or (viii) any of the foregoing
7151 corporation into shares, obligations, or other securities of the surviving
7152 corporation or any other corporation or, in whole or in part, into cash or other
7153 property and the manner and basis of converting rights to acquire shares of each
7154 corporation into rights to acquire shares, obligations, or other securities of the
7155 surviving or any other corporation or, in whole or in part, into cash or other
7156 property;

7157 (e) The articles of incorporation of any domestic or foreign corporation, or the
7158 public organic record of any other domestic or foreign eligible entity to be created by the
7159 merger, or if a new domestic or foreign corporation or other eligible entity is not to be
7160 created by the merger, any amendments to, or restatements of, the survivor's articles of
7161 incorporation or other public organic record;

7162 (f) The effective date and time of the merger, which may be on or after the filing
7163 date of the articles of merger; and

7164 (g) Any other provisions required by the laws under which any party to the merger
7165 is organized or by which it is governed, or by the articles of incorporation or organic rules
7166 of any such party.

7167 (4) In addition to the requirements of subsection (3), a The plan of merger may contain
7168 set forth any other provision that is not prohibited by law.

7169 (a) Amendments to, or a restatement of, the articles of incorporation of the surviving
7170 corporation;

7171 (b) The effective date of the merger, which may be on or after the date of filing the
7172 certificate; and

7173 (c) Other provisions relating to the merger.

7174 (5) Terms of a plan of merger may be made dependent on facts objectively ascertainable

7175 outside the plan in accordance with s. 607.0120(11).
7176

7177 (6) A plan of merger may be amended only with the consent of each party to the merger,
7178 except as provided in the plan. A domestic party to a merger may approve an amendment to a plan:

7179 (a) In the same manner as the plan was approved, if the plan does not provide for
7180 the manner in which it may be amended; or

7181 (b) In the manner provided in the plan, except that shareholders, members, or
7182 interest holders that were entitled to vote on or consent to the approval of the plan are
7183 entitled to vote on or consent to any amendment to the plan that will change:

7184 1. The amount or kind of shares or other securities, eligible interests,
7185 obligations, rights to acquire shares, other securities or eligible interests, cash, or
7186 other property to be received under the plan by the shareholders, holders of rights
7187 to acquire shares or eligible interests, members, or interest holders of any party to
7188 the merger;

7189 2. The articles of incorporation of any domestic corporation, or the
7190 organic rules of any other type of entity, that will be the survivor of the merger,
7191 except for changes permitted by s. 607.1002 or by comparable provisions of the
7192 organic law of any other type of entity; or

7193 3. Any of the other terms or conditions of the plan if the change would
7194 adversely affect such shareholders, members or interest holders in any material
7195 respect.

7196 (7) The redomestication of a foreign insurer to this state under s. 628.520 shall be deemed a
7197 merger of a foreign corporation and a domestic corporation, and the surviving corporation shall be
7198 deemed to be a domestic corporation incorporated under the laws of this state. The redomestication
7199 of a Florida corporation to a foreign jurisdiction under s. 628.525 shall be deemed a merger of a
7200 domestic corporation and a foreign corporation, and the surviving corporation shall be deemed to
7201 be a foreign corporation.

7202

7203 **Commentary to Article 11 Generally:**

7204 Article 11 of the Model Act, dealing with mergers and share exchanges, is new Part A of Article
7205 11 of the FBCA. New Part B of Article 11 of the FBCA contains the conversion provisions of the
7206 Model Act, which are derived from Article 9 of the Model Act. New Part C of Article 11 of the
7207 FBCA contains the domestication provisions of the Model Act, which are also derived from Article
7208 9 of the Model Act. The numbering of Article 11 is intended to keep each part separated, in a
7209 similar format to the corollary provisions in Article 10 of FRLCA.

7210 Each part of Article 9 and Article 11 of the Model Act includes definitions applicable to each part.
7211 All such required definitions are included in s. 607.01401.

7212 **Commentary to Section 607.1101:**

7213 Major changes have been proposed to s. 607.1101 to bring the section in line with the current
7214 corollary section of the Model Act (s. 11.02). The current version of Florida's merger statute is
7215 based on the pre-1999 version of the Model Act, which made no provisions for the merger of a
7216 domestic corporation or other eligible entity with a foreign corporation or other eligible entity, nor
7217 did it allow for the merger of foreign corporations to result in the formation of a Florida
7218 corporation. Changes were made to Model Act s. 11.02 in 1999 and then again in 2003 to allow
7219 for these transactions (and these changes were adopted as ss. 607.1107-607.11101 of the FBCA).
7220 Further changes have been made in the 2016 draft of the Model Act, and now all of these types of
7221 merger transactions are covered by s. 607.1101.

7222 Article 11 uses the term "eligible entity" largely as defined in FRLCA to deal with the types of
7223 entities that can be a party to a merger with a domestic corporation. This harmonizes the types of
7224 entities that can participate in a merger with the types of entities that can merge with a domestic
7225 LLC. The Model Act uses the term "eligible entity" for the same purpose. The difference in the
7226 wording of the definition is not considered substantive.

7227 Subsection (3) of Model Act s. 11.02 has not been recommended for adoption. That section covers
7228 procedures for a domestic eligible entity to approve a merger. Since the Florida Statutes provide
7229 procedures for approving a cross-entity merger with respect to other types of entities, this section
7230 is believed unnecessary.

7231 Subsection (6) of the Model Act has been added to cover the topic of amendments to a plan of
7232 merger. This topic was previously covered in s. 607.1103(8) of the FBCA.

7233 Subsection (7) has been moved here from existing s. 607.1107(5). It is not a Model Act
7234 provision.

7235

7236 607.1102 Share exchange.

7237 (1) By complying with this chapter, including adopting a plan of share exchange in
7238 accordance with subsection (3) and complying with s. 607.1103:

7239 ~~A corporation may acquire all of the outstanding shares of one or more classes or~~
7240 ~~series of another corporation if the board of directors of each corporation adopts and its~~
7241 ~~shareholders (if required by s. 607.1103) approve a plan of share exchange.~~

7242 (a) A domestic corporation may acquire all of the shares or rights to acquire shares
7243 of one or more classes or series of shares or rights to acquire shares of another domestic or
7244 foreign corporation, or all of the eligible interests of one or more classes or series of
7245 interests of a domestic or foreign eligible entity, in exchange for (i) shares or other
7246 securities, (ii) eligible interests, (iii) obligations, (iv) rights to acquire shares or other
7247 securities or eligible interests, (v) cash, (vi) other property, or (vii) any combination of the
7248 foregoing, pursuant to a plan of share exchange; or

7249 (b) All of the shares of one or more classes or series of shares or rights to acquire
7250 shares of a domestic corporation may be acquired by another domestic or foreign eligible
7251 entity, in exchange for (i) shares or other securities, (ii) eligible interests, (iii) obligations,
7252 (iv) rights to acquire share or other securities or eligible interests, (v) cash, (vi) other
7253 property, or (viii) any combination of the foregoing, pursuant to a plan of share exchange.

7254 (2) A foreign eligible entity may be the acquired eligible entity in a share exchange only
7255 if the share exchange is permitted by the organic law of that eligible entity.

7256 (23) The plan of share exchange must ~~shall~~ set forth:

7257 (a) The name of the each domestic or foreign corporation eligible entity the shares
7258 or eligible interests of which will be acquired and the name of the domestic or foreign
7259 acquiring corporation or eligible entity that will acquire those shares or eligible interests;

7260 (b) The terms and conditions of the share exchange;

7261 (c) The manner and basis of exchanging:

7262 1. The shares of each domestic or foreign corporation, and the eligible
7263 interests of each domestic or foreign eligible entity, the shares or eligible interests
7264 that are to be acquired in the share exchange, into shares or other securities, eligible
7265 interests, obligations, rights to acquire shares, other securities or eligible interests,
7266 cash, other property, or any combination of the foregoing, and

7267 2. Rights to acquire shares of each domestic or foreign corporation and
7268 rights to acquire eligible interests of each domestic or foreign eligible entity, that
7269 are to be acquired in the share exchange, into shares or other securities, eligible
7270 interests, obligations, rights to acquire shares, ~~to be acquired for shares obligations,~~
7271 ~~or other securities of the acquiring or any other corporation or, in whole or in part,~~
7272 ~~for cash or other property, and the manner and basis of exchanging rights to acquire~~
7273 ~~shares, other securities, or eligible interests, of the corporation to be acquired for~~
7274 ~~rights to acquire shares, obligations, or, in whole or in part, other securities of the~~
7275 ~~acquiring or any other corporation or, in whole or in part, for cash, or other property,~~
7276 or any combination of the foregoing;- and

7277 (d)Any other provisions required by the organic law governing the acquired eligible
7278 entity or its articles of incorporation or organic rules.

7279 (34) In addition to the requirements of subsection (3), tThe plan of share exchange may
7280 contain any set forth other provisions relating to the exchange that is not prohibited by law.

7281 (5) Terms of a plan of share exchange may be made dependent on facts objectively
7282 ascertainable outside the plan in accordance with s. 607.0120(k).

7283 (6) A plan of share exchange may be amended only with the consent of each party to the
7284 share exchange, except as provided in the plan. A domestic eligible entity may approve an
7285 amendment to a plan:

7286 (a)In the same manner as the plan was approved, if the plan does not provide for
7287 the manner in which it may be amended; or

7288 (b)In the manner provided in the plan, except that shareholders, members, or
7289 interest holders that were entitled to vote on or consent to approval of the plan are entitled
7290 to vote on or consent to any amendment of the plan that will change:

7291 (i) The amount or kind of shares or other securities, eligible interests,
7292 obligations, rights to acquire shares, other securities or eligible interests, cash, or
7293 other property to be received under the plan by the shareholders, members or
7294 interest holders of the acquired eligible entity; or

7295 (ii) Any of the other terms or conditions of the plan if the change would
7296 adversely affect such shareholders, members or interest holders in any material
7297 respect.

7298 (74) This section does not limit the power of a corporation to acquire all or part of the shares
7299 of one or more classes or series of another corporation or eligible interests of any other eligible
7300 entity through a voluntary exchange or otherwise.

7301 **Commentary to Section 607.1102:**

7302 Changes have been made to bring this section into conformity with the corollary provision of s.
7303 11.03 of the Model Act.

7304 Subsection (3) of Model Act s. 11.03 has not been recommended for adoption. That section covers
7305 procedures for a domestic eligible entity to approve a merger. Since the Florida Statutes provide
7306 procedures for approving a cross-entity merger with respect to other types of entities, this section
7307 is believed unnecessary.

7308 Subsections (3) (now subsection (4)) and (4) (now subsection (7)) are not in the Model Act.
7309 However, they have been retained herein for the elimination of doubt and possible confusion that
7310 might result if the sections were removed.

7311

7312 607.1103 Action on a plan of merger or share exchange.

7313 In the case of a domestic corporation that is a party to a merger or the acquired eligible
7314 entity in a share exchange, the plan of merger or the plan of share exchange shall be adopted in the
7315 following manner:

7316 (1) ~~After adopting a~~ The plan of merger or the plan of share exchange shall first be
7317 adopted by the board of directors of such domestic corporation of each corporation party to the
7318 merger, and the board of directors of the corporation the shares of which will be acquired in the
7319 share exchange, shall submit the plan of merger (except as provided in subsection (7)) or the plan
7320 of share exchange for approval by its shareholders.

7321 (2) Except as provided in subsections (8), (10) and (11), and in ss. 607.11035 and
7322 607.1104, the plan of merger or the plan of share exchange shall then be adopted by the
7323 shareholders. In submitting the plan of merger or the plan of share exchange to the shareholders
7324 for approval, the board of directors shall recommend that the shareholders approve the plan, or in
7325 the case of an offer referred to in s. 607.11035(1)(b), that the shareholders tender their shares to
7326 the offeror in response to the offer, unless (a) the board of directors makes a determination that
7327 because of conflicts of interest or other special circumstances, it should not make such a
7328 recommendation, or (b) s. 607.0826 applies. If either (a) or (b) applies, the board shall inform the
7329 shareholders of the basis for its so proceeding without such recommendation.

7330 (2) ~~For a plan of merger or share exchange to be approved:~~

7331 (a) ~~The board of directors must recommend the plan of merger or share exchange~~
7332 ~~to the shareholders, unless the board of directors determines that it should make no~~
7333 ~~recommendation because of conflict of interest or other special circumstances and~~
7334 ~~communicates the basis for its determination to the shareholders with the plan; and~~

7335 (b) ~~The shareholders entitled to vote must approve the plan as provided in~~
7336 ~~subsection (5).~~

7337 (3) ~~The board of directors may condition its submission~~ set conditions for the approval
7338 of the proposed merger or share exchange by the shareholders or the effectiveness of the plan of
7339 merger or the plan of share exchange on any basis.

7340 (4) ~~The corporation the~~ If the plan of merger or the plan of share exchange is required to
7341 be approved by the shareholders of which are entitled to vote on the matter, and if the approval is
7342 to be given at a meeting, the corporation shall notify each shareholder, regardless of whether or
7343 not entitled to vote, of the proposed shareholders' meeting of shareholders at which the plan is to
7344 be submitted for approval, in accordance with s. 607.0705. The notice shall also state that the
7345 purpose, or one of the purposes, of the meeting is to consider the plan of merger or the plan of

7346 share exchange, regardless of whether or not the meeting is an annual or a special meeting, and
7347 contain or be accompanied by a copy ~~or summary~~ of the plan. If the corporation is to be merged
7348 into an existing foreign or domestic eligible entity, the notice must also include or be accompanied
7349 by a copy of the articles of incorporation and bylaws or the organic rules of that eligible entity into
7350 which the corporation is to be merged. If the corporation is to be merged with a domestic or foreign
7351 eligible entity and a new domestic or foreign eligible entity is to be created pursuant to the merger,
7352 the notice must include or be accompanied by a copy of the articles of incorporation and bylaws
7353 or the organic rules of the new eligible entity. Furthermore, if applicable, the notice shall contain
7354 a clear and concise statement that, if the plan of merger or share exchange is effected, shareholders
7355 dissenting therefrom may be entitled, if they comply with the provisions of this act regarding
7356 appraisal rights, to be paid the fair value of their shares, and shall be accompanied by a copy of ss.
7357 607.1301-607.1340~~33~~.

7358 (5) Unless this ~~chapter act,~~ the articles of incorporation, or the board of directors (acting
7359 pursuant to subsection (3)) requires a greater vote or a ~~vote by classes~~ greater quorum in the
7360 respective case, approval of the plan of merger or the plan of share exchange to be authorized shall
7361 be approved by each class entitled to vote on the plan by a majority of all the votes entitled to be
7362 cast on the plan by that class shall require the approval of the shareholders at a meeting at which a
7363 quorum exists by a majority of the votes entitled to be cast on the plan, and, if any class or series
7364 of shares is entitled to vote as a separate group on the plan of merger or the plan of share exchange,
7365 the approval of each such separate voting group at a meeting at which a quorum of the voting
7366 group is present by a majority of the votes entitled to be cast on the merger or share exchange by
7367 that voting group.

7368 (6) (a) Subject to subsection (7), ~~V~~oting by a class or series as a separate voting group
7369 is required on a plan of merger:

7370 1. By each class or series of shares of the corporation that would be
7371 entitled to vote as a separate group on any provision in the plan ~~contains a provision~~
7372 ~~which, if contained in which, if such provision had been contained in a proposed~~
7373 amendment to the articles of incorporation of a surviving corporation, would have
7374 entitled the class or series to vote as a separate voting group on the proposed
7375 amendment under s. 607.1004; or

7376 2. If the plan contains a provision that would allow the plan to be amended
7377 to include the type of amendment to the articles of incorporation referenced in
7378 clause 1., by each class or series of shares of the corporation that would have been
7379 entitled to vote as a separate group on any such amendment to the articles of
7380 incorporation; or

7381 3. By each class or series of shares of the corporation that is to be
7382 converted under the plan of merger into shares, other securities, eligible interests,

7383 obligations, rights to acquire shares, other securities or eligible interests, cash,
7384 property, or any combination of the foregoing; or

7385 4. If the plan contains a provision that would allow the plan to be amended
7386 to convert other classes or series of shares of the corporation, by each class or series
7387 of shares of the corporation that would have been entitled to vote as a separate
7388 group if the plan were to be so amended.

7389 (b) Subject to subsection (7), voting by a class or series as a separate voting group
7390 is required on a plan of share exchange;

7391 1. By each if the shares of such class or series are to be converted or
7392 exchanged under such plan, that is to be exchanged in the exchange, with each class
7393 or series constituting a separate voting group; or if the plan contains any provisions
7394 which, if contained in a proposed amendment to articles of incorporation, would
7395 entitle the class or series to vote as a separate voting group on the proposed
7396 amendment under s. 607.1004.

7397 2. If the plan contains a provision that would allow the plan to be amended
7398 to include the type of amendment to the articles of incorporation referenced in
7399 clause 1., by each class or series of shares of the corporation that would have been
7400 entitled to vote as a separate group on any such amendment to the articles of
7401 incorporation.

7402
7403 (c) Subject to subsection (7), voting by a class or series as a separate voting group
7404 is required on a plan of merger or a plan of share exchange, if the voting group is entitled
7405 under the articles of incorporation to vote as a voting group to approve the plan of merger
7406 or the plan of share exchange, respectively.

7407 (7) The articles of incorporation may expressly limit or eliminate the separate voting
7408 rights provided in any one or more of subparagraphs (6)(a)3. and 4. and subparagraph (6)(b)1. as
7409 to any class or series of shares, except when the plan of merger or the plan of share exchange:

7410 (a) Includes what is or would be, in effect, an amendment subject to any one or
7411 more of subparagraphs (6)(a)1. and 2. and subparagraph (6)(b)2. and

7412 (b) Will not effect a substantive business combination.

7413 (78) Notwithstanding the requirements of this section, unless required by the
7414 corporation's its articles of incorporation provide otherwise, approval action by the corporation's
7415 shareholders of the surviving corporation on of a plan of merger is not required if:

7416 (a) The corporation will survive the merger.

7417 (a**b**) The articles of incorporation of the surviving corporation will not differ
7418 (except for amendments enumerated in s. 607.1002) from its articles of incorporation
7419 before the merger; and

7420 (b**c**) Each shareholder of the surviving corporation whose shares were outstanding
7421 immediately prior to the effective date of the merger will hold the same number of shares,
7422 with identical designations, preferences, rights and limitations, ~~and relative rights,~~
7423 immediately after the effective date of the merger.

7424 ~~(8) — Any plan of merger or share exchange may authorize the board of directors of each~~
7425 ~~corporation party to the merger or share exchange to amend the plan at any time prior to the filing~~
7426 ~~of the articles of merger or share exchange. An amendment made subsequent to the approval of~~
7427 ~~the plan by the shareholders of any corporation party to the merger or share exchange may not:~~

7428 ~~(a) Change the amount or kind of shares, securities, cash, property, or rights to be~~
7429 ~~received in exchange for or on conversion of any or all of the shares of any class or series~~
7430 ~~of such corporation;~~

7431 ~~(b) Change any other terms and conditions of the plan if such change would~~
7432 ~~materially and adversely affect such corporation or the holders of the shares of any class~~
7433 ~~or series of such corporation; or~~

7434 ~~(c) Except as specified in s. 607.1002 or without the vote of shareholders entitled to~~
7435 ~~vote on the matter, change any term of the articles of incorporation of any corporation the~~
7436 ~~shareholders of which must approve the plan of merger or share exchange.~~

7437 ~~If articles of merger or share exchange already have been filed with the Department of~~
7438 ~~State, amended articles of merger or share exchange shall be filed with the Department of State~~
7439 ~~prior to the effective date of the merger or share exchange.~~

7440 ~~(9) — Unless a plan of merger or share exchange prohibits abandonment of the merger or~~
7441 ~~share exchange without shareholder approval after a merger or share exchange has been~~
7442 ~~authorized, the planned merger or share exchange may be abandoned (subject to any contractual~~
7443 ~~rights) at any time prior to the filing of articles of merger or share exchange by any corporation~~
7444 ~~party to the merger or share exchange, without further shareholder action, in accordance with the~~
7445 ~~procedure set forth in the plan of merger or share exchange or, if none is set forth, in the manner~~
7446 ~~determined by the board of directors of such corporation.~~

7447 (9) If, as a result of a merger or share exchange, one or more shareholders of a domestic
7448 corporation would become subject to new interest holder liability, approval of the plan of merger
7449 or the plan of share exchange shall require, in connection with the transaction, the signing by each
7450 such shareholder of a separate written consent to become subject to such new interest holder

7451 liability, unless in the case of a shareholder that already has interest holder liability with respect to
7452 such domestic corporation:

7453 (a)The new interest holder liability is with respect to a domestic or foreign
7454 corporation (which may be a different or the same domestic corporation in which the
7455 person is a shareholder), and

7456 (b) The terms and conditions of the new interest holder liability are
7457 substantially identical to those of the existing interest holder liability (other than for
7458 changes that reduce or eliminate such interest holder liability).

7459 (10) Unless the articles of incorporation otherwise provide, approval of a plan of share
7460 exchange by the shareholders of a domestic corporation is not required if the corporation is the
7461 acquiring eligible entity in the share exchange.

7463 (11) Unless the articles of incorporation otherwise provide, shares in the acquired eligible
7464 entity not to be exchanged under the plan of share exchange are not entitled to vote on the plan.
7465

7466 **Commentary to Section 607.1103:**

7467 Florida's current version of s. 607.1103 follows the 1984 version of Model Act s. 11.04. This
7468 section of the Model Act was substantially revised in 1999, and the revisions to this section are
7469 intended to provide greater clarity as to what is required to approve a merger or share exchange.
7470 Particularly, this section as revised is designed to correct a long-standing ambiguity under Florida
7471 law that arguably allows any class or series of shares to have a separate class vote on a merger or
7472 share exchange even under circumstances where the articles of incorporation arguably provide
7473 otherwise.

7474 The exception in subsection (2) is intended to allow a shareholder vote without a recommendation
7475 from the Board, including where there is a "force the vote" provision in a plan of merger or the
7476 plan of share exchange.

7477 Subsection (5) continues the requirement that a majority of the shares entitled to vote at the meeting
7478 (*i.e.*, an absolute majority, rather than just a majority of the quorum) must approve the merger or
7479 share exchange. This is consistent with existing Florida law, the Model Act and s. 251(e) of the
7480 DGCL.

7481 Subsection (6) sets forth circumstances when voting by a class or series as a separate voting group
7482 is required. While largely based on the Subsection (f) of s. 11.04 of the Model Act, the proposed
7483 language has been expanded to not only cover the substantive provisions of the plan, but also
7484 provisions that would permit amendments to the plan that could subsequently cover such a
7485 substantive provision. Accordingly, subparagraphs (a)2. and 4. and subparagraph (b)2. have been
7486 added for clarification.

7487 New subsection (7) largely follows the Model Act, although the provisions have been modified in
7488 light of the changes to subsection (6). Under subsection (7), the general rule is to allow the
7489 elimination or limitation of separate voting rights under subsection (7) by adding a provision to
7490 the articles of incorporation. However, that exception is overridden when both (i) the plan of
7491 merger or share exchange includes what would be an amendment to the articles of incorporation
7492 of the surviving corporation that would require a vote by separate voting groups under s. 607.1004,
7493 and (ii) the transaction detailed in such plan of merger or share exchange will not effect a
7494 "substantive business combination." The commentary to the Model Act provides guidance
7495 (including examples) as to when a merger or share exchange is considered to be (or not to be) a
7496 "substantive business combination." While the term is somewhat vague, this section is intended to
7497 preclude a corporation from going around the requirements of s. 607.1004 (dealing with when a
7498 class vote is required on changes to the corporation's articles of incorporation) by effecting a
7499 merger which seeks to amend the articles of incorporation but does not constitute a substantive
7500 business combination.

7501 Previous subsection (8), dealing with amendment to a plan of merger or share exchange, has been
7502 moved following the 2016 version of the Model Act into ss. 607.1101(6) and 607.1102(6). The
7503 topic in previous subsection (9), regarding abandonment of a merger or share exchange, is now
7504 covered in new s. 607.1107.

7505 New subsections (9), dealing with protections for shareholders who have interest holder liability,
7506 has been added in conformity with the corollary Model Act provision.

7507 Subsections (10) and (11) deal with the two situations in which, unless the articles of incorporation
7508 provide otherwise, shareholders do not get a vote on a share exchange.

7509

7510 607.11035 Shareholder approval of a merger or share exchange in connection with a
7511 tender offer.

7512 (1) Unless the articles of incorporation otherwise provide, shareholder approval of a plan
7513 of merger or a plan of share exchange under s. 607.1103(1)(b) is not required if:

7514 (a) The plan of merger or share exchange expressly:

7515 1. Permits or requires the merger or share exchange to be effected under
7516 this section; and

7517 2. Provides that, if the merger or share exchange is to be effected under
7518 this section, the merger or share exchange will be effected as soon as practicable
7519 following the satisfaction of the requirement set forth in subsection (1)(f);

7520 (b) Another party to the merger, the acquiring eligible entity in the share exchange,
7521 or a parent of another party to the merger or the parent of the acquiring eligible entity in
7522 the share exchange, makes an offer to purchase, on the terms provided in the plan of merger
7523 or the plan of share exchange, any and all of the outstanding shares of the corporation that,
7524 absent this section, would be entitled to vote on the plan of merger or the plan of share
7525 exchange, except that the offer may exclude shares of the corporation that are owned at the
7526 commencement of the offer by the corporation, the offeror, or any parent of the offeror, or
7527 by any wholly owned subsidiary of any of the foregoing;

7528 (c) The offer discloses that the plan of merger or the plan of share exchange provides
7529 that the merger or share exchange will be effected as soon as practicable following the
7530 satisfaction of the requirement set forth in subsection (1)(f) and that the shares of the
7531 corporation that are not tendered in response to the offer will be treated as set forth in
7532 subsection (1)(h);

7533 (d) The offer remains open for at least 10 days;

7534 (e) The offeror purchases all shares properly tendered in response to the offer and
7535 not properly withdrawn;

7536 (f) The shares listed below are collectively entitled to cast at least the minimum
7537 number of votes on the merger or share exchange that, absent this section, would be
7538 required by this chapter and by the articles of incorporation for the approval of the merger
7539 or share exchange by the shareholders and by each other voting group entitled to vote on
7540 the merger or share exchange at a meeting at which all shares entitled to vote on the
7541 approval were present and voted;

7542 1. Shares purchased by the offeror in accordance with the offer;

7543 2. Shares otherwise owned by the offeror or by any parent of the offeror
7544 or any wholly owned subsidiary of any of the foregoing; and

7545 3. Shares subject to an agreement that they are to be transferred,
7546 contributed or delivered to the offeror, any parent of the offeror, or any wholly
7547 owned subsidiary of any of the foregoing in exchange for shares or eligible interests
7548 in such offeror, parent or subsidiary;

7549 (g)The offeror or a wholly owned subsidiary of the offeror merges with or into, or
7550 effects a share exchange in which it acquires shares of, the corporation; and

7551 (h)Each outstanding share of each class or series of shares of the corporation that
7552 the offeror is offering to purchase in accordance with the offer, and that is not purchased
7553 in accordance with the offer, is to be converted in the merger into, or into the right to
7554 receive, or is to be exchanged in the share exchange for, or for the right to receive, the same
7555 amount and kind of securities, eligible interests, obligations, rights, cash, or other property
7556 to be paid or exchanged in accordance with the offer for each share of that class or series
7557 of shares that is tendered in response to the offer, except that shares of the corporation that
7558 are owned by the corporation or that are described in clause 2. or 3. of subsection (1)(f)
7559 need not be converted into or exchanged for the consideration described in this subsection
7560 (1)(h).

7561 (2) As used in this section:

7562 (a) "Offer" means the offer referred to in subsection (1)(b);

7563 (b) "Offeror" means the person making the offer;

7564 (c) "Parent" of an eligible entity means a person that owns, directly or indirectly
7565 (through one or more wholly owned subsidiaries), all of the outstanding shares of or
7566 eligible interests in that eligible entity;

7567 (d)Shares tendered in response to the offer shall be deemed to have been
7568 "purchased" in accordance with the terms of the offer at the earliest time as of which:

7569 1. The offeror has irrevocably accepted those shares for payment; and

7570 2. Either (A) in the case of shares represented by certificates, the offeror,
7571 or the offeror's designated depository or other agent, has physically received the
7572 certificates representing those shares or (B) in the case of shares without
7573 certificates, those shares have been transferred into the account of the offeror or its
7574 designated depository or other agent, or an agent's message relating to those shares
7575 has been received by the offeror or its designated depository or other agent; and

7576 (e) "Wholly owned subsidiary" of a person means an eligible entity of or in which
7577 that person owns, directly or indirectly (through one or more wholly owned subsidiaries),
7578 all of the outstanding shares or eligible interests.

7579

7580 **Commentary to Section 607.11035:**

7581 New s. 607.11035 is derived from subsection (j) of Model Act s. 11.04. Similar to Delaware law,
7582 it allows for a "two step" transaction in which the offeror first makes a tender offer to shareholders,
7583 and through the tender offer acquires enough of an interest in the Company to satisfy the
7584 shareholder approval that would otherwise be required.

7585

7586 607.1104 Merger between parent and of subsidiary or between subsidiaries
7587 corporation.

7588 (1)(a) A domestic or foreign parent corporation eligible entity that owns shares of a
7589 domestic corporation which carry owning at least 80 percent of the voting power outstanding
7590 shares of each class and series of the outstanding shares of the a subsidiary ~~corporation~~ may:

7591 (a) ~~M~~merge the subsidiary into itself (if it is a domestic or foreign eligible entity) or
7592 into another domestic or foreign eligible entity in which the parent eligible entity owns at
7593 least 90 percent of the voting power of each class and series of the outstanding shares or
7594 eligible interests which have voting power; or

7595 (b) ~~M~~may merge itself (if it is a domestic or foreign eligible entity) into such the
7596 subsidiary,

7597 in either case without the approval of the board of directors or shareholders of the subsidiary,
7598 unless the articles of incorporation or organic rules of the parent eligible entity or the articles of
7599 incorporation of the subsidiary otherwise provide. Section 607.1103(9) applies to a merger under
7600 this section. The articles of merger relating to a merger under this section do not need to be signed
7601 by the subsidiary merge the subsidiary into and with another subsidiary in which the parent
7602 corporation owns at least 80 percent of the outstanding shares of each class of the subsidiary
7603 without the approval of the shareholders of the parent or subsidiary. In a merger of a parent
7604 corporation into its subsidiary corporation, the approval of the shareholders of the parent
7605 corporation shall be required if the articles of incorporation of the surviving corporation will differ,
7606 except for amendments enumerated in s. 607.1002, from the articles of incorporation of the parent
7607 corporation before the merger, and the required vote shall be the greater of the vote required to
7608 approve the merger and the vote required to adopt each change to the articles of incorporation as
7609 if each change had been presented as an amendment to the articles of incorporation of the parent
7610 corporation.

7611 (b) ~~The board of directors of the parent shall adopt a plan of merger sets forth:~~

7612 1. ~~The names of the parent and subsidiary corporations;~~

7613 2. ~~The manner and basis of converting the shares of the subsidiary or parent into~~
7614 ~~shares, obligations, or other securities of the parent or any other corporation or, in whole~~
7615 ~~or in part, into cash or other property, and the manner and basis of converting rights to~~
7616 ~~acquire shares of each corporation into rights to acquire shares, obligations, and other~~
7617 ~~securities of the surviving or any other corporation or, in whole or in part, into cash or other~~
7618 ~~property;~~

7619 ~~3. If the merger is between the parent and a subsidiary corporation and the parent~~
7620 ~~is not the surviving corporation, a provision for the pro rata issuance of shares of the~~
7621 ~~subsidiary to the holders of the shares of the parent corporation upon surrender of any~~
7622 ~~certificates therefor; and~~

7623 ~~4. A clear and concise statement that shareholders of the subsidiary who, except~~
7624 ~~for the applicability of this section, would be entitled to vote and who dissent from the~~
7625 ~~merger pursuant to s. 607.1321, may be entitled, if they comply with the provisions of this~~
7626 ~~act regarding appraisal rights, to be paid the fair value of their shares.~~

7627 ~~(2) The parent shall, within 10 days after the effective date of a merger approved under~~
7628 ~~subsection (1), notify each of the subsidiary's shareholders that the merger has become effective~~
7629 ~~mail a copy or summary of the plan of merger to each shareholder of the subsidiary who does not~~
7630 ~~waive the mailing requirement in writing.~~

7631 ~~(3) The parent may not deliver articles of merger to the Department of State for filing~~
7632 ~~until at least 30 days after the date it mailed a copy of the plan of merger to each shareholder of~~
7633 ~~the subsidiary who did not waive the mailing requirement, or, if earlier, upon the waiver thereof~~
7634 ~~by the holders of all of the outstanding shares of the subsidiary.~~

7635 ~~(4) Articles of merger under this section may not contain amendments to the articles of~~
7636 ~~incorporation of the parent corporation (except for amendments enumerated in s. 607.1002).~~

7637 ~~(5) Two or more subsidiaries may be merged into the parent pursuant to this section.~~

7638 ~~(3) Except as provided for in subsections (1) and (2), a merger between a parent eligible~~
7639 ~~entity and a domestic subsidiary corporation shall be governed by the provisions of ss. 607.1101-~~
7640 ~~607.1107 applicable to mergers generally.~~

7641

7642 **Commentary to Section 607.1104:**

7643 Like the rest of Article 11, this section was fundamentally changed in 1999 and then further
7644 fundamentally changed in the 2016 version of the Model Act.

7645 Subsection (2) is a Model Act provision. It requires that shareholders be given notice within 10
7646 days of the effective date of the merger. A similar requirement is contained in the DGCL.

7647 Subsection (3) has been deleted. The 30 day notice requirement was deleted from the Model Act
7648 in 1999. The requirement still exists in approximately 17 other jurisdictions (including New York
7649 and Illinois), but most states, including other large Model Act states, have removed this
7650 requirement. Removal of subsection (3) eliminates the key objection that many practitioners have
7651 had to this provision in the FBCA.

7652 This section continues to use the 80% threshold for application of this section. While the Model
7653 Act and the DGCL (and many other states) use a 90% threshold, it was believed that because this
7654 threshold has been used in Florida since 1989, that it should be retained in the statute.

7655

7656 607.11045 Holding company formation by merger by certain corporations.

7657 (1) This section applies only to a corporation that has shares registered pursuant to
7658 section 12 of the Securities Exchange Act of 1934 of any class or series which are either registered
7659 on a national securities exchange or designated as a national market system security on an
7660 interdealer quotation system by the National Association of Securities Dealers, Inc., or held of
7661 record by not fewer than 2,000 shareholders.

7662 (2) As used in this section, the term:

7663 (a) "Constituent corporation" means a corporation that is a party to a merger
7664 governed by this section.

7665 (b) "Holding company" means a corporation that, from the date it first issued shares
7666 until consummation of a merger governed by this section, was at all times a wholly owned
7667 subsidiary of a constituent corporation, and whose shares are issued in such merger.

7668 (c) "Wholly owned subsidiary" means, as to a corporation, any other corporation of
7669 which it owns, directly or indirectly through one or more subsidiaries, all of the issued and
7670 outstanding shares.

7671 (3) Notwithstanding the requirements of s. 607.1103, unless expressly required by its
7672 articles of incorporation, no vote of shareholders of a corporation is necessary to authorize a merger
7673 of the corporation with or into a wholly owned subsidiary of such corporation if:

7674 (a) Such corporation and wholly owned subsidiary are the only constituent
7675 corporations to the merger;

7676 (b) Each share or fraction of a share of the constituent corporation whose shares are
7677 being converted pursuant to the merger which are outstanding immediately prior to the
7678 effective date of the merger is converted in the merger into a share or equal fraction of
7679 share of a holding company having the same designations, rights, powers and preferences,
7680 and qualifications, limitations and restrictions thereof as the share of the constituent
7681 corporation being converted in the merger;

7682 (c) The holding company and each of the constituent corporations to the merger are
7683 domestic corporations;

7684 (d) The articles of incorporation and bylaws of the holding company immediately
7685 following the effective date of the merger contain provisions identical to the articles of
7686 incorporation and bylaws of the constituent corporation whose shares are being converted
7687 pursuant to the merger immediately prior to the effective date of the merger, except
7688 provisions regarding the incorporators, the corporate name, the registered office and agent,

7689 the initial board of directors, the initial subscribers for shares and matters solely of
7690 historical significance, and such provisions contained in any amendment to the articles of
7691 incorporation as were necessary to effect a change, exchange, reclassification, or
7692 cancellation of shares, if such change, exchange, reclassification, or cancellation has
7693 become effective;

7694 (e) As a result of the merger, the constituent corporation whose shares are being
7695 converted pursuant to the merger or its successor corporation becomes or remains a direct
7696 or indirect wholly owned subsidiary of the holding company;

7697 (f) The directors of the constituent corporation become or remain the directors of
7698 the holding company upon the effective date of the merger;

7699 (g) The articles of incorporation of the surviving corporation immediately following
7700 the effective date of the merger are identical to the articles of incorporation of the
7701 constituent corporation whose shares are being converted pursuant to the merger
7702 immediately prior to the effective date of the merger, except provisions regarding the
7703 incorporators, the corporate name, the registered office and agent, the initial board of
7704 directors, the initial subscribers for shares and matters solely of historical significance, and
7705 such provisions contained in any amendment to the articles of incorporation as were
7706 necessary to effect a change, exchange, reclassification, or cancellation of shares, if such
7707 change, exchange, reclassification, or cancellation has become effective. The articles of
7708 incorporation of the surviving corporation must be amended in the merger to contain a
7709 provision requiring, by specific reference to this section, that any act or transaction by or
7710 involving the surviving corporation, other than the election or removal of directors, which
7711 requires for its adoption under this chapter ~~æ~~ or its articles of incorporation the approval
7712 of the shareholders of the surviving corporation also be approved by the shareholders of
7713 the holding company, or any successor by merger, by the same vote as is required by this
7714 chapter ~~æ~~ or the articles of incorporation of the surviving corporation. The articles of
7715 incorporation of the surviving corporation may be amended in the merger to reduce the
7716 number of classes and shares which the surviving corporation is authorized to issue;

7717 (h) The board of directors of the constituent corporation determines that the
7718 shareholders of the constituent corporation will not recognize gain or loss for United States
7719 federal income tax purposes; and

7720 (i) The board of directors of such corporation adopts a plan of merger that sets forth:

7721 1. The names of the constituent corporations;

7722 2. The manner and basis of converting the shares of the corporation into
7723 shares of the holding company and the manner and basis of converting rights to

7724 acquire shares of such corporation into rights to acquire shares of the holding
7725 company; and

7726 3. A provision for the pro rata issuance of shares of the holding company
7727 to the holders of shares of the corporation upon surrender of any certificates
7728 therefor.

7729 (4) From and after the effective time of a merger adopted by a constituent corporation
7730 by action of its board of directors and without any vote of shareholders pursuant to this section:

7731 (a) To the extent the restrictions of ss. 607.0901 and 607.0902 applied to the
7732 constituent corporation and its shareholders at the effective time of the merger, such
7733 restrictions also apply to the holding company and its shareholders immediately after the
7734 effective time of the merger as though it were the constituent corporation, and all shares of
7735 the holding company acquired in the merger shall, for purposes of ss. 607.0901 and
7736 607.0902, be deemed to have been acquired at the time that the shares of the constituent
7737 corporation converted in the merger were acquired, and provided further that any
7738 shareholder who immediately prior to the effective time of the merger was not an interested
7739 shareholder within the meaning of s. 607.0901 shall not, solely by reason of the merger,
7740 become an interested shareholder of the holding company; and

7741 (b) If the corporate name of the holding company immediately following the
7742 effective time of the merger is the same as the corporate name of the constituent corporation
7743 immediately prior to the effective time of the merger, the shares of the holding company
7744 into which the shares of the constituent corporation are converted in the merger shall be
7745 represented by the share certificates that previously represented shares of the constituent
7746 corporation.

7747 (5) If a plan of merger is adopted by a constituent corporation by selection of its board
7748 of directors without any vote of shareholders pursuant to this section, the secretary or assistant
7749 secretary of the constituent corporation shall certify in the articles of merger that the plan of merger
7750 has been adopted pursuant to this section and that the conditions specified in subsection (3) have
7751 been satisfied. The articles of merger so certified shall then be filed and become effective in
7752 accordance with s. 607.1106.

7753

7754

7755 **Commentary to Section 607.11045:**

7756 This section is not in the Model Act. It was added to the FBCA in 1998, based on s. 251(g) of the
7757 DGCL. This provision only applies to public companies, although the section has been modified
7758 to make the definition of what is a public company consistent with other proposed FBCA sections
7759 (such as the majority voting section of the FBCA).

7760 The proposed changes bring this section into conformity with certain aspects of the current version
7761 of s. 251(g) of the DGCL, which allows for these transactions to include additional amendments
7762 to constituent documents under subsection (3)(d). However, although the DGCL also attempts to
7763 allow for the transactions to include LLCs, the DGCL revisions in that regard are a bit confusing
7764 and, after consideration, have not been added to the text of this section.

7765

7766 607.1105 Articles of merger or share exchange.

7767 (1) After (i) a plan of merger or share exchange is has been adopted and approved as
7768 required by this chapter, or (ii) if the merger is being effected under s. 607.1101(1)(b), the merger
7769 has been approved as required by the organic law governing the parties to the merger, then the
7770 articles of merger shall be signed by each party to the merger, except as provided in s. 607.1104(1).
7771 The articles approved by the shareholders, or adopted by the board of directors if shareholder
7772 approval is not required, the surviving or acquiring corporation shall deliver to the Department of
7773 State for filing articles of merger or share exchange which shall be executed by each corporation
7774 as required by s. 607.0120 and which shall must set forth:

7775 (a) The plan of merger or share exchange name, jurisdiction of formation, and type
7776 of entity of each party to the merger;

7777 (b) If not already identified as the survivor pursuant to subsection (1)(a), tThe name,
7778 jurisdiction of formation, and type of entity of the survivor effective date of the merger or
7779 share exchange, which may be on or after the date of filing the articles of merger or share
7780 exchange; if the articles of merger or share exchange do not provide for an effective date
7781 of the merger or share exchange, then the effective date shall be the date on which the
7782 articles of merger or share exchange are filed;

7783 (c) If shareholder approval was not required, a statement to that effect; and the
7784 survivor of the merger is a domestic corporation and its articles of incorporation are being
7785 amended, or if a new domestic corporation is being created as a result of the merger:

7786 1. The amendments to the survivor's articles of incorporation; or

7787 2. The articles of incorporation of the new corporation.

7788 (d) As to each corporation, to the extent applicable, the date of adoption of the plan
7789 of merger or share exchange by the shareholders or by the board of directors when no vote
7790 of the shareholders is required. If the survivor of the merger is a domestic eligible entity
7791 (other than a domestic corporation) and its public organic record is being amended in
7792 connection with the merger, or if a new domestic eligible entity is being created as a result
7793 of the merger:

7794 1. The amendments to the public organic record of the survivor; or

7795 2. The public organic record of the new eligible entity.

7796 (e) If the plan of merger required approval by the shareholders of a domestic
7797 corporation that is a party to the merger, a statement that the plan was duly approved by
7798 the shareholders and, if voting by any separate voting group was required, by each such

7799 separate voting group, in the manner required by this chapter and the articles of
7800 incorporation of such domestic corporation;

7801 (f) If the plan of merger did not require approval by the shareholders of a domestic
7802 corporation that is a party to the merger, a statement to that effect;

7803 (g)As to each foreign corporation that is a party to the merger, a statement that the
7804 participation of the foreign corporation was duly authorized in accordance with such
7805 corporation's organic law;

7806 (h)As to each domestic or foreign eligible entity that is a party to the merger and
7807 that is not a domestic or foreign corporation, a statement that the participation of the eligible
7808 entity in the merger was duly authorized in accordance with such eligible entity's organic
7809 law; and

7810 (i) If the survivor is created by the merger and is a domestic limited liability
7811 partnership, the document required to elect that status, as an attachment.

7812 (2) After a plan of share exchange in which the acquired eligible entity is a domestic
7813 corporation or other eligible entity has been adopted and approved as required by this chapter,
7814 articles of share exchange shall be signed by the acquired eligible entity and the acquiring eligible
7815 entity. The articles must set forth:

7816 (a)The name, jurisdiction of formation, and type of entity of the acquired eligible
7817 entity;

7818 (b) The name, jurisdiction of formation, and type of entity of the domestic or foreign
7819 eligible entity that is the acquiring eligible entity; and

7820 (c) A statement that the plan of share exchange was duly approved by the acquired
7821 eligible entity by:

7822 1. The required vote or consent of each class or series of shares or eligible
7823 interests included in the exchange; and

7824 2 The required vote or consent of each other class or series of shares or
7825 eligible interests entitled to vote on approval of the exchange by the articles of
7826 incorporation or the organic rules of the acquired eligible entity.

7827 (3) In addition to the requirements of subsections (1) or (2), articles of merger or articles
7828 of share exchange may contain any other provision not prohibited by law.

7829 (4) The articles of merger or the articles of share exchange shall be delivered to the
7830 department for filing, and, subject to subsection (5), the merger or share exchange shall take effect
7831 at the effective date determined in accordance with s. 607.0123.

7832 (5) With respect to a merger in which one or more foreign entities is a party or a foreign
7833 eligible entity created by the merger is the survivor, the merger itself shall become effective at the
7834 later of:

7835 (a) When all documents required to be filed in all foreign jurisdictions to effect the
7836 merger have become effective; or

7837 (b) When the articles of merger take effect.

7838 (6) Articles of merger required to be filed under this section may be combined with any
7839 filing required under the organic law governing any other domestic eligible entity involved in the
7840 transaction if the combined filing satisfies the requirements of both this section and the other
7841 organic law.²⁰

7842 (27) A copy of the articles of merger or share exchange, certified by the ~~d~~Department of
7843 ~~State~~, may be filed in the office of the official who is the recording officer of each county in this
7844 state in which real property of a constituent corporation other than the surviving corporation is
7845 situated.

7846

²⁰ This section replaces the language that previously was in s. 607.1109(3). It is believed to be better language to avoid having to make changes every time there is a change in another entity statute. However, this change is subject to approval by the Department of State.

7847 **Commentary to Section 607.1105:**

7848 This section has been rewritten to largely bring it into conformity with the 1999 and 2016 changes
7849 to the Model Act. Subsection (2) (now subsection (7)) has been retained even though it is not a
7850 Model Act provision.

7851

7852 607.1106 Effect of merger or share exchange.

7853 (1) When a merger becomes effective:

7854 (a) The domestic or foreign Every other corporation eligible entity that is
7855 designated in the plan of merger as the survivor continues party to the merger merges into
7856 the surviving corporation or comes into existence, as the case may be and the separate
7857 existence of every corporation except the surviving corporation ceases;

7858 (b) The separate existence of every domestic or foreign eligible entity that is a party
7859 to the merger, other than the survivor, ceases;

7860 (bc) All The title to all real property estate and other property, including or any
7861 interest therein and or all title thereto,²¹ owned by, and every contract right possessed by,
7862 each domestic or foreign corporation eligible entity that is a party to the merger, other than
7863 the survivor, is vested in the surviving corporation become the property and contract rights
7864 of and become vested in the survivor, without transfer, reversion or impairment;

7865 (ed) All debts, obligations, and other liabilities of each domestic or foreign The
7866 surviving corporation eligible entity that is a shall thenceforth be responsible and liable for
7867 all the liabilities and obligations of each corporation party to the merger, other than the
7868 survivor, become debts, obligations, and liabilities of the survivor;

7869 (de) The name of the survivor may, but need not be Any claim existing or action
7870 or proceeding pending by or against any corporation party to the merger may be continued
7871 as if the merger did not occur or the surviving corporation may be substituted in any
7872 pending the proceeding for the name of any party to the merger whose separate for the
7873 which ceased existence ceased in the merger;

7874 (ef) Neither the rights of creditors nor any liens upon the property of any
7875 corporation party to the merger shall be impaired by such merger;

7876 (fg) The If the survivor is a domestic eligible entity, the articles of incorporation
7877 and bylaws or the organic rules of the survivor surviving corporation are amended to the
7878 extent provided in the plan of merger; and

7879 (h) The articles of incorporation and bylaws or the organic rules of a survivor that
7880 is a domestic eligible entity and is created by the merger become effective;

7881 (gi) The shares (and the rights to acquire shares, obligations, or other securities)
7882 of each domestic or foreign corporation party to the merger, and the eligible interests in

²¹ Confirm with RPPTL Section that this section regarding title to real estate is acceptable.

7883 any other eligible entity that is party to a merger, that are to be converted in accordance
7884 with the terms of the merger into shares or other securities, eligible interests, rights,
7885 obligations, rights to acquire shares, other securities, eligible interests, or other securities
7886 of the surviving or any other corporation or into cash, or other property, or any combination
7887 of the foregoing are converted, are converted, and the former holders of such the shares,
7888 rights to acquire shares, or other eligible interests are entitled only to the rights provided to
7889 them by those terms of the merger or to any rights they may have in the articles of merger
7890 or to their rights under s. 607.1302 or under the organic law governing the eligible entity;

7891 (j) Except as provided by law or the plan of merger, all the rights, privileges,
7892 franchises and immunities of each eligible entity that is a party to the merger, other than
7893 the survivor, become the rights, privileges, franchises and immunities of the survivor.

7894 (k) If the survivor exists before the merger:

7895 1. All the property and contract rights of the survivor remain its property
7896 and contract rights without transfer, reversion, or impairment;

7897 2. The survivor remains subject to all of its debts, obligations, and other
7898 liabilities; and

7899 3. Except as provided by law or the plan of merger, the survivor continues
7900 to hold all of its rights, privileges, franchises, and immunities.

7901 (2) When a share exchange becomes effective, the shares, eligible interests, and rights to
7902 acquire shares or eligible interests, in the of each-acquired eligible entity corporation that are to be
7903 exchanged in accordance with the terms of the share exchange for shares or other securities,
7904 eligible interests, obligations, rights to acquire shares, other securities or eligible interests, cash,
7905 other property or any combination of the foregoing, are entitled only to the rights provided to them
7906 by the terms of the as provided in the plan of share exchange, and the former holders of the shares
7907 are entitled only to the exchange rights provided in the articles of share exchange or to any their
7908 rights they may have under s. 607.1302 or under the organic law governing the acquired eligible
7909 entity.

7910 (3) Except as otherwise provided in the articles of incorporation of a domestic
7911 corporation or the organic law governing or organic rules of a domestic or foreign eligible entity,
7912 the effect of a merger or share exchange on interest holder liability is as follows:

7913 (a) A person who becomes subject to new interest holder liability in respect of an
7914 eligible entity as a result of a merger or share exchange shall have that new interest holder
7915 liability only in respect of interest holder liabilities that arise after the merger or share
7916 exchange becomes effective.

7917 (b)If a person had interest holder liability with respect to a party to the merger or
7918 the acquired eligible entity before the merger or share exchange becomes effective with
7919 respect to shares or eligible interests of such party or acquired entity which were (i)
7920 exchanged in the merger or share exchange, (ii) were cancelled in the merger or (iii) the
7921 terms and conditions of which relating to interest holder liability were amended pursuant
7922 to the merger:

7923 1. The merger or share exchange does not discharge that prior interest
7924 holder liability with respect to any interest holder liabilities that arose before the
7925 merger or share exchange becomes effective.

7926 2. The provisions of the organic law governing any eligible entity for
7927 which the person had that prior interest holder liability shall continue to apply to
7928 the collection or discharge of any interest holder liabilities preserved by subsection
7929 (3)(b)1., as if the merger or share exchange had not occurred.

7930 3. The person shall have such rights of contribution from other persons as
7931 are provided by the organic law governing the eligible entity for which the person
7932 had that prior interest holder liability with respect to any interest holder liabilities
7933 preserved by subsection (3)(b)1., as if the merger or share exchange had not
7934 occurred.

7935 4. The person shall not, by reason of such prior interest holder liability,
7936 have interest holder liability with respect to any interest holder liabilities that arise
7937 after the merger or share exchange becomes effective.

7938 (c)If a person has interest holder liability both before and after a merger becomes
7939 effective with unchanged terms and conditions with respect to the eligible entity that is the
7940 survivor by reason of owning the same shares or eligible interests before and after the
7941 merger becomes effective, the merger has no effect on such interest holder liability.

7942 (d)A share exchange has no effect on interest holder liability related to shares or
7943 eligible interests of the acquired eligible entity that were not exchanged in the share
7944 exchange.

7945 (4) Upon a merger becoming effective, a foreign eligible entity that is the survivor of the
7946 merger is deemed to:

7947 (a)Appoint the secretary of state as its agent for service of process in a proceeding
7948 to enforce the rights of shareholders of each domestic corporation that is a party to the
7949 merger who exercise appraisal rights, and

7950 (b) Agree that it will promptly pay the amount, if any, to which such shareholders
7951 are entitled under ss. 607.1301-607.1340.

7952 (5) Except as provided in the organic law governing a party to a merger or in its articles
7953 of incorporation or organic rules, the merger does not give rise to any rights that an interest holder,
7954 governor, or third party would have upon a dissolution, liquidation, or winding up of that party.
7955 The merger does not require a party to the merger to wind up its affairs and does not constitute or
7956 cause its dissolution or termination.

7957 (6) Property held for a charitable purpose under the law of this state by a domestic or
7958 foreign eligible entity immediately before a merger becomes effective may not, as a result of the
7959 transaction, be diverted from the objects for which it was donated, granted, devised, or otherwise
7960 transferred except and only to the extent permitted by or pursuant to the laws of this state
7961 addressing cy près or dealing with nondiversion of charitable assets.

7962 (7) A bequest, devise, gift, grant, or promise contained in a will or other instrument of
7963 donation, subscription, or conveyance which is made to an eligible entity that is a party to a merger
7964 that is not the survivor and which takes effect or remains payable after the merger inures to the
7965 survivor.

7966 (8) A trust obligation that would govern property if the property is directed to be
7967 transferred to a nonsurviving eligible entity will apply to property that is to be transferred instead
7968 to the survivor after a merger becomes effective.

7969

7970 **Commentary to Section 607.1106:**

7971 Changes have been made above following other changes made in Article 11 of the Model Act to
7972 provide more clarity on the effect of mergers or share exchanges of domestic and foreign
7973 corporations, to allow mergers with non-corporate entities, and for mergers resulting in the
7974 formation of a new corporation.

7975 Subsection (1)(e) (now subsection (1)(f)) is no longer in the Model Act but has been retained herein
7976 for the elimination of doubt and possible confusion that might result if the section were to be
7977 removed.

7978

7979 607.1107 Abandonment of a Merger or Share Exchange.

7980 (1) After a plan of merger or a plan of share exchange has been adopted and approved
7981 as required by this chapter, and before the articles of merger or the articles of share exchange have
7982 become effective, the plan may be abandoned by a domestic corporation that is a party to the plan
7983 without action by its shareholders in accordance with any procedures set forth in the plan of merger
7984 or the plan of share exchange, or, if no such procedures are set forth in the plan, in the manner
7985 determined by the board of directors.

7986 (2) If a merger or share exchange is abandoned under subsection (1) after articles of
7987 merger or articles of share exchange have been delivered to the department for filing but before
7988 the merger or articles of share exchange has become effective, a statement of abandonment signed
7989 by all the parties that signed the articles of merger or articles of share exchange shall be delivered
7990 to the department for filing before the articles of merger or articles of share exchange become
7991 effective. The statement shall take effect on filing whereupon the merger or share exchange shall
7992 be deemed abandoned and shall not become effective. The statement of abandonment must
7993 contain:

7994 (a) The name of each party to the merger or the names of the acquiring and acquired
7995 entities in a share exchange;

7996 (b) The date on which the articles of merger or articles of share exchange were filed
7997 by the department; and

7998 (c) A statement that the merger or share exchange has been abandoned in
7999 accordance with this section.

8000

8001 **Commentary to Section 607.1107:**

8002 This section (s. 11.08 of the Model Act) was added to the Model Act in 1999 to allow for
8003 abandonment of mergers or share exchanges prior to their effectiveness. This topic was previously
8004 covered in s. 607.1103(9) of the FBCA.

8005 Section 607.1103(9) currently reads as follows:

8006 (9)Unless a plan of merger or share exchange prohibits abandonment of the
8007 merger or share exchange without shareholder approval after a merger or share exchange
8008 has been authorized, the planned merger or share exchange may be abandoned (subject to
8009 any contractual rights) at any time prior to the filing of articles of merger or share
8010 exchange by any corporation party to the merger or share exchange, without further
8011 shareholder action, in accordance with the procedure set forth in the plan of merger or
8012 share exchange or, if none is set forth, in the manner determined by the board of directors
8013 of such corporation.

8014

8015 ~~607.1107—Merger or share exchange with foreign corporations.~~

8016

8017 (1) ~~One or more foreign corporations may merge or enter into a share exchange with one~~
8018 ~~or more domestic corporations if:~~

8019

8020 (a) ~~In a merger, the merger is permitted by the law of the state or country under~~
8021 ~~the law of which each foreign corporation is incorporated and each foreign corporation~~
8022 ~~complies with that law in effecting the merger;~~

8023

8024 (b) ~~In a share exchange, the corporation the shares of which will be acquired is a~~
8025 ~~domestic corporation, whether or not a share exchange is permitted by law of the state or~~
8026 ~~country under the law of which the acquiring corporation is incorporated;~~

8027

8028 (c) ~~The foreign corporation complies with s. 607.1105 if it is the surviving~~
8029 ~~corporation of the merger or acquiring corporation of the share exchange; and~~

8030

8031 (d) ~~Each domestic corporation complies with the applicable provisions of ss.~~
8032 ~~607.1101-607.1104 and, if it is the surviving corporation of the merger or acquiring~~
8033 ~~corporation of the share exchange, with s. 607.1105.~~

8034

8035 (2) ~~Upon the merger becoming effective, the surviving foreign corporation of a merger,~~
8036 ~~and the acquiring foreign corporation in a share exchange, is deemed:~~

8037

8038 (a) ~~To appoint the Secretary of State as its agent for service of process in a~~
8039 ~~proceeding to enforce any obligation or the rights of dissenting shareholders of each~~
8040 ~~domestic corporation party to the merger or share exchange; and~~

8041

8042 (b) ~~To agree that it will promptly pay to the dissenting shareholders of each~~
8043 ~~domestic corporation party to the merger or share exchange the amount, if any, to which~~
8044 ~~they are entitled under s. 607.1302.~~

8045

8046 (3) ~~This section does not limit the power of a foreign corporation to acquire all or part of~~
8047 ~~the shares of one or more classes or series of a domestic corporation through a voluntary exchange~~
8048 ~~or otherwise.~~

8049

8050 (4) ~~The effect of such merger shall be the same as in the case of the merger of domestic~~
8051 ~~corporations if the surviving corporation is to be governed by the laws of this state. If the surviving~~
8052 ~~corporation is to be governed by the laws of any state other than this state, the effect of such merger~~
8053 ~~shall be the same as in the case of the merger of domestic corporations except insofar as the laws~~
8054 ~~of such other state provide otherwise.~~

8055
8056
8057
8058
8059
8060
8061
8062

~~(5) The redomestication of a foreign insurer to this state under s. 628.520 shall be deemed a merger of a foreign corporation and a domestic corporation, and the surviving corporation shall be deemed to be a domestic corporation incorporated under the laws of this state. The redomestication of a Florida corporation to a foreign jurisdiction under s. 628.525 shall be deemed a merger of a domestic corporation and a foreign corporation, and the surviving corporation shall be deemed to be a foreign corporation.~~

8063 **Commentary to Section 607.1107:**

8064

8065 This section has been deleted from the FBCA. The changes in the 1999 and 2016 Model Act,
8066 which now cover this issue within ss. 607.1101-607.1107, now duplicate the intent and effect of
8067 this section.

8068 This section was originally modeled on old Model Act s. 11.07, which was deleted from the Model
8069 Act in 1999.

8070

8071 ~~607.1108 — Merger of domestic corporation and other business entity.~~

8072

8073 ~~(1) — As used in this section and ss. 607.1109 and 607.11101, the term "other business~~
8074 ~~entity" means a limited liability company, a foreign corporation, a not for profit corporation, a~~
8075 ~~business trust or association, a real estate investment trust, a common law trust, an unincorporated~~
8076 ~~business, a general partnership, a limited partnership, or any other entity that is formed pursuant~~
8077 ~~to the requirements of applicable law. Notwithstanding the provisions of chapter 617, a domestic~~
8078 ~~not for profit corporation acting under a plan of merger approved pursuant to s. 617.1103 shall be~~
8079 ~~governed by the provisions of ss. 607.1109, 607.11101, and this section.~~

8080

8081 ~~(2) — Pursuant to a plan of merger complying and approved in accordance with this section,~~
8082 ~~one or more domestic corporations may merge with or into one or more other business entities~~
8083 ~~formed, organized, or incorporated under the laws of this state or any other state, the United States,~~
8084 ~~foreign country, or other foreign jurisdiction, if:~~

8085

8086 ~~(a) — Each domestic corporation which is a party to the merger complies with the~~
8087 ~~applicable provisions of this chapter.~~

8088

8089 ~~(b) — Each domestic partnership that is a party to the merger complies with the~~
8090 ~~applicable provisions of chapter 620.~~

8091

8092 ~~(c) — Each domestic limited liability company that is a party to the merger complies~~
8093 ~~with the applicable provisions of chapter 605.~~

8094

8095 ~~(d) — The merger is permitted by the laws of the state, country, or jurisdiction under~~
8096 ~~which each other business entity that is a party to the merger is formed, organized, or~~
8097 ~~incorporated and each such other business entity complies with such laws in effecting the~~
8098 ~~merger.~~

8099

8100 ~~(3) — The plan of merger shall set forth:~~

8101

8102 ~~(a) — The name of each domestic corporation and the name and jurisdiction of~~
8103 ~~formation, organization, or incorporation of each other business entity planning to merge,~~
8104 ~~and the name of the surviving or resulting domestic corporation or other business entity~~
8105 ~~into which each other domestic corporation or other business entity plans to merge, which~~
8106 ~~is hereinafter and in ss. 607.1109 and 607.11101 designated as the surviving entity.~~

8107

8108 ~~(b) — The terms and conditions of the merger.~~

8109

8110 ~~(c) — The manner and basis of converting the shares of each domestic corporation~~
8111 ~~that is a party to the merger and the partnership interests, interests, shares, obligations or~~
8112 ~~other securities of each other business entity that is a party to the merger into partnership~~
8113 ~~interests, interests, shares, obligations or other securities of the surviving entity or any other~~
8114 ~~domestic corporation or other business entity or, in whole or in part, into cash or other~~
8115 ~~property, and the manner and basis of converting rights to acquire the shares of each~~
8116 ~~domestic corporation that is a party to the merger and rights to acquire partnership interests,~~
8117 ~~interests, shares, obligations or other securities of each other business entity that is a party~~
8118 ~~to the merger into rights to acquire partnership interests, interests, shares, obligations or~~
8119 ~~other securities of the surviving entity or any other domestic corporation or other business~~
8120 ~~entity or, in whole or in part, into cash or other property.~~

8121
8122 ~~(d) — If a partnership is to be the surviving entity, the names and business addresses~~
8123 ~~of the general partners of the surviving entity.~~

8124
8125 ~~(e) — If a limited liability company is to be the surviving entity and management~~
8126 ~~thereof is vested in one or more managers, the names and business addresses of such~~
8127 ~~managers.~~

8128
8129 ~~(f) — All statements required to be set forth in the plan of merger by the laws under~~
8130 ~~which each other business entity that is a party to the merger is formed, organized, or~~
8131 ~~incorporated.~~

8132
8133 ~~(4) — The plan of merger may set forth:~~

8134
8135 ~~(a) — If a domestic corporation is to be the surviving entity, any amendments to, or~~
8136 ~~a restatement of, the articles of incorporation of the surviving entity, and such amendments~~
8137 ~~or restatement shall be effective at the effective date of the merger.~~

8138
8139 ~~(b) — The effective date of the merger, which may be on or after the date of filing~~
8140 ~~the certificate of merger.~~

8141
8142 ~~(c) — Any other provisions relating to the merger.~~

8143
8144 ~~(5) — The plan of merger required by subsection (3) shall be adopted and approved by each~~
8145 ~~domestic corporation that is a party to the merger in the same manner as is provided in s. 607.1103.~~
8146 ~~Notwithstanding the foregoing, if the surviving entity is a partnership, no shareholder of a domestic~~
8147 ~~corporation that is a party to the merger shall, as a result of the merger, become a general partner~~
8148 ~~of the surviving entity, unless such shareholder specifically consents in writing to becoming a~~
8149 ~~general partner of the surviving entity, and unless such written consent is obtained from each such~~

8150 shareholder who, as a result of the merger, would become a general partner of the surviving entity,
8151 such merger shall not become effective under s. 607.11101. Any shareholder providing such
8152 consent in writing shall be deemed to have voted in favor of the plan of merger for purposes of s.
8153 607.1103.

8154
8155 (6) Sections 607.1103 and 607.1301-607.1333 shall, insofar as they are applicable, apply
8156 to mergers of one or more domestic corporations with or into one or more other business entities.

8157
8158 (7) Notwithstanding any provision of this section or ss. 607.1109 and 607.11101, any
8159 merger consisting solely of the merger of one or more domestic corporations with or into one or
8160 more foreign corporations shall be consummated solely in accordance with the requirements of s.
8161 607.1107.

8162

8163 **Commentary to Section 607.1108:**

8164

8165 This section has been deleted from the FBCA. The changes in the 1999 and 2016 Model Act,
8166 which now cover this issue within ss. 607.1101-607.1107, now duplicate the intent and effect of
8167 this section.

8168

8169 ~~607.1109—Articles of merger.~~

8170

8171 ~~(1) After a plan of merger is approved by each domestic corporation and other business~~
8172 ~~entity that is a party to the merger, the surviving entity shall deliver to the Department of State for~~
8173 ~~filing articles of merger, which shall be executed by each domestic corporation as required by s.~~
8174 ~~607.0120 and by each other business entity as required by applicable law, and which shall set forth:~~

8175

8176 ~~(a) The plan of merger.~~

8177

8178 ~~(b) A statement that the plan of merger was approved by each domestic~~
8179 ~~corporation that is a party to the merger in accordance with the applicable provisions of~~
8180 ~~this chapter, and, if applicable, a statement that the written consent of each shareholder of~~
8181 ~~such domestic corporation who, as a result of the merger, becomes a general partner of the~~
8182 ~~surviving entity has been obtained pursuant to s. 607.1108(5).~~

8183

8184 ~~(c) A statement that the plan of merger was approved by each domestic~~
8185 ~~partnership that is a party to the merger in accordance with the applicable provisions of~~
8186 ~~chapter 620.~~

8187

8188 ~~(d) A statement that the plan of merger was approved by each domestic limited~~
8189 ~~liability company that is a party to the merger in accordance with the applicable provisions~~
8190 ~~of chapter 605.~~

8191

8192 ~~(e) A statement that the plan of merger was approved by each other business~~
8193 ~~entity that is a party to the merger, other than domestic corporations, limited liability~~
8194 ~~companies, and partnerships formed, organized, or incorporated under the laws of this~~
8195 ~~state, in accordance with the applicable laws of the state, country, or jurisdiction under~~
8196 ~~which such other business entity is formed, organized, or incorporated.~~

8197

8198 ~~(f) The effective date of the merger, which may be on or after the date of filing~~
8199 ~~the articles of merger, provided, if the articles of merger do not provide for an effective~~
8200 ~~date of the merger, the effective date shall be the date on which the articles of merger are~~
8201 ~~filed.~~

8202

8203 ~~(g) If the surviving entity is another business entity formed, organized, or~~
8204 ~~incorporated under the laws of any state, country, or jurisdiction other than this state:~~

8205

8206 ~~1. The address, including street and number, if any, of its principal office~~
8207 ~~under the laws of the state, country, or jurisdiction in which it was formed,~~
8208 ~~organized, or incorporated.~~

8209
8210
8211
8212
8213
8214
8215
8216
8217
8218
8219
8220
8221
8222
8223
8224
8225
8226
8227
8228
8229

~~2.—A statement that the surviving entity is deemed to have appointed the Secretary of State as its agent for service of process in a proceeding to enforce any obligation or the rights of dissenting shareholders of each domestic corporation that is a party to the merger.~~

~~3.—A statement that the surviving entity has agreed to promptly pay to the dissenting shareholders of each domestic corporation that is a party to the merger the amount, if any, to which they are entitled under s. 607.1302.~~

~~(2)—A copy of the articles of merger, certified by the Department of State, may be filed in the office of the official who is the recording officer of each county in this state in which real property of a party to the merger other than the surviving entity is situated.~~

~~(3)—A domestic corporation is not required to file articles of merger pursuant to subsection (1) if the domestic corporation is named as a party or constituent organization in articles of merger or a certificate of merger filed for the same merger in accordance with s. 605.1025, s. 617.1108, s. 620.2108(3), or s. 620.8918(1) and (2), and if the articles of merger or certificate of merger substantially complies with the requirements of this section. In such a case, the other articles of merger or certificate of merger may also be used for purposes of subsection (2).~~

8230 **Commentary to Section 607.1109:**

8231

8232 This section has been deleted from the FBCA. The changes in the 1999 and 2016 Model Act,
8233 which now cover this issue within ss. 607.1101-607.1107, now duplicate the intent and effect of
8234 this section.

8235

8236 ~~607.11101—Effect of merger of domestic corporation and other business entity.~~

8237

8238 ~~When a merger becomes effective:~~

8239

8240 ~~(1) Every domestic corporation and other business entity that is a party to the merger~~
8241 ~~merges into the surviving entity and the separate existence of every domestic corporation and other~~
8242 ~~business entity that is a party to the merger except the surviving entity ceases.~~

8243

8244 ~~(2) The title to all real estate and other property, or any interest therein, owned by each~~
8245 ~~domestic corporation and other business entity that is a party to the merger is vested in the~~
8246 ~~surviving entity without reversion or impairment.~~

8247

8248 ~~(3) The surviving entity shall thereafter be responsible and liable for all the liabilities and~~
8249 ~~obligations of each domestic corporation and other business entity that is a party to the merger,~~
8250 ~~including liabilities arising out of appraisal rights with respect to such merger under applicable~~
8251 ~~law.~~

8252

8253 ~~(4) Any claim existing or action or proceeding pending by or against any domestic~~
8254 ~~corporation or other business entity that is a party to the merger may be continued as if the merger~~
8255 ~~did not occur or the surviving entity may be substituted in the proceeding for the domestic~~
8256 ~~corporation or other business entity which ceased existence.~~

8257

8258 ~~(5) Neither the rights of creditors nor any liens upon the property of any domestic~~
8259 ~~corporation or other business entity shall be impaired by such merger.~~

8260

8261 ~~(6) If a domestic corporation is the surviving entity, the articles of incorporation of such~~
8262 ~~corporation in effect immediately prior to the time the merger becomes effective shall be the~~
8263 ~~articles of incorporation of the surviving entity, except as amended or restated to the extent~~
8264 ~~provided in the plan of merger.~~

8265

8266 ~~(7) The shares, partnership interests, interests, obligations, or other securities, and the~~
8267 ~~rights to acquire shares, partnership interests, interests, obligations, or other securities, of each~~
8268 ~~domestic corporation and other business entity that is a party to the merger shall be converted into~~
8269 ~~shares, partnership interests, interests, obligations, or other securities, or rights to such securities,~~
8270 ~~of the surviving entity or any other domestic corporation or other business entity or, in whole or~~
8271 ~~in part, into cash or other property as provided in the plan of merger, and the former holders of~~
8272 ~~shares, partnership interests, interests, obligations, or other securities, or rights to such securities,~~
8273 ~~shall be entitled only to the rights provided in the plan of merger and to their appraisal rights, if~~
8274 ~~any, under s. 605.1006, ss. 605.1061–605.1072, ss. 607.1301–607.1333, ss. 620.2114–620.2124, or~~
8275 ~~other applicable law.~~

8276 **Commentary to Section 607.11101:**

8277 This section has been deleted from the FBCA. The changes in the 1999 and 2016 Model Act,
8278 which now cover this issue within ss. 607.1101-607.1107, now duplicate the intent and effect of
8279 this section.

8280

PART B - DOMESTICATION

607.11920 Domestication.²²

(1) By complying with the provisions of this section and ss. 607.11921-607.11924, as applicable, a foreign corporation may become a domestic corporation if the domestication is permitted by the organic law of the foreign corporation.

(2) By complying with the provisions of this section and ss. 607.11921-607.11924, as applicable, a domestic corporation may become a foreign corporation pursuant to a plan of domestication if the domestication is permitted by the organic law of the foreign corporation.

(3) In a domestication under subsections (2), the domesticating eligible entity shall enter into a plan of domestication. The plan of domestication must include:

(a) The name of the domesticating corporation;

(b) The name and jurisdiction of formation of the domesticated corporation;

(c) The manner and basis of reclassifying the shares of the domesticating corporation into (i) shares or other securities, (ii) obligations, (iii) rights to acquire shares or other securities, (iv) cash, (v) other property, or (vi) any combination of the foregoing;

(d) The proposed organic rules of the domesticated corporation which are to be in writing; and

(e) The other terms and conditions of the domestication.

(4) In addition to the requirements of subsection (3), a plan of domestication may contain any other provision not prohibited by law.

(5) The terms of a plan of domestication may be made dependent upon facts objectively ascertainable outside the plan in accordance with a. 607.0120(11).

(6) If a protected agreement of a domesticating corporation in effect immediately before the domestication becomes effective contains a provision applying to a merger of the corporation and the agreement does not refer to a domestication of the corporation, the provision applies to a

²² The topic of whether to allow domestications in other than inbound transactions by non-U.S. entities domesticating into Florida will be taken up for consideration one final time at the September 1, 2018 meeting of the Corporations, Securities and Financial Services Committee.

8318 domestication of the corporation as if the domestication were a merger until such time as the
8319 provision is first amended after _____, 20__ (its enactment date).
8320

8321 **Commentary to Section 607.11920:**

8322 The FBCA currently has one section dealing with domestication, s. 607.1801. Florida law currently
8323 allows non-United States corporations (with corporations being broadly defined in the existing
8324 statute) to domesticate into Florida. New proposed ss. 607.11920-607.11924 expands the use of
8325 those types of domestications that can be completed under the FBCA and provides greater
8326 guidance as to the effect of those domestications.
8327

8328 This proposal allows domestications of (i) Florida corporations into foreign corporations organized
8329 in both other states of the United States and non-United States jurisdictions, and (ii) foreign
8330 corporations organized in other states of the United States and in non-United States jurisdictions
8331 to become Florida domestic corporations, so long as, in both cases, the domestication is permitted
8332 by the organic law of the foreign corporation. This proposal does not permit other types of entities
8333 to domesticate into Florida or Florida corporations to domesticate into other types of foreign
8334 entities, with the view that such transactions can be completed as either a conversion or a merger.
8335

8336 Because the definition of foreign corporation under the FBCA includes not only a corporation
8337 organized in another state of the United States but also an eligible entity organized under the law
8338 of a non-United States jurisdiction that would be a business corporation if incorporated under the
8339 law of this state, this definition would include entities in non-United States jurisdictions called
8340 something other than "corporations" that are the functional equivalent of what would be a domestic
8341 corporation in Florida.
8342

8343 **Consideration should be given to modifying s. 605.1051 in the manner set forth in this proposal.**

8344

8345 607.11921 Action on a Plan of Domestication.

8346
8347 In the case of a domestication of a domestic corporation into a foreign jurisdiction, the plan
8348 of domestication shall be adopted in the following manner:

8349
8350 (1) The plan of domestication shall first be adopted by the board of directors of such
8351 domestic corporation.

8352
8353 (2) The plan of domestication shall then be approved by the shareholders of such domestic
8354 corporation. In submitting the plan of domestication to the shareholders for approval, the board of
8355 directors shall recommend that the shareholders approve the plan, unless (i) the board of directors
8356 makes a determination that because of conflicts of interest or other special circumstances it should
8357 not make such a recommendation or (ii) s. 607.0826 applies. If either (i) or (ii) applies, the board
8358 shall inform the shareholders of the basis for its so proceeding without such recommendation.

8359
8360 (3) The board of directors may set conditions for approval of the plan of domestication
8361 by the shareholders or the effectiveness of the plan of domestication.

8362
8363 (4) If the plan of domestication is required to be approved by the shareholders, and if the
8364 approval of the shareholders is to be given at a meeting, the corporation shall notify each shareholder,
8365 regardless of whether entitled to vote, of the meeting of shareholders at which the plan of domestication
8366 is to be submitted for approval. The notice must state that the purpose, or one of the purposes, of the
8367 meeting is to consider the plan of domestication and must contain or be accompanied by a copy of the
8368 plan. The notice must include or be accompanied by a copy of the organic rules of the domesticated
8369 eligible entity that are to be in writing as they will be in effect immediately after the domestication.

8370
8371 (5) Unless the articles of incorporation, or the board of directors acting pursuant to
8372 subsection (3), require a greater vote or a greater quorum in the respective case, approval of the plan
8373 of domestication requires:

8374
8375 (a) The approval of the shareholders at a meeting at which a quorum exists consisting
8376 of a majority of the votes entitled to be cast on the plan, and,

8377
8378 (b) Except as provided in subsection (6), the approval of each class or series of shares
8379 voting as a separate voting group at a meeting at which a quorum of the voting group exists
8380 consisting of a majority of the votes entitled to be cast on the plan by that voting group.

8381
8382 (6) The articles of incorporation may expressly limit or eliminate the separate voting
8383 rights provided in subsection (5)(b) as to any class or series of shares, except when the public
8384 organic rules of the foreign corporation resulting from the domestication include what would be

8385 in effect an amendment that would entitle the class or series to vote as a separate group under s.
8386 607.1004 if it were a proposed amendment of the articles of incorporation of a domestic
8387 domesticating corporation.
8388

8389 (7) If as a result of a domestication one or more shareholders of a domestic domesticating
8390 corporation would become subject to interest holder liability, approval of the plan of domestication
8391 shall require the signing in connection with the domestication, by each such shareholder, of a
8392 separate written consent to become subject to such interest holder liability, unless in the case of a
8393 shareholder that already has interest holder liability with respect to the domesticating corporation,
8394 the terms and conditions of the interest holder liability with respect to the domesticated corporation
8395 are substantially identical to those of the existing interest holder liability (other than for changes
8396 that eliminate or reduce such interest holder liability).
8397

8398 **Commentary to Section 607.11921:**

8399 This section largely follows s. 9.21 of the Model Act with respect to the votes required to approve a
8400 domestication of a Florida corporation into a corporation formed in another jurisdiction.

8401

8402 607.11922 Articles of Domestication; Effectiveness.

8403
8404 (1) Articles of domestication shall be signed by the domesticating corporation after:

8405
8406 (a) A plan of domestication of a domestic corporation has been adopted and
8407 approved as required by this chapter, or

8408
8409 (b) A foreign corporation that is the domesticating corporation has approved a
8410 domestication as required by the applicable provisions of this chapter and under the foreign
8411 corporation's organic law.

8412
8413 (2) Articles of domestication must set forth:

8414
8415 (a) The name of the domesticating corporation and its jurisdiction of formation;

8416
8417 (b) The name and jurisdiction of formation of the domesticated corporation; and

8418
8419 (c) If the domesticating corporation is a domestic corporation, a statement that the plan
8420 of domestication was approved in accordance with this chapter or, if the domesticating
8421 corporation is a foreign corporation, a statement that the domestication was approved in
8422 accordance with its organic law.

8423
8424 (3) If the domesticated corporation is to be a domestic corporation, the articles of
8425 domestication must attach articles of incorporation of the domesticated corporation that satisfy the
8426 requirements of s. 607.0202. Provisions that would not be required to be included in restated articles
8427 of incorporation may be omitted from the articles of incorporation attached to the articles of
8428 domestication.

8429
8430 (4) The articles of domestication shall be delivered to the department for filing, and shall
8431 take effect at the effective date determined in accordance with s. 607.0123.

8432
8433 (5) If the domesticated corporation is a domestic corporation, the domestication becomes
8434 effective when the articles of domestication are effective. If the domesticated corporation is a
8435 foreign corporation, the domestication becomes effective on the later of (i) the date and time
8436 provided by the organic law of the domesticated corporation, and (ii) when the articles of
8437 domestication are effective.

8438
8439 (6) If the domesticating corporation is a foreign corporation that is qualified to transact
8440 business in this state under ss. 607.1501-607.1523, its certificate of authority shall be cancelled
8441 automatically when the domestication becomes effective.

8442

8443 (7) A copy of the articles of domestication, certified by the department, may be filed in
8444 the official records of any county in this state in which the domesticating eligible entity holds an
8445 interest in real property.

8446

8447 **Commentary to Section 607.11922:**

8448 This section largely follows s. 9.22 of the Model Act with respect to the filing of articles of
8449 domestication and effectiveness of a domestication. It is very similar to the provisions in the Model
8450 Act relating to conversions of entities.

8451

8452 607.11923 Amendment of a Plan of Domestication; Abandonment.

8453

8454 (1) A plan of domestication of a domestic corporation adopted under s. 607.11920(3) may be
8455 amended:

8456

8457 (a) In the same manner as the plan of domestication was approved, if the plan does
8458 not provide for the manner in which it may be amended; or

8459

8460 (b) In the manner provided in the plan of domestication, except that a shareholder
8461 that was entitled to vote on or consent to approval of the plan is entitled to vote on or consent
8462 to any amendment of the plan that will change:

8463

8464 1. The amount or kind of (i) shares or other securities, (ii) obligations, (iii) rights
8465 to acquire shares or other securities, eligible interests, (iv) cash, (v) other property, or (vi)
8466 any combination of the foregoing, to be received by any of the shareholders of the
8467 domesticating corporation under the plan;

8468

8469 2. The organic rules of the domesticated corporation that are to be in writing and
8470 that will be in effect immediately after the domestication becomes effective, except for
8471 changes that do not require approval of the shareholders of the domesticated corporation
8472 under its organic rules as set forth in the plan of domestication; or

8473

8474 3. Any of the other terms or conditions of the plan, if the change would adversely
8475 affect the shareholder in any material respect.

8476

8477 (2) After a plan of domestication has been adopted and approved by a domestic corporation
8478 as required by this chapter, and before the articles of domestication have become effective, the
8479 plan may be abandoned by the corporation without action by its shareholders in accordance with
8480 any procedures set forth in the plan or, if no such procedures are set forth in the plan, in the manner
8481 determined by the board of directors of the domestic corporation.

8482

8483 (3) If a domestication is abandoned after the articles of domestication have been delivered to
8484 the department for filing but before the articles of domestication have become effective, a
8485 statement of abandonment, signed by the domesticating corporation, must be delivered to the
8486 department for filing before the articles of domestication become effective. The statement shall
8487 take effect upon filing, and the domestication shall be deemed abandoned and shall not become
8488 effective. The statement of abandonment must contain:

8489

8490 (a) The name of the domesticating corporation;

8491

8492 (b) The date on which the articles of domestication were filed by the department; and

8493

8494 (c) A statement that the domestication has been abandoned in accordance with this

8495 section.

8496

8497 **Commentary to Section 607.11923:**

8498 This section largely follows s. 9.23 of the Model Act.

8499

8500 607.11924 Effect of Domestication.

8501

8502 (1) When a domestication becomes effective:

8503

8504

8505 (a) All real property and other property owned by, including any interests therein
8506 and all title thereto²³, and every contract right possessed by, the domesticating corporation, are
8507 the property and contract rights of the domesticated corporation without transfer, reversion or
8508 impairment;

8509

8510

8511

(b) All debts, obligations and other liabilities of the domesticating corporation are
the debts, obligations and other liabilities of the domesticated corporation;

8512

8513

8514

(c) The name of the domesticated corporation may but need not be substituted for the
name of the domesticating corporation in any pending proceeding;

8515

8516

(d) The organic rules of the domesticated corporation become effective;

8517

8518

8519

8520

8521

8522

8523

(e) The shares or equity interests of the domesticating corporation are reclassified
into (i) shares or other securities, (ii) obligations, (iii) rights to acquire shares or other
securities, (iv) cash or (v) other property in accordance with the terms of the domestication,
and the shareholders or equity owners of the domesticating corporation are entitled only to the
rights provided to them by those terms and to any appraisal rights they may have under the
organic law of the domesticating corporation; and

8524

8525

(f) The domesticated corporation is:

8526

8527

8528

1. Incorporated under and subject to the organic law of the domesticated
corporation;

8529

8530

8531

2. The same corporation without interruption as the domesticating
corporation; and

8532

8533

8534

3. Deemed to have been incorporated or formed on the date the domesticating
corporation was originally incorporated.

8535

8536

8537

(2) In addition, when a domestication of a domestic corporation into a foreign
jurisdiction becomes effective, the domesticated corporation is deemed to:

²³ Confirm that the wording of this subsection is acceptable to the RPPTL Section.

8538 (a) Appoint the secretary of state as its agent for service of process in a proceeding
8539 to enforce the rights of shareholders who exercise appraisal rights in connection with the
8540 domestication; and

8541
8542 (b) Agree that it will promptly pay the amount, if any, to which such shareholders
8543 are entitled under ss. 607.1301-607.1340.

8544
8545 (3) Except as otherwise provided in the organic law or organic rules of a domesticating
8546 foreign corporation, the interest holder liability of a shareholder or equity holder in a foreign
8547 corporation that is domesticated into this state who had interest holder liability in respect of such
8548 domesticating corporation before the domestication becomes effective shall be as follows:

8549
8550 (a) The domestication does not discharge that prior interest holder liability with
8551 respect to any interest holder liabilities that arose before the domestication becomes effective.

8552
8553 (b) The provisions of the organic law of the domesticating corporation shall
8554 continue to apply to the collection or discharge of any interest holder liabilities preserved by
8555 subsection (3)(a), as if the domestication had not occurred.

8556
8557 (c) The shareholder or equity holder shall have such rights of contribution from
8558 other persons as are provided by the organic law of the domesticating corporation with respect
8559 to any interest holder liabilities preserved by subsection (3)(a), as if the domestication had not
8560 occurred.

8561
8562 (d) The shareholder or equity holder shall not, by reason of such prior interest holder
8563 liability, have interest holder liability with respect to any interest holder liabilities that are
8564 incurred after the domestication becomes effective.

8565
8566 (4) A shareholder or equity holder who becomes subject to interest holder liability in respect
8567 of the domesticated corporation as a result of the domestication shall have such interest holder
8568 liability only in respect of interest holder liabilities that arise after the domestication becomes
8569 effective.

8570
8571 (5) A domestication does not constitute or cause the dissolution of the domesticating
8572 corporation.

8573
8574 (6) Property held for charitable purposes under the laws of this state by a domestic or foreign
8575 corporation immediately before a domestication becomes effective may not, as a result of the
8576 transaction, be diverted from the objects for which it was donated, granted, devised, or otherwise
8577 transferred except and to the extent permitted by or pursuant to the laws of this state addressing cy

8578 près or dealing with nondiversion of charitable assets.

8579

8580 (7) A bequest, devise, gift, grant, or promise contained in a will or other instrument of
8581 donation, subscription, or conveyance which is made to the domesticating corporation and which
8582 takes effect or remains payable after the domestication inures to the domesticated corporation.

8583

8584 (8) A trust obligation that would govern property if transferred to the domesticating
8585 corporation applies to property that is transferred to the domesticated corporation after the
8586 domestication takes effect.

8587

8588 (9) In the case of a non-United States foreign corporation that domesticates into a Florida
8589 corporation, the filing of articles of domestication shall not affect the choice of law applicable to
8590 the corporation, except that, from the date the articles of domestication are filed, the law of this
8591 state, including this chapter, shall apply to the corporation to the same extent as if the corporation
8592 has been incorporated as a corporation of this state on that date.²⁴

8593

²⁴ Is this provision still required, given that domestications can now only occur if permitted under the law of the non-United States foreign corporation?

8594 **Commentary to Section 607.11924:**

8595 This section largely follows s. 9.24 of the Model Act and resolves one of the shortcomings of the
8596 existing FBCA domestication statute, which does not explicitly describe the effect of a
8597 domestication.

8598 Subsection (9), which only applies in the context of a domestication of a non-United States entity
8599 into a Florida corporation, has been retained from existing s. 607.1801(6).

8600

8601
8602
8603
8604
8605
8606
8607
8608
8609
8610
8611
8612
8613
8614
8615
8616
8617
8618
8619
8620
8621
8622
8623
8624
8625
8626
8627
8628
8629
8630
8631
8632
8633
8634

PART C - CONVERSIONS²⁵

607.11930~~12~~ Conversion of domestic corporation into another business entity.

~~(1) As used in this section and ss. 607.1113 and 607.1114, the term "another business entity" or "other business entity" means a limited liability company; a common law or business trust or association; a real estate investment trust; a general partnership, including a limited liability partnership; a limited partnership, including a limited liability limited partnership; or any other domestic or foreign entity that is organized under a governing law or other applicable law, provided such term shall not include a corporation and shall not include any entity that has not been organized for profit.~~

~~(2) By complying with this chapter, including adopting a plan of conversion in accordance with s. 607.11931 and complying with s. 607.11932, a domestic corporation may become: Pursuant to a plan of conversion complying with and approved in accordance with this section, a domestic corporation may become ~~convert to another business entity organized under the laws of this state or any other state, the United States, a foreign country, or other foreign jurisdiction, if:~~(a) A domestic eligible entity, other than a domestic corporation; or the domestic corporation converting to the other business entity complies with the applicable provisions of this chapter.~~

~~(b) A foreign eligible entity, if the conversion is permitted by the organic law of the foreign eligible entity The conversion is permitted by the laws of the jurisdiction that enacted the applicable laws under which the other business entity is governed and the other business entity complies with such laws in effecting the conversion.~~

~~(2) By complying with the provisions of this chapter and applicable provisions of its organic law, a domestic eligible entity other than a domestic corporation may become a domestic corporation.~~

~~(3) By complying with the provisions of this chapter applicable to foreign entities and by complying with the applicable provisions of its organic law, a foreign eligible entity may become a domestic corporation, but only if the organic law of the foreign eligible entity permits it to become a corporation in another jurisdiction.~~

~~(3) If a protected agreement of a domestic converting eligible entity is in effect immediately before the conversion becomes effective contains a provision applying to a merger of the corporation that is a converting eligible entity and the agreement does not refer to a conversion of the corporation, the provision applies to a conversion of the corporation as if the conversion were~~

²⁵ Need to discuss with bill drafting if the draft can renumber these sections as set forth in this subchapter B so that they follow the numbering of the sections of Article 9 of the Model Act dealing with this topic.

8635 a merger, until such time as the provision is first amended after _____, 20 (the
8636 enactment date).

8637
8638 ~~(3) The plan of conversion shall set forth:~~

8639 ~~(a) The name of the domestic corporation and the name, jurisdiction of organization~~
8640 ~~of the other business entity to which the domestic corporation is to be converted.~~

8641 ~~(b) The terms and conditions of the conversion, including the manner and basis of~~
8642 ~~converting the shares, obligations, or other securities, or rights to acquire shares,~~
8643 ~~obligations, or other securities, of the domestic corporation into the partnership interests,~~
8644 ~~limited liability company interests, obligations, or other securities of the other business~~
8645 ~~entity, including any rights to acquire any such interests, obligations, or other securities,~~
8646 ~~or, in whole or in part, into cash or other consideration.~~

8647 ~~(c) All statements required to be set forth in the plan of conversion by the laws under~~
8648 ~~which the other business entity is governed.~~

8649 ~~(4) The plan of conversion shall include, or have attached to it, the articles, certificate,~~
8650 ~~registration, or other organizational document by which the other business entity has been or will~~
8651 ~~be organized under its governing laws.~~

8652 ~~(5) The plan of conversion may also set forth any other provisions relating to the~~
8653 ~~conversion.~~

8654 ~~(6) The plan of conversion shall be adopted and approved by the board of directors and~~
8655 ~~shareholders of a domestic corporation in the same manner as a merger of a domestic corporation~~
8656 ~~under s. 607.1103. Notwithstanding such requirement, if the other business entity is a partnership~~
8657 ~~or limited partnership, no shareholder of the converting domestic corporation shall, as a result of~~
8658 ~~the conversion, become a general partner of the partnership or limited partnership, unless such~~
8659 ~~shareholder specifically consents in writing to becoming a general partner of such partnership or~~
8660 ~~limited partnership and, unless such written consent is obtained from each such shareholder, such~~
8661 ~~conversion shall not become effective under s. 607.1114. Any shareholder providing such consent~~
8662 ~~in writing shall be deemed to have voted in favor of the plan of conversion pursuant to which the~~
8663 ~~shareholder became a general partner.~~

8664 ~~(7) Section 607.1103 and ss. 607.1301–607.1333 shall, insofar as they are applicable,~~
8665 ~~apply to a conversion of a domestic corporation into another business entity in accordance with~~
8666 ~~this chapter.~~

8667

8668 **Commentary to Section 607.11930:**

8669 This section has not been renumbered despite the proposed deletion of several preceding sections.
8670 It is largely based on s. 9.30 of the Model Act.

8671 In 2001, amended several times since, this section of the Model Act was split into three different
8672 sections. This proposal follows the Model Act in that regard. All types of conversions of a domestic
8673 corporation into a domestic or foreign eligible entity (other than a domestic corporation) and all
8674 conversions of a domestic or foreign eligible entity into a domestic corporation are now addressed
8675 in this section with applicable details set forth in subsequent sections addressing conversions.

8676

8677 607.119313 Plan Certificate of conversion.

8678 (1) A domestic corporation may convert to a domestic or foreign eligible entity under
8679 this chapter by approving After a plan of conversion. The plan of conversion must include is
8680 approved by the board of directors and shareholders of a converting domestic corporation such
8681 corporation shall deliver to the Department of State for filing a certificate of conversion which
8682 shall be executed by the domestic corporation as required by s. 607.0120 and shall set forth:

8683 (a) The name of the domestic converting corporation; ~~A statement that the~~
8684 ~~domestic corporation has been converted into another business entity in compliance with~~
8685 ~~this chapter and that the conversion complies with the applicable laws governing the other~~
8686 ~~business entity.~~

8687 (b) The name, jurisdiction of formation and type of entity of the converted
8688 eligible entity; ~~A statement that the plan of conversion was approved by the converting~~
8689 ~~domestic corporation in accordance with this chapter and, if applicable, a statement that~~
8690 ~~the written consent of each shareholder of such domestic corporation who, as a result of~~
8691 ~~the conversion, becomes a general partner of the surviving entity has been obtained~~
8692 ~~pursuant to s. 607.1112(6).~~

8693 (c) The manner and basis of converting the shares of the domestic corporation, or
8694 the rights to acquire shares, obligations or other securities, of the domestic corporation
8695 into (i) shares, (ii) other securities, (iii) eligible interests, (iv) obligations, (v) rights to
8696 acquire shares, other securities or eligible interests, (vi) cash, (vii) other property, or (viii)
8697 any combination of the foregoing; ~~effective date of the conversion, which, subject to the~~
8698 ~~limitations in s. 607.0123(2), may be on or after the date of filing the certificate of~~
8699 ~~conversion but shall not be different than the effective date of the conversion under the~~
8700 ~~laws governing the other business entity into which the domestic corporation has been~~
8701 ~~converted.~~

8703 (d) The other terms and conditions of the conversion; ~~and address, including street~~
8704 ~~and number, if any, of the principal office of the other business entity under the laws of the~~
8705 ~~state, country, or jurisdiction in which such other business entity was organized.~~

8706 (e) The full text, as it will be in effect immediately after the conversion becomes
8707 effective, of the organic rules of the converted eligible entity which are to be in writing. If
8708 the other business entity is a foreign entity and is not authorized to transact business in this
8709 state, a statement that the other business entity appoints the Secretary of State as its agent
8710 for service of process in a proceeding to enforce obligations of the converting domestic
8711 corporation, including any appraisal rights of shareholders of the converting domestic
8712 corporation under ss. 607.1301-607.1333 and the street and mailing address of an office
8713 which the Department of State may use for purposes of s. 607.1114(4).

8714 ~~(f) A statement that the other business entity has agreed to pay any shareholders~~
8715 ~~having appraisal rights the amount to which they are entitled under ss. 607.1301-607.1333.~~

8716 (2) In addition to the requirements of subsection (1), a plan of conversion may contain
8717 any other provision not prohibited by law ~~A copy of the certificate of conversion, certified by the~~
8718 ~~department of State, may be filed in the official records of any county in this state in which the~~
8719 ~~converting domestic corporation holds an interest in real property.~~

8720 (3) The terms of a plan of conversion may be made dependent upon facts objectively
8721 ascertainable outside the plan in accordance with section 607.0120(11) ~~A converting domestic~~
8722 ~~corporation is not required to file a certificate of conversion pursuant to subsection (1) if the~~
8723 ~~converting domestic corporation files articles of conversion or a certificate of conversion that~~
8724 ~~substantially complies with the requirements of this section pursuant to s. 605.1045,~~
8725 ~~s. 620.2104(1)(b), or s. 620.8914(1)(b) and contains the signatures required by this chapter. In such~~
8726 ~~a case, the other certificate of conversion may also be used for purposes of subsection (2).~~

8727

8728 **Commentary to Section 607.11931:**

8729 This provision largely follows the corollary provision of the Model Act (s. 9.31).

8730 Subsection (4) has been retained even though it is not part of the Model Act.

8731 Part B of Article 11 uses the term "converted eligible entity" to mean the converting eligible entity
8732 as it continues in existence after (following) the conversion. Put another way, it is the entity to
8733 which the converting eligible entity is converted. At the same time, it's the same entity as the
8734 converting eligible entity. Thus, there was some concern as to whether the term "converted eligible
8735 entity" (not unlike the term currently used in the FBCA, the "other business entity") causes
8736 confusion. Based on this concern, the Subcommittee considered using a term other than "converted
8737 eligible entity" (such as "resulting eligible entity" or the "eligible entity to which the converting
8738 eligible entity is converted" or the "as-converted eligible entity"). However, there was a view that
8739 all of these terms had the same issues, so the decision was made to retain the Model Act definition.

8740

8741 607.1193244 **Action on a plan** ~~Effect of conversion of domestic corporation into another~~
8742 ~~business entity.~~

8743 In the case of a conversion of a domestic corporation to a domestic or foreign eligible
8744 entity other than a domestic corporation, the plan of conversion shall be adopted in the following
8745 manner:
8746

8747 (1) The plan of conversion shall first be adopted by the board of directors of such
8748 domestic corporation ~~When a conversion becomes effective: A domestic corporation that has~~
8749 ~~been converted into another business entity pursuant to this chapter is for all purposes the same~~
8750 ~~entity that existed before the conversion.~~

8751 (2) The plan of conversion shall then be approved by the shareholders of such domestic
8752 corporation. In submitting the plan of conversion to the shareholders for their approval, the board
8753 of directors shall recommend that the shareholders approve the plan of conversion, unless (i) the
8754 board of directors makes a determination that because of conflicts of interest or other special
8755 circumstances it should not make such a recommendation, or (ii) s. 607.0826 applies. If either (i)
8756 or (ii) applies, the board of directors shall inform the shareholders of the basis for its so proceeding
8757 without such recommendation ~~title to all real property and other property, or any interest therein,~~
8758 ~~owned by the domestic corporation at the time of its conversion into the other business entity~~
8759 ~~remains vested in the converted entity without reversion or impairment by operation of this~~
8760 ~~chapter.~~

8761 (3) The board of directors may set conditions for approval of the plan of conversion by
8762 the shareholders or the effectiveness of the plan of conversion ~~other business entity into which the~~
8763 ~~domestic corporation was converted shall continue to be responsible and liable for all the liabilities~~
8764 ~~and obligations of the converting domestic corporation, including liability to any shareholders~~
8765 ~~having appraisal rights under ss. 607.1301-607.1333 with respect to such conversion.~~

8766 (4) If plan of conversion is required to be approved by the shareholders, and if the
8767 approval is to be given at a meeting, the corporation shall notify each shareholder, regardless of
8768 whether entitled to vote, of the meeting of shareholders at which the plan is to be submitted for
8769 approval, in accordance with s. 607.0705. The notice must state that the purpose, or one of the
8770 purposes, of the meeting is to consider the plan of conversion and must contain or be accompanied
8771 by a copy of the plan. The notice must include or be accompanied by a copy of the organic rules
8772 of the converted eligible entity which are to be in writing as they will be in effect immediately
8773 after the conversion ~~Any claim existing or action or proceeding pending by or against any domestic~~
8774 ~~corporation that is converted into another business entity may be continued as if the conversion~~
8775 ~~did not occur.~~

8776 (5) ~~Neither the rights of creditors nor any liens upon the property of a domestic~~
8777 ~~corporation that is converted into another business entity under this chapter shall be impaired by~~

8778 ~~such conversion~~ Unless the articles of incorporation, or the board of directors acting pursuant to
8779 subsection (3), require a greater vote or a greater quorum in the respective case, approval of the plan
8780 of conversion requires:

8781 (a) The approval of the shareholders at a meeting at which a quorum exists consisting
8782 of a majority of the votes entitled to be cast on the plan; and

8783 (b) The approval of each class or series of shares voting as a separate voting group at a
8784 meeting at which a quorum of the voting group exists consisting of a majority of the votes
8785 entitled to be cast on the plan by that voting group.

8786 (6) If as a result of the conversion one or more shareholders of the converting domestic
8787 corporation would become subject to interest holder liability, approval of the plan of conversion shall
8788 require the signing in connection with the transaction, by each such shareholder, of a separate written
8789 consent to become subject to such interest holder liability ~~The shares, obligations, and other~~
8790 ~~securities, or rights to acquire shares, obligations, or other securities, of the domestic corporation~~
8791 ~~shall be converted into the partnership interests, limited liability company interests, obligations, or~~
8792 ~~other securities of the other business entity, including any rights to acquire any such interests,~~
8793 ~~obligations, or other securities, or, in whole or in part, into cash, or other consideration, as provided~~
8794 ~~in the plan of conversion. The former shareholders of the converting domestic corporation shall be~~
8795 ~~entitled only to the rights provided in the plan of conversion and to their appraisal rights, if any,~~
8796 ~~under ss. 607.1301-607.1333 or other applicable law.~~

8797 (7) If the converted eligible entity is a partnership or limited partnership, no shareholder
8798 of the converting domestic corporation shall, as a result of the conversion, become a general
8799 partner of the partnership or limited partnership, unless such shareholder specifically consents in
8800 writing to becoming a general partner of such partnership or limited partnership and, unless such
8801 written consent is obtained from each such shareholder, such conversion shall not become effective
8802 under s. 607.11933. Any shareholder providing such consent in writing shall be deemed to have
8803 voted in favor of the plan of conversion pursuant to which the shareholder became a general
8804 partner.

8805 (8) Sections 607.1301-607.1340 shall, insofar as they are applicable, apply to a conversion
8806 in accordance with this chapter of a domestic corporation into a domestic or foreign eligible
8807 entity that is not a domestic corporation.

8808

8809 **Commentary to Section 607.11932:**

8810 Like the other sections in Chapter 11, the section of the Model Act (s, 9.32 in the 2016 Model Act)
8811 has been substantially changed in both 1999 and 2016. This revised draft largely follows the Model
8812 Act construct.

8813 Subsection (7) was retained from existing FBCA s. 607.1112(6) even though it is not in the Model
8814 Act.

8815 For clarity, subsection (8) was retained from existing s. 607.1112(7) even though it is not a Model
8816 Act provision.

8817

8818 607.1193345 Articles of Conversion; Effectiveness of another business entity to a
8819 domestic corporation.

8820 (1) After (i) a plan of conversion of a domestic corporation has been adopted and
8821 approved as required by this chapter, or (ii) a domestic or foreign eligible entity (other than a
8822 domestic corporation) that is the converting eligible entity has approved a conversion as required
8823 under its organic law, articles of conversion shall be signed by the converting eligible entity as
8824 required by s. 607.0120 and must: As used in this section, the term "other business entity" means a
8825 limited liability company; a common law or business trust or association; a real estate investment
8826 trust; a general partnership, including a limited liability partnership; a limited partnership,
8827 including a limited liability limited partnership; or any other domestic or foreign entity that is
8828 organized under a governing law or other applicable law, provided such term shall not include a
8829 corporation and shall not include any entity that has not been organized for profit.
8830

8831 (a) State the name, jurisdiction of formation, and type of entity of the
8832 converting eligible entity;
8833

8834 (b) State the name, jurisdiction of formation, and type of entity of the converted
8835 eligible entity;
8836

8837 (c) If the converting eligible entity is:
8838

8839 1. A domestic corporation, state that the plan of conversion was approved
8840 in accordance with this chapter; or
8841

8842 2. A domestic or foreign eligible entity other than a domestic corporation,
8843 state that the conversion was approved by the eligible entity in accordance with its
8844 organic law.
8845

8846 (d) If the converted eligible entity is:
8847

8848 1. A domestic corporation or a domestic or foreign eligible entity that is not
8849 a domestic corporation, attach the public organic record of the converted eligible
8850 entity, except that provisions that would not be required to be included in a restated
8851 public organic record may be omitted; or
8852

8853 2. A domestic limited liability partnership, attach the filing or filings
8854 required to become a domestic limited liability partnership.
8855

8856 (2) If the converted eligible entity is a domestic corporation, its articles of incorporation
8857 must satisfy the requirements of section 607.0202, except that provisions that would not be required to

8858 be included in restated articles of incorporation may be omitted from the articles of incorporation. If
8859 the converted eligible entity is a domestic eligible entity that is not a domestic corporation, its public
8860 organic record, if any, must satisfy the applicable requirements of the organic law of this state, except
8861 that the public organic record does not need to be signed. Any other business entity may convert to
8862 a domestic corporation if the conversion is permitted by the laws of the jurisdiction that enacted
8863 the applicable laws governing the other business entity and the other business entity complies with
8864 such laws and the requirements of this section in effecting the conversion. The other business entity
8865 shall file with the Department of State in accordance with s. 607.0120:

8866 ~~(a) A certificate of conversion that has been executed in accordance with~~
8867 ~~s. 607.0120 and by the other business entity as required by applicable law.~~

8868 ~~(b) Articles of incorporation that comply with s. 607.0202 and have been executed~~
8869 ~~in accordance with s. 607.0120.~~

8870 (3) The articles of conversion shall be delivered to the department for filing, and shall take
8871 effect at the effective date determined in accordance with s. 607.0123. The certificate of conversion
8872 shall state:

8873 ~~(a) The date on which, and the jurisdiction in which, the other business entity was~~
8874 ~~first organized and, if the entity has changed, its jurisdiction immediately prior to its~~
8875 ~~conversion.~~

8876 ~~(b) The name of the other business entity immediately prior to the filing of the~~
8877 ~~certificate of conversion to a corporation.~~

8878 ~~(c) The name of the corporation as set forth in its articles of incorporation filed in~~
8879 ~~accordance with subsection (2).~~

8880 ~~(d) The delayed effective date or time, which, subject to the limitations in~~
8881 ~~s. 607.0123(2), shall be a date or time certain, of the conversion if the conversion is not to~~
8882 ~~be effective upon the filing of the certificate of conversion and the articles of incorporation,~~
8883 ~~provided such delayed effective date may not be different than the effective date and time~~
8884 ~~of the articles of incorporation.~~

8885 (4) If a converted eligible entity is a domestic eligible entity, the conversion becomes
8886 effective when the articles of conversion are effective. With respect to a conversion in which the
8887 converted eligible entity is a foreign eligible entity, the conversion itself shall become effective at the later
8888 of:

8889 1. The date and time provided by the organic law of that eligible entity, and

8890 2. When the articles of conversion take effect ~~Upon the filing with the Department of~~
8891 ~~State of the certificate of conversion and the articles of incorporation, or upon the delayed~~
8892 ~~effective date or time of the certificate of conversion and the articles of incorporation, the~~
8893 ~~other business entity shall be converted into a domestic corporation and the corporation~~
8894 ~~shall thereafter be subject to all of the provisions of this chapter, except notwithstanding~~
8895 ~~s. 607.0123, the existence of the corporation shall be deemed to have commenced when~~
8896 ~~the other business entity commenced its existence in the jurisdiction in which the other~~
8897 ~~business entity was first organized.~~

8898 (5) Articles of conversion required to be filed under this section may be combined with any
8899 filing required under the organic law of a domestic eligible entity that is the converting eligible entity or
8900 the converted eligible entity if the combined filing satisfies the requirements of both this section and
8901 the other organic law.²⁶ ~~The conversion of any other business entity into a domestic corporation~~
8902 ~~shall not affect any obligations or liabilities of the other business entity incurred prior to its~~
8903 ~~conversion to a domestic corporation or the personal liability of any person incurred prior to such~~
8904 ~~conversion.~~

8905 (6) If the converting eligible entity is a foreign eligible entity that is authorized to transaction
8906 business in this state under a provision of law similar to ss. 607.1501-607.1532, its foreign qualification
8907 shall be cancelled automatically on the effective date of its conversion ~~When any conversion~~
8908 ~~becomes effective under this section, for all purposes of the laws of this state, all of the rights,~~
8909 ~~privileges, and powers of the other business entity that has been converted, and all property, real,~~
8910 ~~personal, and mixed, and all debts due to such other business entity, as well as all other things and~~
8911 ~~causes of action belonging to such other business entity, shall be vested in the domestic corporation~~
8912 ~~into which it was converted and shall thereafter be the property of the domestic corporation as they~~
8913 ~~were of the other business entity. Without limiting this provision, title to any real property, or any~~
8914 ~~interest therein, vested by deed or otherwise in such other business entity at the time of conversion~~
8915 ~~shall remain vested in the converted entity without reversion or impairment by operation of this~~
8916 ~~chapter. All rights of creditors and all liens upon any property of such other business entity shall~~
8917 ~~be preserved unimpaired, and all debts, liabilities, and duties of such other business entity shall~~
8918 ~~thenceforth attach to the domestic corporation into which it was converted and may be enforced~~
8919 ~~against the domestic corporation to the same extent as if said debts, liabilities, and duties had been~~
8920 ~~incurred or contracted by the domestic corporation.~~

8921 (7) ~~Unless otherwise agreed, or as required under applicable laws of states other than~~
8922 ~~this state, the converting entity shall not be required to wind up its affairs or pay its liabilities and~~
8923 ~~distribute its assets and the conversion shall not constitute a dissolution of such entity and shall~~
8924 ~~constitute a continuation of the existence of the converting entity in the form of a domestic~~
8925 ~~corporation.~~

²⁶ Confirm that DOS is comfortable with this change. For reference, see discussion in footnote 1 to s. 607.1105(6).

8926 (8) ~~Prior to filing a certificate of conversion with the Department of State, the conversion~~
8927 ~~shall be approved in the manner provided for by the document, instrument, agreement, or other~~
8928 ~~writing, as the case may be, governing the internal affairs of the other business entity or by other~~
8929 ~~applicable law, as appropriate, and the articles of incorporation and bylaws of the corporation shall~~
8930 ~~be approved by the same authorization required to approve the conversion. As part of such an~~
8931 ~~approval, a plan of conversion or other record may describe the manner and basis of converting~~
8932 ~~the partnership interests, limited liability company interests, obligations, or securities of, or other~~
8933 ~~interests or rights in, the other business entity, including any rights to acquire any such interests,~~
8934 ~~obligations, securities, or other rights, into shares of the domestic corporation, or rights to acquire~~
8935 ~~shares, obligations, securities, or other rights, or, in whole or in part, into cash or other~~
8936 ~~consideration. Such a plan or other record may also contain other provisions relating to the~~
8937 ~~conversion, including without limitation the right of the other business entity to abandon a~~
8938 ~~proposed conversion, or an effective date for the conversion that is not inconsistent with paragraph~~
8939 ~~(2)(d).~~

8940 (7) A copy of the articles of conversion, certified by the department, may be filed in the
8941 official records of any county in this state in which the converting eligible entity holds an interest
8942 in real property.

8943

8944 **Commentary to Section 607.11933:**

8945 This section largely follows s. 9.33 of the Model Act, but retains some aspects of existing Florida
8946 law.

8947 Subsection (7) is retained from existing s. 607.1113(2).

8948

8949 607.1193416 Amendment of Plan of Conversion; Abandonment.

8950

8951 (1) A plan of conversion of a converting eligible entity that is a domestic corporation
8952 may be amended:

8953

8954 (a) In the same manner as the plan of conversion was approved, if the plan does not
8955 provide for the manner in which it may be amended; or

8956

8957 (b) In the manner provided in the plan of conversion, except that shareholders that
8958 were entitled to vote on or consent to approval of the plan are entitled to vote on or consent
8959 to any amendment of the plan that will change:

8960

8961 1. The amount or kind of shares or other securities, eligible interests,
8962 obligations, rights to acquire shares or other securities, eligible interests, cash, other
8963 property, or any combination of the foregoing, to be received by any of the
8964 shareholders of the converting corporation under the plan;

8965

8966 2. The organic rules of the converted eligible entity that will be in effect
8967 immediately after the conversion becomes effective, except for changes that do not
8968 require approval of the eligible interest holders of the converted eligible entity under
8969 its organic law or organic rules; or

8970

8971 3. Any other terms or conditions of the plan, if the change would adversely
8972 affect such shareholders in any material respect.

8973

8974 (2) After a plan of conversion has been adopted and approved by a converting eligible
8975 entity that is a domestic corporation in the manner required by this chapter and before the articles
8976 of conversion become effective, the plan may be abandoned by the domestic corporation without
8977 action by its shareholders in accordance with any procedures set forth in the plan or, if no such
8978 procedures are set forth in the plan, in the manner determined by the board of directors of the
8979 domestic corporation.

8980

8981 (3) If a conversion is abandoned after the articles of conversion have been delivered to
8982 the department for filing but before the articles of conversion have become effective, a statement
8983 of abandonment, signed by the converting eligible entity, shall be delivered to the department for
8984 filing before the articles of conversion become effective. The statement shall take effect on filing,
8985 and the conversion shall be deemed abandoned and shall not become effective. The statement of
8986 abandonment must contain:

8987

8988 (a) The name of the converting eligible entity;

8989

8990 (b) The date on which the articles of conversion were filed by the department; and

8991

8992 (c) A statement that the conversion has been abandoned in accordance with this
8993 section.

8994

8995 **Commentary to Section 607.11934:**

8996 This section largely adopts Model Act s. 9.34 and for the most part follows the corollary provisions
8997 in the Model Act regarding amendment and abandonment of a plan of merger or a plan of share
8998 exchange.

8999

9000 607.1193547 Effect of Conversion.

9001

9002 (1) When a conversion becomes effective:

9003

9004 (a) All real property and other property owned by, including any interest therein and
9005 all title thereto²⁷, and every contract right possessed by, the converting eligible entity remain
9006 the property and contract rights of the converted eligible entity without transfer, reversion or
9007 impairment;

9008

9009 (b) All debts, obligations and other liabilities of the converting eligible entity remain
9010 the debts, obligations and other liabilities of the converted eligible entity;

9011

9012 (c) The name of the converted eligible entity may but need not be substituted for
9013 the name of the converting eligible entity in any pending action or proceeding;

9014

9015 (d) If the converted eligible entity is a filing entity or a domestic corporation or a
9016 domestic or foreign nonprofit corporation,²⁸ its public organic record and its private organic
9017 rules become effective;

9018

9019 (e) If the converted eligible entity is a nonfiling entity, its private organic rules
9020 become effective;

9021

9022 (f) If the converted eligible entity is a limited liability partnership, the filing required
9023 to become a limited liability partnership and its private organic rules become effective;

9024

9025 (g) The shares, rights to acquire shares, eligible interests, other securities and
9026 obligations of the converting eligible entity are reclassified into shares other securities, rights
9027 to acquire shares or other securities, eligible interests, obligations, cash, or other property in
9028 accordance with the terms of the conversion, and the shareholders or interest holders of the
9029 converting eligible entity are entitled only to the rights provided to them by those terms and to
9030 any rights they may have under s. 607.1302 or under the organic law of the converting eligible
9031 entity; and

9032

9033 (h) The converted eligible entity is:

9034

9035 1. Deemed to be incorporated or organized under and subject to the organic law of
9036 the converted eligible entity;

²⁷ Confirm with the RPPTL Section that this section is acceptable from a real property point of view. See footnote 2 to s. 607.1106 for further information.

²⁸ Confirm with Corporate Laws Committee why they included "foreign nonprofit corporation in this section. Why wouldn't a foreign nonprofit corporation already be covered as a "filing entity?"

9037
9038
9039
9040
9041
9042
9043
9044
9045
9046
9047
9048
9049
9050
9051
9052
9053
9054
9055
9056
9057
9058
9059
9060
9061
9062
9063
9064
9065
9066
9067
9068
9069
9070
9071
9072
9073
9074
9075
9076

2. Deemed to be the same entity without interruption as the converting eligible entity; and

3. Deemed to have been incorporated or otherwise organized on the date that the converting eligible entity was originally incorporated or organized.

(2) When a conversion of a domestic corporation to a domestic or foreign eligible entity other than a domestic corporation becomes effective, the converted eligible entity is deemed to:

(a) Appoint the secretary of state as its agent for service of process in a proceeding to enforce the rights of shareholders who exercise appraisal rights in connection with the conversion; and

(b) Agree that it will promptly pay the amount, if any, to which such shareholders are entitled under ss. 607.1301-607.1340.

(3) Except as otherwise provided in the articles of incorporation of a domestic corporation or the organic law or organic rules of a domestic or foreign eligible entity other than a domestic corporation, a shareholder or eligible interest holder who becomes subject to interest holder liability in respect of a domestic corporation or domestic or foreign eligible entity other than a domestic eligible entity as a result of the conversion shall have such interest holder liability only in respect of interest holder liabilities that arise after the conversion becomes effective.

(4) Except as otherwise provided in the organic law or the organic rules of the domestic or foreign eligible entity, the interest holder liability of an interest holder in a converting eligible entity that converts to a domestic corporation who had interest holder liability in respect of such converting eligible entity before the conversion becomes effective shall be as follows:

(a) The conversion does not discharge that prior interest holder liability with respect to any interest holder liabilities that arose before the conversion became effective.

(b) The provisions of the organic law of the eligible entity shall continue to apply to the collection or discharge of any interest holder liabilities preserved by subsection (4)(a), as if the conversion had not occurred.

(c) The eligible interest holder shall have such rights of contribution from other persons as are provided by the organic law of the eligible entity with respect to any interest holder liabilities preserved by subsection (4)(a), as if the conversion had not occurred.

9077 (d) The eligible interest holder shall not, by reason of such prior interest holder
9078 liability, have interest holder liability with respect to any interest holder liabilities that arise
9079 after the conversion becomes effective.
9080

9081 (5) A conversion does not require the converting eligible entity to wind up its affairs and
9082 does not constitute or cause the dissolution or termination of the entity.
9083

9084 (6) Property held for charitable purposes under the laws of this state by a domestic or
9085 foreign eligible entity immediately before a conversion becomes effective may not, as a result of the
9086 transaction, be diverted from the objects for which it was donated, granted, devised, or otherwise
9087 transferred except and to the extent permitted by or pursuant to the laws of this state addressing cy
9088 près or dealing with nondiversion of charitable assets.
9089

9090 (7) A bequest, devise, gift, grant, or promise contained in a will or other instrument of
9091 donation, subscription, or conveyance which is made to the converting eligible entity and which
9092 takes effect or remains payable after the conversion inures to the converted eligible entity.
9093

9094 (8) A trust obligation that would govern property if transferred to the converting eligible
9095 entity applies to property that is to be transferred to the converted eligible entity after the conversion
9096 becomes effective.
9097

9098 **Commentary to Section 607.11935:**

9099 This section largely adopts Model Act s. 9.35 and for the most part follows the corollary provisions
9100 in the Model Act regarding the effect of a merger or share exchange.

9101

9102 ARTICLE 12

9103 SALE OF ASSETS

9104

9105 607.1201 Disposition of Sale of assets not requiring shareholder approval in regular
9106 course of business and mortgage of assets.

9107

9108 (4) No approval by the shareholders is required, unless the articles of incorporation
9109 otherwise provide A corporation may, on the terms and conditions and for the consideration
9110 determined by the board of directors:

9111

9112 (1a) To Ssell, lease, exchange, or otherwise dispose of any or all, of the
9113 corporation's assets or substantially all, of its property in the usual and regular course of
9114 business;

9115

9116 (2b) To mMortgage, pledge, dedicate to the repayment of indebtedness (whether
9117 with or without recourse), create a security interest in, or otherwise encumber any or all of
9118 the corporation's its assets, property regardless of whether or not in the usual and regular
9119 course of business; or

9120

9121 (c) To transfer any or all of the corporation's assets to one or more domestic or
9122 foreign corporations or other entities all of the shares or interests of which its property to a
9123 corporation all the shares of which are owned by the corporation; or

9124

9125 (d) Except to the extent that the distribution is part of a dissolution of the corporation
9126 under ss. 607.1401-607.14401, to distribute assets pro rata to the holders of one or more
9127 classes or series of the corporation's shares.

9128

9129 (2) ~~Unless the articles of incorporation require it, approval by the shareholders of a~~
9130 ~~transaction described in subsection (1) is not required.~~

9132 **Commentary to Section 607.1201:**

9133

9134 This section makes changes to largely conform this section to the provisions of s. 12.01 of the
9135 Model Act. While many of these changes are not considered substantive, the revised section
9136 clarifies situations where shareholder approval would not be required even though one might argue
9137 that that such transactions constitute a sale of substantially all of the assets of the corporation.

9138

9139 New s. 607.1201 does not include existing language in s. 607.1201 that, although not believed to
9140 be intended, could have been read as requiring all sales of assets to be approved by the board of
9141 directors. While most Florida lawyers do not believe that such board approval is required in all
9142 circumstances under the existing statute, this revised provision removes the ambiguous language
9143 and appropriately leaves the issue of whether the particular transaction requires board approval to
9144 the general rules relating to when the board is required to approve a transaction.

9145

9146 607.1202 **Shareholder approval of certain dispositions** ~~Sale of assets other than in~~
9147 ~~regular course of business.~~

9148
9149 (1) A corporation may sell, lease, exchange or otherwise dispose or all or substantially
9150 all, of its property (with or without good will), otherwise than in the usual and regular course of
9151 business, on the terms and conditions and for the consideration determined by the corporation's
9152 board of directors, but only if the board of directors proposes and its shareholders of record approve
9153 the proposed transaction.

9154
9155 (2) ~~To obtain the approval of the shareholders under subsection (1), the~~ For a transaction
9156 ~~to be authorized: (a) The~~ board of directors must first adopt a resolution approving the disposition
9157 and thereafter, the disposition must also be approved by the corporation's shareholders. In
9158 submitting the disposition to the shareholders for approval, the board of directors shall recommend
9159 the proposed transaction to the shareholders unless (i) the board of directors makes a determination
9160 that determines that it should make no recommendation (a) because of conflict of interest or other
9161 special circumstances, it should not make such a recommendation, or (b), s. 607.0826 applies. If
9162 either (a) or (b) applies, the board of directors shall inform the shareholders of the basis for its so
9163 proceeding without a recommendation. and communicates the basis for its determination to the
9164 shareholders of record with the submission of the proposed transaction; and

9165
9166 ~~(b) The shareholders entitled to vote must approve the transaction as provided in~~
9167 ~~subsection (5).~~

9168
9169 (3) The board of directors may set conditions for approval of the disposition or the
9170 effectiveness of the disposition ~~its submission of the proposed transaction on any basis.~~

9171
9172 (4) If the disposition is required to be approved by the shareholders under subsection (1)
9173 and if the approval is to be given at a meeting, tThe corporation shall notify each shareholder
9174 regardless of record, whether or not entitled to vote, of the proposed shareholders' meeting of
9175 shareholders at which the disposition is to be submitted for approval in accordance with s.
9176 607.0705. The notice shall also state that the purpose, or one of the purposes, of the meeting is to
9177 consider the disposition sale, lease, exchange, or other disposition of all, or substantially all, the
9178 property of the corporation, regardless of whether or not the meeting is an annual or a special
9179 meeting, and shall contain or be accompanied by a description of the transaction disposition and
9180 the consideration to be received by the corporation. Furthermore, the notice shall contain a clear
9181 and concise statement that, if the transaction is effected, shareholders dissenting therefrom are or
9182 may be entitled, if they comply with the provisions of this chapter act regarding appraisal rights,
9183 to be paid the fair value of their shares and such notice shall be accompanied by a copy of ss.
9184 607.1301-607.134033.

9186 (5) Unless this ~~chapter act~~, the articles of incorporation, or the board of directors (acting
9187 pursuant to subsection (34)) requires a greater vote or a greater quorum ~~vote by voting groups~~, the
9188 approval of the disposition shall require the approval of the shareholders at a meeting at which a
9189 quorum exists consisting of ~~transaction to be authorized shall be approved by a majority of all the~~
9190 votes entitled to be cast on the disposition ~~transaction~~.

9191
9192 (6) After a disposition has been approved by the shareholders under this chapter, and at
9193 any time before the disposition has been consummated, it may be abandoned by the corporation
9194 without action by the shareholders, subject to any contractual rights of other parties to the
9195 disposition. Any plan or agreement providing for a sale, lease, exchange, or other disposition of
9196 property, or any resolution of the board of directors or shareholders approving such transaction,
9197 may authorize the board of directors of the corporation to amend the terms thereof at any time
9198 prior to the consummation of such transaction. An amendment made subsequent to the approval
9199 of the transaction by the shareholders of the corporation may not:

9200
9201 (a) ~~Change the amount or kind of shares, securities, cash, property, or rights to be~~
9202 ~~received in exchange for the corporation's property; or~~

9203
9204 (b) ~~Change any other terms and conditions of the transaction if such change would~~
9205 ~~materially and adversely affect the shareholders or the corporation.~~

9206
9207 (7) ~~Unless a plan or agreement providing for a sale, lease, exchange, or other disposition~~
9208 ~~of property, or any resolution of the board of directors or shareholders approving such transaction,~~
9209 ~~prohibits abandonment of the transaction without shareholder approval after a transaction has been~~
9210 ~~authorized, the planned transaction may be abandoned (subject to any contractual rights) at any~~
9211 ~~time prior to consummation thereof, without further shareholder action, in accordance with the~~
9212 ~~procedure set forth in the plan, agreement, or resolutions providing for or approving such~~
9213 ~~transaction or, if none is set forth, in the manner determined by the board of directors.~~

9214
9215 (7~~8~~) A disposition of assets in the course of dissolution shall be governed by ss.
9216 607.1401-607.14401 ~~transaction that constitutes a distribution is governed by s. 607.06401 and~~
9217 ~~not by this section.~~

9218
9219 (8) The assets of a direct or indirect consolidated subsidiary shall be deemed to be the
9220 assets of the parent corporation for purposes of this section.

9221
9222 (9) For purposes of this section, the term "shareholder" includes a beneficial shareholder
9223 and a voting trust beneficial owner.

9225 **Commentary to Section 607.1202:**

9226

9227 Model Act s. 12.02, adopted in 1999, moves away from the "all or substantially all of the assets"
9228 test for when shareholder approval of a sale of assets is required (which was in the Model Act prior
9229 to that time) to an evaluation of whether the disposition would leave the corporation "without a
9230 significant continuing business activity." The historical commentary provided that this change was
9231 made because of the belief on the part of the Corporate Laws Committee that in evaluating the
9232 issue of whether a disposition was a sale of substantially all of the assets of the corporation outside
9233 the ordinary course of business, courts, in reaching decisions on that issue, were actually
9234 substantively evaluating whether there remained "significant continuing business activity" in the
9235 corporation.

9236

9237 The Model Act provision also includes a quantitative conclusive presumption safe harbor, which,
9238 if satisfied, means that the corporation is deemed to be retaining a significant business activity
9239 after the transaction (and that therefore no shareholder approval is required for the sale), as follows:

9240

9241 A corporation will conclusively be deemed to have retained a significant continuing
9242 business activity if it retains a business activity that represented, for the corporation and its
9243 subsidiaries on a consolidated basis, at least (i) 25% of total assets at the end of the most
9244 recently completed fiscal year, and (ii) either 25% of either income from continuing
9245 operations before taxes or 25% of revenues from continuing operations, in each case for
9246 the most recent completed fiscal year.

9247

9248 In its commentary to the 1999 version of s. 12.02 of the Model Act, the Corporate Laws Committee
9249 explained that the safe harbor represents a policy judgment that a greater measure of certainty is
9250 highly desirable and that, although setting the percentage threshold at 25% is arbitrary, it was
9251 considered reasonable under the circumstances.

9252

9253 To date, 15 states have adopted the new Model Act standard to evaluate whether shareholder action
9254 is required for the particular disposition of assets. All of these states have also adopted the Model
9255 Act safe harbor at the 25% threshold level (except for one that set a 20% threshold). Further, three
9256 additional states require shareholder approval to sell all or substantially all of the corporation's
9257 assets outside the ordinary course of business, but include a presumption that if the Model Act
9258 25% safe harbor is satisfied, it is conclusively presumed that such disposition is not a sale of all or
9259 substantially all of the corporation's assets. All other states (including Delaware) retain the "all or
9260 substantially all of the assets" test.

9261

9262 In its consideration of s. 607.1201, the Subcommittee was concerned that moving away from the
9263 current standard for when obtaining shareholder approval is required might very well provide more
9264 uncertainty than electing to stay with the existing standard, in light of the fact that much of the

9265 significant case law evaluating this topic is found in Delaware (where the traditional "all or
9266 substantially all of the assets" test remains the standard). Further, although the benefit of adding a
9267 quantitative safe harbor was considered, there was some disagreement over whether the Model
9268 Act safe harbor standard was too high or too low.²⁹

9269
9270 The addition in subsection (1) of the words "but only if" is not intended to be substantive change,
9271 but rather to make clear the meaning of this provision, which is that a sale or other disposition of
9272 "all or substantially all of the assets" of a Florida corporation outside the ordinary course of
9273 business can only occur with shareholder approval and also, except in limited circumstances, board
9274 of directors approval. It is believed that this has been the interpretation of this provision even
9275 without these clarifying words, but that these clarifying words clear up any question as to what is
9276 intended by this provision.

9277
9278 Subsections (3)-(7) have been updated largely based on the Model Act and are consistent with
9279 corollary provisions in Article 11, to the extent applicable. These changes are considered clarifying
9280 and not substantive.

9281
9282 Subsection (7) was added, from the corollary provision of the Model Act, to make it clear that in
9283 addition to pro rata distributions, dissolutions are governed by Article 14 (Dissolutions) and not
9284 by Article 12 (Sales of assets).

9285

²⁹ This topic will be taken up one final time at the September 1, 2018 meeting of the Corporations, Securities and Financial Services Committee.

9286 ARTICLE 13

9287 APPRAISAL RIGHTS

9288 607.1301 Appraisal rights; definitions.

9289 The following definitions apply to ss. 607.1301~~2~~-607.133~~3~~40:

9290 (1) "Accrued interest" means interest from the date the corporate action becomes effective
9291 until the date of payment, at the rate of interest determined for judgments in accordance with s.
9292 55.03, determined as of the effective date of the corporate action.

9293 (2) "Affiliate" means a person that directly or indirectly through one or more intermediaries
9294 controls, is controlled by, or is under common control with another person or is a senior executive
9295 of such person thereof. For purposes of s. 607.1302~~1~~(2~~6~~)(~~4~~a), a person is deemed to be an affiliate
9296 of its senior executives.

9297 (3) "Corporate action" means an event described in s. 607.1302(1).

9298 ~~(2) "Beneficial shareholder" means a person who is the beneficial owner of shares held in a~~
9299 ~~voting trust or by a nominee on the beneficial owner's behalf.~~

9300 ~~(4)~~ "Corporation" means the domestic corporation that is the issuer of the shares held by a
9301 shareholder demanding appraisal and, for matters covered in ss. 607.1322-607.133~~3~~40, includes
9302 the domesticated eligible entity in a domestication, the converted eligible entity in a conversion,
9303 and the survivor of surviving entity in a merger.

9304 ~~(5)~~ "Fair value" means the value of the corporation's shares determined:

9305 (a) Immediately before the effectiveness³⁰ ~~effectuation~~ of the corporate action to which
9306 the shareholder objects.

9307 (b) Using customary and current valuation concepts and techniques generally employed
9308 for similar businesses in the context of the transaction requiring appraisal, excluding any
9309 appreciation or depreciation in anticipation of the corporate action unless exclusion would be
9310 inequitable to the corporation and its remaining shareholders.

9311 (c) ~~For a corporation with 10 or fewer shareholders, w~~ Without discounting for lack of
9312 marketability or minority status.

³⁰ Make corresponding change in s. 605.1061(5)(a).

9313 ~~(5) "Interest" means interest from the effective date of the corporate action until the date of~~
9314 ~~payment, at the rate of interest on judgments in this state on the effective date of the corporate~~
9315 ~~action.~~

9316 (6) "Interested transaction" means a corporate action described in s. 607.1302(1), other than a
9317 merger pursuant to s. 607.1104, involving an interested person in which any of the shares or assets of
9318 the corporation are being acquired or converted. As used in this definition:

9319 (a) "Interested person" means a person, or an affiliate of a person, who at any time during
9320 the one-year period immediately preceding approval by the board of directors of the corporate
9321 action:

9322 1. Was the beneficial owner of 20% or more of the voting power of the corporation,
9323 other than as owner of excluded shares;

9324 2. Had the power, contractually or otherwise, other than as owner of excluded shares,
9325 to cause the appointment or election of 25% or more of the directors to the board of directors
9326 of the corporation; or

9327 3. Was a senior executive or director of the corporation or a senior executive of any
9328 affiliate of the corporation, and that senior executive or director will receive, as a result of the
9329 corporate action, a financial benefit not generally available to other shareholders as such,
9330 other than:

9331 (A) Employment, consulting, retirement, or similar benefits established
9332 separately and not as part of or in contemplation of the corporate action;

9333 (B) Employment, consulting, retirement, or similar benefits established in
9334 contemplation of, or as part of, the corporate action that are not more favorable than
9335 those existing before the corporate action or, if more favorable, that have been approved
9336 on behalf of the corporation in the same manner as is provided in s. 607.0832; or

9337 (C) In the case of a director of the corporation who will, in the corporate action,
9338 become a director or governor of the acquiror or any of its affiliates, rights and benefits
9339 as a director or governor that are provided on the same basis as those afforded by the
9340 acquiror generally to other directors or governors of such entity or such affiliate.

9341 (b) "Beneficial owner" means any person who, directly or indirectly, through any contract,
9342 arrangement, or understanding, other than a revocable proxy, has or shares the power to vote, or
9343 to direct the voting of, shares; except that a member of a national securities exchange is not deemed
9344 to be a beneficial owner of securities held directly or indirectly by it on behalf of another person

9353 if the member is precluded by the rules of the exchange from voting without instruction on
9354 contested matters or matters that may affect substantially the rights or privileges of the holders of
9355 the securities to be voted. When two or more persons agree to act together for the purpose of
9356 voting their shares of the corporation, each member of the group formed thereby is deemed to
9357 have acquired beneficial ownership, as of the date of the agreement, of all shares having voting
9358 power of the corporation beneficially owned by any member of the group.³¹
9359

9360 (c) "Excluded shares" means shares acquired pursuant to an offer for all shares having
9361 voting power if the offer was made within one year before the corporate action for consideration
9362 of the same kind and of a value equal to or less than that paid in connection with the corporate
9363 action.

9364
9365 (7) "Preferred shares" means a class or series of shares the holders of which have preference
9366 over any other class or series of shares with respect to distributions.

9367 ~~(7) "Record shareholder" means the person in whose name shares are registered in the records~~
9368 ~~of the corporation or the beneficial owner of shares to the extent of the rights granted by a nominee~~
9369 ~~certificate on file with the corporation.~~

9370 (8) "Senior executive" means the chief executive officer, chief operating officer, chief
9371 financial officer, or anyone individual in charge of a principal business unit or function.

9372 (9) For purposes of ss. 607.1301-607.1340, "sShareholder" means both a record shareholder,
9373 and a beneficial shareholder, and a voting trust beneficial owner.

9374

³¹ Should we modify the definition of "beneficial owner" in s. 607.01401 to add the concepts in this definition?

9375 **Commentary to Section 607.1301:**

9376 The statute follows FRLLLCA for the most part and the Model Act in certain respects. With very
9377 few exceptions, the changes are considered non-substantive; rather, they are designed to define
9378 certain terms that are used in Article 13 and to remove terms that are already being defined in s.
9379 607.01401. However, the change to the definition of "fair value" is a substantive change in that it
9380 follows FRLLLCA by indicating that fair value is determined, in all cases, without any discounting
9381 for lack of marketability or minority status (i.e., it removes the language that had been added back
9382 in 2005 which qualified such exclusion of discounting for lack of marketability or minority status
9383 for corporations with 10 or fewer shareholders). Thus, the amendment in 2005 had left some
9384 ambiguity in the statute in terms of whether the statutory language implied that, for corporations
9385 with more than 10 shareholders, discounts for lack of marketability and minority status should be
9386 applied. By virtue of the change in the statute, this ambiguity has been resolved with the effect
9387 that fair value, in the context of appraisal rights valuation, should always be determined without
9388 any discount for lack of marketability or minority status.

9389
9390 The statute adds the definition of an "interested transaction" from Section 13.01 of the Model Act.
9391 While this definition is only used in a few places (s. 607.1302(2)(d)), s. 607.1302(1)(d)2., s.
9392 607.1302(2)(c) and [s. 607.1340], it was concluded that the definition of "interested transaction"
9393 was a more fulsome complete definition of the concept that ought to be included in an "interested
9394 transaction."

9395

9396 607.1302 Right of shareholders to appraisal.

9397 (1) A shareholder of a domestic corporation is entitled to appraisal rights, and to obtain
9398 payment of the fair value of that shareholder's shares, in the event of any of the following corporate
9399 actions:

9400 (a) Consummation of a domestication or a conversion of such corporation pursuant
9401 to s. 607.11921 or s. 607.11934~~2~~, as applicable, if shareholder approval is required for the
9402 domestication or the conversion and the shareholder is entitled to vote on the conversion
9403 under s. 607.11931;³²

9404 (b) ~~or the e~~Consummation of a merger to which such corporation is a party:

9405 1. ~~if~~ shareholder approval is required for the merger under s. 607.1103, or
9406 would be required, but for the provisions of s. 607.11035, and the shareholder is
9407 entitled to vote on the merger³², except that appraisal rights shall not be available to
9408 any shareholder of the corporation with respect to shares of any class or series that
9409 remains outstanding after consummation of the merger where the terms of such class
9410 or series have not been materially altered; or

9411 2. ~~if~~ such corporation is a subsidiary and the merger is governed by s.
9412 607.1104;

9413 (c) Consummation of a share exchange to which the corporation is a party as the
9414 corporation whose shares will be acquired ~~if the shareholder is entitled to vote on the~~
9415 exchange³², except that appraisal rights are not available to any shareholder of the
9416 corporation with respect to any class or series of shares of the corporation that is not
9417 exchanged-acquired in the share exchange;

9418 (d) Consummation of a disposition of assets pursuant to s. 607.1202 if the
9419 shareholder is entitled to vote on the disposition, including a sale in dissolution, ~~but not~~
9420 including a sale pursuant to court order or a sale for cash pursuant to a plan by which all or
9421 substantially all of the net proceeds of the sale will be distributed to the shareholders within
9422 1 year after the date of sale; except that appraisal rights shall not be available to any
9423 shareholder of the corporation with respect to shares of any class or series if:

9424 1. Under the terms of the corporate action approved by the shareholders there
9425 is to be distributed to shareholders in cash the corporation's net assets, in excess of a

³² The Model Act grants appraisal rights to non-voting shareholders, while the FBCA and FRLCA only give appraisal rights to shareholders who can vote. This proposal follows the Model Act with respect to this issue in all respects. This draft follows the Model Act on this issue, rather than the existing FBCA and FRLCA provision. This topic will be considered further at the meeting of the Corporations, Securities and Financial Services Committee to be held on Saturday, September 1, 2018.

9426 reasonable amount reserved to meet claims of the type described in ss. 607.1406 and
9427 6070.1407,

9428 (A) Within one year after the shareholders' approval of the action; and

9429 (B) In accordance with their respective interests determined at the time of
9430 distribution, and

9431 2. The disposition of assets is not an interested transaction.

9432 (ed) An amendment of the articles of incorporation with respect to a the class or series
9433 of shares which reduces the number of shares of a class or series owned by the shareholder
9434 to a fraction of a share if the corporation has the obligation or the right to repurchase the
9435 fractional share so created;

9436 (fe) Any other ~~amendment to the articles of incorporation,~~ merger, share exchange,
9437 ~~or~~ disposition of assets, or amendment to the articles of incorporation, in each case to the
9438 extent provided by the articles of incorporation, bylaws, or a resolution of the board of
9439 directors, except that no bylaw or board resolution providing for appraisal rights may be
9440 amended or otherwise altered except by shareholder approval;

9441 (g) An amendment to the articles of incorporation or bylaws of the corporation, the
9442 effect of which is to alter or abolish voting or other rights with respect to such interest in a
9443 manner that is adverse to the interest of such shareholder, except as the right may be
9444 affected by the voting or other rights of new shares then being authorized of a new class or
9445 series of shares.

9446 (h) An amendment to the articles of incorporation or bylaws of a corporation the
9447 effect of which is to adversely affect the interest of the member by altering or abolishing
9448 appraisal rights under this section.

9449
9450 (if) With regard to a class of shares prescribed in the articles of incorporation prior
9451 to October 1, 2003, including any shares within that class subsequently authorized by
9452 amendment, any amendment of the articles of incorporation if the shareholder is entitled
9453 to vote on the amendment and if such amendment would adversely affect such shareholder
9454 by:

9455 1. Altering or abolishing any preemptive rights attached to any of his or her
9456 shares;

9457 2. Altering or abolishing the voting rights pertaining to any of his or her shares,
9458 except as such rights may be affected by the voting rights of new shares then being
9459 authorized of any existing or new class or series of shares;

9460 3. Effecting an exchange, cancellation, or reclassification of any of his or her
9461 shares, when such exchange, cancellation, or reclassification would alter or abolish
9462 the shareholder's voting rights or alter his or her percentage of equity in the
9463 corporation, or effecting a reduction or cancellation of accrued dividends or other
9464 arrearages in respect to such shares;

9465 4. Reducing the stated redemption price of any of the shareholder's
9466 redeemable shares, altering or abolishing any provision relating to any sinking fund
9467 for the redemption or purchase of any of his or her shares, or making any of his or
9468 her shares subject to redemption when they are not otherwise redeemable;

9469 5. Making noncumulative, in whole or in part, dividends of any of the
9470 shareholder's preferred shares which had theretofore been cumulative;

9471 6. Reducing the stated dividend preference of any of the shareholder's
9472 preferred shares; or

9473 7. Reducing any stated preferential amount payable on any of the
9474 shareholder's preferred shares upon voluntary or involuntary liquidation;

9475 (jg) An amendment of the articles of incorporation of a social purpose corporation
9476 to which s. 607.504 or s. 607.505 applies;

9477 (kh) An amendment of the articles of incorporation of a benefit corporation to which
9478 s. 607.604 or s. 607.605 applies;

9479 (li) A merger, domestication,³³ conversion, or share exchange of a social purpose
9480 corporation to which s. 607.504 applies; or

9481 (mj) A merger, domestication³⁵, conversion, or share exchange of a benefit
9482 corporation to which s. 607.604 applies.

9483 (2) Notwithstanding subsection (1), the availability of appraisal rights under paragraphs
9484 (1)(a), (b), (c), ~~and~~ (d), and (e) shall be limited in accordance with the following provisions:

9485 (a) Appraisal rights shall not be available for the holders of shares of any class or
9486 series of shares which is:

³³ Modify ss. 607.504 and 607.604 so that that they apply to domestications.

9487 1. A covered security under s. 18(b)(1)(A) or (B) of the Securities Act of 1933
9488 Listed on the New York Stock Exchange or the American Stock Exchange or
9489 designated as a national market system security on an interdealer quotation system
9490 by the National Association of Securities Dealers, Inc.; or

9491 2. Traded in an organized market and Not so listed or designated, but has at
9492 least 2,000 shareholders and the outstanding shares of such class or series have a
9493 market value of at least \$20 \$40 million, exclusive of the value of such shares held
9494 by its subsidiaries, senior executives, and directors, and by any beneficial
9495 shareholders and any voting trust beneficial owner owning more than 10 percent of
9496 such shares; or-

9497 3. Issued by an open end management investment company registered with the
9498 Securities and Exchange Commission under the Investment Company Act of 1940
9499 and which may be redeemed at the option of the holder at net asset value.

9500 (b) The applicability of paragraph (a) shall be determined as of:

9501 1. The record date fixed to determine the shareholders entitled to receive
9502 notice of, ~~and to vote at,~~ the meeting of shareholders to act upon the corporate action
9503 requiring appraisal rights or, in the case of an offer made pursuant to s. 607.11035,
9504 the date of such offer; or

9505 2. If there will be no meeting of shareholders and no offer is made
9506 pursuant to s. 607.11035, the close of business on the day before the consummation
9507 of the ~~on which the board of directors adopts the resolution recommending such~~
9508 corporate action or the effective date of the amendment of the articles, as
9509 applicable.³⁴

9510 (c) Paragraph (a) shall not be applicable and appraisal rights shall be available pursuant
9511 to subsection (1) for the holders of any class or series of shares where the corporate action
9512 is an interested transaction.;

9513 ~~who are required by the terms of the corporate action requiring appraisal~~
9514 ~~rights to accept for such shares anything other than cash or shares of any class or~~
9515 ~~any series of shares of any corporation, or any other proprietary interest of any other~~
9516 ~~entity, that satisfies the standards set forth in paragraph (a) at the time the corporate~~
9517 ~~action becomes effective;~~

³⁴ A corollary change should be made to FRLICA.

9518 ~~(d) Paragraph (a) shall not be applicable and appraisal rights shall be available pursuant~~
9519 ~~to subsection (1) for the holders of any class or series of shares if:~~

9520 ~~1. Any of the shares or assets of the corporation are being acquired or~~
9521 ~~converted, whether by merger, share exchange, or otherwise, pursuant to the~~
9522 ~~corporate action by a person, or by an affiliate of a person, who:~~

9523 ~~a. Is, or at any time in the 1-year period immediately preceding~~
9524 ~~approval by the board of directors of the corporate action requiring appraisal~~
9525 ~~rights was, the beneficial owner of 20 percent or more of the voting power~~
9526 ~~of the corporation, excluding any shares acquired pursuant to an offer for~~
9527 ~~all shares having voting power if such offer was made within 1 year prior~~
9528 ~~to the corporate action requiring appraisal rights for consideration of the~~
9529 ~~same kind and of a value equal to or less than that paid in connection with~~
9530 ~~the corporate action; or~~

9531 ~~b. Directly or indirectly has, or at any time in the 1 year period~~
9532 ~~immediately preceding approval by the board of directors of the corporation~~
9533 ~~of the corporate action requiring appraisal rights had, the power,~~
9534 ~~contractually or otherwise, to cause the appointment or election of 25~~
9535 ~~percent or more of the directors to the board of directors of the corporation;~~
9536 ~~or~~

9537 ~~2. Any of the shares or assets of the corporation are being acquired or~~
9538 ~~converted, whether by merger, share exchange, or otherwise, pursuant to such~~
9539 ~~corporate action by a person, or by an affiliate of a person, who is, or at any time in~~
9540 ~~the 1-year period immediately preceding approval by the board of directors of the~~
9541 ~~corporate action requiring appraisal rights was, a senior executive or director of the~~
9542 ~~corporation or a senior executive of any affiliate thereof, and that senior executive~~
9543 ~~or director will receive, as a result of the corporate action, a financial benefit not~~
9544 ~~generally available to other shareholders as such, other than:~~

9545 ~~a. Employment, consulting, retirement, or similar benefits~~
9546 ~~established separately and not as part of or in contemplation of the corporate~~
9547 ~~action;~~

9548 ~~b. Employment, consulting, retirement, or similar benefits~~
9549 ~~established in contemplation of, or as part of, the corporate action that are~~
9550 ~~not more favorable than those existing before the corporate action or, if~~
9551 ~~more favorable, that have been approved on behalf of the corporation in the~~
9552 ~~same manner as is provided in s. 607.0832; or~~

9553 e. ~~In the case of a director of the corporation who will, in the~~
9554 ~~corporate action, become a director of the acquiring entity in the corporate~~
9555 ~~action or one of its affiliates, rights and benefits as a director or governor~~
9556 ~~that are provided on the same basis as those afforded by the acquiring entity~~
9557 ~~generally to other directors or governors of such entity or such affiliate.~~

9558 ~~(e) For the purposes of paragraph (d) only, the term "beneficial owner" means any~~
9559 ~~person who, directly or indirectly, through any contract, arrangement, or understanding,~~
9560 ~~other than a revocable proxy, has or shares the power to vote, or to direct the voting of,~~
9561 ~~shares, provided that a member of a national securities exchange shall not be deemed to~~
9562 ~~be a beneficial owner of securities held directly or indirectly by it on behalf of another~~
9563 ~~person solely because such member is the recordholder of such securities if the member~~
9564 ~~is precluded by the rules of such exchange from voting without instruction on contested~~
9565 ~~matters or matters that may affect substantially the rights or privileges of the holders of~~
9566 ~~the securities to be voted. When two or more persons agree to act together for the purpose~~
9567 ~~of voting their shares of the corporation, each member of the group formed thereby shall~~
9568 ~~be deemed to have acquired beneficial ownership, as of the date of such agreement, of all~~
9569 ~~shares having voting power shares of the corporation beneficially owned by any member~~
9570 ~~of the group.~~

9571 (3) Notwithstanding any other provision of this section, the articles of incorporation as
9572 originally filed or any amendment to the articles of incorporation thereto may limit or eliminate
9573 appraisal rights for any class or series of preferred shares, except that:

9574 (a) ~~but a~~ No such limitation or elimination shall be effective if the class or series
9575 does not have the right to vote separately as a voting group (alone or as part of a group) on
9576 the action or if the action is a domestication under s. 607.11920 or a conversion under s.
9577 607. 11901, or a merger having a similar effect as a domestication or conversion in which
9578 the domesticated eligible entity or the converted eligible entity, as applicable, is an eligible
9579 entity, and

9580 (b) Any such limitation or elimination contained in an amendment to the articles of
9581 incorporation that limits or eliminates appraisal rights for any of such shares that are
9582 outstanding immediately ~~before~~ prior to the effective date of such amendment or that the
9583 corporation is or may be required to issue or sell thereafter pursuant to any conversion,
9584 exchange, or other right existing immediately before the effective date of such amendment
9585 shall not apply to any corporate action that becomes effective within 1 year ~~after the~~
9586 effective of that date ~~of such amendment~~ if such action would otherwise afford appraisal
9587 rights.

9588 ~~(4) A shareholder entitled to appraisal rights under this chapter may not challenge a~~
9589 ~~completed corporate action for which appraisal rights are available unless such corporate action:~~

9590 ~~(a) — Was not effectuated in accordance with the applicable provisions of this section~~
9591 ~~or the corporation's articles of incorporation, bylaws, or board of directors' resolution~~
9592 ~~authorizing the corporate action; or~~

9593 ~~(b) — Was procured as a result of fraud or material misrepresentation.~~

9594

9595 **Commentary to Section 607.1302:**

9596 Consistent with FRLUCA, this section is revised to separate out conversions from mergers into
9597 two separate subparagraphs rather than continuing to include them within the same subparagraph.
9598 [In addition, with respect to conversions, domestications, mergers and share exchanges and
9599 consistent with the approach of the Model Act, the requirement that the shareholder be entitled to
9600 vote on the transaction in order to have appraisal rights has been removed.]

9601
9602 Because of the addition of s. 607.11035 relating to "mop up" mergers, the requirement with respect
9603 to granting appraisal rights in connection with mergers that shareholder approval must be required
9604 is overridden with respect to those transactions that are subject to s. 607.11035. In other words,
9605 the minority shareholder in a s. 607.11035 "mop up" merger would be entitled to appraisal rights
9606 in connection with such merger even though the statute expressly overrides any need to secure
9607 shareholder approval for such "mop up" merger transactions.

9608
9609 Because the transactions with respect to which domestications can occur have been expanded to
9610 follow the expanded scope set forth in the Model Act, the Model Act provision triggering appraisal
9611 rights with respect to certain domestication transactions from the Model Act has been added to the
9612 statute.

9613
9614 The public company override of appraisal rights has been modified to follow the Model Act by
9615 referencing "covered securities," and trading in an organized market where the market value is at
9616 least \$20 million instead of \$10 million and by adding the reference to issuances by open end
9617 management investment companies registered under the 1940 Act. However, this public company
9618 override has certain exceptions. An additional exception relating to the consummation of a
9619 disposition of assets pursuant to s. 607.1202 has been added consistent with the Model Act and
9620 FRLUCA.

9621
9622 The provisions in s. 607.1302(4) have, consistent with the Model Act, been moved to new s.
9623 607.1340, with certain clean-up changes to mirror the language used in s. 607.1340. However,
9624 certain of the aspects of Section 13.40 of the Model Act, which are not covered at all in s.
9625 607.1302(4) have not been adopted, as more specifically described in the commentary to s.
9626 607.1340.

9627
9628 FRLUCA contains two additional grounds for appraisal rights that were considered: (i) following
9629 s. 605.1006(1)(h), to the extent authorized in the articles of incorporation or by laws or a
9630 shareholders' agreement under s. 607.0732. and (ii) following s. 605.1006(2), the right to abolish
9631 appraisal rights in an operating agreement. While a shareholders agreement under s. 607.0732
9632 might arguably abolish appraisal rights if such change does not violate fundamental public policy,
9633 as a general rule, the co-chairs do not believe that these provisions should be added to the FBCA
9634 in the context of a corporation (compared to an LLC).

9635 607.1303 Assertion of rights by nominees and beneficial owners.

9636 (1) A record shareholder may assert appraisal rights as to fewer than all the shares
9637 registered in the record shareholder's name but owned by a beneficial shareholder or a voting trust
9638 beneficial owner only if the record shareholder objects with respect to all shares of the class or
9639 series owned by the beneficial shareholder or a voting trust beneficial owner and notifies the
9640 corporation in writing of the name and address of each beneficial shareholder or voting trust
9641 beneficial owner on whose behalf appraisal rights are being asserted. The rights of a record
9642 shareholder who asserts appraisal rights for only part of the shares held of record in the record
9643 shareholder's name under this subsection shall be determined as if the shares as to which the record
9644 shareholder objects and the record shareholder's other shares were registered in the names of
9645 different record shareholders.

9646 (2) A beneficial shareholder and a voting trust beneficial owner may assert appraisal
9647 rights as to shares of any class or series held on behalf of the shareholder only if such shareholder:

9648 (a) Submits to the corporation the record shareholder's written consent to the
9649 assertion of such rights no later than the date referred to in s. 607.1322(2)(b)2.

9650 (b) Does so with respect to all shares of the class or series that are beneficially
9651 owned by the beneficial shareholder or a voting trust beneficial owner.

9652

9653 **Commentary to Section 607.1303:**

9654 No substantive changes have been made to this section.

9655

9656 607.1320 Notice of appraisal rights.

9657 (1) If a proposed corporate action described in s. 607.1302(1) is to be submitted to a vote
9658 at a shareholders' meeting, the meeting notice (or where no approval of such action is required
9659 pursuant to s. 607.11035, the offer made pursuant to s. 607.11035) must state that the corporation
9660 has concluded that shareholders are, are not, or may be entitled to assert appraisal rights under this
9661 chapter. If the corporation concludes that appraisal rights are or may be available, a copy of ss.
9662 607.1301-607.133340 must accompany the meeting notice or offer, as applicable sent to those
9663 record shareholders entitled to exercise appraisal rights.

9664 (2) In a merger pursuant to s. 607.1104, the parent corporation must notify in writing all
9665 record shareholders of the subsidiary who are entitled to assert appraisal rights that the corporate
9666 action became effective. Such notice must be sent within 10 days after the corporate action became
9667 effective and include the materials described in s. 607.1322.

9668 (3) If a the proposed corporate action described in s. 607.1302(1) is to be approved by
9669 written consent of the shareholders pursuant to s. 607.0704³⁵ other than by a shareholders'
9670 meeting:

9671 (a) Written notice that appraisal rights are, are not, or may be available must be sent
9672 to each member from whom a consent is solicited at the time consent of such member is
9673 first solicited, and if the corporation has concluded that appraisal rights are or may be
9674 available, a copy of ss. 607.1301-607.1340 must accompany such written notice; and

9675 (b) Written notice that appraisal rights are, are not, or may be available must be
9676 delivered, at least 10 days before the corporate action becomes effective, to all
9677 nonconsenting and nonvoting members, and, if the corporation has concluded that
9678 appraisal rights are or may be available, a copy of ss. 607.1301-607.1340 must
9679 accompany such written notice. the notice referred to in subsection (1) must be sent to all
9680 shareholders at the time that consents are first solicited pursuant to s. 607.0704, whether
9681 or not consents are solicited from all shareholders, and include the materials described in
9682 s. 607.1322.

9683 (4) Where a corporate action described in s. 607.1302(1) is proposed or a merger
9684 pursuant to s. 607.1104 is effected, and the corporation concludes that appraisal rights are or may
9685 be available, the notice referred to in subsection (1), paragraph (3)(a), or paragraph (3)(b) must be
9686 accompanied by:

9687 (a) Financial statements of the corporation that issued the shares that may be or are
9688 subject to appraisal rights, consisting of a balance sheet as of the end of the fiscal year

³⁵ A similar change should be made in the corollary section of FRLICA.

9689 ending not more than 16 months before the date of the notice, an income statement for
9690 that fiscal year, and a cash flow statement for that fiscal year; however, if such financial
9691 statements are not reasonably available, the corporation shall provide reasonably
9692 equivalent financial information; and

9693 (b) The latest available interim financial statements, including year-to-date through
9694 the end of the interim period, of such corporation, if any.

9695 (5) The right to receive the information described in subsection (4) may be waived in
9696 writing by a shareholder before or after the corporate action is effected.

9697

9698 **Commentary to Section 607.1320:**

9699 This section has been harmonized with s. 605.1063, which in turn, when drafted, had been based
9700 in large part on the corollary provision in the Model Act. In addition, language addressing
9701 coordination with new s. 607.11035 relating to "mop up" mergers have been added.

9702
9703 Most importantly, consistent with FRLICA, the provisions of this section have been modified to
9704 eliminate certain circularity that existed under the prior statute relating to corporate actions that
9705 were being approved other than by way of vote at a shareholders meeting, such as an approval by
9706 way of written consent. The change, which follows the parallel provision in FRLICA, now (i)
9707 contemplates providing written notice of the appraisal rights being sent to a member from whom
9708 a consent is being solicited at the time the consent of that member is first solicited rather than
9709 arguably having to send notice of appraisal rights to all shareholders at the time the first
9710 shareholder's consent is being solicited, and (ii) adds that, when such a transaction is being
9711 approved by written consent rather than by a vote at a shareholders meeting, notice of the appraisal
9712 rights must be sent at least 10 days before the corporate action becomes effective to any
9713 nonconsenting or nonvoting members.

9714
9715 The statute has also been updated to make it clear that certain financial statements need to be
9716 provided to the shareholders together with the written notice indicating that appraisal rights may
9717 be available, which again is consistent with the provisions of FRLICA. However, subsection (5)
9718 has been added to make it clear that the right to receive the financial statement information can be
9719 waived in writing by any shareholder either before or after the particular corporate action is
9720 effected.

9721

9722 607.1321 Notice of intent to demand payment.

9723 (1) If a proposed corporate action requiring appraisal rights under s. 607.1302 is
9724 submitted to a vote at a shareholders' meeting, ~~or is submitted to a shareholder pursuant to a~~
9725 ~~consent vote under s. 607.0704,~~ a shareholder who wishes to assert appraisal rights with respect to
9726 any class or series of shares:

9727 (a) Must deliver to the corporation before the vote is taken, ~~or within 20 days after~~
9728 ~~receiving the notice pursuant to s. 607.1320(3) if action is to be taken without a shareholder~~
9729 ~~meeting,~~ written notice of the shareholder's intent to demand payment if the proposed
9730 corporate action is effectuated; and-

9731 (b) Must not vote, or cause or permit to be voted, any shares of such class or series
9732 in favor of the proposed corporate action.

9733 (2) If a proposed corporate action requiring appraisal rights under s. 607.1302 is to be
9734 approved by written consent, a shareholder who wishes to assert appraisal rights with respect to
9735 any class or series of shares shall not sign a consent in favor of the proposed corporate action with
9736 respect to that class or series of shares.

9737 (3) If a proposed corporate action specified in s. 607.1302(1) does not require
9738 shareholder approval pursuant to s. 607.11035, a shareholder who wishes to assert appraisal rights
9739 with respect to any class or series of shares:

9740 (a) Shall deliver to the corporation before the shares are purchased pursuant to the
9741 offer written notice of the shareholder's intent to demand payment if the proposed action
9742 is effected; and

9743 (b) Shall not tender, or cause or permit to be tendered, any shares of such class or
9744 series in response to such offer.

9745 (4) A shareholder who may otherwise be entitled to appraisal rights, but does not satisfy
9746 the requirements of subsection (1), (2) or (3) is not entitled to payment under this chapter.

9747

9748 **Commentary to Section 607.1321:**

9749 Similar to s. 607.1320, this section has been updated to be harmonized with s. 605.1064 of
9750 FRLCA, which in turn had been modeled after the provisions in the corollary section of the
9751 Model Act. As with s. 607.1320, the procedure applicable to the shareholder in terms of noticing
9752 an intent to demand payment has been modified so that the provisions relating to transactions that
9753 are approved by written consent, rather than at a shareholders' meeting, are separately addressed
9754 to avoid the circularity that existed under the previous version of the statute. In addition, because
9755 of the addition of s. 607.11035 relating to "mop up" mergers where no vote is required, the process
9756 for a shareholder to assert appraisal rights in that type of transaction is added as new subsection
9757 (3).
9758

9759 607.1322 Appraisal notice and form.

9760 (1) If a ~~proposed~~ corporate action requiring appraisal rights under s. 607.1302(1)
9761 becomes effective, the corporation must deliver a written appraisal notice and form required by
9762 paragraph (2)(a) to all shareholders who satisfied the requirements of s. 607.1321(1), (2) or (3).
9763 In the case of a merger under s. 607.1104, the parent must deliver a written appraisal notice and
9764 form to all record shareholders who may be entitled to assert appraisal rights.

9765 (2) The appraisal notice must be delivered ~~sent~~ no earlier than the date the corporate
9766 action became effective, and no later than 10 days after such date, and must:

9767 (a) Supply a form that specifies the date that the corporate action became effective and
9768 that provides for the shareholder to state:

9769 1. The shareholder's name and address.

9770 2. The number, classes, and series of shares as to which the shareholder asserts
9771 appraisal rights.

9772 3. That the shareholder did not vote for the transaction.

9773 4. Whether the shareholder accepts the corporation's offer as stated in
9774 subparagraph (b)4.

9775 5. If the offer is not accepted, the shareholder's estimated fair value of the shares
9776 and a demand for payment of the shareholder's estimated value plus accrued interest.

9777 (b) State:

9778 1. Where the form must be sent and where certificates for certificated shares must
9779 be deposited and the date by which those certificates must be deposited, which date may
9780 not be earlier than the date by which the corporation must receive ~~for receiving~~ the
9781 required form under subparagraph 2.

9782 2. A date by which the corporation must receive the form, which date may not be
9783 fewer than 40 nor more than 60 days after the date the subsection (1) appraisal notice and
9784 form are sent, and state that the shareholder shall have waived the right to demand
9785 appraisal with respect to the shares unless the form is received by the corporation by such
9786 specified date.

9787 3. The corporation's estimate of the fair value of the shares.

9788 4. An offer to each shareholder who is entitled to appraisal rights to pay the
9789 corporation's estimate of fair value set forth in subparagraph 3.

9790 5. That, if requested in writing, the corporation will provide to the shareholder so
9791 requesting, within 10 days after the date specified in subparagraph 2., the number of
9792 shareholders who return the forms by the specified date and the total number of shares
9793 owned by them.

9794 6. The date by which the notice to withdraw under s. 607.1323 must be received,
9795 which date must be within 20 days after the date specified in subparagraph 2.

9796 7. If not previously provided, accompanied by a copy of ss. 607.1301-607.1340.

9797 ~~(c) Be accompanied by:~~

9798 1. ~~Financial statements of the corporation that issued the shares to be~~
9799 ~~appraised, consisting of a balance sheet as of the end of the fiscal year ending not~~
9800 ~~more than 15 months prior to the date of the corporation's appraisal notice, an~~
9801 ~~income statement for that year, a cash flow statement for that year, and the latest~~
9802 ~~available interim financial statements, if any.~~

9803 2. ~~A copy of ss. 607.1301-607.1333.~~

9804

9805 **Commentary to Section 607.1322:**

9806 The changes to this section are mostly non-substantive. Subsection (2)(c) has been deleted
9807 because, by the time the appraisal notice and form is being provided to those shareholders
9808 indicating their intent to exercise appraisal rights, such shareholders will have already received the
9809 appropriate financial statements and a copy of the appraisal statute earlier on in the process.

9810 The requirement to provide financial statements in old subsection (3) is now included in s.
9811 607.1320(4).

9812

9813 607.1323 Perfection of rights; right to withdraw.

9814 (1) A shareholder who receives notice pursuant to s. 607.1322 and who wishes to
9815 exercise appraisal rights must ~~sign~~ ~~execute~~ and return the form received pursuant to s. 607.1322(1)
9816 and, in the case of certificated shares, deposit the shareholder's certificates in accordance with the
9817 terms of the notice by the date referred to in the notice pursuant to s. 607.1322(2)(b)2. Once a
9818 shareholder deposits that shareholder's certificates or, in the case of uncertificated shares, returns
9819 the ~~signed~~ ~~executed~~ forms, that shareholder loses all rights as a shareholder, unless the shareholder
9820 withdraws pursuant to subsection (2).

9821 (2) A shareholder who has complied with subsection (1) may nevertheless decline to
9822 exercise appraisal rights and withdraw from the appraisal process by so notifying the corporation
9823 in writing by the date set forth in the appraisal notice pursuant to s. 607.1322(2)(b)6. A shareholder
9824 who fails to so withdraw from the appraisal process may not thereafter withdraw without the
9825 corporation's written consent.

9826 (3) A shareholder who does not sign ~~execute~~ and return the form and, in the case of
9827 certificated shares, deposit that shareholder's share certificates if required, each by the date set
9828 forth in the notice described in s. ~~607.1322(2) subsection (2),~~ shall not be entitled to payment under
9829 ss. 607.1301-607.1340 ~~this chapter.~~

9830

9831 **Commentary to Section 607.1323:**

9832 There are no substantive changes to this section.

9833

9834 607.1324 Shareholder's acceptance of corporation's offer.

9835 (1) If the shareholder states on the form provided in s. 607.1322(1) that the shareholder
9836 accepts the offer of the corporation to pay the corporation's estimated fair value for the shares, the
9837 corporation shall make such payment to the shareholder within 90 days after the corporation's
9838 receipt of the form from the shareholder.

9839 (2) Upon payment of the agreed value, the shareholder shall cease to have any right to
9840 receive any further consideration with respect to such ~~cease to have any interest in the~~ shares.

9841

9842 **Commentary to Section 607.1324:**

9843 The language in subsection (2) has been changed so as to make it clear that a shareholder who
9844 receives payment of an agreed value ceases to have any right to receive any further consideration
9845 with respect to the shares rather than such shareholder ceasing to have any interest in the shares
9846 given that other sections of Article 13 will have already caused the shareholder to cease to have
9847 any interest in the shares themselves.

9848

9849 A decision was made not to add subsection (b) from Model Act s. 13.24 requiring delivery of
9850 financial statements, an estimate of fair value and a right to demand further payment because such
9851 information will have already previously been provided to the shareholder.

9852

9853 Model Act s. 13.25 After-acquired shares.

9854 Model Act s. 13.25 covers after-acquired shares and allows a corporation to withhold payments
9855 required by Model Act s. 13.24 with respect to certain after-acquired shares. This provision
9856 coordinates with the provisions of Model Act s. 13.24 that require payment of the corporation's
9857 estimate of fair value prior to the resolution of the appraised value. Since a decision was made not
9858 to include this concept of early payment in the FBCA, this Model Act provision was considered
9859 unnecessary and it has not been added to this proposal.

9860 While it is not expressly stated in the commentary to the 2002 proposal, it is clear that a decision
9861 was made at that time not to include this provision in the FBCA. This provision is not in FRLCA,
9862 and is believed unnecessary if the advance payment provisions from the Model Act that are in s.
9863 13.24 are not added to the FBCA.

9864

9865 607.1326 Procedure if shareholder is dissatisfied with offer.

9866 (1) A shareholder who is dissatisfied with the corporation's offer as set forth pursuant to
9867 s. 607.1322(2)(b)4. must notify the corporation on the form provided pursuant to s. 607.1322(1)
9868 of that shareholder's estimate of the fair value of the shares and demand payment of that estimate
9869 plus accrued interest.

9870 (2) A shareholder who fails to notify the corporation in writing of that shareholder's
9871 demand to be paid the shareholder's stated estimate of the fair value plus accrued interest under
9872 subsection (1) within the timeframe set forth in s. 607.1322(2)(b)2. waives the right to demand
9873 payment under this section and shall be entitled only to the payment offered by the corporation
9874 pursuant to s. 607.1322(2)(b)4.

9875

9876 **Commentary to Section 607.1326:**

9877 No substantive changes have been made to this section.

9878

9879 607.1330 Court action.

9880 (1) If a shareholder makes demand for payment under s. 607.1326 which remains
9881 unsettled, the corporation shall commence a proceeding within 60 days after receiving the payment
9882 demand and petition the court to determine the fair value of the shares and accrued interest from
9883 the date of the corporate action. If the corporation does not commence the proceeding within the
9884 60-day period, any shareholder who has made a demand pursuant to s. 607.1326 may commence
9885 the proceeding in the name of the corporation.

9886 (2) The proceeding shall be commenced in the circuit court in the applicable county
9887 appropriate court of the county in which the corporation's principal office, or, if none, its registered
9888 office, in this state is located. If by virtue of the corporate action becoming effective the entity has
9889 become the corporation is a foreign eligible entity corporation without a registered office in this
9890 state, the proceeding shall be commenced in the county in this state in which the principal office
9891 or registered office of the domestic corporation merged with the foreign eligible entity corporation
9892 was located immediately before the time the corporate action became effective; if it has, and
9893 immediately before the corporate action became effective had, no principal office in this state, then
9894 in the county in which the corporation has, or immediately before the time the corporate action
9895 became effective had, an office in this state; or if none in this state, then in the county in which the
9896 corporation's registered office is or was last located. at the time of the transaction.

9897 (3) All shareholders, whether or not residents of this state, whose demands remain
9898 unsettled shall be made parties to the proceeding as in an action against their shares. The
9899 corporation shall serve a copy of the initial pleading in such proceeding upon each shareholder
9900 party who is a resident of this state in the manner provided by law for the service of a summons
9901 and complaint and upon each nonresident shareholder party by registered or certified mail or by
9902 publication as provided by law.

9903 (4) The jurisdiction of the court in which the proceeding is commenced under subsection
9904 (2) is plenary and exclusive. If it so elects, the court may appoint one or more persons as appraisers
9905 to receive evidence and recommend a decision on the question of fair value. The appraisers shall
9906 have the powers described in the order appointing them or in any amendment to the order. The
9907 shareholders demanding appraisal rights are entitled to the same discovery rights as parties in other
9908 civil proceedings. There shall be no right to a jury trial.

9909 (5) Each shareholder made a party to the proceeding is entitled to judgment for the
9910 amount of the fair value of such shareholder's shares, plus accrued interest, as found by the court.

9911 (6) The corporation shall pay each such shareholder the amount found to be due within
9912 10 days after final determination of the proceedings. Upon payment of the judgment, the
9913 shareholder shall cease to have any rights to receive any further consideration with respect to such

9914 ~~interest in the~~ shares other than any amounts ordered to be paid for court costs and attorney's fees
9915 under s. 607.1331.

9916

9917 **Commentary to Section 607.1330:**

9918 In subsection (2), the concept of "applicable county" (which has been added to the definitions in
9919 s. 607.01401) has been incorporated into this section. Some additional language has been added to
9920 deal with situations where the corporation, by virtue of the corporate action becoming effective,
9921 has become a foreign entity and what to do where that corporation did not have a principal office
9922 in Florida prior to the transaction. In addition, in subsection (6), language has been clarified such
9923 that, upon payment of the judgment, the shareholder ceases to have any right to receive any further
9924 consideration with respect to the shares rather than such shareholder ceasing to have any interest
9925 in the shares, given that other sections of Article 13 will have already caused the shareholder to
9926 cease to have any interest in the shares themselves. However, this provision is not intended to
9927 eliminate rights to receive reimbursement for court costs and attorney's fees that might be assessed
9928 under s. 607.1331 (and language has been added to reflect this concept).

9929

9930 Other than these clarifying changes, no substantive changes have been made to this section.

9931

9932 607.1331 Court costs and counsel fees.

9933 (1) The court in an appraisal proceeding shall determine all costs of the proceeding,
9934 including the reasonable compensation and expenses of appraisers appointed by the court. The
9935 court shall assess the costs against the corporation, except that the court may assess costs against
9936 all or some of the shareholders demanding appraisal, in amounts the court finds equitable, to the
9937 extent the court finds such shareholders acted arbitrarily, vexatiously, or not in good faith with
9938 respect to the rights provided by this chapter.

9939 (2) The court in an appraisal proceeding may also assess the fees and expenses of counsel
9940 and experts for the respective parties, in amounts the court finds equitable:

9941 (a) Against the corporation and in favor of any or all shareholders demanding
9942 appraisal if the court finds the corporation did not substantially comply with ss. 607.1320
9943 and 607.1322; or

9944 (b) Against either the corporation or a shareholder demanding appraisal, in favor of
9945 any other party, if the court finds that the party against whom the fees and expenses are
9946 assessed acted arbitrarily, vexatiously, or not in good faith with respect to the rights
9947 provided by this chapter.

9948 (3) If the court in an appraisal proceeding finds that the services of counsel for any
9949 shareholder were of substantial benefit to other shareholders similarly situated, and that the fees
9950 for those services should not be assessed against the corporation, the court may award to such
9951 counsel reasonable fees to be paid out of the amounts awarded the shareholders who were
9952 benefited.

9953 (4) To the extent the corporation fails to make a required payment pursuant to s.
9954 607.1324, the shareholder may sue directly for the amount owed and, to the extent successful, shall
9955 be entitled to recover from the corporation all costs and expenses of the suit, including
9956 attorneyseounsel fees.

9957

9958 **Commentary to Section 607.1331:**

9959 The existing statute follows the Model Act (and matches the corollary provision in FRLICA), so
9960 only minor clean-up changes have been made.

9961

9962 607.1332 Disposition of acquired shares.

9963 Shares acquired by a corporation pursuant to payment of the agreed value thereof or
9964 pursuant to payment of the judgment entered therefor, as provided in this chapter, may be held and
9965 disposed of by such corporation as authorized but unissued shares of the corporation, except that,
9966 in the case of a merger or share exchange, they may be held and disposed of as the plan of merger
9967 or share exchange otherwise provides. The shares of the survivor ~~surviving corporation~~ into which
9968 the shares of such shareholders demanding appraisal rights would have been converted had they
9969 assented to the merger shall have the status of authorized but unissued shares of the survivor
9970 ~~surviving corporation~~.

9971

9972 **Commentary to Section 607.1332:**

9973 This is not a Model Act provision. Rather it is an existing FBCA provision that matches the
9974 corollary provision in FRLCA. No substantive changes were made to this section.

9975

9976 607.1333 Limitation on corporate payment.

9977 (1) No payment shall be made to a shareholder seeking appraisal rights if, at the time of
9978 payment, the corporation is unable to meet the distribution standards of s. 607.06401. In such
9979 event, the shareholder shall, at the shareholder's option:

9980 (a) Withdraw his or her notice of intent to assert appraisal rights, which shall in such
9981 event be deemed withdrawn with the consent of the corporation; or

9982 (b) Retain his or her status as a claimant against the corporation and, if it is
9983 liquidated, be subordinated to the rights of creditors of the corporation, but have rights
9984 superior to the shareholders not asserting appraisal rights, and if the corporation ~~it~~ is not
9985 liquidated, retain his or her right to be paid for the shares, which right the corporation
9986 shall be obliged to satisfy when the restrictions of this section do not apply.

9987 (2) The shareholder shall exercise the option under paragraph (1)(a) or paragraph (1)(b)
9988 by written notice filed with the corporation within 30 days after the corporation has given written
9989 notice that the payment for shares cannot be made because of the restrictions of this section. If the
9990 shareholder fails to exercise the option, the shareholder shall be deemed to have withdrawn his or
9991 her notice of intent to assert appraisal rights.

9992

9993 **Commentary to Section 607.1333:**

9994 This is not a Model Act provision. Rather it is an existing FBCA provision that matches the
9995 corollary provision in FRLCA. No substantive changes were made to this section.

9996

9997 607.1340 Other remedies limited.

9998 (1) A shareholder entitled to appraisal rights under this chapter may not challenge a
9999 completed corporate action for which appraisal rights are available unless such corporate action:

10000 (a) Was not authorized and approved in accordance with the applicable provisions of
10001 this chapter;

10002 (b) Was procured as a result of fraud, a material misrepresentation, or an omission of a
10003 material fact necessary to make statements made, in light of the circumstances in which they
10004 were made, not misleading;

10005 [(c) Is an interested transaction;³⁶] or

10006 [(d) Is approved by less than unanimous consent of the voting shareholders pursuant to s.
10007 607.0704 if:

10008 1. The challenge to the corporate action is brought by a shareholder who did not
10009 consent and as to whom notice of the approval of the corporate action was not effective
10010 at least 10 days before the corporate action was effected; and

10011 2. The proceeding challenging the corporate action is commenced within 10 days
10012 after notice of the approval of the corporate action is effective as to the shareholder
10013 bringing the proceeding.]³⁷

10014 (2) Nothing in this section will operate to override or supersede any of the provisions of s.
10015 607.0832.

10016

³⁶ This provision is a Model Act provision, but is not currently in the FBCA or in FRLUCA. This provision was in FRLUCA when it was originally adopted in 2013, but this provision was removed in 2015 pending consideration of this provision as part of the comprehensive review of the FBCA giving rise to this proposal. This provision will be considered further at the August 21, 2018 meeting of the Subcommittee.

³⁷ This provision will be considered at the August 31, 2018 meeting of the Subcommittee.

10017 **Commentary to Section 607.1340:**

10018 This section follows Section 13.40 of the Model Act conceptually but uses, for the most part, the
10019 somewhat different language that already appeared in Section 607.1302(4) prior to the updated
10020 statute. The language in the existing statute was believed to more clearly communicate that, in
10021 those situations where appraisal rights are available, such appraisal rights serve as the remedy for
10022 an objecting shareholder rather than stating that all rights to contest have been taken away after
10023 shareholders have approved a corporate action.

10024
10025 [In addition, the Subcommittee determined to add the carve outs addressing both interested
10026 transactions and transactions approved by less than unanimous consent of the voting shareholders
10027 under certain circumstances. **Corollary change should be made to s. 605.1072 of FRLCA.**]

10028
10029 Subsection (3) has been added to make clear that this provision is not intended to override the
10030 rights or operative provisions of Section 607.0832 relating to conflict of interest transactions.

10031

10032
10033
10034
10035
10036
10037
10038
10039
10040
10041
10042
10043
10044
10045
10046
10047
10048
10049

ARTICLE 14

DISSOLUTION

607.1401 Dissolution by incorporators or directors.

If a corporation has not yet issued shares, its board of directors, or a majority of the incorporators, if it has no board of ~~or directors, of a corporation that has not issued shares or has not commenced business~~ may dissolve the corporation by delivering to the ~~D~~department of State for filing articles of dissolution that set forth:

- (1) The name of the corporation;
- (2) The date of its incorporation ~~filing of its articles of incorporation~~;
- (3) ~~Either:~~
 - ~~(a) That none of the corporation's shares have been issued, or~~
 - ~~(b) That the corporation has not commenced business;~~
- (4) That no debt of the corporation remains unpaid;
- (5) That the net assets of the corporation remaining after winding up have been distributed to the shareholders, if shares were issued; and
- (6) That a majority of the incorporators or directors authorized the dissolution.

10050 **Commentary to Section 607.1401:**

10051 Minor non-substantive changes have been made to conform this section to the current version of
10052 the corollary section of the Model Act.

10053 Nearly all Model Act states, along with California and Delaware, have adopted very similar
10054 statutes regarding dissolution by incorporators or initial directors. California expressly allows
10055 dissolution where the corporation has not issued shares at the time of dissolution (Cal. Corp. Code.
10056 §1900.5(6) in a situation where: "the known assets of the corporation remaining after payment of,
10057 or adequately providing for, known debts and liabilities have been distributed to the persons
10058 entitled thereto or that the corporation acquired no known assets, as the case may be".) Other states,
10059 including Illinois and Maryland, permit dissolution by incorporators only where no shares have
10060 been issued, while Kansas and Pennsylvania permit dissolution only where the corporation has not
10061 commenced business. Eight states, including Nevada and Texas, require both that shares must not
10062 have been issued and business has not commenced.

10063

10064 607.1402 Dissolution by board of directors and shareholders; dissolution by written consent
10065 of shareholders.

10066 (1) A corporation's board of directors may propose dissolution for submission to the
10067 shareholders by first adopting a resolution authorizing the dissolution.

10068 (2) For a proposal to dissolve to be adopted: ~~(a) T, it shall then be approved by the~~
10069 shareholders as provided in subsection (5). In submitting the proposal to dissolve to the
10070 shareholders for approval, the board of directors must recommend ~~dissolution that to~~ the
10071 shareholders approve the dissolution, unless (a) the board of directors determines that because of
10072 conflict of interest or other special circumstances it should make no recommendation, or (b) s.
10073 607.0826 applies. If either (a) or (b) applies, the board shall inform the shareholders of the basis
10074 for its proceeding in such manner and communicates the basis for its determination to the
10075 shareholders; and (b) The shareholders entitled to vote must approve the proposal to dissolve as
10076 provided in subsection (5).

10077 (3) The board of directors may set conditions for the approval of its submission of the
10078 proposal for dissolution ~~on any basis~~ by shareholders or for the effectiveness of the dissolution.

10079 (4) If the approval of the shareholders is to be given at a meeting, Tthe corporation shall
10080 notify, in accordance with s. 607.0705, each shareholder of record, regardless of whether or not
10081 entitled to vote, of the ~~proposed shareholders'~~ meeting of shareholders at which the dissolution is
10082 to be submitted for approval in accordance with s. 607.0705. The notice must also state that the
10083 purpose, or one of the purposes, of the meeting is to consider dissolving the corporation.

10084 (5) Unless the articles of incorporation or the board of directors (acting pursuant to
10085 subsection (3)) require a greater vote or a vote by voting groups, the proposal to dissolve to be
10086 adopted must be approved by a majority of all the votes entitled to be cast on ~~that~~ the proposal to
10087 dissolve.

10088 (6) Alternatively, without action of the board of directors, action to dissolve a corporation
10089 may be taken by the written consent of the shareholders pursuant to s. 607.0704.

10090

10091 **Commentary to Section 607.1402:**

10092 The language in subsections (1) through (4) has been modified to adopt many of the language
10093 changes in the Model Act in these provisions. None of these changes are substantive.

10094 There are two substantive differences between this section of the FBCA and the corollary Model
10095 Act provision. First, the Florida only provision in subsection (6) that allows shareholders to
10096 approve dissolution of the corporation by written consent without action of the board of directors
10097 has been retained. This non-Model Act provision was specifically added to the FBCA in 1989.
10098 Second, the statute continues the requirement in subsection (5) that the shareholders approve a
10099 proposal for dissolution by a vote of a majority of the shares entitled to vote on the proposal,
10100 compared to the requirement in the corollary provision of the Model Act only requiring approval
10101 by a majority of the quorum in attendance at a meeting called to consider the proposal.

10102

10103 607.1403 Articles of dissolution.

10104 (1) At any time after dissolution is authorized, the corporation may dissolve by
10105 delivering to the ~~D~~department of State for filing articles of dissolution which shall be signed
10106 ~~executed~~ in accordance with s. 607.0120 and which shall set forth:

10107 (a) The name of the corporation;

10108 (b) The date dissolution was authorized;

10109 (c) If dissolution was approved by the shareholders, a statement that the proposal
10110 to dissolve was duly approved by the shareholders in the manner required by this chapter
10111 and by the articles of incorporation the number ~~— cast for dissolution by the shareholders~~
10112 ~~was sufficient for approval.~~

10113 (d) ~~If dissolution was approved by the shareholders and if voting by voting groups~~
10114 ~~was required, a statement that the number cast for dissolution by the shareholders was~~
10115 ~~sufficient for approval must be separately provided for each voting group entitled to vote~~
10116 ~~separately on the plan to dissolve.~~

10117 (2) The articles of dissolution shall take effect at the effective date determined in
10118 accordance with s. 607.0123. A corporation is dissolved upon the effective date of its articles of
10119 dissolution.

10120 (3) For purposes of s. 607.1401 – s. 607.1410, "dissolved corporation" means a corporation
10121 whose articles of dissolution have become effective and includes a successor entity, as defined in
10122 subsection (4).

10123 (4) As used in s. 607.1401 – s. 607.1410, the term "successor entity" includes a trust,
10124 receivership, or other legal entity governed by the laws of this state to which the remaining assets
10125 and liabilities of a dissolved corporation are transferred and which exists solely for the purposes
10126 of prosecuting and defending suits by or against the dissolved corporation, thereby enabling the
10127 dissolved corporation to settle and close the business of the dissolved corporation, to dispose of
10128 and convey the property of the dissolved corporation, to discharge the liabilities of the dissolved
10129 corporation, and to distribute to the dissolved corporation's shareholders any remaining assets, but
10130 not for the purpose of continuing the activities and affairs for which the dissolved corporation was
10131 organized.

10132

10133 **Commentary to Section 607.1403:**

10134 The statute has been modified to make the clarifying language changes contained in the corollary
10135 version of the Model Act. These changes are not substantive.

10136 Two issues were considered:

10137 1. Subsection 1(c) of the FBCA was modified to conform to the Model Act. However, it
10138 removes the requirement that the vote of voting groups be noted in the articles of
10139 dissolution. This difference has existed in the FBCA since 1989.

10140

10141 2. The language "in accordance with s. 607.0120" in the FBCA in subsection (1) has been
10142 retained, although not in the corollary section of the Model Act. It has been in the statute
10143 since 1989 and has been retained as a reminder to users of the FBCA that they need to
10144 comply with the FBCA section on filing requirements in filing articles of dissolution.

10145

10146 Thirty-four states, including most Model Act states, along with Delaware and New York follow
10147 the general process of Model Act s. 14.03. Some states additionally require certain statements as
10148 to the settlement of debts, distribution of property, and the status of any pending litigation against
10149 the company. These are not in the Model Act or the existing FBCA provision, and have not been
10150 included.

10151

10152 Following dissolution, the existence of the corporation continues as a "dissolved corporation"
10153 while the corporation is being liquidated under s. 607.1405. However, after the dissolution
10154 becomes effective, the corporation can conduct no business other than to wind down and liquidate.

10155 Subsection (4) includes the definition of a "successor entity" that was previously included in s.
10156 607.1406(15). A successor entity is included within the definition of dissolved corporation under
10157 subsection (3).

10158

10159 607.1404 Revocation of dissolution.

10160 (1) A corporation may revoke its dissolution at any time prior to the expiration of 120 days
10161 following the effective date of the articles of dissolution.

10162 (2) Revocation of dissolution must be authorized in the same manner as the dissolution was
10163 authorized unless that authorization permitted revocation by action of the board of directors alone,
10164 in which event the board of directors may revoke the dissolution without shareholder action.

10165 (3) After the revocation of dissolution is authorized, the corporation may revoke the
10166 dissolution by delivering to the ~~Department of State~~, within the 120 day period following the
10167 effective date of the articles of dissolution, for filing articles of revocation of dissolution, together
10168 with a copy of its articles of dissolution, that set forth:

10169 (a) The name of the corporation;

10170 (b) The effective date of the dissolution that was revoked;

10171 (c) The date that the revocation of dissolution was authorized;

10172 (d) If the corporation's board of directors or incorporators revoked the dissolution, a
10173 statement to that effect;

10174 (e) If the corporation's board of directors revoked a dissolution authorized by the
10175 shareholders, a statement that revocation was permitted by action by the board of directors alone
10176 pursuant to that authorization; and

10177 (f) If shareholder action was required to revoke the dissolution, ~~the information required~~
10178 ~~by s. 607.1403(1)(c) or (d)~~ a statement that the revocation was authorized by the shareholders in
10179 the manner required by this chapter and by the articles of incorporation.

10180 (4) Revocation of dissolution is effective upon the effective date of the articles of revocation
10181 of dissolution.

10182 (5) When the revocation of dissolution is effective, it relates back to and takes effect as of
10183 the effective date of the dissolution and the corporation resumes carrying on its business as if
10184 dissolution had never occurred.

10185

10186 **Commentary to Section 607.1404:**

10187 The FBCA provision is identical to the Model Act.

10188 Many states allow a corporation to revoke dissolution as long as the revocation occurs prior to 120
10189 days after the effective date of the articles of dissolution. Delaware allows it for three years, while
10190 California allows for revocation prior to the distribution of assets, with no time limit. Four states,
10191 including New York, do not allow for revocation of a voluntarily dissolution.

10192

10193 607.1405 Effect of dissolution.

10194 (1) A ~~dissolved~~ corporation that has dissolved continues its corporate existence but the
10195 dissolved corporation may not carry on any business except that appropriate to wind up and
10196 liquidate its business and affairs, including:

10197 (a) Collecting its assets;

10198 (b) Disposing of its properties that will not be distributed in kind to its
10199 shareholders;

10200 (c) Discharging or making provision for discharging its liabilities;

10201 (d) Making distributions of ~~Distributing~~ its remaining assets ~~property~~ among its
10202 shareholders according to their interests; and

10203 (e) Doing every other act necessary to wind up and liquidate its business and affairs.

10204 (2) Dissolution of a corporation does not:

10205 (a) Transfer title to the corporation's property;

10206 (b) Prevent transfer of its shares or securities, ~~although the authorization to~~
10207 ~~dissolve may provide for closing the corporation's share transfer records;~~

10208 (c) Subject its directors or officers to standards of conduct different from those
10209 prescribed in ss. 607.0801-607.08590 ~~except as provided in s. 607.1421(4);~~

10210 (d) Change quorum or voting requirements for its board of directors or
10211 shareholders, change provisions for selection, resignation, or removal of its directors or
10212 officers or both; or change provisions for amending its bylaws;

10213 (e) Prevent commencement of a proceeding by or against the corporation in its
10214 corporate name;

10215 (f) Abate or suspend a proceeding pending by or against the corporation on the
10216 effective date of dissolution; or

10217 (g) Terminate the authority of the registered agent of the corporation.

10218 (3) A distribution in liquidation under this section may only be made by a dissolved corporation.
10219 For purposes of determining the shareholders entitled to receive a distribution in liquidation, the board
10220 of directors may fix a record date for determining shareholders entitled to a distribution in liquidation,
10221 which date may not be retroactive. If the board of directors does not fix a record date for determining

10222 shareholders entitled to a distribution in liquidation, the record date is the date the board of directors
10223 authorizes the distribution in liquidation.

10224 (34) The directors, officers, and agents of a corporation dissolved pursuant to s. 607.1403
10225 shall not incur any personal liability thereby by reason of their status as directors, officers, and
10226 agents of a dissolved corporation, as distinguished from a corporation which is not dissolved.

10227 (45) The name of a dissolved corporation ~~is not shall not be~~ available for assumption or use
10228 by another eligible entity corporation until 1 year ~~120 days~~ after the effective date of dissolution
10229 unless the dissolved corporation provides the ~~D~~department of ~~S~~State with an affidavit, signed
10230 ~~executed~~ as required pursuant to s. 607.0120, permitting the immediate assumption or use of the
10231 name by another eligible entity corporation.

10232 (56) For purposes of this section, the circuit court may appoint a trustee, custodian or
10233 receiver for any property owned or acquired by the corporation who may engage in any act
10234 permitted under subsection (1) if any director or officer of the dissolved corporation is unwilling
10235 or unable to serve or cannot be located.

10236

10237 **Commentary to Section 607.1405:**

10238 Subsections (1) and (2) of the FBCA follow subsections (a) and (b) of the corollary section of the
10239 Model Act. The reference to s. 607.1421(4) of the FBCA, which deals with possible personal
10240 liability of officers or directors in dissolution, has been removed because that provision was not
10241 retained in the FBCA.

10242 Distributions in liquidation that occur after dissolution are distinct from the pre-dissolution
10243 distributions governed by s. 607.06401. As a result, new subsection (3) has been added to allow
10244 for setting a record date for determining shareholders entitled to receive a distribution in
10245 liquidation.

10246 Subsections (3), (4), and (5) of the FBCA (renumbered as sections (4), (5) and (6) above) do not
10247 appear in the Model Act. Subsection (3) was added to the FBCA in 1989 to make clear that
10248 dissolution does not change the duty of care, fiduciary duty, limitations on liability or right to
10249 indemnification of officers, directors and agents of the dissolved corporation. Subsection (6)
10250 expressly allows a court to appoint a trustee, custodian or receiver to carry out the winding up
10251 process, presumably at the behest of creditors or shareholders who have a stake in the liquidation
10252 of the corporation if the directors or officers are unwilling to serve. Finally, subsection (5) deals
10253 with use of a corporate name following dissolution.

10254

10255 607.1406 Known claims against dissolved corporation.

10256 (1) A dissolved corporation may dispose of the known claims against it by giving written
10257 notice, satisfying the requirements of subsection (2), to its known claimants at any time after the
10258 effective date of the dissolution (but no later than the date which is 270 days prior to the date which
10259 is 3 years after the effective date of the dissolution).

10260 (2) The written notice must:

10261 (a) State the name of the corporation that is the subject of a dissolution;

10262 (b) State that the corporation is the subject of a dissolution and the effective date of
10263 the dissolution;

10264 (c) Specify the information that must be included in a claim;

10265 (d) State that a claim must be in writing and provide a mailing address where a claim
10266 may be sent;

10267 (e) State the deadline, which may not be fewer than 120 days after the date the
10268 written notice is received by the claimant, by which the dissolved corporation must receive
10269 the claim;

10270 (f) State that the claim will be barred if not received by the deadline;

10271 (g) State that the dissolved corporation may make distributions thereafter to
10272 other claimants and to the dissolved corporation's shareholders or persons interested
10273 without further notice; and

10274 (h) Be accompanied by a copy of ss. 607.1405-607.1410 of this chapter.

10275 (3) A dissolved corporation may reject, in whole or in part, a claim submitted by a
10276 claimant and received prior to the deadline specified in the written notice given pursuant to
10277 subsections (1) and (2) by mailing notice of the rejection to the claimant on or before the date
10278 which is the earlier of (i) 90 days after the dissolved corporation receives the claim and (ii) the
10279 date which is 150 days prior to the date which is 3 years after the effective date of the dissolution.
10280 A rejection notice sent by the dissolved corporation pursuant to this subsection must state that the
10281 claim will be barred unless the claimant, not later than 120 days after the claimant receives the
10282 rejection notice, commences an action in the circuit court in the applicable county against the
10283 dissolved corporation to enforce the claim.

10284 (4) A claim against the dissolved corporation is barred:

10285 (a) If a claimant who was given written notice pursuant to subsections (1) and (2)
10286 does not deliver the claim to the dissolved corporation by the specified deadline; or

10287 (b) If the claim was timely received by the dissolved corporation but was timely
10288 rejected by the dissolved corporation under subsection (3) and the claimant does not
10289 commence the required action in the applicable county within 120 days after the claimant
10290 receives the rejection notice.

10291 (5) For purposes of this section, "known claims" means any claim or liability that, as of
10292 the date of the giving of the written notice contemplated by subsections (1) and (2), either:

10293 (a) Has matured sufficiently on or prior to the effective date of the dissolution
10294 to be legally capable of assertion against the dissolved corporation; or

10295 (b) Is unmatured as of the effective date of the dissolution but will mature in
10296 the future solely based on the passage of time.

10297 Notwithstanding, a "known claim" does not include a claim based on an event occurring after the
10298 effective date of the dissolution or a claim that is a contingent claim.

10299 (6) The giving of any notice pursuant to the provisions of this section shall not revive
10300 any claim then barred or constitute acknowledgment by the dissolved corporation that any person
10301 to whom such notice is sent is a proper claimant and shall not operate as a waiver of any defense
10302 or counterclaim in respect of any claim asserted by any person to whom such notice is sent.

10303 ~~(1) — A dissolved corporation or successor entity, as defined in subsection (15), may~~
10304 ~~dispose of the known claims against it by following the procedures described in subsections (2)~~
10305 ~~(3), and (4).~~

10306 ~~(2) — The dissolved corporation or successor entity shall deliver to each of its known claimants~~
10307 ~~written notice of the dissolution at any time after its effective date. The written notice shall:~~

10308 ~~(a) — Provide a reasonable description of the claim that the claimant may be entitled~~
10309 ~~to assert;~~

10310 ~~(b) — State whether the claim is admitted or not admitted, in whole or in part, and,~~
10311 ~~if admitted:~~

10312 ~~1. — The amount that is admitted, which may be as of a given date; and~~

10313 ~~2. — Any interest obligation if fixed by an instrument of indebtedness;~~

10314 ~~(c) — Provide a mailing address where a claim may be sent;~~

10315 ~~(d) State the deadline, which may not be fewer than 120 days after the effective~~
10316 ~~date of the written notice, by which confirmation of the claim must be delivered to the~~
10317 ~~dissolved corporation or successor entity; and~~

10318 ~~(e) State that the corporation or successor entity may make distributions thereafter~~
10319 ~~to other claimants and the corporation's shareholders or persons interested as having been~~
10320 ~~such without further notice.~~

10321 ~~(3) A dissolved corporation or successor entity may reject, in whole or in part, any claim~~
10322 ~~made by a claimant pursuant to this subsection by mailing notice of such rejection to the claimant~~
10323 ~~within 90 days after receipt of such claim and, in all events, at least 150 days before expiration of~~
10324 ~~3 years following the effective date of dissolution. A notice sent by the dissolved corporation or~~
10325 ~~successor entity pursuant to this subsection shall be accompanied by a copy of this section.~~

10326 ~~(4) A dissolved corporation or successor entity electing to follow the procedures described~~
10327 ~~in subsections (2) and (3) shall also give notice of the dissolution of the corporation to persons~~
10328 ~~with known claims, that are contingent upon the occurrence or nonoccurrence of future events or~~
10329 ~~otherwise conditional or unmatured, and request that such persons present such claims in~~
10330 ~~accordance with the terms of such notice. Such notice shall be in substantially the same form, and~~
10331 ~~sent in the same manner, as described in subsection (2).~~

10332 ~~(5) A dissolved corporation or successor entity shall offer any claimant whose known claim~~
10333 ~~is contingent, conditional, or unmatured such security as the corporation or such entity determines~~
10334 ~~is sufficient to provide compensation to the claimant if the claim matures. The dissolved~~
10335 ~~corporation or successor entity shall deliver such offer to the claimant within 90 days after receipt~~
10336 ~~of such claim and, in all events, at least 150 days before expiration of 3 years after following the~~
10337 ~~effective date of dissolution. If the claimant offered such security does not deliver in writing to the~~
10338 ~~dissolved corporation or successor entity a notice rejecting the offer within 120 days after receipt~~
10339 ~~of such offer for security, the claimant is deemed to have accepted such security as the sole source~~
10340 ~~from which to satisfy his or her claim against the corporation.~~

10341 ~~(6) A dissolved corporation or successor entity which has given notice in accordance with~~
10342 ~~subsection (2) shall petition the circuit court in the county where the corporation's principal office~~
10343 ~~is located or was located at the effective date of dissolution to determine the amount and form of~~
10344 ~~security that will be sufficient to provide compensation to any claimant who has rejected the offer~~
10345 ~~for security made pursuant to subsection (5).~~

10346 ~~(7) A dissolved corporation or successor entity which has given notice in accordance with~~
10347 ~~subsection (2) shall petition the circuit court in the county where the corporation's principal office~~
10348 ~~is located or was located at the effective date of dissolution to determine the amount and form of~~
10349 ~~security which will be sufficient to provide compensation to claimants whose claims are known to~~
10350 ~~the corporation or successor entity but whose identities are unknown. The court shall appoint a~~

10351 ~~guardian ad litem to represent all claimants whose identities are unknown in any proceeding~~
10352 ~~brought under this subsection. The reasonable fees and expenses of such guardian, including all~~
10353 ~~reasonable expert witness fees, shall be paid by the petitioner in such proceeding.~~

10354 ~~(8) The giving of any notice or making of any offer pursuant to the provisions of this section~~
10355 ~~shall not revive any claim then barred or constitute acknowledgment by the dissolved corporation~~
10356 ~~or successor entity that any person to whom such notice is sent is a proper claimant, and shall not~~
10357 ~~operate as a waiver of any defense or counterclaim in respect of any claim asserted by any person~~
10358 ~~to whom such notice is sent.~~

10359 ~~(9) A dissolved corporation or successor entity which has followed the procedures described~~
10360 ~~in subsections (2)-(7):~~

10361 ~~(a) Shall pay the claims admitted or made and not rejected in accordance with~~
10362 ~~subsection (3);~~

10363 ~~(b) Shall post the security offered and not rejected pursuant to subsection (5);~~

10364 ~~(c) Shall post any security ordered by the circuit court in any proceeding under~~
10365 ~~subsections (6) and (7); and~~

10366 ~~(d) Shall pay or make provision for all other known obligations of the corporation~~
10367 ~~or such successor entity.~~

10368 ~~Such claims or obligations shall be paid in full, and any such provision for payments shall~~
10369 ~~be made in full if there are sufficient funds. If there are insufficient funds, such claims and~~
10370 ~~obligations shall be paid or provided for according to their priority and, among claims of equal~~
10371 ~~priority, ratably to the extent of funds legally available therefor. Any remaining funds shall be~~
10372 ~~distributed to the shareholders of the dissolved corporation; however, such distribution may not be~~
10373 ~~made before the expiration of 150 days from the date of the last notice of rejections given pursuant~~
10374 ~~to subsection (3). In the absence of actual fraud, the judgment of the directors of the dissolved~~
10375 ~~corporation or the governing persons of such successor entity as to the provisions made for the~~
10376 ~~payment of all obligations under paragraph (d) is conclusive.~~

10377 ~~(10) A dissolved corporation or successor entity which has not followed the procedures~~
10378 ~~described in subsections (2) and (3) shall pay or make reasonable provision to pay all known claims~~
10379 ~~and obligations, including all contingent, conditional, or unmatured claims known to the~~
10380 ~~corporation or such successor entity and all claims which are known to the dissolved corporation~~
10381 ~~or such successor entity but for which the identity of the claimant is unknown. Such claims shall~~
10382 ~~be paid in full, and any such provision for payment made shall be made in full if there are sufficient~~
10383 ~~funds. If there are insufficient funds, such claims and obligations shall be paid or provided for~~
10384 ~~according to their priority and, among claims of equal priority, ratably to the extent of funds legally~~

10385 available therefor. Any remaining funds shall be distributed to the shareholders of the dissolved
10386 corporation.

10387 (11) ~~Directors of a dissolved corporation or governing persons of a successor entity which~~
10388 ~~has complied with subsection (9) or subsection (10) are not personally liable to the claimants of~~
10389 ~~the dissolved corporation.~~

10390 (12) ~~A shareholder of a dissolved corporation the assets of which were distributed pursuant~~
10391 ~~to subsection (9) or subsection (10) is not liable for any claim against the corporation in an amount~~
10392 ~~in excess of such shareholder's pro rata share of the claim or the amount distributed to the~~
10393 ~~shareholder, whichever is less.~~

10394 (13) ~~A shareholder of a dissolved corporation, the assets of which were distributed pursuant~~
10395 ~~to subsection (9), is not liable for any claim against the corporation, which claim is known to the~~
10396 ~~dissolved corporation or successor entity, on which a proceeding is not begun prior to the~~
10397 ~~expiration of 3 years following the effective date of dissolution.~~

10398 (14) ~~The aggregate liability of any shareholder of a dissolved corporation for claims against~~
10399 ~~the dissolved corporation arising under this section, s. 607.1407, or otherwise, may not exceed the~~
10400 ~~amount distributed to the shareholder in dissolution.~~

10401 (15) ~~As used in ss. 601.1401—607.1409 this section, or s. 607.1407, the term "successor~~
10402 ~~entity" includes a trust, receivership, or other legal entity governed by the laws of this state to~~
10403 ~~which the remaining assets and liabilities of a dissolved corporation are transferred and which~~
10404 ~~exists solely for the purposes of prosecuting and defending suits by or against the dissolved~~
10405 ~~corporation, thereby enabling the dissolved corporation to settle and close the business of the~~
10406 ~~dissolved corporation, to dispose of and convey the property of the dissolved corporation, to~~
10407 ~~discharge the liabilities of the dissolved corporation, and to distribute to the dissolved~~
10408 ~~corporation's shareholders any remaining assets, but not for the purpose of continuing the activities~~
10409 ~~and affairs for which the dissolved corporation was organized.~~

10410

10411 **Commentary to Section 607.1406:**

10412 The current FBCA provisions dealing with claims against a dissolved corporation are largely
10413 Florida only provisions. The original s. 607.1406 was adopted in 1989 and, according to the
10414 commentary from the 1989 committee, was based on DGCL ss. 280, 281 and 282 as those statutes
10415 existed at that time. The revised section of the FBCA is largely based on the corollary section of
10416 the Model Act, with some language and structure borrowed from the corollary provision in
10417 RULLCA. However, some of the wording from the existing FBCA provision has been retained
10418 where the Subcommittee believes it reflects more clarity than the Model Act.

10419 The words "or successor entity" are no longer contained in the statute because the definition of
10420 "dissolved corporation" under s. 607.1403(3) now includes a successor entity

10421 The Model Act commentary describes what is a "known claim" (covered by s. 14.06) and what is an
10422 "other claim" (covered by s. 14.07), in the following manner:

10423 Sections 14.06 and 14.07 provide a simplified system for handling claims against a dissolved
10424 corporation. Section 14.06 deals solely with known claims while section 14.07 deals with
10425 unknown or subsequently arising claims. Known claims may be unliquidated, but a claim that
10426 is contingent or has not yet matured (or in certain cases has matured but has not been asserted)
10427 is not a "claim" for purposes of section 14.06(d). For example, an unmatured liability under a
10428 guarantee, a potential default under a lease, or an unasserted claim based upon a defective
10429 product manufactured by the dissolved corporation would not be a "claim" under section
10430 14.06."

10431 Notwithstanding, unlike the Model Act, s. 607.1406 treats claims that are unmatured as of the
10432 effective date of the dissolution, but that will mature solely with the passage of time, as known
10433 claims. An example would be a debt due under a promissory note that is not yet due or a trade
10434 payable that has been accrued for accounting purposes but is not yet due.

10435 A "known claim" does not include a claim that would accrue upon the occurrence of an event after
10436 the effective date of the dissolution or a claim that is a contingent claim. Examples would include
10437 an unmatured liability under a guarantee, a potential default under a lease, or an unasserted claim
10438 based on a defective product manufactured by the dissolved corporation.

10439 The principles of s. 607.1406 do not lengthen the statute of limitations applicable under general
10440 state law and claims that are not barred under s. 607.1406 may be made within the general statute
10441 of limitations.

10442 Section 607.1406 is voluntary. If the corporation does not follow this section in handling known
10443 claims in dissolution, the directors and the shareholders do not get the protections of this section
10444 and s. 607.1410.

10445 Under s. 607.1406, claimants who comply with the statutory requirements and are not barred have
10446 the ability to have recourse to the remaining assets of the corporation or to recover from
10447 shareholders. Such recovery from each shareholder is limited to the lesser of the respective
10448 shareholder's pro rata share of the claim or the total amount of assets received by the respective
10449 shareholder as a liquidating distribution. However, if s. 607.1406 is not followed, the shareholder
10450 could be liable for its share of any claim not barred by the regular statute of limitation up to the
10451 amount of the distribution which it received in liquidation. See s. 607.1408.

10452

10453 607.1407 ~~Other Unknown~~ Other claims against dissolved corporation.

10454 (1) A dissolved corporation ~~or successor entity, as defined in s. 607.1406(15),~~ may choose
10455 to execute ~~one of the following procedures to resolve payment of unknown claims against the~~
10456 dissolved corporation that are other than known claims. ~~(a) A dissolved corporation or successor~~
10457 entity may file notice of its dissolution with the ~~D~~department of State on the form prescribed by
10458 the ~~D~~department of State and request that persons with claims against the corporation which are
10459 not known claims present them in accordance with the notice. The notice ~~shall~~ must:

10460 (a) State the name of the corporation ~~and the date~~ that is the subject of the
10461 dissolution;

10462 (b) ~~Describe the information that must be included in a claim and provide a~~
10463 mailing address to which the claim may be sent State that the corporation is the subject of
10464 a dissolution and the effective date of the dissolution; and

10465 (c) Specify the information that must be included in a claim;

10466 (d) State that a claim must be in writing and provide a mailing address where a
10467 claim may be sent;

10468 (e) State that a claim against the corporation under this subsection will be
10469 barred unless a proceeding to enforce the claim is commenced within 4 years after the filing
10470 of the notice.

10471 (2) ~~A dissolved corporation or successor entity may, within 10 days after filing articles~~
10472 ~~of dissolution with the Department of State publish a "Notice of Corporate Dissolution." The notice~~
10473 ~~shall appear once a week for 2 consecutive weeks in a newspaper of general circulation in a county~~
10474 ~~in the state in which the corporation has its principal office, if any, or, if none, in a county in the~~
10475 ~~state in which the corporation owns real or personal property. Such newspaper shall meet the~~
10476 ~~requirements as are prescribed by law for such purposes. The notice shall:~~

10477 (a) ~~State the name of the corporation and the date of dissolution;~~

10478 (b) ~~Describe the information that must be included in a claim and provide a~~
10479 mailing address to which the claim may be sent; and

10480 (c) ~~State that a claim against the corporation under this subsection will be barred~~
10481 ~~unless a proceeding to enforce the claim is commenced within 4 years after the date of the~~
10482 ~~second consecutive weekly publication of the notice authorized by this section.~~

10483 (23) If the dissolved corporation ~~or successor entity~~ complies with subsection (1) ~~or~~
10484 subsection (2), unless sooner barred by another statute limiting actions, the claim of each of the

10485 following claimants is barred unless the claimant commences a proceeding to enforce the claim
10486 against the dissolved corporation within 4 years after the date of filing the notice with the
10487 ~~Department of State or the date of the second consecutive weekly publication, as applicable:~~

10488 (a) A claimant who did not receive written notice under s. 607.1406(9)³⁸ ~~or whose~~
10489 ~~claim was not provided for under s. 607.1406(1), whether such claim is based on an event~~
10490 ~~occurring before or after the effective date of dissolution.~~

10491 (b) A claimant whose claim was timely sent to the dissolved corporation but on
10492 which no action was taken by the dissolved corporation.

10493 (c) A claimant whose claim is not a known claim under s. 607.1406(5).

10494 ~~(4) A claim may be entered under this section:~~

10495 ~~(a) Against the dissolved corporation, to the extent of its undistributed assets; or~~

10496 ~~(b) If the assets have been distributed in liquidation, against a shareholder of the~~
10497 ~~dissolved corporation to the extent of such shareholder's pro rata share of the claim or the~~
10498 ~~corporate assets distributed to such shareholder in liquidation, whichever is less, provided~~
10499 ~~that the aggregate liability of any shareholder of a dissolved corporation arising under this~~
10500 ~~section, s. 607.1406, or otherwise may not exceed the amount distributed to the shareholder~~
10501 ~~in dissolution.~~

10502 (3) Nothing in this section shall preclude or relieve the corporation from its notification
10503 to claimants otherwise set forth in this chapter.

10504

³⁸ This language is not in s. 605.0712(2)

10505 **Commentary to Section 607.1407:**

10506 The FBCA is one of two state corporate statutes (along with California) with a four year statute of
10507 limitations. Most jurisdictions have a three year limitations period (the statute of limitations under
10508 the Model Act) or five years (the statute of limitations in Delaware), while seven jurisdictions,
10509 including New York, provide no statute of limitations (instead, the statute of limitations is dictated
10510 by the underlying cause of action).

10511 The Model Act allows for posting on the dissolved corporation's website and newspaper
10512 publication as the means to notify potential claimants of a dissolved corporation. Section 607.1407
10513 previously included the right to notify claimants by either publication or the filing of a notice with
10514 the Department of State on a form prescribed by the Department. This statute eliminates the
10515 publication option based on the belief that filing with the Department is a more permanent,
10516 accessible notice to potential claimants than the publication of a notice in a newspaper of limited
10517 circulation.

10518 The principles of s. 607.1407 do not lengthen the statute of limitations applicable under general
10519 state law and claims that are not barred under s. 607.1407 may be made within the general statute
10520 of limitations.

10521 Section 607.1407 is voluntary. If the corporation does not follow this section in handling claims
10522 other than known claims in dissolution, the corporation, its board and its shareholders do not get
10523 the protections afforded by this section and by s. 607.1410.

10524 Section 607.1407 addresses problems created by possible claims that might rise long after the
10525 dissolution process is completed and the corporate assets distributed to shareholders. The problems
10526 raised by these claims are difficult. On the one hand, the application of a mechanical limitation
10527 period of a claim for injury that occurs after the period has expired may involve injustice to the
10528 plaintiff. On the other hand, to permit these suits generally could make it impossible to ever
10529 complete the winding up of the corporation, make suitable provisions for creditors and distribute
10530 the balance of the corporate assets to the shareholders. The approach taken in s. 607.1407 is to
10531 continue the liability of the dissolved corporation for an arbitrary period of time (three years in the
10532 Model Act provision; four years in the current corollary FBCA provision).

10533 Under s. 607.1407, claimants have the ability within this arbitrary statute of limitations to have
10534 recourse to the remaining assets of the corporation or to recover from shareholders. Such recovery
10535 from each shareholder is limited to the lesser of the respective shareholder's pro rata share of the
10536 claim or the total amount of assets received by the respective shareholder as a liquidating
10537 distribution. However, if s. 607.1407 is not followed, the shareholder could be liable for its share
10538 of any claim not barred by the regular statute of limitation up to the amount of the distribution
10539 which it received in liquidation. See s. 607.1408.

10540 Section 607.1407 allows a dissolved corporation to initiate a court proceeding to establish what, if
10541 any, provision should be made for contingent or unknown claims that are not reasonably expected
10542 to be barred after the limitations period in s. 607.1407(2). This provision is designed to permit the
10543 court to adopt procedures appropriate to the circumstances. If the dissolved corporation provides
10544 for security for claims under s. 607.1409(4), that section protects shareholders who receive
10545 distributions against those claims and also protects directors for a breach of their duty under s.
10546 607.1410(1) to discharge or make reasonable provision for payment of claims, thereby protecting
10547 the directors from liability for those distributions.

10548

10549 607.1408 Enforcement of claims against dissolved corporations.

10550 A claim that is not barred by s. 607.1406(4), by s. 607.1407(2), or by another statute limiting
10551 actions may be enforced:

10552 (a) Against the dissolved corporation, to the extent of its undistributed assets; or

10553 (b) Except as provided in s. 607.1409(4), if the assets have been distributed in
10554 liquidation, against a shareholder of the dissolved corporation to the extent of the
10555 shareholder's pro rata share of the claim or the corporate assets distributed to the shareholder
10556 in liquidation, whichever is less, provided that the aggregate liability of any shareholder of
10557 a dissolved corporation arising under s. 607.1406, s. 607.1407, or otherwise may not
10558 exceed the total amount of assets distributed to the shareholder in dissolution.

10559

10560 **Commentary to Section 607.1408:**

10561 Although this section is a new section, it effectively keeps in the FBCA the voluntary claims
10562 provisions from ss. 607.1406 and 607.1407 of the existing statute that are beneficial to
10563 shareholders of those corporations that elect to utilize those particular sections to deal with the
10564 corporation's claims in dissolution.

10565

10566 607.1409 Court proceedings.
10567

10568 (1) A dissolved corporation that has filed a notice under s. 607.1407(1) may file an
10569 application with the circuit court in the applicable county, for a determination of the amount and
10570 form of security to be provided for payment of claims that are contingent or have not been made
10571 known to the dissolved corporation or that are based on an event occurring after the effective
10572 date of dissolution but that, based on the facts known to the dissolved corporation, are reasonably
10573 estimated to arise after the effective date of dissolution. Provision need not be made for any
10574 claim that is or is reasonably anticipated to be barred under s. 607.1407(2).
10575

10576 (2) Within 10 days after the filing of the application under subsection (1), notice of the
10577 proceeding shall be given by the dissolved corporation to each claimant holding a contingent claim
10578 whose identity and contingent claim is known to the dissolved corporation. Such notice shall be
10579 accompanied by a copy of ss. 607.1405-607.1410 of this chapter.

10580 (3) In any proceeding under this section, the court may appoint a guardian ad litem to
10581 represent all claimants whose identities are unknown. The reasonable fees and expenses of such
10582 guardian, including all reasonable expert witness fees, shall be paid by the dissolved corporation.
10583

10584 (4) Provision by the dissolved corporation for security in the amount and the form
10585 ordered by the court under subsection (1) shall satisfy the dissolved corporation's obligations with
10586 respect to claims that are contingent, have not been made known to the dissolved corporation or
10587 are based on an event occurring after the effective date of dissolution, and such claims may not be
10588 enforced against a shareholder who received assets in liquidation.
10589

10590 **Commentary to Section 607.1409:**

10591 This section was added to the Model Act in 2000 to provide a procedure for handling unknown
10592 and contingent claims against the dissolved corporation. It has now been added to the FBCA.

10593 Subsection (4) was part of the current version of s. 607.1406, but has been moved here because
10594 those types of claims are now to be covered under s. 607.1407.

10595

10596 607.1410 Director duties.

10597 (1) Directors shall cause the dissolved corporation to discharge or make reasonable
10598 provision for the payment of claims and make distributions in liquidation of assets to shareholders
10599 after payment or provision for claims.

10600 (2) Directors of a dissolved corporation that has disposed of claims under ss. 607.1406,
10601 607.1407, or 607.1409 shall not be liable to any claimant or shareholder for breach of s.
10602 607.1410(1) with respect to claims against the dissolved corporation that are barred or satisfied in
10603 accordance with ss. 607.1406, 607.1407, or 607.1409.

10604

10605 **Commentary to Section 607.1410:**

10606 This is a new section. It is based on the corollary section of the Model Act (s. 14.09).

10607 Section 14.09 of the Model Act was added to the Model Act in 2000 and establishes the terms
10608 under which a director could be relieved of liability for unlawful distributions in liquidation under
10609 s. 607.1401 et seq., and thus avoid the general distribution liability under s. 607.06401. Although
10610 similar in large respect, the new terms under which a director could be relieved of such liability
10611 differ somewhat from the exculpatory provisions that previously had appeared in subsection (11)
10612 of s. 607.1406.

10613

10614 607.1420 Grounds for Administrative dissolution.

10615 (1) ~~The Department of State may commence a proceeding under s. 607.1421 to~~
10616 ~~administratively dissolve a corporation administratively if the corporation does not:~~

10617 (a) Deliver its annual report to the department ~~The corporation has failed to file its~~
10618 ~~annual report and pay the annual report filing fee by 5:00 p.m. Eastern Time on the third~~
10619 ~~Friday in September of each year;~~

10620 (b) Pay a fee or penalty due to the department under this chapter;

10621 (c) Appoint and maintain ~~The corporation is without a registered agent and~~ or registered
10622 office as required by s. 607.0501 in this state for 30 days or more;

10623 (de) Deliver for filing a statement of change under s. 607.0502 ~~The corporation does~~
10624 ~~not notify the department of State within 30 days after a change has occurred in the name or~~
10625 ~~address of the agent unless, within 30 days after the change occurred: that its the corporation's~~
10626 ~~registered agent or registered office has been changed, that its registered agent has resigned,~~
10627 ~~or that its registered office has been discontinued;~~

10628 1. The agent filed a statement of change under s. 607.05031; or

10629 2. The change was made in accordance with s. 607.0502(4);

10630 (d) ~~The corporation has failed to answer truthfully and fully, within the time prescribed~~
10631 ~~by this act, interrogatories propounded by the Department of State; or~~

10632 (e) The corporation's period of duration stated in its articles of incorporation expires ~~has~~
10633 ~~expired.~~

10634 (2) ~~The foregoing enumeration in subsection (1) of grounds for administrative dissolution~~
10635 ~~shall not exclude actions or special proceedings by the Department of Legal Affairs or any state~~
10636 ~~officials for the annulment or dissolution of a corporation for other causes as provided in any other~~
10637 ~~statute of this state.~~

10638 (2) Administrative dissolution of a corporation for failure to file an annual report must occur
10639 on the fourth Friday in September of each year. The department shall issue a notice in a record of
10640 administrative dissolution to the corporation dissolved for failure to file an annual report. Issuance
10641 of the notice may be by electronic transmission to a corporation that has provided the department
10642 with an e-mail address.

10643 (3) If the department determines that one or more grounds exist for administratively
10644 dissolving a corporation under paragraph (1)(b), paragraph (1)(c), or paragraph (1)(d), the

10645 department shall serve notice in a record to the corporation of its intent to administratively dissolve
10646 the corporation. Issuance of the notice may be by electronic transmission to a corporation that has
10647 provided the department with an e-mail address.

10648 (4) If, within 60 days after sending the notice of intent to administratively dissolve pursuant
10649 to subsection (3), a corporation does not correct each ground for dissolution under paragraph
10650 (1)(b), paragraph (1)(c), or paragraph (1)(d) or demonstrate to the reasonable satisfaction of the
10651 department that each ground determined by the department does not exist, the department shall
10652 dissolve the corporation administratively and issue to the corporation a notice in a record of
10653 administrative dissolution that states the grounds for dissolution. Issuance of the notice of
10654 administrative dissolution may be by electronic transmission to a corporation that has provided the
10655 department with an e-mail address.

10656 (5) A corporation that has been administratively dissolved continues in existence but may
10657 only carry on activities necessary to wind up its activities and affairs, liquidate and distribute its
10658 assets, and notify claimants under ss. 607.1405, 607.1406 and 607.1407.

10659 (6) The administrative dissolution of a corporation does not terminate the authority of its
10660 registered agent for service of process.

10661

10662 **Commentary to Section 607.1420:**

10663 This provision has been updated and modernized to follow the substance of FRLLCA s. 605.0714.

10664 The FBCA contains provisions allowing for administrative dissolution in other situations (old
10665 paragraph (1)(e) and subsection (2)). Neither of these grounds for administrative dissolution was
10666 included in the corollary provision of FRLLCA, although both grounds were in the corollary
10667 section of Chapter 608 (in s. 608.448). In both cases, the Subcommittee believes that these
10668 provisions are almost never used, and the Division of Corporations has advised the Subcommittee
10669 that they have no objection to removing these provisions from the FBCA.

10670

10671 ~~607.1421—Procedure for and effect of administrative dissolution.~~

10672 ~~(1) If the Department of State determines that one or more grounds exist under s. 607.1420~~
10673 ~~for dissolving a corporation, it shall serve the corporation with notice of its intention to~~
10674 ~~administratively dissolve the corporation. If the corporation has provided the Department with an~~
10675 ~~electronic mail address, such notice shall be by electronic transmission. Administrative dissolution~~
10676 ~~for failure to file an annual report shall occur on the fourth Friday in September of each year. The~~
10677 ~~Department of State shall issue a certificate of dissolution to each dissolved corporation. Issuance~~
10678 ~~of the certificate of dissolution may be by electronic transmission to any corporation that has~~
10679 ~~provided the department with an electronic mail address.~~

10680 ~~(2) If the corporation does not correct each ground for dissolution under s. 607.1420(1)(b),~~
10681 ~~(c), (d), or (e) or demonstrate to the reasonable satisfaction of the Department of State that each~~
10682 ~~ground determined by the department does not exist within 60 days of issuance of the notice, the~~
10683 ~~department shall administratively dissolve the corporation by issuing a certificate of dissolution~~
10684 ~~that recites the ground or grounds for dissolution and its effective date. Issuance of the certificate~~
10685 ~~of dissolution may be by electronic transmission to any corporation that has provided the~~
10686 ~~department with an electronic mail address.~~

10687 ~~(3) A corporation administratively dissolved continues its corporate existence but may not~~
10688 ~~carry on any business except that necessary to wind up and liquidate its business and affairs under~~
10689 ~~s. 607.1405 and notify claimants under ss. 607.1406 and 607.1407.~~

10690 ~~(4) A director, officer, or agent of a corporation dissolved pursuant to this section,~~
10691 ~~purporting to act on behalf of the corporation, is personally liable for the debts, obligations, and~~
10692 ~~liabilities of the corporation arising from such action and incurred subsequent to the corporation's~~
10693 ~~administrative dissolution only if he or she has actual notice of the administrative dissolution at~~
10694 ~~the time such action is taken; but such liability shall be terminated upon the ratification of such~~
10695 ~~action by the corporation's board of directors or shareholders subsequent to the reinstatement of~~
10696 ~~the corporation under ss. 607.1401–607.14401.~~

10697 ~~(5) The administrative dissolution of a corporation does not terminate the authority of its~~
10698 ~~registered agent.~~

10699

10700 **Commentary to Section 607.1421:**

10701 The substance of this section has been added to s. 607.1420 to follow the corollary FRLCA
10702 model. As a result, this section has been eliminated.

10703 One of the subsections eliminated was subsection (4), which previously provided that:

10704 (4)A director, officer, or agent of a corporation dissolved pursuant to this section,
10705 purporting to act on behalf of the corporation, is personally liable for the debts, obligations,
10706 and liabilities of the corporation arising from such action and incurred subsequent to the
10707 corporation's administrative dissolution only if he or she has actual notice of the
10708 administrative dissolution at the time such action is taken; but such liability shall be
10709 terminated upon the ratification of such action by the corporation's board of directors or
10710 shareholders subsequent to the reinstatement of the corporation under ss. 607.1401-
10711 607.14401.

10712 This subsection was not added to the corollary provisions of FRLCA and is not in the Model Act.
10713 Its exclusion is not intended to say that a director or agent cannot be personally liable for the debts
10714 of a corporation that has been administratively dissolved, but rather to leave that topic to agency
10715 law and courts to make the determination under the particular circumstances.

10716

10717 607.1422 Reinstatement following administrative dissolution.

10718 (1) A corporation that is administratively dissolved under s. 607.1420~~4~~ or former s.
10719 607.1421 may apply to the ~~D~~department of State for reinstatement at any time after the effective
10720 date of dissolution. The corporation must submit all fees and penalties then owned by the
10721 corporation at the rates provided by laws at the time the corporation applies for reinstatement,
10722 together with an application for a reinstatement form prescribed and furnished by the ~~D~~department
10723 of State, which is ~~or a current uniform business report~~ signed by both the registered agent and an
10724 officer or director of ~~and all fees then owed by the corporation, and states: computed at the rate~~
10725 provided by law at the time the corporation applies for reinstatement.

10726 (a) The name of the corporation.

10727 (b) The street address of the corporation's principal office and mailing address.

10728 (c) The date of the corporation's organization.

10729 (d) The corporation's federal employer identification number or, if none, whether
10730 one has been applied for.

10731 (e) The name, title or capacity, and address of at least one officer or director of the
10732 corporation.

10733 (f) Additional information that is necessary or appropriate to enable the department
10734 to carry out this chapter.

10735 (2) In lieu of the requirement to file an application for reinstatement as described in
10736 subsection (1), an administratively dissolved corporation may submit all fees and penalties owed
10737 by the corporation at the rates provided by law at the time the corporation applies for reinstatement,
10738 together with a current annual report, signed by both the registered agent and an officer or director
10739 of the corporation, which contains the information described in subsection (1).

10740 (3) If the department determines that an application for reinstatement contains the
10741 information required under subsection (1) or subsection (2) and that the information is correct,
10742 upon payment of all required fees and penalties, the department shall reinstate the corporation.

10743 (4) When reinstatement under this section becomes effective:

10744 (a) The reinstatement relates back to and takes effect as of the effective date of the
10745 administrative dissolution.

10746 (b) The corporation may resume its activities and affairs as if the administrative
10747 dissolution had not occurred.

10748 (c) The rights of a person arising out of an act or omission in reliance on the
10749 dissolution before the person knew or had notice of the reinstatement are not affected.

10750 ~~(2) If the Department of State determines that the application contains the information~~
10751 ~~required by subsection (1) and that the information is correct, it shall reinstate the corporation.~~

10752 ~~(3) When the reinstatement is effective, it relates back to and takes effect as of the~~
10753 ~~effective date of the administrative dissolution and the corporation resumes carrying on its business~~
10754 ~~as if the administrative dissolution had never occurred.~~

10755 (54) The name of the dissolved corporation is shall not be available for assumption or use
10756 by another eligible entity corporation until 1 year after the effective date of dissolution unless the
10757 dissolved corporation provides the ~~Department of State~~ with an affidavit signed ~~executed~~ as
10758 required pursuant to ~~by~~ s. 607.0120 permitting the immediate assumption or use of the name by
10759 another eligible entity corporation.³⁹

10760 (65) If the name of the dissolved corporation has been lawfully assumed in this state by
10761 another business entity corporation, the ~~Department of State~~ shall require the dissolved
10762 corporation to amend its articles of incorporation to change its name before accepting its
10763 application for reinstatement.⁴⁰

10764

³⁹ Similar to this change, the last words of s. 605.0715(5) should be changed from "limited liability company" to "eligible entity."

⁴⁰ This subsection is not in FRLCA, and needs to be added into FRLCA.

10765 **Commentary to Section 607.1422:**

10766 This section has been modified to make it consistent with the corollary section of FRLICA.

10767 The corollary provision of the Model Act limits administrative dissolution to a two-year period
10768 following the administrative dissolution. Florida is one of twenty-four jurisdictions, including
10769 Delaware, that do not expressly limit the period for reinstatement. Another twenty-four
10770 jurisdictions permit reinstatement for time periods between two and ten years after dissolution.
10771 This section retains the ability to reinstate a corporation at any time after dissolution.

10772

10773 607.1423 Judicial review of ~~appeal from~~ denial of reinstatement.

10774 (1) If the ~~D~~department of ~~S~~State denies a corporation's application for reinstatement after
10775 following administrative dissolution, the department ~~it~~ shall serve the corporation under either s.
10776 607.0504(1) or s. 607.0504(2) with a written notice that explains the reason or reasons for denial.

10777 (2) Within 30 days after service of a notice of denial of reinstatement, a ~~After exhaustion of~~
10778 ~~administrative remedies, the corporation may appeal the denial of reinstatement to~~ by petitioning
10779 the circuit court in the applicable county to set aside the dissolution ~~the appropriate court as~~
10780 ~~provided in s. 120.68 within 30 days after service of the notice of denial is perfected effected.~~ The
10781 petition must be served on the department and contain a copy of the department's notice of
10782 administrative ~~corporation appeals by petitioning the court to set aside the dissolution and~~
10783 ~~attaching to the petition copies of the D~~department's of State's certificate of dissolution, the
10784 corporation's application for reinstatement, and the department's notice of denial.

10785 (3) The court may ~~summarily~~ order the ~~D~~department of ~~S~~State to reinstate the dissolved
10786 corporation or ~~may~~ take other action the court considers appropriate.

10787 (4) ~~The court's final decision may be appealed as in other civil proceedings.~~

10788

10789 **Commentary to Section 607.1423:**

10790 This section is revised to follow the wording of the corollary section of FRLUCA.

10791 Subsection (4) was deleted. It is a rule of court that is believed to be the applicable rule whether
10792 or not expressly stated in the statute. This subsection was not added to FRLUCA when FRLUCA
10793 was adopted.

10794

10795 607.1430 Grounds for judicial dissolution.

10796 (1) A circuit court may dissolve a corporation or order such other remedy as provided in
10797 s. 607.1434:

10798 (4a) In a proceeding by the Department of Legal Affairs to dissolve a corporation
10799 if it is established that:

10800 1. The corporation obtained its articles of incorporation through fraud; or

10801 2. The corporation has continued to exceed or abuse the authority
10802 conferred upon it by law.

10803 ~~(b)~~The enumeration in subparagraphs 1. and 2. above paragraph (a) of grounds for
10804 involuntary dissolution does not exclude actions or special proceedings by the
10805 Department of Legal Affairs or any state official for the annulment or dissolution
10806 of a corporation for other causes as provided in any other statute of this state;

10807 ~~(b)(2)~~ In a proceeding by a shareholder to dissolve a corporation if it is established
10808 that:

10809 ~~(a)~~ 1. The directors are deadlocked in the management of the corporate
10810 affairs, the shareholders are unable to break the deadlock, and either (i) irreparable
10811 injury to the corporation is threatened or being suffered, (ii) the business and affairs
10812 of the corporation can no longer be conducted to the advantage of the shareholders
10813 generally because of the deadlock, or (iii) both (i) and (ii); or

10814 ~~(b)~~ 2. The shareholders are deadlocked in voting power and have failed to
10815 elect successors to directors whose terms have expired or would have expired upon
10816 qualification of their successors;

10817 ~~(3)~~ ~~In a proceeding by a shareholder or group of shareholders in a corporation~~
10818 ~~having 35 or fewer shareholders if it is established that:~~

10819 ~~(a)~~ 3. The corporate assets are being misapplied or wasted, causing material
10820 injury to the corporation; or

10821 ~~(b)~~ 4. The directors or those in control of the corporation have acted, are
10822 acting, or will ~~are reasonably expected to~~ act in a manner that is illegal, oppressive
10823 or fraudulent;

10824 ~~(4)~~(c) In a proceeding by a creditor if it is established that:

10825 ~~(a)~~ 1. The creditor's claim has been reduced to judgment, the execution
10826 on the judgment returned unsatisfied, and the corporation is insolvent; or

10827 ~~(b)~~ 2. The corporation has admitted in writing that the creditor's claim is
10828 due and owing and the corporation is insolvent; ~~or~~

10829 ~~(5)~~(d) In a proceeding by the corporation to have its voluntary dissolution
10830 continued under court supervision; or

10831 (e) In a proceeding by a shareholder if the corporation has abandoned its
10832 business and has failed within a reasonable period of time to liquidate and distribute its
10833 assets and dissolve.

10834 (2) Subsection (1)(b) shall not apply in the case of a corporation that, on the date of the filing
10835 of the proceeding, has shares which are:

10836 (a) A covered security under section 18(b)(1)(A) or (B) of the Securities
10837 Act of 1933; or

10838 (b) Not a covered security, but are held by at least 300 shareholders and the
10839 shares outstanding have a market value of at least \$20 million (exclusive of the value
10840 of such shares held by the corporation's subsidiaries, senior executives, directors and
10841 beneficial shareholders and voting trust beneficial owners owning more than 10% of
10842 such shares).

10843 (3) A proceeding by a shareholder under paragraph (1)(b)4. asserting that the directors or those
10844 in control of the corporation have acted, are acting, or will act in a manner that is oppressive may
10845 only be brought by a shareholder who at the time that a proceeding is commenced under paragraph
10846 (1)(b)4. owns at least 10% of the outstanding shares of the corporation.

10847 (4) In the event of a deadlock situation that satisfies s. 607.1430(1)(b), if the shareholders are
10848 subject to a shareholders' agreement that complies with s. 607.0732 and contains a deadlock sale
10849 provision, then such deadlock sale provision applies to the resolution of such deadlock instead of
10850 the court entering an order of judicial dissolution or an order directing the purchase of petitioner's
10851 interest under s. 607.1436, so long as the provisions of such deadlock sale provision are initiated
10852 and effectuated within the time period for the corporation to act under s. 607.1436 and in
10853 accordance with the terms of such deadlock sale provision. As used in this section, the term
10854 "deadlock sale provision" means a provision in a shareholders' agreement which is or may be
10855 applicable in the event of a deadlock among the directors or shareholders of the corporation which
10856 neither the directors nor the shareholders of the corporation are unable to break and which provides
10857 for a deadlock breaking mechanism, including, but not limited to: a purchase and sale of interests
10858 or a governance change, among or between shareholders; the sale of all or substantially all of the

10859 assets of the company; or a similar provision that, if initiated and effectuated, breaks the deadlock
10860 by causing the transfer of interests, a governance change, or the sale of all or substantially all of
10861 the company's assets.

10862 (5) For purposes of subsections (1) (2) and (3), the term "shareholder" means a record
10863 shareholder, a beneficial shareholder, and an unrestricted voting trust beneficial owner.

10864

10865 **Commentary to Section 607.1430:**

10866 Florida largely follows the Model Act.

10867 This section changes existing law such that the rights of shareholders to petition the circuit court
10868 to seek judicial dissolution are limited to corporations other than those that are essentially public
10869 companies from current Florida law under which such rights are limited to shareholders of smaller
10870 corporations with 35 or fewer shareholders in Florida.

10871 Following the Model Act, this section adds "oppressive" conduct as a grounds for judicial
10872 dissolution and changes the prospective trigger from "reasonably expected to act" to "will act."
10873 Previously, the FBCA did not include "oppression" of minority holders as a grounds for judicial
10874 dissolution.

10875 **Background on the topic of "oppression" of minority shareholders as a ground for judicial**
10876 **dissolution**

10877 Currently, s. 607.1430 provides, among other grounds for judicial dissolution, that the directors or
10878 those in control of the corporation have acted, are acting, or are reasonably expected to act in a
10879 manner that is illegal or fraudulent. The corollary section of the Model Act (s. 14.30) includes one
10880 additional ground for judicial dissolution, "oppression of minority shareholders" and includes the
10881 higher threshold "will act" language as the prospective trigger.

10882 In 1994, when Florida's current judicial dissolution statute was adopted, there was a view among
10883 some Business Law Section members who worked on the draft that the concept of oppression was
10884 too vague and would present the possibility of vexatious litigation based on an uncertain standard.
10885 In contrast, other Business Law Section members working on the draft advocated for including the
10886 oppression provision, arguing that oppression is capable of reasonable definition and that minority
10887 shareholders might not otherwise have an adequate basis for relief in squeeze-out situations such
10888 as loss of office, salary or dividends. Such advocates also argued that the failure to include
10889 "oppression" as a grounds for judicial dissolution has a definite chilling effect on the rights of
10890 minority shareholders in Florida.

10891
10892 It is believed that some Florida courts, by applying fiduciary principles, have been able to get
10893 around the absence of "oppression" as a ground for dissolution so as to provide an equitable remedy
10894 for a minority shareholder who may have been oppressed by the majority; however, that analysis
10895 is purely anecdotal.

10896
10897 Some believe that Florida has been out of the mainstream on this issue. Today, over 35 states have
10898 adopted oppression (or some analogous language) as a ground for judicial dissolution. Some of
10899 these states have limited this particular right to seek judicial dissolution to only those shareholders
10900 who meet certain minimum ownership requirements (for example, (i) Maryland and Georgia, both

10901 of which are Model Act states, have such requirements, requiring the ownership of 25% and 20%
10902 of the outstanding shares respectively, (ii) California requires the ownership of 1/3rd of the
10903 outstanding shares, and (iii) New York sets a 20% ownership requirement), while others (such as
10904 California and Michigan) include language which has the effect of requiring more egregious
10905 conduct to constitute oppression or an equivalent of oppression. At the same time, certain states
10906 (such as Indiana, Nevada, North Carolina, Ohio, and Texas) have not (consistent with current
10907 Florida law) included oppression as a ground for judicial dissolution, and Massachusetts has not
10908 adopted as a grounds for dissolution any conduct other than deadlock (although Massachusetts has
10909 a closely held corporation statute that allows the parties to broadly add dissolution remedies into
10910 their articles of incorporation).

10911
10912 The Uniform Revised Limited Liability Company Act also includes "oppression of minority
10913 members" as a ground for judicial dissolution. However, when Chapter 605 was adopted, it was
10914 decided to defer the question of including this ground for judicial dissolution in the LLC statute
10915 pending consideration of the topic as part of the consideration of modifications to the FBCA, in an
10916 effort to address harmonization.

10917
10918 The issue of adding "oppression" as a ground for judicial dissolution was discussed extensively at
10919 several meetings of the Corporations, Securities and Financial Services Committee and of the
10920 Subcommittee during the summer and fall of 2017 and in early 2018. In addition to addressing the
10921 gating issue of whether to add "oppression" there was consideration given to (i) whether the term
10922 "willful" should be added before the term "oppression," (ii) whether to add "oppression" without
10923 definition (following the Model Act), leaving it to the courts to define that term or to add a definition
10924 of "oppression," considering different approaches to such a definition, (iii) whether there should be an
10925 ownership threshold to pursue judicial dissolution based on "oppression," and (iv) whether to add an
10926 express carve out from this provision for conduct permitted by a shareholders' agreement.

10927
10928 At the Corporations, Securities and Financial Services Committee held on January 18, 2018 in
10929 conjunction with the Business Law Section's winter meeting, the following decisions were made:

- 10930
- 10931 • To follow the Model Act language and thus to add "oppression" of minority shareholders
10932 to the FBCA as a grounds for judicial dissolution;
 - 10933
 - 10934 • Not to expressly define "oppression" in the statute, or to change the definition to "willful
10935 oppression", but rather to allow the courts to define the term "oppression" over time,
10936 consistent with the Model Act and based on the extensive case law on the topic that has
10937 developed around the country;
 - 10938

10939 • To provided that an action relating to "oppressive" conduct under s. 607.1430 may only be
10940 brought by a shareholder who at the time that the proceeding is commenced owns at least
10941 10% of the corporation's outstanding shares; and
10942

10943 • Not to add an express carve out from this provision for conduct permitted by a
10944 shareholders' agreement, but rather to allow the courts to determine when a carve out for
10945 conduct permitted by a shareholders' agreement will apply, again consistent with the
10946 Model Act and based on the extensive case law on the topic that has developed around the
10947 country.
10948

10949 In connection with making this decision, the Committee noted certain protections in the FBCA for
10950 corporations faced with an action for judicial dissolution. First, it was noted that under s.
10951 607.1431(5), a court may award attorneys' fees and other reasonable expenses to party who has
10952 been adversely affected by such actions if the court determines that a party who has commenced,
10953 continued, or participated in a proceeding under s. 607.1430 has acted arbitrarily, frivolously,
10954 vexatiously, or not in good faith in bringing such proceeding. Second, it was noted that the
10955 corporation has an absolute right to purchase the interest in the corporation of the petitioning
10956 shareholder for fair value under s. 607.1436, which provides the corporation and the remaining
10957 shareholders with an ability to end the litigation if they so choose.
10958

10959 607.1431 Procedure for judicial dissolution.

10960 (1) Venue for a proceeding brought under s. 607.1430 lies in the circuit court in ~~of the~~
10961 applicable county ~~where the corporation's principal office is or was last located, as shown by the~~
10962 ~~records of the Department of State, or, if none in this state, where its registered office is or was~~
10963 ~~last located.~~

10964 (2) It is not necessary to make shareholders parties to a proceeding to dissolve a corporation
10965 unless relief is sought against them individually.

10966 (3) A court in a proceeding brought under s. 607.1430 ~~to dissolve a corporation~~ may issue
10967 injunctions, appoint a receiver or custodian ~~pendent lite~~ during the proceeding with all powers and
10968 duties the court directs, take other action required to preserve the corporate assets wherever
10969 located, and carry on the business of the corporation until a full hearing can be held.

10970 (4) Within 30 days of the commencement of a proceeding under s. 607.1430(1)(b), the
10971 corporation shall deliver to all shareholders, other than the petitioner, a notice stating that the
10972 shareholders are entitled to avoid the dissolution of the corporation by electing to purchase the
10973 petitioner's shares under s. 607.1436 and accompanied by a copy of s. 607.1436.

10974 (4~~5~~) If the court determines that any party has commenced, continued, or participated in a
10975 proceeding ~~an action~~ under s. 607.1430 and has acted arbitrarily, frivolously, vexatiously, or not
10976 in good faith, the court may, in its discretion, award attorney's fees and other reasonable expenses
10977 to the other parties to the action who have been affected adversely by such actions.

10978

10979 **Commentary to Section 607.1431:**

10980 With some non-material differences, subsections (1)-(3) of the FBCA match their corresponding
10981 subsections in the Model Act. Subsection (5) of the FBCA is unique to the FBCA.

10982 The FBCA did not previously include subsection (d) of the corollary provision of the Model Act,
10983 which relates to notification to shareholders of their rights to purchase the holdings of the
10984 petitioning shareholders under s. 607.1436 of the FBCA. This subsection has been added to the
10985 FBCA in new subsection (4).

10986

10987 607.1432 Receivership or custodianship.

10988 (1) A court in a judicial proceeding brought under s. 607.1430 ~~to dissolve a corporation~~ may
10989 appoint one or more receivers to wind up and liquidate, or one or more custodians to manage, the
10990 business and affairs of the corporation. The court shall hold a hearing, after notifying all parties to
10991 the proceeding and any interested persons designated by the court, before appointing a receiver or
10992 custodian. The court appointing a receiver or custodian has exclusive jurisdiction over the
10993 corporation and all of its property wherever located.

10994 (2) The court may appoint a natural person or a eligible entity ~~corporation~~ authorized to act
10995 as a receiver or custodian. The eligible entity ~~corporation~~ may be a domestic eligible entity
10996 ~~corporation~~ or a foreign eligible entity ~~corporation~~ authorized to transact business in this state. The
10997 court may require the receiver or custodian to post bond, with or without sureties, in an amount
10998 the court directs.

10999 (3) The court shall describe the powers and duties of the receiver or custodian in its
11000 appointing order, which may be amended from time to time. Among other powers:

11001 (a) The receiver:

11002 1. May dispose of all or any part of the assets of the corporation wherever
11003 located, at a public or private sale, if authorized by the court; and

11004 2. May sue and defend in his, ~~or her,~~ or its own name as receiver of the
11005 corporation in all courts of this state.

11006 (b) The custodian may exercise all of the powers of the corporation, through or
11007 in place of its board of directors or officers, to the extent necessary to manage the affairs
11008 of the corporation in the best interests of its shareholders and creditors.

11009 (4) The court during a receivership may redesignate the receiver a custodian, and during
11010 a custodianship may redesignate the custodian a receiver, if doing so is determined by the court to
11011 be in the best interests of the corporation and its shareholders and creditors.

11012 (5) The court from time to time during the receivership or custodianship may order
11013 compensation paid and expense disbursements or reimbursements made to the receiver or
11014 custodian and his, ~~or her,~~ or its counsel from the assets of the corporation or proceeds from the
11015 sale of the assets.

11016 (6) The court has jurisdiction to appoint an ancillary receiver for the assets and business of
11017 a corporation. The ancillary receiver shall serve ancillary to a receiver located in any other state,
11018 whenever the court deems that circumstances exist requiring the appointment of such a receiver.
11019 The court may appoint such an ancillary receiver for a foreign corporation even though no receiver

11020 has been appointed elsewhere. Such receivership shall be converted into an ancillary receivership
11021 when an order entered by a court of competent jurisdiction in the other state provides for a
11022 receivership of the corporation.

11023

11024 **Commentary to Section 607.1432:**

11025 Subsections (1)-(5) of this section of the FBCA are materially the same as their counterpart
11026 subsections in the Model Act. The only difference appears in subsection (1). The Model Act
11027 provision provides that a receiver or custodian cannot be appointed during the 90-day period in
11028 which the corporation and other shareholders are given the right in s. 607.1436 to purchase the
11029 shares of the complaining shareholder. The corollary provision of the FBCA does not include that
11030 limitation, and that limitation has not been added to this section. In exigent circumstances, the
11031 court should have the right to immediately appoint a receiver or custodian during such 90-day
11032 period, even if it turns out that the receiver or custodian can be dismissed after a purchase of the
11033 complaining shareholders' interest is completed under s. 607.1436.

11034 Subsection (6) of the FBCA has been retained in the statute even though it is not in the Model Act.

11035

11036 607.1433 Judgment of dissolution.

11037 (1) If after a hearing in a proceeding under s. 607.1430 the court determines that one or more
11038 grounds for judicial dissolution described in s. 607.1430 exist, it may enter a judgment dissolving
11039 the corporation and specifying the effective date of the dissolution, and the clerk of the court shall
11040 deliver a certified copy of the judgment to the ~~D~~epartment of State, which shall file it.

11041 (2) After entering the judgment of dissolution, the court shall direct the winding up and
11042 liquidation of the corporation's business and affairs in accordance with s. 607.1405 and the
11043 notification of claimants in accordance with ss. 607.1406 and 607.1407, subject to the provisions
11044 of subsection (3).

11045 (3) In a proceeding for judicial dissolution, the court may require all creditors of the
11046 corporation to file with the clerk of the court or with the receiver, in such form as the court may
11047 prescribe, proofs under oath of their respective claims. If the court requires the filing of claims, it
11048 shall fix a date, which shall be not less than 4 months from the date of the order, as the last day for
11049 filing of claims. The court shall prescribe the method by which such notice of the deadline for
11050 filing claims shall be given to creditors and claimants. Prior to the date so fixed, the court may
11051 extend the time for the filing of claims by court order. Creditors and claimants failing to file proofs
11052 of claim on or before the date so fixed shall ~~may~~ be barred, ~~by order of court~~, from participating
11053 in the distribution of the assets of the corporation. Nothing in this section affects the enforceability
11054 of any recorded mortgage or lien or the perfected security interest or rights of a person in
11055 possession of real or personal property.

11056

11057 **Commentary to Section 607.1433:**

11058 Subsections (1) and (2) of s. 607.1433 generally follow the Model Act. One minor clean-up
11059 change was made in subsection (2) to require notice to potential claimants in accordance with s.
11060 607.1407, consistent with the Model Act language.

11061 Florida is one of nine jurisdictions (including California) that limits the claims to four months (or
11062 120 days) after the date of the order. Some other jurisdictions (including New York) provide for
11063 a six month period. The Model Act does not have a comparable subsection.

11064

11065 607.1434 Alternative remedies to judicial dissolution.

11066 (1) In a proceeding an action for dissolution under pursuant to s. 607.1430, the court
11067 may, as an alternative to directing the dissolution of the corporation and upon a showing of
11068 sufficient merit to warrant such remedy:

11069 (a~~1~~) Appoint a receiver or custodian ~~pendent lite~~ during the proceeding as
11070 provided in s. 607.1432;

11071 (b~~2~~) Appoint a provisional director as provided in s. 607.1435;

11072 (c~~3~~) Order a purchase of the complaining shareholder's shares pursuant to s.
11073 607.1436; or

11074 (d~~4~~) Upon proof of good cause, make any order or grant any equitable relief
11075 other than dissolution ~~or liquidation~~ as in its discretion it may deem appropriate.

11076 (2) Alternative remedies, such as the appointment of a receiver or custodian, may also be
11077 ordered in the discretion of the court, upon a showing of sufficient merit to warrant such remedy,
11078 in advance of directing the dissolution of the corporation or, after a judgment of dissolution is
11079 entered, to assist in facilitating the winding up of the corporation.

11080

11081 **Commentary to Section 607.1434:**

11082 Section 607.1434 was added to the FBCA in 1994 to enumerate and clarify the alternative remedies
11083 available for actions brought under s. 607.1430. The "sufficient merit" phrase in the opening clause
11084 is intended to require that none of these remedies be imposed unless the petitioner meets the burden
11085 of proving the necessity of such relief. This section is intended to explicitly recognize the existing
11086 equity powers of courts to fashion a remedy other than dissolution in circumstances where the
11087 grounds for judicial dissolution are present.

11088 A minor change was included in subsection (2) to match a similar change made in Section
11089 607.1431(3).

11090

11091 607.1435 Provisional director.

11092 (1) In a proceeding under s. 607.1430, aA provisional director may be appointed in the
11093 discretion of the court if it appears that such action by the court will remedy the grounds alleged
11094 by the complaining shareholder to support the jurisdiction of the court under s. 607.1430. A
11095 provisional director may be appointed notwithstanding the absence of a vacancy on the board of
11096 directors, and such director shall have all the rights and powers of a duly elected director, including
11097 the right to notice of and to vote at meetings of directors, until such time as the provisional director
11098 is removed by order of the court or, unless otherwise ordered by a court, removed by a vote of the
11099 shareholders sufficient either to elect a majority of the board of directors or, if greater than majority
11100 voting is required by the articles of incorporation or the bylaws, to elect the requisite number of
11101 directors needed to take action. A provisional director shall be an impartial person who is neither
11102 a shareholder nor a creditor of the corporation or of any subsidiary or affiliate of the corporation,
11103 and whose further qualifications, if any, may be determined by the court.

11104 (2) A provisional director shall report from time to time to the court concerning the matter
11105 complained of, or the status of the deadlock, if any, and of the status of the corporation's business,
11106 as the court shall direct. No provisional director shall be liable for any action taken or decision
11107 made, except as directors may be liable under s. 607.0831. In addition, the provisional director
11108 shall submit to the court, if so directed, recommendations as to the appropriate disposition of the
11109 action. Whenever a provisional director is appointed, any officer or director of the corporation
11110 may, from time to time, petition the court for instructions clarifying the duties and responsibilities
11111 of such officer or director.

11112 (3) In any proceeding under which a provisional director is appointed pursuant to this
11113 section, the court shall allow reasonable compensation to the provisional director for services
11114 rendered and reimbursement or direct payment of reasonable costs and expenses, which amounts
11115 shall be paid by the corporation.

11116

11117 **Commentary to Section 607.1435:**

11118 This section was added to the FBCA in 1994. It allows a court, on its own or at the request of one
11119 of the parties, under circumstances where the court by such an action can remedy a situation under
11120 s. 607.1430, to appoint a provisional director to act with full power and authority along with the
11121 corporation's other directors. The remedy, which could be used to break a deadlock on the board
11122 of directors, is considered less intrusive on corporate management than the appointment of a
11123 receiver or custodian.

11124 Because the remedy discussed in s. 607.1435 can only be granted in connection with a suit for
11125 dissolution, a new standalone section has been added to the FBCA (s. 607.0749) to allow a court
11126 to appoint a provisional director in the event of a deadlock even if no party is seeking to dissolve
11127 the corporation.

11128

11129 607.1436 Election to purchase instead of dissolution.

11130 (1) In a proceeding under s. 607.1430(1)(b) ~~(2) or (3) to dissolve a corporation~~, the
11131 corporation may elect or, if it fails to elect, one or more shareholders may elect to purchase all
11132 shares owned by the petitioning shareholder at the fair value of the shares. An election pursuant to
11133 this section shall be irrevocable unless the court determines that it is equitable to set aside or
11134 modify the election.

11135 (2) An election to purchase pursuant to this section may be filed with the court at any time
11136 within 90 days after the filing of the petition under s. 607.1430(1)(b) ~~(2) or (3)~~ or at such later time
11137 as the court in its discretion may allow. If the election to purchase is filed by one or more
11138 shareholders, the corporation shall, within 10 days thereafter, give written notice to all
11139 shareholders, other than the petitioner. The notice must state the name and number of shares owned
11140 by the petitioner and the name and number of shares owned by each electing shareholder and must
11141 advise the recipients of their right to join in the election to purchase shares in accordance with this
11142 section. Shareholders who wish to participate must file notice of their intention to join in the
11143 purchase no later than 30 days after the effective date of the notice to them. All shareholders who
11144 have filed an election or notice of their intention to participate in the election to purchase thereby
11145 become parties to the proceeding and shall participate in the purchase in proportion to their
11146 ownership of shares as of the date the first election was filed, unless they otherwise agree or the
11147 court otherwise directs. After an election has been filed by the corporation or one or more
11148 shareholders, the proceeding under s. 607.1430(1)(b) ~~(2) or (3)~~ may not be discontinued or settled,
11149 nor may the petitioning shareholder sell or otherwise dispose of his or her shares, unless the court
11150 determines that it would be equitable to the corporation and the shareholders, other than the
11151 petitioner, to permit such discontinuance, settlement, sale, or other disposition.

11152 (3) If, within 60 days after the filing of the first election, the parties reach agreement as to
11153 the fair value and terms of the purchase of the petitioner's shares, the court shall enter an order
11154 directing the purchase of the petitioner's shares upon the terms and conditions agreed to by the
11155 parties.

11156 (4) If the parties are unable to reach an agreement as provided for in subsection (3), the
11157 court, upon application of any party, may shall stay the proceeding to dissolve under s.
11158 607.1430(1)(b) proceeding and shall, whether or not the proceeding is stayed, determine the fair
11159 value of the petitioner's shares as of the day before the date on which the petition under s. 607.1430
11160 was filed or as of such other date as the court deems appropriate under the circumstances.

11161 (5) Upon determining the fair value of the shares, the court shall enter an order directing the
11162 purchase upon such terms and conditions as the court deems appropriate, which may include
11163 payment of the purchase price in installments, when necessary in the interests of equity, provision
11164 for security to assure payment of the purchase price and any additional costs, fees, and expenses
11165 as may have been awarded, and, if the shares are to be purchased by shareholders, the allocation

11166 of shares among such shareholders. In allocating the petitioner's shares among holders of different
11167 classes of shares, the court shall attempt to preserve any ~~the~~ existing distribution of voting rights
11168 among holders of different classes and series insofar as practicable and may direct that holders of
11169 any a specific class or classes or series shall not participate in the purchase. Interest may be allowed
11170 at the rate and from the date determined by the court to be equitable; however, if the court finds
11171 that the refusal of the petitioning shareholder to accept an offer of payment was arbitrary or
11172 otherwise not in good faith, no interest shall be allowed. If the court finds that the petitioning
11173 shareholder had probable grounds for relief under s. 607.1430(1)(b)(~~3~~), it may award expenses to
11174 the petitioning shareholder, including reasonable fees and expenses of counsel and of any experts
11175 employed by petitioner.

11176 (6) ~~The Upon~~ entry of an order under subsection (3) or subsection (5), shall be subject to the
11177 provisions of subsection (8), and the order shall not be entered unless and until the award is
11178 determined by the court to be permitted under the provisions of subsection (8). In determining
11179 compliance with s. 607.06401, the court may rely on an affidavit from the corporation as to
11180 compliance with that section as of the measurement date. Upon entry of an order under subsection
11181 (3) or subsection (5), the court shall dismiss the petition to dissolve the corporation under s.
11182 607.1430(1)(b) and the petitioning shareholder shall no longer have any rights or status as a
11183 shareholder of the corporation, except the right to receive the amounts awarded by the order of the
11184 court, which shall be enforceable in the same manner as any other judgment.

11185 (7) The purchase ordered pursuant to subsection (5) shall be made within 10 days after the
11186 date the order becomes final ~~unless, before that time, the corporation files with the court a notice~~
11187 ~~of its intention to adopt articles of dissolution pursuant to ss. 607.1402 and 607.1403, which~~
11188 ~~articles shall then be adopted and filed within 50 days thereafter. Upon filing of such articles of~~
11189 ~~dissolution, the corporation shall be dissolved in accordance with the provisions of ss. 607.1405~~
11190 ~~and 607.1406, and the order entered pursuant to subsection (5) shall no longer be of any force or~~
11191 ~~effect, except that the court may award the petitioning shareholder reasonable fees and expenses~~
11192 ~~of counsel and any experts in accordance with the provisions of subsection (5) and the petitioner~~
11193 ~~may continue to pursue any claims previously asserted on behalf of the corporation.~~

11194 (8) Any award pursuant to an order under subsection (3) or subsection (5), other than an
11195 award of fees and expenses pursuant to subsection (5), is subject to the provisions of s. 607.06401.
11196 Unless otherwise provided in the court's order, the effect of the distribution under s. 607.06401
11197 shall be measured as of the date of the court's order under subsection (3) or subsection (5).

11198

11199 **Comments to Section 607.1436:**

11200 This section largely follows the Model Act.

11201 Section 14.36(g) of the Model Act no longer includes the right to dissolve the corporation in lieu
11202 of completing the purchase based on the purchase price determined by the court. This change was
11203 made because the Corporate Laws Committee determined that giving the corporation the option to
11204 purchase and then reversing its course and dissolving would be unfair to petitioning shareholders
11205 and discourage them from making such petitions. The revised FBCA eliminates subsection (7) for
11206 this reason.

11207 Eliminating subsection (7) also eliminates the concerns raised by the decision in Jones v. Pfaff, 77
11208 So.3rd 884 (2nd DCA, Florida, 2012). In that case, the court determined, in a situation where the
11209 corporation elected not to complete its purchase of the petitioning shareholders' shares under s.
11210 607.1436, but rather elected to wind up and liquidate, that such action moved the liquidation under
11211 the auspices of a voluntary dissolution and thus eliminated the jurisdiction of the court to oversee
11212 the dissolution proceedings.

11213 In subsection (4), the requirement that the court stay the dissolution proceeding while determining
11214 the fair value of the shares to be purchased has been eliminated in favor of giving the court the
11215 option to do so under appropriate circumstances. While it may be appropriate to stay the dissolution
11216 proceeding under many circumstances, this change leaves the court with the discretion to continue
11217 to monitor the activities of the corporation and to take other equitable actions, as it deems
11218 appropriate, and to continue the dissolution proceedings while the purchase process is being
11219 completed in those circumstances where the court determines that such oversight remains
11220 appropriate. That may also include, for example, the equitable power to require the corporation to
11221 post a bond where that may be reasonable or appropriate.

11222 Under subsection (8), after entry of an order under subsection (5), the petitioner is a creditor with
11223 respect to the corporation or the electing shareholder who participate in the purchase, but any
11224 payments to be made by the corporation, other than expenses awarded under s. subsection (5) fall
11225 within the definition of "distribution" under s. 607.06401. Subsection (8) provides that the
11226 evaluation of whether the "distribution" is permissible under the requirements of s. 607.06401
11227 shall be tested at the time of the order unless the order expressly provides that such determination
11228 shall be made at the time of payment. A cross reference of this section has been added to
11229 subsection (6) to make clear that the Court should consider the measurement under subsection
11230 (8) before dismissing the petition to dissolve the corporation under that subsection.

11231

11232 607.14401 Deposit with Department of Financial Services.

11233 Assets of a dissolved corporation that should be transferred to a creditor, claimant, or
11234 shareholder of the corporation who cannot be found or who is not competent to receive them shall
11235 be reduced to cash and deposited, ~~within 6 months from the date fixed for the payment of the final~~
11236 ~~liquidating distribution~~, with the Department of Financial Services for safekeeping, ~~where such~~
11237 ~~assets shall be held as abandoned property~~. When the creditor, claimant, or shareholder furnishes
11238 satisfactory proof of entitlement to the amount ~~or assets~~ deposited, the Department of Financial
11239 Services shall pay such person ~~the creditor, claimant, or shareholder~~ or his or her representative
11240 that amount ~~or those assets~~.

11241

11242 **Commentary to Section 607.14401:**

11243 This provision has been modified to match the corollary provision in the Model Act.

11244

11245
11246
11247
11248
11249
11250
11251
11252
11253
11254
11255
11256
11257
11258
11259
11260
11261
11262
11263
11264
11265
11266
11267
11268
11269

ARTICLE 15

FOREIGN CORPORATIONS

607.1501 Authority of foreign corporation to transact business required; activities not constituting transacting business.⁴¹

(1) A foreign corporation may not transact business in this state until it obtains a certificate of authority from the ~~D~~department of State.

(2) The following activities, among others, do not constitute transacting business within the meaning of subsection (1):

(a) Maintaining, defending, mediating, arbitrating, or settling any proceeding.

(b) Carrying on any activity concerning the internal affairs of the foreign corporation, including h Holding meetings of its shareholders or the board of directors ~~or shareholders or carrying on other activities concerning internal corporate affairs.~~

(c) Maintaining bank accounts in financial institutions.

(d) Maintaining ~~officers offices~~ offices or agencies for the transfer, exchange, and registration of ~~the corporation's own~~ securities of the foreign corporation or maintaining trustees or depositaries with respect to those securities.

(e) Selling through independent contractors.

(f) Soliciting or obtaining orders, whether by mail or through employees, agents, or otherwise, if the orders require acceptance outside this state before they become contracts.

(g) Creating or acquiring indebtedness, mortgages, or ~~and~~ security interests in real or personal property.

(h) Securing or collecting debts or enforcing mortgages or ~~and~~ security interests in property securing the debts, and holding, protecting, or maintaining property so acquired.

(i) Transacting business in interstate commerce.

⁴¹ The Subcommittee is considering adding a provision to the list of activities that are not, in and of themselves, activities constituting "transacting business" in Florida to deal with the U.S. Supreme Court's recent decision in *South Dakota v. Wayfair, Inc.*, No. 17-494 (June 21, 2018).

11270 (j) Conducting an isolated transaction that is completed within 30 days and that is not
11271 one in the course of repeated transactions of a like nature.

11272 (k) Owning and controlling a subsidiary corporation incorporated in or limited liability
11273 company formed in, or transacting business within, this state; voting the stock of any such
11274 subsidiary corporation; or voting the membership interests of any such limited liability
11275 company, which it has lawfully acquired.

11276 (l) Owning a limited partnership interest in a limited partnership that is transacting ~~doing~~
11277 business within this state, unless the ~~such~~ limited partner manages or controls the partnership
11278 or exercises the powers and duties of a general partner.

11279 (m) Owning, protecting and maintaining, without more, real or personal property.

11280 (3) The list of activities in subsection (2) is not an exhaustive list of activities that do not
11281 constitute transacting business within the meaning of subsection (1).

11282 (4) This section ~~has no application to the question of whether any~~ does not apply in
11283 determining the contacts or activities that may subject a foreign corporation is subject to service
11284 of process, taxation, or regulation ~~and suit in~~ under any the law of this state other than this chapter.

11285

11286 **Note to Article 15 generally:**

11287 Article 15 is largely based on the substance contained in Article 9 of FRLUCA. At the same time,
11288 a number of sections are in different places than where they are found in FRLUCA, so as to make
11289 the form of this Article 15 continue to follow the structure of the current version of Article 15 in
11290 the FBCA. Further, a number of changes have been made where appropriate to integrate into
11291 Article 15 some of the modifications in the Model Act, and corollary changes in Article 9 of
11292 FRLUCA are proposed. However, the Model Act's change in terminology to reflect the registration
11293 concept in the Model Act has not been incorporated.

11294 **Commentary to Section 607.1501:**

11295 Florida substantially follows the Model Act's list of transactions that do not constitute transacting
11296 business in the state. Florida's list contains all of the transactions listed under the Model Act and
11297 adds two additional types of transactions (under subsections (2)(k) and (2)(l)) as well.
11298 Modifications have been made to reflect changes in subsection (2) from s. 605.0905 of
11299 FRLUCA. Further, subsections (a), (b), (c), (g), (h), and (m) reflect changes based on the 2016
11300 version of the Model Act.

11301 Subsection (3) does not appear in the Model Act. Modifications to this section reflect changes to
11302 bring this subsection into conformity with s. 605.0905 of FRLUCA.

11303

11304
11305
11306
11307
11308
11309
11310
11311
11312
11313

607.15015 Governing law.

(1) The law of the state or other jurisdiction under which a foreign corporation exists governs:

(a) The organization and internal affairs of the foreign corporation; and

(b) The interest holder liability of its shareholders.

(2) A foreign corporation may not be denied a certificate of authority by reason of a difference between the laws of its jurisdiction of formation and the laws of this state.

(3) A certificate of authority does not authorize a foreign corporation to engage in any business or exercise any power that a corporation may not engage in or exercise in this state.

11314 **Commentary to Section 607.15015:**

11315 This section is based largely on the language used in s. 605.0901 of FRLCA. It also is similar to
11316 s. 15.01 of the Model Act, although it does not use the Model Act wording regarding "registration"
11317 to do business in this State. Subsection (2) is replaced in s. 607.1503(4)

11318

11319 607.1502 Effect of failure to have a certificate of ~~Consequences of transacting business~~
 11320 without authority.

11321 (1) A foreign corporation transacting business in this state or its successors ~~without a~~
 11322 ~~certificate of authority~~ may not prosecute or maintain an action or proceeding in any court in this
 11323 state until it has obtained ~~obtains~~ a certificate of authority to transact business in this state.

11324 (2) The successor to a foreign corporation that transacted business in this state without a
 11325 certificate of authority and the assignee of a cause of action arising out of that business may not
 11326 prosecute or maintain a proceeding based on that cause of action in a any court in this state until
 11327 the foreign corporation or its successor has obtained ~~obtains~~ a certificate of authority to transact
 11328 business in this state.

11329 (3) A court may stay a proceeding commenced by a foreign corporation or its successor or
 11330 assignee until it determines whether the foreign corporation or its successor requires a certificate
 11331 of authority. If it so determines, the court may further stay the proceeding until the foreign
 11332 corporation or its successor has obtained ~~obtains the a~~ certificate of authority to transact business
 11333 in this state⁴².

11334 (4) A foreign corporation which transacts business in this state without obtaining a certificate
 11335 of authority to do so shall be ~~is~~ liable to this state for the years or parts thereof during which it
 11336 transacted business in this state without obtaining a certificate of authority in an amount equal to
 11337 all fees and penalties ~~taxes which that~~ would have been imposed by this chapter ~~act~~ upon the
 11338 foreign ~~such~~ corporation had it duly applied for and received a certificate of authority to transact
 11339 business in this state as required under ~~by~~ this chapter ~~act~~. In addition to the payments thus
 11340 prescribed, ~~such~~ the foreign corporation may, to the extent ordered by a court of competent
 11341 jurisdiction, be ~~shall be~~ liable for a civil penalty of not less than \$500 but not ~~or~~ more than \$1,000
 11342 for each year or part thereof during which it transacts business in this state without a certificate of
 11343 authority. The ~~Department of State~~ may collect all penalties due under this subsection ~~and may~~
 11344 ~~bring an action in circuit court to recover all penalties and fees due and owing the state.~~

11345 (5) ~~Notwithstanding subsections (1) and (2),~~ ~~the~~ failure of a foreign corporation to have
 11346 ~~obtain~~ a certificate of authority to transact business in this state does not impair the validity of any
 11347 of its contracts, deeds, mortgages, security interests, or corporate acts⁴³ or prevent the foreign
 11348 corporation ~~it~~ from defending an action or any proceeding in this state.

11349 (6) A shareholder, officer or director of a foreign corporation is not liable for the debts,
 11350 obligations, or other liabilities of the foreign corporation solely because the foreign corporation
 11351 transacted business in this state without a certificate of authority.

⁴² Corollary changes should be made at the end of s. 605.0904(3).

⁴³ Corollary change should be made to the wording in s. 605.0904(4).

11352 (7) Section 607.15015(1) applies even if a foreign corporation fails to have a certificate of
11353 authority to transact business in this state.

11354 (8) If a foreign corporation transacts business in this state without a certificate of
11355 authority or cancels its certificate of authority, it appoints the secretary of state as its agent for
11356 service of process for rights of action arising out of the transaction of business in this state.

11357

11358 **Commentary to Section 607.1502:**

11359 This section has been harmonized with s. 605.0904 of FRLCA.

11360 The word "maintain" is defined in the commentary to s. 15.02 of the Model Act as follows:

11361 The distinction between "maintaining" and "defending" an action or proceeding is
11362 determined on the basis of whether affirmative relief is sought. Such a nonregistered
11363 foreign corporation may interpose any defense or permissive or mandatory counterclaim to
11364 defeat a claimed recovery, but may not obtain a judgment based on the counterclaim until it
11365 has registered.

11366 The word "maintain" in the derivative action sections of Article 7 is used in a different context
11367 than the context in which it is used in Article 15. The use of the same word in Article 7 (which
11368 deals with maintaining an interest in the corporation during the pendency of the derivative action
11369 proceeding) should not be confused with the way the word "maintain" is being used in Article
11370 15.

11371 The changes to subsection (4) clarifying when payment of the described penalty is required
11372 reflects the current position of the Department of State not to collect this penalty unless required
11373 to do so by a court of competent jurisdiction.

11374

11375 607.1503 Application for certificate of authority.

11376 (1) A foreign corporation may apply for a certificate of authority to transact business in
11377 this state by delivering an application to the ~~D~~department of State for filing. Such application shall
11378 be made on forms prescribed ~~and furnished~~ by the ~~D~~department of State. The application must
11379 contain the following and shall set forth:

11380 (a) ~~The name of the foreign corporation and, as long as its name satisfies the~~
11381 ~~requirements of if the name does not comply with s. 607.0401, an alternate name adopted~~
11382 ~~pursuant to but if its name does not satisfy such requirements, a corporate name that~~
11383 ~~otherwise satisfies the requirements of s. 607.1506.;~~

11384 (b) The name of the foreign corporation's jurisdiction of incorporation under the
11385 law of which it is incorporated.;

11386 (c) Its date of incorporation and period of duration;

11387 (d) The principal office and mailing street address of the foreign corporation its
11388 principal office.;

11389 (e) The name and street address of its registered office in this state of, and the
11390 written acceptance by, the foreign corporation's initial and the name of its registered agent
11391 at that office in this state.;

11392 (f) The names and usual business addresses of its current directors and officers.;

11393 (g) ~~Such a~~ Additional information as may be necessary or appropriate in order to
11394 enable the ~~D~~department of State to determine whether the foreign ~~such~~ corporation is
11395 entitled to file an application for certificate of authority to transact business in this state
11396 and to determine and assess the fees ~~and taxes~~ payable as prescribed in this chapter ~~aet.~~

11397 (2) The foreign corporation shall deliver with a ~~the~~ completed application under
11398 subsection (1) a certificate of existence or a record (~~or a document~~ of similar import), duly
11399 authenticated, not more than 90 days prior to delivery of the application to the ~~D~~department of
11400 State signed by the secretary of state or other official having custody of the foreign corporation's
11401 publicly filed ~~corporate~~ records in its ~~the~~ jurisdiction of incorporation ~~under the law of which it is~~
11402 ~~incorporated~~. A translation of the certificate, under oath of the translator, must be attached to a
11403 certificate which is in a language other than the English language.

11404 (3) ~~A foreign corporation shall not be denied authority to transact business in this state~~
11405 ~~by reason of the fact that the laws of the jurisdiction under which such corporation is organized~~
11406 ~~governing its organization and internal affairs differ from the laws of this state.~~

11407 **Commentary to Section 607.1503:**

11408 This section is harmonized with s. 605.0902 of FRLCA.

11409 The requirement for an English translation in subsection (2) is consistent with the language in s.
11410 607.0120(5).

11411

11412 607.1504 Amended certificate of authority.

11413 (1) A foreign corporation authorized to transact business in this state shall deliver for
11414 filing an amendment to its ~~make application to the Department of State to obtain an amended~~
11415 certificate of authority to reflect a change in any of the following if it changes:

11416 (a) Its ~~corporate~~ name on the records of the department;

11417 (b) ~~The period of its duration; or~~

11418 (c) The jurisdiction of its incorporation.

11419 (d) The name and street address in this state of the foreign corporation's registered
11420 agent in this state, unless the change was timely made in accordance with s. 607.0502 or
11421 s. 607.05031.⁴⁴

11422 (2) The amendment must be filed within 90 days⁴⁵ after the occurrence of a change
11423 described in subsection (1), must be signed by an officer of the foreign corporation, and must state
11424 the following ~~Such application shall be made within 90 days after the occurrence of any change~~
11425 ~~mentioned in subsection (1), shall be made on forms prescribed by the Department of State, and~~
11426 ~~shall be executed in accordance with s. 607.0120. The foreign corporation shall deliver with the~~
11427 ~~completed application, a certificate, or a document of similar import, authenticated as of a date not~~
11428 ~~more than 90 days prior to delivery of the application to the Department of State by the Secretary~~
11429 ~~of State or other official having custody of corporate records in the jurisdiction under the laws of~~
11430 ~~which it is incorporated, evidencing the amendment. A translation of the certificate, under oath or~~
11431 ~~affirmation of the translator, must be attached to a certificate that is in a language other than~~
11432 ~~English. The application shall set forth:~~

11433 (a) ~~The~~ name of the foreign corporation as it appears on the records of the
11434 ~~D~~epartment of State.

11435 (b) The jurisdiction of its incorporation.

11436 (c) The date the foreign corporation ~~it~~ was authorized to do business in this state.

11437 (d) ~~If the name of the foreign corporation has been changed, the name relinquished,~~
11438 ~~the and its new name, a statement that the change of name has been effected under the laws~~
11439 ~~of the jurisdiction of its incorporation, and the date the change was effected.~~

⁴⁴ Subsection (d) of s. 605.0907(1), requiring changes to managers or members to be disclosed in an amended certificate of authority, should be removed from that statute.

⁴⁵ The corollary provision in FRLCA (s. 607.0907(2)) has a 30 day period. Consistent with the prior Act, a 90 day period is considered more appropriate, and, as a result, the corollary provision in FRLCA should be modified to use the same 90 day period.

11440 (e) If the amendment changes its period of duration, a statement of such change.

11441 (f) If the amendment changes the jurisdiction of incorporation of the foreign
11442 corporation, a statement of that ~~such~~ change.

11443 (3) The requirements of s. 607.1503⁴⁶ for obtaining an original certificate of authority apply
11444 to obtaining an amended certificate under this section unless the department or other official
11445 having custody of the foreign corporation's publicly filed records in its jurisdiction of
11446 incorporation did not require an amendment to effectuate the change on its records.

11447 (4) Subject to subsection (3), a foreign corporation authorized to do business in this state may
11448 make application to the department to obtain an amended certificate of authority to add, remove,
11449 or change the name, title, capacity, or address of an officer or director of the foreign corporation.

11450

⁴⁶ The reference in s. 605.0907(4) of FRLCA is to subsection (2) of 605.0902 (Application for certificate of authority). The reference in this subsection (3) is to s. 607.1503 generally and not just to subsection (2) of s. 607.1503. The corollary FRLCA provision should remove the reference to subsection (2).

11451 **Commentary to Section 607.1504:**

11452 This section has been harmonized with s. 605.0907 of FRLCA.

11453

11454 607.1505 Effect of a certificate of authority.

11455 (1) Unless the department determines that an application for a A certificate of authority of a
11456 authorizes the foreign corporation to which it is issued to transact business in this state does not
11457 comply with the filing requirements of this chapter, subject, however, to the right of the
11458 Department of State shall, upon payment of all filing fees, authorize the foreign corporation to
11459 transact business in this state and file the application for to suspend or revoke the certificate of
11460 authority as provided in this act.

11461 (2) The filing by the department of an application for a certificate of authority means that the
11462 foreign corporation that filed⁴⁷ the application to transact business in this state has obtained a
11463 certificate of authority to transact business in this state and is authorized to transact business in
11464 this state, subject, however, to the right of the department to suspend or revoke the certificate of
11465 authority as provided in this chapter.⁴⁸ A foreign corporation with a valid certificate of authority
11466 has the same but no greater rights and has the same but no greater privileges as, and except as
11467 otherwise provided by this act is subject to the same duties, restrictions, penalties, and liabilities
11468 now or later imposed on, a domestic corporation of like character.

11469 (3) ~~This act does not authorize this state to regulate the organization or internal affairs of a~~
11470 ~~foreign corporation authorized to transact business in this state.~~

11471

⁴⁷ The word "files" in s. 605.0903(2) should be changed to "filed".

⁴⁸ The language in subsection (2) above is based in large part on the language from subsection (2) of 605.0903 of FRLCA, but has been further refined to more clearly identify the effect of an acceptance of a filing by the Department of State. Section 605.0903(2) should be modified in the same manner as changed in subsection (2) above.

11472 **Commentary to Section 607.1505:**

11473 This section has been harmonized with s. 605.0903 of FRLUCA.

11474 The language deleted in subsection (2) is now covered in s. 607.15015(3). While the language used
11475 in that section is slightly different than the wording in the existing FBCA (based on the wording
11476 in the corollary section of FRLUCA), it is not intended to be a substantive change to existing law.

11477

11478 607.1506 Corporate name of foreign corporation.

11479 (1) A foreign corporation whose name is unavailable under or whose name does is-not
 11480 otherwise comply with entitled to file an application for a certificate of authority unless the
 11481 corporate name of such foreign such corporation satisfies the requirements of s. 607.0401 shall⁴⁹
 11482 use an alternate name that complies with .If the corporate name of a foreign corporation does not
 11483 satisfy the requirements of s. 607.0401, the foreign corporation, to obtain or maintain a certificate
 11484 of authority to transact business in this state.: An alternate name adopted for use in this state shall
 11485 be cross-referenced to the actual name of the foreign corporation in the records of the department,
 11486 provided that no cross reference is required if the alternate name involves no more than adding the
 11487 suffix "corporation," "company," or "incorporated" or the abbreviation "Corp.," or "Inc.," or Co."
 11488 or the designation "Corp.," or "Inc." or "Co." to the name. If the actual name of the foreign
 11489 corporation subsequently becomes available in this state and the foreign corporation elects to
 11490 operate in this state under its actual name, or the foreign corporation chooses to change its alternate
 11491 name, a record approving the election or change, as the case may be, by its directors or
 11492 shareholders, and signed as required pursuant to s. 607.0120, shall be delivered to the department
 11493 for filing.

11494 (a) ~~May add the word "corporation," "company," or "incorporated" or the~~
 11495 ~~abbreviation "Corp.," or "Inc.," or "Co.," or the designation "Corp," or "Inc," or "Co," as~~
 11496 ~~will clearly indicate that it is a corporation instead of a natural person, partnership, or other~~
 11497 ~~business entity; or~~

11498 (b) ~~May use an alternate name to transact business in this state if its real name is~~
 11499 ~~unavailable. Any such alternate corporate name, adopted for use in this state, shall be cross-~~
 11500 ~~referenced to the real corporate name in the records of the Division of Corporations. If the~~
 11501 ~~corporation's real corporate name becomes available in this state or the corporation~~
 11502 ~~chooses to change its alternate name, a copy of the resolution of its board of directors~~
 11503 ~~changing or withdrawing the alternate name, executed as required by s. 607.0120, shall be~~
 11504 ~~delivered for filing.~~

11505 (2) A The corporate name (including the alternate name) of a foreign corporation that adopts
 11506 an alternate name under subsection (1) and obtains a certificate of authority with the alternate name
 11507 need not comply with s. 865.09 with respect to the alternate name. must be distinguishable upon
 11508 the records of the Division of Corporations from:

11509 (a) ~~Any corporate name of a corporation incorporated or authorized to transact~~
 11510 ~~business in this state;~~

⁴⁹ A corollary change should be made to s. 605.0906 to change the word "may" to "shall".

11511 ~~(b)The alternate name of another foreign corporation authorized to transact~~
11512 ~~business in this state;~~

11513 ~~(c)The corporate name of a not for profit corporation incorporated or authorized to~~
11514 ~~transact business in this state; and~~

11515 ~~(d)The names of all other entities or filings, except fictitious name registrations~~
11516 ~~pursuant to s. 865.09, organized or registered under the laws of this state that are on file~~
11517 ~~with the Division of Corporations.~~

11518 (3) So long as a foreign corporation maintains a certificate of authority with an alternate
11519 name, a foreign corporation shall transact business in this state under the alternate name unless the
11520 corporation is authorized under s. 865.09 to transact business in this state under another name.

11521 (4) If a foreign corporation authorized to transact business in this state changes its
11522 corporate name to one that does not comply with ~~satisfy the requirements of~~ s. 607.0401, it may
11523 not thereafter transact business in this state ~~under the changed name~~ until it complies with
11524 subsection (1) adopts a name satisfying the requirements of s. 607.0401 and obtains an amended
11525 certificate of authority under s. 607.1504⁵⁰.

11526 (5) Notwithstanding the foregoing, a foreign corporation may register under a name that
11527 is not otherwise distinguishable on the records of the department with the written consent of the
11528 other entity if the consent is filed with the department at the time of registration of such name and
11529 if such name is not identical to the name of the other entity.

11530

⁵⁰ The reference to the section of FRLUCA that is the corollary section to s. 607.1504 (s. 605.0907 of FRLUCA) does not include a reference to the section dealing with an amended certificate of authority. A similar reference should be added to s. 605.0906(4).

11531 **Commentary to Section 607.1506:**

11532 This section has been harmonized with s. 605.0906 of FRLCA.

11533 Subsection (5), consistent with s. 607.0401(1)(e) with respect to domestic corporations, allows a
11534 name otherwise unavailable to be used by consent. The section also provides that the department
11535 shall deny such a request if the name of the entity requested with consent is identical to the name
11536 of the other entity.

11537

11538 607.1507 Registered office and registered agent of foreign corporation.

11539 (1) Each foreign corporation authorized to transact business in this state shall designate and
11540 ~~must~~ continuously maintain in this state:

11541 (a) A registered office, which ~~that~~ may be the same as ~~any~~ of its places of business
11542 in this state; and

11543 (b) A registered agent, which must ~~who may~~ be:

11544 1. An individual who resides in this state and whose business address
11545 office is identical to the address of ~~with~~ the registered office; or

11546 2. A domestic entity which is an authorized entity and whose business
11547 address is identical to the address of the registered office, or another foreign entity
11548 authorized to transact business in this state which is an authorized entity and whose
11549 business address ~~corporation or not for profit corporation as defined in chapter 617,~~
11550 ~~the business office of which is identical to the address of~~ with the registered office;
11551 ~~or~~

11552 3. ~~Another foreign corporation or foreign not for profit corporation~~
11553 ~~authorized pursuant to this chapter or chapter 617, to transact business or conduct~~
11554 ~~its affairs in this state the business office of which is identical with the registered~~
11555 ~~office.~~

11556 (2) This section does not apply to corporations which are required by law to designate the
11557 Chief Financial Officer as their attorney for the service of process, associations subject to the
11558 provisions of chapter 665, and banks and trust companies subject to the provisions of the financial
11559 institutions codes.

11560 (32) Each initial A-registered agent, and each appointed pursuant to this section or a
11561 successor registered agent that is appointed, pursuant to s. 607.1508 on whom process may be
11562 served shall each file a statement in writing with the Department of State, in the such form and
11563 manner as shall be prescribed by the department, accepting the appointment as a-registered agent
11564 while simultaneously with his or her being designated as the registered agent. The Such statement
11565 of acceptance must provide shall state that the registered agent is familiar with, and accepts, the
11566 obligations of that position.

11567 (4) The duties of a registered agent are as follows:

11568 (a) To forward to the foreign corporation at the address most recently supplied
11569 to the registered agent by the foreign corporation, a process, notice or demand pertaining to
11570 the foreign corporation which is served on or received by the registered agent;

11571 (b) If the registered agent resigns, to provide the notice required under s.
11572 607.1509 to the foreign corporation at the address most recently supplied to the registered
11573 agent by the foreign corporation.

11574 (5) The department shall maintain an accurate record of the registered agents and registered
11575 offices for the service of process and shall promptly furnish any information disclosed thereby
11576 promptly upon request and payment of the required fee.

11577 (6) A foreign corporation may not prosecute or maintain any action in a court in this state
11578 until the foreign corporation complies with the provisions of this section, pays to the department
11579 the amounts required by this chapter, and, to the extent ordered by a court of competent
11580 jurisdiction, pays to the department a penalty of \$5 for each day it has failed to so comply or \$500,
11581 whichever is less.

11582 (7) A court may stay a proceeding commenced by a foreign corporation until the
11583 corporation complies with this section.

11584

11585 **Commentary to Section 607.1507:**

11586 This section has been harmonized with s. 607.0501 of the FBCA.

11587 The change to subsection (1)(a) is to make it consistent with s. 607.0501 of the FBCA and the
11588 corollary section of FRLCA. It is not intended to a substantive change.

11589 New subsection (6) is modeled after s. 607.1502(3) and allows a court to stay a proceeding
11590 commenced by a corporation until the corporation complies with this section. The change in
11591 subsection (6) relating to payment of a penalty reflects the current position of the Department of
11592 State not to collect this penalty unless required to do so by a court of competent jurisdiction.

11593

11594 607.1508 Change of registered office and registered agent of foreign corporation.

11595 (1) In order to change its registered agent or registered office address, a foreign corporation
11596 authorized to transact business in this state may deliver ~~change its registered office or registered~~
11597 ~~agent by delivering~~ to the ~~D~~department of State for filing a statement of change containing the
11598 following that sets forth:

11599 (a) The ~~its~~ name of the foreign corporation.;

11600 (b) The name ~~street address~~ of its current registered office.;

11601 (c) If the current registered agent is to be changed, the name of the new registered
11602 agent.

11603 (d) The street address of its current registered office for its current⁵¹ registered
11604 agent.

11605 (e) If the street address of the current registered office is to be changed, the new
11606 street address of the ~~its new~~ registered office;

11607 (d) ~~The name of its current registered agent;~~

11608 (e) ~~If the current registered agent is to be changed, the name of its new registered~~
11609 ~~agent and the new agent's written consent (either on the statement or attached to it) to the~~
11610 ~~appointment;~~

11611 (f) ~~That, after the change or changes are made, the street address of its registered~~
11612 ~~office and the business office of its registered agent will be identical; and~~

11613 (g) ~~That such change was authorized by resolution duly adopted by its board of~~
11614 ~~directors or by an officer of the corporation so authorized by the board of directors.~~

11615 (2) ~~If a registered agent changes the street address of her or his business office, she or he may~~
11616 ~~change the street address of the registered office of any foreign corporation for which she or he is~~
11617 ~~the registered agent by notifying the corporation in writing of the change and signing (either~~
11618 ~~manually or in facsimile) and delivering to the Department of State for filing a statement of change~~
11619 ~~that complies with the requirements of paragraphs (1)(a)-(f) and recites that the corporation has~~
11620 ~~been notified of the change. If the registered agent is changed, the written acceptance of the~~
11621 ~~successor registered agent described in s. 607.1507(3) must also be included in or attached to the~~
11622 ~~statement of change.~~

11623 (3) A statement of change is effective when filed by the department.

⁵¹ Add the word "current" in the same places in s. 605.0114(1)(d) as it is used here and in s. 607.0502(1).

11624 (4) The changes described in this section may also be made on the foreign corporation's
11625 annual report or in an application for reinstatement filed with the department under s. 607.1622.
11626

11627 **Commentary to Section 607.1508:**

11628 This section has been harmonized with s. 607.0502 of the FBCA and s. 605.0114 of FRLCA.

11629

11630 607.1509 Resignation of registered agent of foreign corporation.

11631 (1) A registered agent may resign as agent for a foreign corporation by delivering to the
11632 department for filing a signed statement of resignation containing the name of the foreign
11633 corporation. The registered agent of a foreign corporation may resign his or her agency
11634 appointment by signing and delivering to the Department of State for filing a statement of
11635 resignation and mailing a copy of such statement to the corporation at the corporation's principal
11636 office address shown in its most recent annual report or, if none, shown in its application for a
11637 certificate of authority or other most recently filed document. The statement of resignation must
11638 state that a copy of such statement has been mailed to the corporation at the address so stated. The
11639 statement of resignation may include a statement that the registered office is also discontinued.

11640 (2) After delivering the statement of resignation to the department for filing, the registered
11641 agent shall promptly mail a copy to the foreign corporation at its current mailing address. The
11642 agency appointment is terminated as of the 31st day after the date on which the statement was filed
11643 and, unless otherwise provided in the statement, termination of the agency acts as a termination of
11644 the registered office.

11645 (3) A registered agent is terminated upon the earlier of:

11646 (a) The 31st day after the department files the statement of resignation; or

11647 (b) When a statement of change or other record designating a new registered
11648 agent is filed by the department.

11649 (4) When a statement of resignation takes effect, the registered agent ceases to have
11650 responsibility for a matter thereafter tendered to it as agent for the foreign corporation. The
11651 resignation does not affect contractual rights that the foreign corporation has against the agent or
11652 that the agent has against the foreign corporation.

11653 (5) A registered agent may resign from a foreign corporation regardless of whether the
11654 foreign corporation has active status.

11655

11656 **Commentary to Section 607.1509:**

11657 This section has been harmonized with s. 607.0503 of the FBCA and s. 605.0115 of FRLCA.

11658

- 11659 607.15091 Change of name or address by registered agent.
- 11660 (1) If a registered agent changes his or her name or address, the agent may deliver to the
- 11661 department for filing a statement of change that provides the following:
- 11662 (a) The name of the foreign corporation represented by the registered agent.
- 11663 (b) The name of the registered⁵² agent as currently shown in the records of the
- 11664 department for the corporation.
- 11665 (c) If the name of the registered agent has changed, its new name.
- 11666 (d) If the address of the registered agent has changed, the new address.
- 11667 (e) A statement that the registered agent has given the notice required under subsection
- 11668 (2).
- 11669 (2) A registered agent shall promptly furnish notice of the statement of change and the
- 11670 changes made by the statement filed with the department to the represented foreign corporation.
- 11671

⁵² Add the word "registered" before the word "agent" in s. 605.0116(1)(b), (c), and (d).

11672 **Commentary to Section 607.15091:**

11673 This section has been harmonized with s. 607.05031 of the FBCA. It replaces s. 607.1509(2).

11674

11675 607.15092 Delivery of notice or other communication.

11676 (1) Except as otherwise provided in this chapter, permissible means of delivery of a notice
11677 or other communication includes delivery by hand, the United States Postal Service, a commercial
11678 delivery service, and electronic transmission, all as more particularly described in s. 607.0141.

11679 (2) Except as provided in subsection (3), delivery to the department is effective only when
11680 a notice or other communication is received by the department.

11681 (3) If a check is mailed to the department for payment of an annual report fee or the annual
11682 supplemental⁵³ fee required under s. 607.193, the check shall be deemed to have been received by
11683 the department as of the postmark date appearing on the envelope or package transmitting the
11684 check if the envelope or package is received by the department.

11685

⁵³ The word "supplemental" should also be added to s. 605.0118(3).

11686 **Commentary to Section 607.15092:**

11687 This section has been harmonized with s. 607.05032 of the FBCA which, in turn, was derived from

11688 s. 605.0118 of FRLCA. It is new to the FBCA.

11689

11690 607.15101 Service of process, notice, or demand on a foreign corporation.

11691 (1) A foreign corporation may be served with process required or authorized by law by
11692 serving on its registered agent.

11693 (2) If a foreign corporation ceases to have a registered agent or if its registered agent
11694 cannot with reasonable diligence be served, the process required or permitted by law may instead
11695 be served on the chair of the board, the president, any vice president, the secretary, or the treasurer
11696 of the foreign corporation at the principal office of the foreign corporation in this state.

11697 (3) If the process cannot be served on a foreign corporation pursuant to subsection (1) or
11698 subsection (2), the process may be served on the secretary of state as an agent of the foreign
11699 corporation.

11700 (4) Service of process on the secretary of state may be made by delivering to and leaving
11701 with the department duplicate copies of the process.

11702 (5) Service is effectuated under subsection (3) on the date shown as received by the
11703 department.

11704 (6) The department shall keep a record of each process served on the secretary of state
11705 pursuant to this section and record the time of and the action taken regarding the service.⁵⁴

11706 (7) Any notice or demand on a foreign corporation under this chapter may be given or
11707 made to the chair of the board, the president, any vice president, the secretary, or the treasurer of
11708 the foreign corporation; to the registered agent of the foreign corporation at the registered office
11709 of the foreign corporation in this state; or to any other address in this state that is in fact the
11710 principal office of the foreign corporation in this state.

11711 (8) This section does not affect the right to serve process, give notice, or make a demand
11712 in any other manner provided by law.

11713 ~~The registered agent of a foreign corporation authorized to transact business in this state is~~
11714 ~~the corporation's agent for service of process, notice, or demand required or permitted by law to~~
11715 ~~be served on the foreign corporation.~~

11716 ~~(2) A foreign corporation may be served by registered or certified mail, return receipt~~
11717 ~~requested, addressed to the secretary of the foreign corporation at its principal office shown in its~~
11718 ~~application for a certificate of authority or in its most recent annual report if the foreign~~
11719 ~~corporation:~~

⁵⁴ What is the Department's obligation to transmit the service to the foreign corporation?

- 11720 (a) ~~Has no registered agent or its registered agent cannot with reasonable diligence~~
11721 ~~be served;~~
- 11722 (b) ~~Has withdrawn from transacting business in this state under s. 607.1520; or~~
- 11723 (c) ~~Has had its certificate of authority revoked under s. 607.1531.~~
- 11724 (3) ~~— Service is perfected under subsection (2) at the earliest of:~~
- 11725 (a) ~~The date the foreign corporation receives the mail;~~
- 11726 (b) ~~The date shown on the return receipt, if signed on behalf of the foreign~~
11727 ~~corporation; or~~
- 11728 (c) ~~Five days after its deposit in the United States mail, as evidenced by the~~
11729 ~~postmark, if mailed postpaid and correctly addressed.~~
- 11730 (4) ~~— This section does not prescribe the only means, or necessarily the required means, of~~
11731 ~~serving a foreign corporation. Process against any foreign corporation may also be served in~~
11732 ~~accordance with chapter 48 or chapter 49.~~
- 11733 (5) ~~— Any notice to or demand on a foreign corporation made pursuant to this act may be made~~
11734 ~~in accordance with the procedures for notice to or demand on domestic corporations under s.~~
11735 ~~607.0504.~~
- 11736

11737 **Commentary to Section 607.15101:**

11738 This section has been harmonized with s. 607.0504 of the FBCA.

11739

11740 607.1520 Withdrawal and cancellation of certificate of authority for of foreign
11741 corporation.

11742 (1) To cancel its certificate of authority to transact business in this state, a foreign
11743 corporation must deliver to the department for filing a notice of withdrawal of certificate of
11744 authority. The certificate of authority⁵⁵ is canceled when the notice of withdrawal becomes
11745 effective pursuant to s. 607.0123. The notice of withdrawal of certificate of authority must be
11746 signed by an officer or director and state the following:

11747 (a) The name of the foreign corporation as it appears on the records of the
11748 department.

11749 (b) The name of the foreign corporation's jurisdiction of incorporation.

11750 (c) The date the foreign corporation was authorized to transact business in this
11751 state.

11752 (d) That⁵⁶ the foreign corporation is withdrawing its certificate of authority in this
11753 state.

11754 (e) That it revokes the authority of its registered agent to accept service on its behalf
11755 and appoints the secretary of state as its agent for service of process based on a cause of
11756 action arising during the time it was authorized to transact business in this state;

11757 (f) A mailing address to which the secretary of state may mail a copy of any process
11758 served on it under paragraph (e); and

11759 (g) A commitment to notify the department in the future of any change in its mailing
11760 address.

11761 ~~A foreign corporation authorized to transact business in this state may not withdraw from~~
11762 ~~this state until it obtains a certificate of withdrawal from the Department of State.~~

11763 ~~(2) — A foreign corporation authorized to transact business in this state may apply for a~~
11764 ~~certificate of withdrawal by delivering an application to the Department of State for filing. The~~
11765 ~~application shall be made on forms prescribed and furnished by the Department of State and shall~~
11766 ~~set forth:~~

11767 ~~(a) The name of the foreign corporation and the jurisdiction under the law of which~~
11768 ~~it is incorporated;~~

⁵⁵ The words "of authority" should also be added to the second sentence of s. 605.0910.

⁵⁶ The word "that" should also be added in the same manner to s. 605.0910(4) of FRLCA.

11769 ~~(b) That it is not transacting business in this state and that it surrenders its authority~~
11770 ~~to transact business in this state;~~

11771 ~~(c) That it revokes the authority of its registered agent to accept service on its behalf~~
11772 ~~and appoints the Department of State as its agent for service of process based on a cause~~
11773 ~~of action arising during the time it was authorized to transact business in this state;~~

11774 ~~(d) A mailing address to which the Department of State may mail a copy of any~~
11775 ~~process served on it under paragraph (c); and~~

11776 ~~(e) A commitment to notify the Department of State in the future of any change in~~
11777 ~~its mailing address.~~

11778 ~~(23)~~⁵⁷ After the withdrawal of the foreign corporation is effective, service of process on the
11779 ~~secretary of state~~ Department of State under this section is service on the foreign corporation. Upon
11780 receipt of the process, the secretary of state ~~Department of State~~ shall mail a copy of the process
11781 to the foreign corporation at the mailing address set forth under subsection ~~(1)(f)~~ ~~(2)~~.

11782

⁵⁷ Add this subsection (2) to FRLCA s. 605.0910.

11783 **Commentary to Section 607.1520:**

11784 This section has been harmonized with s. 605.0910 of FRLCA.

11785

11786 607.1521 Withdrawal deemed on conversion to domestic filing entity.

11787 A foreign corporation authorized to transact business in this state that converts to a
11788 domestic corporation or another domestic eligible entity that is organized, incorporated, registered
11789 or otherwise formed through the delivery of a record to the department for filing is deemed to have
11790 withdrawn its certificate of authority on the effective date of the conversion.⁵⁸

11791

⁵⁸ Harmonize this language in s. 605.0911 of FRLCA.

11792 **Commentary to Section 607.1521:**

11793 This section is new to the FBCA. It is based on s. 605.0911 of FRLCA and s. 15.08 of the Model
11794 Act.

11795

11796 607.1522 Withdrawal on dissolution, merger, or conversion to **certain** nonfiling
11797 entities.

11798
11799 (1) A foreign corporation that is authorized to transact business in this state that has
11800 dissolved and completed winding up, has merged into a foreign eligible entity that is not authorized
11801 to transact business in this state, or has converted to a domestic or foreign eligible entity that is not
11802 organized, incorporated, registered or otherwise formed through the public filing of a record, shall
11803 deliver a notice of withdrawal of certificate of authority to the department for filing in accordance
11804 with s. 607.1520.

11805 (2) After a withdrawal under this section of a foreign corporation that has converted to
11806 another type of entity is effective, service of process in any action or proceeding based on a cause
11807 of action arising during the time the foreign corporation was authorized to transact⁵⁹ business in
11808 this state may be made pursuant to s. 607.15101.

11809

⁵⁹ The corollary FRLCA provision uses the words "do business". The FRLCA provision should be conformed to this section.

11810 **Commentary to Section 607.1522:**

11811 This section is new to the FBCA. It is based on s. 605.0912 of FRLCA and s. 15.09 of the Model
11812 Act.

11813

11814 607.1523 Action by Department of Legal Affairs.

11815

11816 The Department of Legal Affairs may maintain an action to enjoin a foreign corporation
11817 from transacting business in this state in violation of this chapter.

11818

11819 **Commentary to Section 607.1523:**

11820 This section is new to the FBCA. It is based on s. 605.0913 of FRLCA and s. 15.12 of the Model
11821 Act.

11822

11823 607.1530 ~~Grounds for~~ Revocation of certificate of authority to transact business.

11824 (1) ~~A The Department of State may commence a proceeding under s. 607.1531 to revoke~~
11825 ~~the certificate of authority of a foreign corporation authorized to transact business in this state may~~
11826 ~~be revoked by the department if:~~

11827 (a~~1~~) The foreign corporation ~~does not deliver~~ has failed to file its annual report
11828 to with the Department of State by 5 p.m. Eastern Time on the third Friday in September
11829 of each year;

11830 (b~~2~~) The foreign corporation does not pay, ~~within the time required by this act,~~
11831 ~~any a fees, taxes, or penalty penalties~~ due to the department under this chapter imposed by
11832 this act or other law;

11833 (c~~3~~) The foreign corporation ~~does not appoint and maintain a is without a~~
11834 ~~registered agent as required by s. 607.1507; or registered office in this state for 30 days or~~
11835 ~~more.~~

11836 (d~~4~~) The foreign corporation does not deliver for filing a statement of a change
11837 under notify the Department of State under s. 607.1508 within 30 days after the change in
11838 the name or address of the agent has occurred⁶⁰, unless, within 30 days after the change
11839 occurred either: or s. 607.1509 that its registered agent has resigned or that its registered
11840 office has been discontinued within 30 days of the resignation or discontinuance.

11841 1. The registered agent files a statement of change under s. 607.15091; or

11842 2. The change was made in accordance with s. 607.1508(4) or s.
11843 607.1504(1)(c);

11844 (e) The foreign corporation has failed to amend its certificate of authority to reflect
11845 a change in its name on the records of the department or its jurisdiction of incorporation;

11846 (f) The foreign corporation's period of duration stated in its articles of incorporation
11847 has expired;

11848 (g~~5~~) An incorporator, director, officer, or agent of the foreign corporation signs
11849 ~~signed~~ a document that she or he knew was false in ~~a any~~ material respect with the intent
11850 that the document be delivered to the ~~D~~department of State for filing;

11851 (h~~6~~) The ~~D~~department of State receives a duly authenticated certificate from the
11852 secretary of state or other official having custody of corporate records in the jurisdiction

⁶⁰ Make a corresponding change in s. 605.0908(1)(d) of FRLICA.

11853 under the law of which the foreign corporation is incorporated stating that it has been
11854 dissolved or is no longer active on the official's records; or disappeared as the result of a
11855 merger.

11856 (i7) The foreign corporation has failed to answer truthfully and fully, within the
11857 time prescribed by this chapter ~~aet~~, interrogatories propounded by the ~~D~~department of
11858 State.

11859 (2) Revocation of a foreign corporation's certificate of authority for failure to file an
11860 annual report shall occur on the fourth Friday in September of each year. The department shall
11861 issue a notice in a record of the revocation to the revoked foreign corporation. Issuance of the
11862 notice may be by electronic transmission to a foreign corporation that has provided the department
11863 with an e-mail address.

11864 (3) If the department determines that one or more grounds exist under paragraph (1)(b)
11865 for revoking a foreign corporation's certificate of authority, the department shall issue a notice in
11866 a record to the foreign corporation of the department's intent to revoke the certificate of authority.
11867 Issuance of the notice may be by electronic transmission to a foreign corporation that has provided
11868 the department with an e-mail address.

11869 (4) If, within 60 days after the department sends the notice of intent to revoke in
11870 accordance with subsection (3), the foreign corporation does not correct each ground for
11871 revocation or demonstrate to the reasonable satisfaction of the department that each ground
11872 determined by the department does not exist, the department shall revoke the foreign corporation's
11873 authority to transact business in this state and issue a notice in a record of revocation which states
11874 the grounds for revocation. Issuance of the notice may be by electronic transmission to a foreign
11875 corporation that has provided the department with an e-mail address.

11876 (5) Revocation of a foreign corporation's certificate of authority does not terminate the
11877 authority of the registered agent of the corporation.

11878

11879 **Commentary to Section 607.1530:**

11880 This provision has been updated and modernized to follow the substance of FRLCA s. 605.0908.

11881 Subsection (5) has been added from s. 607.0531(4) since s. 607.0131 is being removed.

11882

11883 ~~607.1531—Procedure for and effect of revocation.~~

11884 ~~(1) If the Department of State determines that one or more grounds exist under s. 607.1530~~
11885 ~~for revocation of a certificate of authority, the Department of State shall serve the foreign~~
11886 ~~corporation with notice of its intent to revoke the foreign corporation's certificate of authority. If~~
11887 ~~the foreign corporation has provided the department with an electronic mail address, such notice~~
11888 ~~shall be by electronic transmission. Revocation for failure to file an annual report shall occur on~~
11889 ~~the fourth Friday in September of each year. The department shall issue a certificate of revocation~~
11890 ~~to each revoked corporation. Issuance of the certificate of revocation may be by electronic~~
11891 ~~transmission to any corporation that has provided the department with an electronic mail address.~~

11892 ~~—(2) If the foreign corporation does not correct each ground for revocation under s.~~
11893 ~~607.1530(2) (7) or demonstrate to the reasonable satisfaction of the Department of State that each~~
11894 ~~ground determined by the Department of State does not exist within 60 days after issuance of~~
11895 ~~notice, the Department of State shall revoke the foreign corporation's certificate of authority by~~
11896 ~~issuing a certificate of revocation that recites the ground or grounds for revocation and its effective~~
11897 ~~date. Issuance of the certificate of revocation may be by electronic transmission to any foreign~~
11898 ~~corporation that has provided the department with an electronic mail address.~~

11899 ~~—(3) The authority of a foreign corporation to transact business in this state ceases on the date~~
11900 ~~shown on the certificate revoking its certificate of authority.~~

11901 ~~—(4) Revocation of a foreign corporation's certificate of authority does not terminate the~~
11902 ~~authority of the registered agent of the corporation.~~

11903

11904 **Commentary to Section 607.1531:**

11905 The substance of this section has been added to s. 607.1530 of the FBCA in order to follow the
11906 corollary FRLCA model. As a result, this section has been eliminated.

11907

11908 607.15315 ~~Revocation; application for Reinstatement following revocation of certificate~~
11909 ~~of authority.~~

11910 (1)(a) ~~A foreign corporation the certificate of authority of which has been revoked pursuant~~
11911 ~~to s. 607.1530 or former s. 607.1531 may apply to the Department of State for reinstatement at~~
11912 ~~any time after the effective date of revocation of authority. The application must foreign~~
11913 ~~corporation applying for reinstatement must submit all fees and penalties then owed by the foreign~~
11914 ~~corporation at rates provided by law at the time the foreign corporation applies for reinstatement,~~
11915 ~~together with an application for reinstatement prescribed and furnished by the department, which~~
11916 ~~is signed by both the registered agent and an officer or director of the company and states:~~

11917 (a)1. ~~Recite the name under which of the foreign corporation is authorized to~~
11918 ~~transact business in this state and the effective date of its revocation of authority;.~~

11919 (b)2. ~~The street address of the corporation's principal office and mailing address~~
11920 ~~State that the ground or grounds for revocation of authority either did not exist or have~~
11921 ~~been eliminated and that no further grounds currently exist for revocation of authority;.~~

11922 (c)3. ~~The jurisdiction of State that the foreign corporation's formation and the~~
11923 ~~date on which it became qualified to transact business in this state. name satisfies the~~
11924 ~~requirements of s. 607.1506; and~~

11925 4. ~~State that all fees owed by the corporation and computed at the rate provided by~~
11926 ~~law at the time the foreign corporation applies for reinstatement have been paid; or~~

11927 (d) ~~The foreign corporation's federal employer identification number or, if none,~~
11928 ~~whether one has been applied for.;~~

11929 (e) ~~The name, title or capacity, and address of at least one officer or director of~~
11930 ~~the corporation.~~

11931 (f) ~~Additional information that is necessary or appropriate to enable the~~
11932 ~~department to carry out this chapter.~~

11933 (2) ~~In lieu of the requirement to file an application for reinstatement as described in~~
11934 ~~subsection (1), a foreign corporation whose certificate of authority has been revoked may submit~~
11935 ~~all fees and penalties owed by the corporation at the rates provided by law at the time the~~
11936 ~~corporation applies for reinstatement, together with a current annual report, signed by both the~~
11937 ~~registered agent and an officer or director of the corporation, which contains the information~~
11938 ~~described in subsection (1).~~

11939 ~~(b)As an alternative, the foreign corporation may submit a current annual report,~~
11940 ~~signed by the registered agent and an officer or director, which substantially complies with~~
11941 ~~the requirements of paragraph (a).~~

11942 (3) If the department determines that an application for reinstatement contains the
11943 information required under subsection (1) or subsection (2) and that the information is correct,
11944 upon payment of all required fees and penalties, the department shall reinstate the foreign
11945 corporation's certificate of authority.

11946 ~~(2) If the Department of State determines that the application contains the information~~
11947 ~~required by subsection (1) and that the information is correct, it shall cancel the certificate of~~
11948 ~~revocation of authority and prepare a certificate of reinstatement that recites its determination and~~
11949 ~~prepare a certificate of reinstatement, file the original of the certificate, and serve a copy on the~~
11950 ~~corporation under s. 607.0504(2).~~

11951 ~~(43) When a~~ the reinstatement becomes ~~is effective, it relates back to and takes effect as of the~~
11952 ~~effective date of the revocation of authority and the foreign corporation may resume its activities~~
11953 ~~in this state resumes carrying on its business as if the revocation of authority had not never~~
11954 ~~occurred.~~

11955 (54) The name of the foreign corporation whose ~~the~~ certificate of authority of which has
11956 been revoked is not available for assumption or use by another eligible entity corporation ~~until 1~~
11957 year after the effective date of revocation of authority unless the corporation provides the
11958 Department of State with an affidavit signed ~~executed~~ as required by s. 607.0120 which
11959 authorizes ~~permitting~~ the immediate assumption or use of the name by another corporation.

11960 (65) If the name of the foreign corporation applying for reinstatement ~~has been lawfully~~
11961 assumed in this state by another eligible entity corporation, ~~the Department of State shall require~~
11962 the foreign corporation to comply with s. 607.1506 before accepting its application for
11963 reinstatement.

11964

11965 **Commentary to Section 607.15315:**

11966 This section has been modified to harmonize with s. 605.0909 of FRLICA.

11967

11968 607.1532 Judicial review of denial of reinstatement ~~Appeal from revocation.~~

11969 (1) ~~If the Department of State denies a foreign corporation's application for reinstatement~~
11970 ~~after revocation of its certificate of authority, the department shall serve the foreign corporation~~
11971 ~~under s. 607.15101 with a written notice that explains the reason or reasons for the denial~~ ~~revokes~~
11972 ~~the authority of any foreign corporation to transact business in this state pursuant to the provisions~~
11973 ~~of this act, such foreign corporation may likewise appeal to the circuit court of the county where~~
11974 ~~the registered office of such corporation in this state is situated by filing with the clerk of such~~
11975 ~~court a petition setting forth a copy of its application for authority to transact business in this state~~
11976 ~~and a copy of the certificate of revocation given by the Department of State, whereupon the matter~~
11977 ~~shall be tried de novo by the court, and the court shall either sustain the action of the Department~~
11978 ~~of State or direct the department to take such action as the court deems proper.~~

11979 (2) Within 30 days after service of a notice of denial of reinstatement, a foreign corporation
11980 may appeal the denial by petitioning the circuit court in and for Leon County to set aside the
11981 revocation.⁶¹ The petition must be served on the department and contain a copy of the department's
11982 notice of revocation, the foreign corporation's application for reinstatement, and the department's
11983 notice of denial. Appeals from all final orders and judgments entered by the circuit court under
11984 this section in review of any ruling or decision of the Department of State may be taken as in other
11985 civil actions.

11986 (3) The circuit court may order the department to reinstate the certificate of authority of the
11987 foreign corporation or take other action the court considers appropriate.

11988 (4) The circuit court's final decision may be appealed as in other civil proceedings.⁶²

11989

⁶¹ Section 605.0716(2) uses the term "applicable county" as defined in s. 605.0711(14). The Department has requested that this section require such action to be brought in the circuit court in and for **Leon County, Florida**.

⁶² Subsection (4) is not in FRLCA, but it should be added.

11990 **Commentary to Section 607.1532:**

11991 This section substantially follows s. 607.1423 of the FBCA. **This section is not currently in Article**
11992 **9 of FRLCA, but should be added.**

11993 In subsection (2), Florida, unlike the Model Act, provides for a trial de novo. The Model Act, and
11994 the majority of Model Act states, do not specify the burden of proof applicable to an appeal.

11995

11996
11997
11998
11999

12000
12001
12002
12003
12004
12005
12006
12007
12008
12009
12010
12011
12012
12013
12014
12015
12016
12017

12018
12019

12020
12021
12022

12023
12024

12025
12026
12027

ARTICLE 16

RECORDS AND REPORTS

607.1601 Corporate records.

(1) A corporation shall keep as permanent records ~~minutes of all meetings of its shareholders and board of directors, a record of all actions taken by the shareholders or board of directors without a meeting, and a record of all actions taken by a committee of the board of directors in place of the board of directors on behalf of the corporation.~~

(2) ~~A corporation shall maintain accurate accounting records.~~

(3) ~~A corporation or its agent shall maintain a record of its shareholders in a form that permits preparation of a list of the names and addresses of all shareholders in alphabetical order by class of shares showing the number and series of shares held by each.~~

(4) ~~A corporation shall maintain its records in written form or in another form capable of conversion into written form within a reasonable time.~~

(5) ~~A corporation shall keep a copy of the following records~~ maintain the following records:

(a) ~~Its articles or restated articles of incorporation, as and all amendments to them~~ currently in effect;

(b) Any notices to shareholders referred to in s. 607.0120(11)(e) specifying facts on which a filed document is dependent, if those facts are not included in the articles of incorporation or otherwise available as specified in s. 607.0120(11)(e);

(~~b~~c) ~~Its bylaws or restated bylaws, as and all amendments to them~~ currently in effect;

(~~e~~) ~~Resolutions adopted by its board of directors creating one or more classes or series of shares and fixing their relative rights, preferences, and limitations, if shares issued pursuant to those resolutions are outstanding;~~

(~~d~~) ~~The minutes of all shareholders' meetings and records of all action taken by shareholders without a meeting for the past 3 years;~~

(~~e~~) All ~~W~~written communications within the past 3 years to all shareholders generally or to all shareholders of a class or series within the past 3 years, including the financial statements furnished for the past 3 years under s. 607.1620;

12028 (e) Minutes of all meetings of, and records of all actions taken without a meeting
12029 by, its shareholders, its board of directors, and any board committees established under s.
12030 607.0825;

12031 (f) A list of the names and business street addresses of its current directors and
12032 officers; and

12033 (g) Its most recent annual report delivered to the ~~D~~department of ~~S~~State under s.
12034 607.1622.

12036 (2) A corporation shall maintain all annual financial statements prepared for the
12037 corporation for its last three fiscal years (or such shorter period of existence) and any audit or other
12038 reports with respect to such financial statements.

12039 (3) A corporation shall maintain accounting records in a form that permits preparation
12040 of its financial statements.

12041 (4) A corporation shall maintain a record of its current shareholders in alphabetical order by
12042 class or series of shares showing the address of, and the number and class or series of shares held
12043 by, each shareholder. Nothing contained in this subsection (4) shall require the corporation to
12044 include in such record the electronic mail address or other electronic contact information of a
12045 shareholder.

12046 (5) A corporation shall maintain the records specified in this section in a manner so that they
12047 may be available for inspection within a reasonable time.

12048

12049 **Commentary to Section 607.1601:**

12050 This section has been modified to conform to the language used in the 2016 version of the Model
12051 Act. While the changes are not considered substantive, the Model Act language is considered
12052 clearer and easier to understand. Specifically, the deletion of the words "keep as permanent
12053 records" in subsection (1) and the adoption of the word "maintain" (which is used in the Model
12054 Act for this purpose) as to records required to be kept, is not considered or intended to be a
12055 substantive change or to change the duty to maintain the records required to be maintained under
12056 subsection (1).

12057 At some time in the future, the Section may wish to consider changes to the record keeping
12058 requirements to allow shareholder records to be maintained in a blockchain. However, a decision
12059 on that topic is believed to be premature for consideration.

12060

12061

12062 607.1602 Inspection of records by shareholders.

12063 (1) A shareholder of a corporation is entitled to inspect and copy, during regular business
12064 hours at the corporation's principal office, any of the records of the corporation described in s.
12065 607.1601(51), excluding minutes of meetings of, and records of actions taken without a meeting
12066 by, the corporation's board of directors and any board committees established under s. 607.0825,
12067 if the shareholder gives the corporation written notice of the shareholder's ~~his or her~~ demand at
12068 least 5 business days before the date on which the shareholder ~~he or she~~ wishes to inspect and
12069 copy.

12070 (2) A shareholder of a corporation is entitled to inspect and copy, during regular business
12071 hours at a reasonable location specified by the corporation, any of the following records of the
12072 corporation if the shareholder meets the requirements of subsection (3) and gives the corporation
12073 written notice of the shareholder's ~~his or her~~ demand at least 5 business days before the date on
12074 which he or she wishes to inspect and copy:

12075 (a) Excerpts from minutes of any meeting of, or records of any actions taken without
12076 a meeting by, the corporation's board of directors, and board committees maintained in
12077 accordance with s. 607.1601(1) records of any action of a committee of the board of directors
12078 while acting in place of the board of directors on behalf of the corporation, minutes of any
12079 meeting of the shareholders, and records of action taken by the shareholders or board of
12080 directors without a meeting, to the extent not subject to inspection under subsection (1);

12081 (b) The financial statements of the corporation maintained in accordance with s.
12082 607.1601(2);

12083 (c) Accounting records of the corporation;

12084 (d) The record of shareholders maintained in accordance with s. 607.1601(4)
12085 and

12086 (de) any other books and records.

12087 (3) A shareholder may inspect and copy the records described in subsection (2) only if:

12088 (a) The shareholder's demand is made in good faith and for a proper purpose;

12089 (b) The shareholder's demand describes with reasonable particularity the shareholder's
12090 ~~his or her~~ purpose and the records the shareholder ~~he or she~~ desires to inspect; and

12091 (c) The records are directly connected with the shareholder's purpose.

12092 (4) The corporation may impose reasonable restrictions on the disclosure, use, or distribution
12093 of, and reasonable obligations to maintain the confidentiality of, records described in subsection
12094 (2).

12095 ~~(4) A shareholder of a Florida corporation, or a shareholder of a foreign corporation~~
12096 ~~authorized to transact business in this state who resides in this state, is entitled to inspect and copy,~~
12097 ~~during regular business hours at a reasonable location in this state specified by the corporation, a~~
12098 ~~copy of the records of the corporation described in s. 607.1601(5)(b) and (f), if the shareholder~~
12099 ~~gives the corporation written notice of his or her demand at least 15 business days before the date~~
12100 ~~on which he or she wishes to inspect and copy.~~

12101 (5) For any meeting of shareholders for which the record date for determining shareholders
12102 entitled to vote at the meeting is different than the record date for notice of the meeting, any person who
12103 becomes a shareholder subsequent to the record date for notice of the meeting and is entitled to vote at
12104 the meeting is entitled to obtain from the corporation upon request the notice and any other information
12105 provided by the corporation to shareholders in connection with the meeting, unless the corporation has
12106 made such information generally available to shareholders by posting it on its website or by other
12107 generally recognized means. Failure of a corporation to provide such information does not affect the
12108 validity of action taken at the meeting.

12109 (6) The right of inspection granted by this section may not be abolished or limited by a
12110 corporation's articles of incorporation or bylaws.

12111 ~~(57)~~ This section does not affect:

12112 (a) The right of a shareholder to inspect and copy records under s. 607.0720 or, if the
12113 shareholder is in litigation with the corporation, to the same extent as any other litigant; or

12114 (b) The power of a court, independently of this chapter ~~aet~~, to compel the production of
12115 corporate records for examination, and to impose reasonable restrictions as provided in s.
12116 607.1604(3), provided that, in the case of production of records described in subsection (2) of
12117 this section at the request of a shareholder, the shareholder has met the requirements of
12118 subsection (3).

12119 ~~(68)~~ A corporation may deny any demand for inspection made pursuant to subsection (2) if
12120 the demand was made for an improper purpose, or if the demanding shareholder has within 2 years
12121 preceding his or her demand sold or offered for sale any list of shareholders of the corporation or
12122 any other corporation, has aided or abetted any person in procuring any list of shareholders for any
12123 such purpose, or has improperly used any information secured through any prior examination of
12124 the records of the corporation or any other corporation.

12125 (79) A shareholder may not sell or otherwise distribute any information or records
12126 inspected under this section, except to the extent that such use is for a proper purpose as defined
12127 in subsection (311).

12128 (810) For purposes of this section, the term "shareholder" means a record shareholder,
12129 ~~includes a beneficial shareholder, and an unrestricted owner whose shares are held in a voting trust~~
12130 beneficial owner or by a nominee on his or her behalf.

12131 (911) For purposes of this section, a "proper purpose" means a purpose reasonably related
12132 to such person's interest as a shareholder.

12133 (12) The rights of a shareholder to obtain records under subsections (1) and (2) shall also
12134 apply to the records of subsidiaries of the corporation.

12135

12136 **Commentary to Section 607.1602:**

12137 Changes have been made to conform this provision of the FBCA with the Model Act. The non-
12138 Model Act provisions contained in subsections (2)(d), (8), (9) and (11) have been retained. These
12139 provisions have been in the FBCA for many years. However, the civil penalty in subsection (9)
12140 has been eliminated, with the view that Courts faced with an issue under subsection (9) will
12141 determine the level of penalty or equitable relief that is appropriate under the circumstances.

12142

12143 607.1603 Scope of inspection right.

12144 (1) A shareholder's may appoint an agent or attorney has the same to exercise the
12145 shareholder's inspection and copying rights as the shareholder he or she represents under s.
12146 607.1602.

12147 (2) The corporation may, if reasonable, satisfy the right of a shareholder to copy records
12148 under s. 607.1602 includes, if reasonable, by furnishing to the shareholder right to receive copies
12149 made by photographic, xerographic, or other means photocopy or other means chosen by the
12150 corporation, including furnishing copies through an electronic transmission.

12151 (3) The corporation may impose a reasonable charge, covering to cover the costs of labor and
12152 material, for providing copies of any documents provided to the shareholder. The charge, which
12153 may not exceed the estimated cost of production or reproduction of the records be based on an
12154 estimate of such costs. If the records are kept in other than written form, the corporation shall
12155 convert such records into written form upon the request of any person entitled to inspect the same.
12156 The corporation shall bear the costs of converting any records described in s. 607.1601(51). The
12157 requesting shareholder shall bear the costs, including the cost of compiling the information
12158 requested, incurred to convert any records described in s. 607.1602(2).

12159 (4) If requested by a shareholder, †The corporation may shall comply at its expense with a
12160 shareholder's demand to inspect the records of shareholders under s. 607.1602(2)(ed) by providing
12161 the shareholder him or her with a list of its shareholders that was of the nature described in s.
12162 607.1601(34). Such a list must be compiled no earlier than the date of the shareholder's demand
12163 as of the last record date for which it has been compiled or as of a subsequent date if specified by
12164 the shareholder.

12165

12166 **Commentary to Section 607.1603:**

12167 Changes have been made to conform this section with the Model Act.

12168

12169 607.1604 Court-ordered inspection.

12170 (1) If a corporation does not allow a shareholder who complies with s. 607.1602(1) ~~or (4)~~ to
12171 inspect and copy any records required by that subsection to be available for inspection, the circuit
12172 court in the applicable county ~~where the corporation's principal office (or, if none in this state, its~~
12173 ~~registered office) is located~~ may summarily order inspection and copying of the records demanded
12174 at the corporation's expense upon application of the shareholder. If the court orders inspection and
12175 copying of the records demanded under s. 607.1601(1), it shall also order the corporation to pay
12176 the shareholder's expenses incurred, including reasonable attorney's fees, incurred to obtain the
12177 order and enforce its rights under this section.

12178 (2) If a corporation does not within a reasonable time allow a shareholder who complies
12179 with s. 607.1602(2) to inspect and copy ~~any other record~~ the records required by that section, the
12180 shareholder who complies with s. ~~607.1602(2) and~~ 607.1602(3); may apply to the circuit court in
12181 the applicable county ~~where the corporation's principal office (or, if none in this state, its registered~~
12182 ~~office) is located~~ for an order to permit inspection and copying of the records demanded. The court
12183 shall dispose of an application under this subsection on an expedited basis.

12184 (3) If the court orders inspection and ~~or~~ copying of the records demanded under s.
12185 607.1602(2), it may impose reasonable restrictions on the disclosure, use, or distribution of, and
12186 reasonable obligations to maintain the confidentiality of, such records, and it shall also order the
12187 corporation to pay the shareholder's expenses incurred ~~costs~~, including reasonable attorney's fees,
12188 ~~reasonably~~ incurred to obtain the order and enforce its rights under this section unless the
12189 corporation, ~~or the officer, director, or agent, as the case may be, proves~~ establishes that the
12190 corporation ~~it or she or he~~ refused inspection in good faith because the corporation ~~it or she or he~~
12191 had:

12192 (a) A reasonable basis for doubt about the right of the shareholder to inspect or copy
12193 the records demanded; or

12194 (4b) ~~If the court orders inspection or copying of the records demanded, it may impose~~
12195 Required reasonable restrictions on the disclosure, use, or distribution of, and reasonable
12196 obligations to maintain the confidentiality of, such ~~use or distribution of the records demanded~~
12197 to which ~~by~~ the demanding shareholder had been unwilling to agree.

12198

12199 **Commentary to Section 607.1604:**

12200 Changes were made to confirm this section to the corollary provision of the Model Act. These

12201 changes are not believed to be substantive.

12202

12203 607.1605 Inspection of records by directors **rights of directors.**

12204 (1) A director of a corporation is entitled to inspect and copy the books, records, and
12205 documents of the corporation at any reasonable time to the extent reasonably related to the
12206 performance of the director's duties as a director, including duties as a member of a board
12207 committee, but not for any other purpose or in any manner that would violate any duty to the
12208 corporation.

12209 (2) The circuit court of the applicable county ~~in which the corporation's principal office or,~~
12210 ~~if none in this state, its registered office is located~~ may order inspection and copying of the books,
12211 records, and documents at the corporation's expense, upon application of a director who has been
12212 refused such inspection rights, unless the corporation establishes that the director is not entitled to
12213 such inspection rights. The court shall dispose of an application under this subsection on an
12214 expedited basis.

12215 (3) If an order is issued, the court may include provisions protecting the corporation from
12216 undue burden or expense and prohibiting the director from using information obtained upon
12217 exercise of the inspection rights in a manner that would violate a duty to the corporation, and may
12218 also order the corporation to reimburse the director for the director's costs, including reasonable
12219 counsel fees, incurred in connection with the application.

12220

12221 **Commentary to Section 607.1605:**

12222 This provision was added to the FBCA in 2003 and is identical to the corollary provision in the
12223 Model Act.

12224

12225

12226 607.1620 Financial statements for shareholders.

12227 (1) Upon the written request of any shareholder ~~Unless modified by resolution of the~~
12228 ~~shareholders within 120 days of the close of each fiscal year,~~ a corporation shall deliver ~~furnish or~~
12229 make available to the requesting shareholder the corporation's ~~its shareholders~~ annual financial
12230 statements for the most recent fiscal year of the corporation ~~which may be consolidated or~~
12231 ~~combined statements of the corporation and one or more of its subsidiaries, as appropriate, that~~
12232 ~~include a balance sheet as of the end of the fiscal year, an income statement for that year, and a~~
12233 ~~statement of cash flows for that year.~~ If annual financial statements are have been prepared for the
12234 corporation on the basis of generally accepted accounting principles for such specified period, the
12235 corporation shall deliver or make available such financial statements to the requesting shareholder.
12236 ~~the annual financial statements must also be prepared on that basis.~~(2) If the annual financial
12237 ~~statements are to be~~ delivered or made available to the requesting ~~its~~ shareholder are audited or
12238 otherwise reported upon by a public accountant, ~~his or her~~ the report of the public accountant shall
12239 also be delivered or made available to the requesting shareholder. ~~must accompany them. If not,~~
12240 ~~the statements must be accompanied by a statement of the president or the person responsible for~~
12241 ~~the corporation's accounting records:~~

12242 (a) ~~Stating his or her reasonable belief whether the statements were prepared on~~
12243 ~~the basis of generally accepted accounting principles and, if not, describing the basis of~~
12244 ~~preparation; and~~

12245 (b) ~~Describing any respects in which the statements were not prepared on a basis~~
12246 ~~of accounting consistent with the statements prepared for the preceding year.~~

12247 (32) ~~Any~~ A corporation required by subsection (1) to deliver or make available ~~furnish~~
12248 annual financial statements to a requesting shareholder ~~its shareholders~~ shall deliver or make
12249 available ~~furnish~~ such annual financial statements to such ~~each~~ shareholder within five (5) business
12250 days after the request if the annual financial statements have already been prepared and are
12251 available, or, if the annual financial statements have not been prepared, shall notify the shareholder
12252 within five (5) business days that the annual financial statements have not yet been prepared and
12253 shall deliver or make available such annual financial statements to the shareholder within 120 days
12254 after the request ~~or the close of each fiscal year~~ or within such additional time thereafter as is
12255 reasonably necessary to enable the corporation to prepare its annual financial statements if, for
12256 reasons beyond the corporation's control, it is unable to prepare its annual financial statements
12257 within the prescribed period. ~~Thereafter, on written request from a shareholder who was not~~
12258 ~~furnished the statements, the corporation shall furnish him or her the latest annual financial~~
12259 ~~statements.~~

12260 (3) If requested by the requesting shareholder in its written request under subsection (1), the
12261 corporation shall promptly notify all other shareholders that the annual financial statements that
12262 have or are to be delivered or made available to the requesting shareholder have been or are being

12263 made available to the requesting shareholder and will also be delivered or made available to any
12264 other shareholder who makes its own written request to the corporation under subsection (1).

12265 ~~(4) If a corporation does not comply with the shareholder's request for annual financial~~
12266 ~~statements pursuant to this section within [30] days of delivery of such request to the corporation,~~
12267 ~~the circuit court in the county where the corporation's principal office (or, if none in this state, its~~
12268 ~~registered office) is located may, upon application of the shareholder, summarily order the~~
12269 ~~corporation to furnish such financial statements. If the court orders the corporation to furnish the~~
12270 ~~shareholder with the financial statements demanded, it shall also order the corporation to pay the~~
12271 ~~shareholder's costs, including reasonable attorney's fees, reasonably incurred to obtain the order~~
12272 ~~and otherwise enforce its rights under this section.~~

12273 (45) A corporation may fulfill its responsibilities under this section by delivering the
12274 specified annual financial statements, by posting the specified annual financial statements on its
12275 website, by any other generally recognized means, or in any other manner permitted by the
12276 applicable rules and regulations of the United States Securities and Exchange Commission ~~The~~
12277 ~~requirement to furnish annual financial statements as described in this section shall be satisfied by~~
12278 ~~sending such annual financial statements by mail or electronic transmission. If a corporation has~~
12279 ~~an outstanding class of securities registered under s. 12 of the Securities Exchange Act of 1934, as~~
12280 ~~amended, the requirement to furnish annual financial statements may be satisfied by complying~~
12281 ~~with 17 C.F.R. s. 240.14a-16, as amended, with respect to the obligation of a corporation to furnish~~
12282 ~~an annual financial report to shareholders pursuant to 17 C.F.R. s. 240.14a-3(b), as amended.~~

12283 (5) Notwithstanding the provisions of subsections (1), (2) and (3) of this section:

12284 (a) As a condition to delivering or making available annual financial statements to
12285 any requesting shareholder, the corporation may require the requesting shareholder to agree
12286 to reasonable restrictions on the confidentiality, use and distribution of such annual financial
12287 statements; and

12288 (b) The corporation may, if it reasonably determines that the shareholder's request is
12289 not made in good faith or for a proper purpose, decline to deliver or make available such
12290 annual financial statements to that shareholder.

12291 (6) If a corporation does not respond to a shareholder's request for annual financial statements
12292 pursuant to this section in accordance with subsection (3) within the applicable period specified in
12293 subsection (2):

12294 (a) The requesting shareholder may apply to the circuit court in the applicable county
12295 for an order requiring delivery of or access to the requested annual financial statements. The
12296 court shall dispose of an application under this subsection on an expedited basis.

12297 (b) If the court orders delivery or access to the requested annual financial statements,
12298 it may impose reasonable restrictions on their confidentiality, use or distribution.

12299 (c) In such proceeding, if the corporation has declined to deliver or make available
12300 such annual financial statements because the shareholder had been unwilling to agree to
12301 restrictions proposed by the corporation on the confidentiality, use and distribution of such
12302 financials statements, the corporation shall have the burden of demonstrating that the
12303 restrictions proposed by the corporation were reasonable.

12304 (d) In such proceeding, if the corporation has declined to deliver or make available
12305 such annual financial statements pursuant to s. 607.1620(5)(b), the corporation shall have the
12306 burden of demonstrating that it had reasonably determined that the shareholder's request was
12307 not made in good faith or for a proper purpose.

12308 (7) If the court orders delivery or access to the requested annual financial statements it shall
12309 order the corporation to pay the shareholder's expenses incurred to obtain such order unless the
12310 corporation establishes that it had refused delivery or access to the requested annual financial
12311 statements because the shareholder had refused to agree to reasonable restrictions on the
12312 confidentiality, use or distribution of the annual financial statements or that the corporation had
12313 reasonably determined that the shareholder's request was not made in good faith or for a proper
12314 purpose.

12315

12316 **Commentary to Section 607.1620:**

12317 Until 1978, the Model Act required only that the annual financial statements be furnished on
12318 request. Twenty-five jurisdictions currently follow that model. Eighteen jurisdictions follow the
12319 post-1978 Model Act model by requiring that the annual financial statements be furnished to all
12320 shareholders. In the 2016 revision to the Model Act, the Model Act has reversed itself yet again
12321 and now only requires the annual financial statements to be made available upon request.

12322 This provision takes a middle ground and requires that annual financial statements be delivered to
12323 or made available to a requesting shareholder. Like the corollary provision of the Model Act, it
12324 does not prescribe what constitutes annual financial statements, and there is extensive commentary
12325 in the comments to the corollary section of the Model Act that discusses what might constitute
12326 annual financial statements of a particular corporation under particular circumstances.

12327 New subsections (5), (6) and (7) are derived from the 2016 version of the Model Act. Further, the
12328 ability of the corporation's shareholders to waive the requirement to deliver annual financial
12329 statements has been eliminated in favor of the Model Act provision. Finally, while a shareholder
12330 must request annual financial statements before the corporation becomes obligated to provide
12331 them, new subsection (3) has been added to require that the corporation notify its other
12332 shareholders that annual financial statements are being delivered or made available to a requesting
12333 shareholder, and that such annual financial statements will be delivered or made available to any
12334 other shareholder who requests them in the manner provided in subsection (1).

12335

12336 ~~607.1621—Other reports to shareholders.~~

12337 ~~(1) If a corporation indemnifies or advances expenses to any director or, officer, employee,~~
12338 ~~or agent under ss. 607.0850 through 607.0859 otherwise than by court order or action by the~~
12339 ~~shareholders or by an insurance carrier pursuant to insurance maintained by the corporation, the~~
12340 ~~corporation shall report the indemnification or advance in writing to the shareholders with or~~
12341 ~~before the notice of the next shareholders' meeting, or prior to such meeting if the indemnification~~
12342 ~~or advance occurs after the giving of such notice but prior to the time such meeting is held, which~~
12343 ~~report shall include a statement specifying the persons paid, the amounts paid, and the nature and~~
12344 ~~status at the time of such payment of the litigation or threatened litigation.~~

12345 ~~(2) If a corporation issues or authorizes the issuance of shares for promises to render services~~
12346 ~~in the future, the corporation shall report in writing to the shareholders the number of shares~~
12347 ~~authorized or issued, and the consideration received by the corporation, with or before the notice~~
12348 ~~of the next shareholders' meeting.~~

12349

12350 **Commentary to Section 607.1621:**

12351 Section 607.1621 of the FBCA was added to the FBCA in 1989. It was based on an earlier version
12352 of the Model Act as it existed at the time. Subsection (1) requires Florida corporations to report to
12353 shareholders as to certain matters relating to indemnification and advancement of expenses.
12354 Subsection (2) requires disclosure to shareholders when shares are issued by the corporation for
12355 promises to render future services. This provision is no longer in the Model Act

12356 In its decision to recommend removal of this section from the FBCA, the Subcommittee was
12357 concerned that notwithstanding the fact that this section has been in the statute for many years, it
12358 is a trap for the unwary, because many users of the FBCA are not aware of the provision. The
12359 Subcommittee also concluded that, in its view, this section is unnecessary because shareholders
12360 can demand information about these types of matters under s. 607.1602 under appropriate
12361 circumstances.

12362

12363 607.1622 Annual report for Department of State department.

12364 (1) Each domestic corporation and each foreign corporation authorized to transact
12365 business in this state shall deliver to the ~~Department of State~~ department for filing ~~an a sworn~~
12366 annual report ~~on such forms as the Department of State prescribes~~ that states the following sets
12367 forth:

12368 (a) The name of the corporation or, if a foreign corporation, the name under which
12369 the foreign corporation is authorized to transact business in this ~~and the state or country~~
12370 under the law of which it is incorporated.

12371 (b) The date of its incorporation and ~~or, if a foreign corporation, the jurisdiction~~
12372 of its incorporation and the date on which it became qualified to transact ~~was admitted to~~
12373 do business in this state;

12374 (c) The street address of its principal office and the mailing address of the
12375 corporation;

12376 (d) The corporation's federal employer identification number, if any, or, if none,
12377 whether one has been applied for;

12378 (e) The names and business street addresses of its directors and principal officers;
12379 and

12380 (f) ~~The street address of its registered office and the name of its registered agent~~
12381 ~~at that office in this state;~~

12382 (g) ~~Language permitting a voluntary contribution of \$5 per taxpayer, which~~
12383 ~~contribution shall be transferred into the Election Campaign Financing Trust Fund. A~~
12384 ~~statement providing an explanation of the purpose of the trust fund shall also be included;~~
12385 ~~and~~

12386 (fh) Any Such additional information that is as may be necessary or appropriate
12387 to enable the ~~D~~department of State carry out the provisions of this chapter ~~aet.~~

12388 (2) ~~Proof to the satisfaction of the Department of State that on or before May 1 such~~
12389 ~~report was deposited in the United States mail in a sealed envelope, properly addressed with~~
12390 ~~postage prepaid, shall be deemed compliance with this requirement.~~

12391 (2) If an annual report contains the name and address of a registered agent which differs
12392 from the information shown in the records of the department immediately before the annual report
12393 becomes effective, the differing information in the annual report is considered a statement of
12394 change under s. 607.0502.

12395 (3) If an annual report does not contain the information required ~~in~~ by this section, the
12396 ~~Department of State~~ shall promptly notify the reporting domestic corporation or foreign
12397 corporation ~~in writing and return the report to it for correction.~~ If the report is corrected to contain
12398 the information required ~~in subsection (1) by this section~~ and delivered to the ~~Department of State~~
12399 within 30 days after the effective date of the notice, it is ~~deemed to be~~ will be considered timely
12400 delivered filed.

12401 ~~(4) Each report shall be executed by the corporation by an officer or director or, if the~~
12402 ~~corporation is in the hands of a receiver or trustee, shall be executed on behalf of the corporation~~
12403 ~~by such receiver or trustee, and the signing thereof shall have the same legal effect as if made~~
12404 ~~under oath, without the necessity of appending such oath thereto.~~

12405 ~~(45)~~ The first annual report must be delivered to the ~~Department of State~~ department
12406 between January 1 and May 1 of the year following the calendar year in which a domestic
12407 corporation's articles of incorporation became effective or the was incorporated or a foreign
12408 corporation obtained its certificate of authority was authorized to transact business in this state.
12409 Subsequent annual reports must be delivered to the ~~Department of State~~ between January 1 and
12410 May 1 of ~~each the subsequent~~ calendar years thereafter. If one or more forms of annual report are
12411 submitted for a calendar year, the department shall file each of them and make the information
12412 contained in them part of the official record. The first form of annual report filed in a calendar year
12413 shall be considered the annual report for that calendar year, and each report filed after that one in
12414 the same calendar year shall be treated as an amended report for that calendar year.

12415 ~~(56)~~ Information in the annual report must be current as of the date the annual report is
12416 delivered to the department for filing ~~executed on behalf of the corporation.~~

12417 ~~(7) If an additional updated report is received, the department shall file the document and~~
12418 ~~make the information contained therein part of the official record.~~

12419 ~~(68)~~ A domestic corporation or foreign ~~Any~~ corporation that fails failing to file an annual
12420 report that which complies with the requirements of this section may not shall not be permitted to
12421 prosecute, or maintain or defend any action in any court of this state until the such report is filed
12422 and all fees and penalties taxes due under this chapter act are paid, and shall be subject to
12423 dissolution or cancellation of its certificate of authority to transact de business as provided in this
12424 chapter act.

12425 (79) The department shall prescribe the forms, which may be in an electronic format, on
12426 which to make the annual report called for in this section and may substitute the uniform business
12427 report, pursuant to s. 606.06, as a means of satisfying the requirement of this chapter part.

12428 (10) As a condition of a merger under s. 607.1101, each party to a merger which exists
12429 under the laws of this state, and each party to the merger which exists under the laws of another

12430 jurisdiction and has a certificate of authority to transact business or conduct its affairs in this state,
12431 must be active and current in filing its annual reports in the records of the department through
12432 December 31 of the calendar year in which the articles of merger are submitted to the department
12433 for filing.

12434 (11) As a condition of a conversion of an entity to a corporation under s. 607.11930, the
12435 entity, if it exists under the laws of this state, or if it exists under the laws of another jurisdiction
12436 and has a certificate of authority to transact business or conduct its affairs in this state, must be
12437 active and current in filing its annual reports in the records of the department through December
12438 31 of the calendar year in which the articles of conversion are submitted to the department for
12439 filing.

12440 (12) As a condition of a conversion of a domestic corporation to another type of entity
12441 under s. 607.11930, the domestic corporation converting to the other type of entity must be active
12442 and current in filing its annual reports in the records of the department through December 31 of
12443 the calendar year in which the articles of conversion are submitted to the department for filing.

12444 (13) As a condition of a share exchange between a corporation and another entity under
12445 s. 607.1102, the corporation, and each other entity that is a party to the share exchange which exists
12446 under the laws of this state, and each party to the share exchange which exists under the laws of
12447 another jurisdiction and has a certificate of authority to transact business or conduct its affairs in
12448 this state, must be active and current in filing its annual reports in the records of the department
12449 through December 31 of the calendar year in which the articles of share exchange are submitted
12450 to the department for filing.

12451 (14) As a condition of domestication of a domestic corporation into a foreign jurisdiction
12452 under s. 607.11920, the domestic corporation domesticating into a foreign jurisdiction must be
12453 active and current in filing its annual reports in the records of the department through December
12454 31 of the calendar year in which the articles of domestication are submitted to the department for
12455 filing.

12456

12457 **Commentary to Section 607.1622:**

12458 This section has been modified to conform the language in this section to the corollary provision
12459 from FRLCA (s. 605.0212) that was adopted in 2013.

12460 Subsections (10), (11), (12) and (13) are derived from s. 605.0212 and require that the corporation
12461 has filed an annual report before the corporation can make filings regarding mergers, share
12462 exchanges and conversions. Subsection (14) relating to domestications is new, but follows the
12463 same premise.

12464

ARTICLES 17, 18 AND 19

TRANSITION AND MISCELLANEOUS PROVISIONS

12465
12466
12467
12468
12469
12470
12471
12472
12473
12474
12475
12476

607.1701 Application to existing domestic corporation.

This ~~chapter~~ act applies to all domestic corporations in existence on _____ [the effective date of the new FBCA] ~~July 1, 1990~~, that were incorporated under any general statute of this state providing for incorporation of corporations for profit if power to amend or repeal the statute under which the corporation was incorporated was reserved.

12477 **Commentary to Section 607.1701:**

12478

12479 The change in the effective date that the new FBCA applies to existing Florida corporations has
12480 been updated to the date that the new FBCA will become effective.

12481

12482 607.1702 Application to qualified foreign corporations.

12483

12484 A foreign corporation authorized to transact business in this state on _____ [the
12485 effective date of the new FBCA] ~~July 1, 1990~~, is subject to this chapter, is deemed to be
12486 authorized to transact business in this state, and ~~act~~ but is not required to obtain a new certificate
12487 of authority to transact business under this chapter ~~act~~.

12488

12489 **Commentary to Section 607.1702:**

12490

12491 The change in the effective date that the new FBCA applies to existing foreign corporations
12492 authorized to transact business in Florida has been updated to the date that the new FBCA will
12493 become effective. The additional language added to this statute conforms to the current wording
12494 of s. 17.02 of the Model Act. It is not considered a substantive change.

12495

12496 607.1711 Application to foreign and interstate commerce.

12497

12498 The provisions of this chapter ~~act~~ apply to commerce with foreign nations and among the
12499 several states only insofar as the same may be permitted under the Constitution and laws of the
12500 United States.

12501

12502 **Commentary to Section 607.1711:**

12503

12504 No substantive change has been made to this section.

12505

12506 ~~607.1801—Domestication of foreign corporations.~~

12507

12508 ~~(1) As used in this section, the term "corporation" includes any incorporated~~
12509 ~~organization, private law corporation (whether or not organized for business purposes), public law~~
12510 ~~corporation, partnership, proprietorship, joint venture, foundation, trust, association, or similar~~
12511 ~~entity.~~

12512

12513 ~~(2) Any foreign corporation may become domesticated in this state by filing with the~~
12514 ~~Department of State:~~

12515

12516 ~~(a) A certificate of domestication which shall be executed in accordance with~~
12517 ~~subsection (7) and filed and recorded in accordance with s. 607.0120; and~~

12518

12519 ~~(b) Articles of incorporation, which shall be executed, filed, and recorded in~~
12520 ~~accordance with ss. 607.0120 and 607.0202.~~

12521

12522 ~~(3) The certificate of domestication shall certify:~~

12523

12524 ~~(a) The date on which and jurisdiction where the corporation was first formed,~~
12525 ~~incorporated, or otherwise came into being;~~

12526

12527 ~~(b) The name of the corporation immediately prior to the filing of the certificate~~
12528 ~~of domestication;~~

12529

12530 ~~(c) The name of the corporation as set forth in its articles of incorporation filed in~~
12531 ~~accordance with paragraph (2)(b); and~~

12532

12533 ~~(d) The jurisdiction that constituted the seat, siege social, or principal place of~~
12534 ~~business or central administration of the corporation, or any other equivalent thereto under~~
12535 ~~applicable law, immediately prior to the filing of the certificate of domestication.~~

12536

12537 ~~(4) Upon filing with the Department of State of the certificate of domestication and~~
12538 ~~articles of incorporation, the corporation shall be domesticated in this state, and the corporation~~
12539 ~~shall thereafter be subject to this act, except that notwithstanding the provision of s. 607.0203 the~~
12540 ~~existence of the corporation shall be deemed to have commenced on the date the corporation~~
12541 ~~commenced its existence in the jurisdiction in which the corporation was first formed,~~
12542 ~~incorporated, or otherwise came into being.~~

12543

12544 ~~(5) The domestication of any corporation in this state shall not be deemed to affect any~~
12545 ~~obligations or liabilities of the corporation incurred prior to its domestication.~~

12546
12547
12548
12549
12550
12551
12552
12553
12554
12555
12556

~~(6) — The filing of a certificate of domestication shall not affect the choice of law applicable to the corporation, except that, from the date the certificate of domestication is filed, the law of this state, including this act, shall apply to the corporation to the same extent as if the corporation has been incorporated as a corporation of this state on that date.~~

~~(7) — The certificate of domestication shall be signed by any corporation officer, director, trustee, manager, partner, or other person performing functions equivalent to those of an officer or director, however named or described, and who is authorized to sign the certificate of domestication on behalf of the corporation.~~

12557 **Commentary to Section 607.1801:**

12558

12559 This section has been eliminated, as the topic of domestications is now covered in ss. 607.11920-
12560 607.11924.

12561

12562 607.1805 Procedures for conversion to professional service corporation.

12563

12564 A corporation that is organized for profit under the laws of this state and that is engaged
12565 solely in carrying out the professional services provided by a corporation organized under
12566 chapter 621 may change its corporate nature to that of a professional service corporation if it
12567 complies with chapter 621.

12568

12569

12570 **Commentary to Section 607.1805:**

12571

12572 No change has been made to this section.

12573

12574

12575 607.1904 Estoppel.

12576

12577 No body of persons acting as a corporation shall be permitted to set up the lack of legal
12578 organization as a defense to an action against them as a corporation, nor shall any person sued on
12579 a contract made with the corporation or sued for an injury to its property or a wrong done to its
12580 interests be permitted to set up the lack of such legal organization in his or her defense.

12581

12582 **Commentary to Section 607.1904:**

12583

12584 No change has been made to this section.

12585

12586 607.1907 Effect of repeal of prior acts.⁶³

12587

12588 (1) Except as provided in subsection (2), the repeal of a statute by Law c. 2019-_____, does
12589 not affect:

12590

12591 (a) The operation of the statute or any action taken under it before its repeal,
12592 including, without limiting the generality of the foregoing, the continuing validity of any
12593 provision of the articles of incorporation or bylaws of a corporation authorized by the
12594 statute at the time of its adoption;

12595

12596 (b) Any ratification, right, remedy, privilege, obligation, or liability acquired,
12597 accrued, or incurred under the statute before its repeal;

12598

12599 (c) Any violation of the statute, or any penalty, forfeiture, or punishment incurred
12600 because of the violation, before its repeal; or

12601

12602 (d) Any proceeding, merger, consolidation, share exchange, conversion,
12603 domestication, sale of assets, reorganization, or dissolution commenced under the statute
12604 before its repeal, and the proceeding, merger, consolidation, share exchange, conversion,
12605 domestication, sale of assets, reorganization, or dissolution may be completed in
12606 accordance with the statute as if it had not been repealed.

12607

12608 (2) If a penalty or punishment imposed for violation of a statute repealed by *Law c.*
12609 *2019-_____*, is reduced by *Law c. 2019-_____*, the penalty or punishment if not already imposed
12610 shall be imposed in accordance with this chapter *aet.*

12611

12612 (3) *Law c. 2019-_____*, does not affect an action commenced, proceeding brought, or right
12613 accrued before *Law c. 2019-_____*, takes effect.

12614

⁶³ To be considered further at the August 31, 2018 meeting of the Subcommittee.

12615 **Commentary to Section 607.1907:**

12616

12617 Changes have been made to confirm this section to the corollary provision of FRLCA, s.
12618 605.1106.

12619

12620 One alternative provision to be considered at the August 31, 2018 meeting of the Subcommittee
12621 comes from the Model Act and is as follows:

12622

12623

12624

607.1907 Saving Provisions

12625

12626

12627

12628

12629

(1) Except as to procedural provisions, *Law c. 2019-___* does not affect a pending action or proceeding or a right accrued before the effective date of *Law c. 2019-___*, and a pending civil action or proceeding may be completed, and a right accrued may be enforced, as if *Law c. 2019-___* had not become effective.

12630

12631

12632

(2) If a penalty or punishment for violation of a statute or rule is reduced by *Law c. 2019-___*, the penalty, if not already imposed, shall be imposed in accordance with *Law c. 2019-___*.

12633

12634

Approaches taken by other states (including other Model Act states) will be considered.

12635

12636

12637

If an alternative savings provision is adopted, a corollary change should be made to s. 605.1106 of FRLCA.

12638 607.1908 Severability clause.

12639

12640 If any provision of this chapter or its application to any person or circumstance is held
12641 invalid, the invalidity does not affect other provisions or applications of this chapter which can
12642 be given effect without the invalid provision or application, and to this end the provisions of this
12643 chapter are severable.

12644

12645

12646 **Commentary to Section 607.1908:**

12647

12648 This section has been added to the FBCA. It is derived from s. 605.1107 of FRLICA.

12649

12650
12651 607.193 Supplemental corporate fee.

12652
12653 (1) In addition to any other taxes imposed by law, an annual supplemental corporate fee
12654 of \$88.75 is imposed on each business entity that is authorized to transact business in this state
12655 and is required to file an annual report with the Department of State under s. 605.0212, s.
12656 607.1622, or s. 620.1210.

12657
12658 (2) (a) The business entity shall remit the supplemental corporate fee to the
12659 Department of State at the time it files the annual report required by s. 605.0212, s.
12660 607.1622, or s. 620.1210.

12661
12662 (b) In addition to the fees levied under ss. 605.0213, 607.0122, and 620.1109
12663 and the supplemental corporate fee, a late charge of \$400 shall be imposed if the
12664 supplemental corporate fee is remitted after May 1 except in circumstances in which a
12665 business entity was administratively dissolved or its certificate of authority was revoked
12666 due to its failure to file an annual report and the entity subsequently applied for
12667 reinstatement and paid the applicable reinstatement fee.

12668

12669 **Commentary to Section 607.193:**

12670

12671 No changes have been proposed to this section.

12672

Proposed Revisions to Section 607.0901

607.0901 Affiliated transactions.

(1) For purposes of this section:

(a) “Affiliate” means a person who directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, a specified person.

(b) “Affiliated transaction,” when used in reference to the corporation and any interested shareholder, means:

1. Any merger or consolidation of the corporation or any subsidiary of the corporation with:

a. The interested shareholder; or

b. Any other corporation, partnership, or other entity (in each case, whether or not itself an interested shareholder) which is, or after such merger or consolidation would be, an affiliate or associate of the interested shareholder;

2. Any sale, lease, exchange, mortgage, pledge, transfer, or other disposition (in one transaction or a series of transactions), except proportionately as a shareholder of such corporation, to or with the interested shareholder or any affiliate or associate of the interested shareholder, whether as part of a dissolution or otherwise, of assets of the corporation or any subsidiary of the corporation:

a. Having an aggregate fair market value equal to 10~~5~~ percent or more of the aggregate fair market value of all the assets, determined on a consolidated basis, of the corporation;

b. Having an aggregate fair market value equal to 10~~5~~ percent or more of the aggregate fair market value of all the outstanding shares of the corporation; or

c. Representing 10~~5~~ percent or more of the earning power or net income, determined on a consolidated basis, of the corporation;

3. The issuance or transfer by the corporation or any subsidiary of the corporation (in one transaction or a series of transactions) of any shares of the corporation or any subsidiary of the corporation which have an aggregate fair market value equal to 10~~5~~ percent or more of the aggregate fair market value of

all the outstanding shares of the corporation to the interested shareholder or any affiliate or associate of the interested shareholder except:

a. pursuant to the exercise, exchange or conversion of securities exercisable for, exchangeable for or convertible into shares of the corporation or any subsidiary of the corporation which were outstanding prior to the time that the interested shareholder became such;

b. pursuant to a merger under s. 607.11045;

c. pursuant to warrants or rights to purchase stock offered, or a dividend or distribution paid or made, or the exercise, exchange or conversion of securities exercisable for, exchangeable for or convertible into shares of the corporation which security is distributed, pro rata to all holders of a class or series of shares of such corporation subsequent to the time the interested shareholder became such shareholders of the corporation;

d. pursuant to an exchange offer by the corporation to purchase shares of such corporation made on the same terms to all holders of said shares;

e. any issuance or transfer of stock by the corporation;

provided however, that in no case under items (c) through (e) of this subparagraph shall there be an increase in the interested shareholder's proportionate share of the shares of any class or series of the corporation or of the voting shares of the corporation.

4. The adoption of any plan or proposal for the liquidation or dissolution of the corporation proposed by, or pursuant to any agreement, arrangement, or understanding (whether or not in writing) with, the interested shareholder or any affiliate or associate of the interested shareholder;

5. Any reclassification of securities (including, without limitation, any stock split, stock dividend, or other distribution of shares in respect of shares, or any reverse stock split) or recapitalization of the corporation, or any merger or consolidation of the corporation with any subsidiary of the corporation, or any other transaction (whether or not with or into or otherwise involving the interested shareholder), with the interested shareholder or any affiliate or associate of the interested shareholder, which has the effect, directly or indirectly (in one transaction or a series of transactions during any 12-month period), of increasing by more than 105 percent the percentage of the outstanding voting shares of the

corporation or any subsidiary of the corporation beneficially owned by the interested shareholder;

6. Any transaction involving the corporation or any subsidiary of the corporation which has the effect, directly or indirectly, of increasing the proportionate share of shares of any class or series, or securities convertible into shares of any class or series, of the corporation or of any such subsidiary which is owned by the interested shareholder, except as a result of immaterial changes due to fractional share adjustments or as a result of any purchase or redemption of any shares not caused, directly or indirectly, by the interested shareholder; or

76. Any receipt by the interested shareholder or any affiliate or associate of the interested shareholder of the benefit, directly or indirectly (except proportionately as a shareholder of the corporation), of any loans, advances, guaranties, pledges, or other financial assistance or any tax credits or other tax advantages (other than those expressly permitted in paragraphs (b)(3)1.- 6.) provided by or through the corporation or any subsidiary of the corporation.

(c) “Announcement date,” when used in reference to any affiliated transaction, means the date of the first general public announcement of the proposed affiliated transaction or of the intention to propose an affiliated transaction, or the date on which the proposed affiliated transaction or the intention to propose an affiliated transaction is first communicated generally to the shareholders of the corporation, whichever is earlier.

(d) “Associate,” when used to indicate a relationship with any person, means any entity, other than the corporation or any of its subsidiaries, of which such person is an officer, director, or partner or is, directly or indirectly, the beneficial owner of ~~20~~40 percent or more of any class of voting shares; any trust or other estate in which such person has at least a 20% ~~a substantial~~ beneficial interest or as to which such person serves as trustee or in a similar fiduciary capacity; and any relative or spouse of such person, or any relative of such spouse, who has the same residence ~~home~~ as such person or who is an officer or director of the corporation or any of its affiliates.

(e) A person is deemed to be a “beneficial owner” of voting shares as to which such person and such person’s affiliates and associates, individually or in the aggregate, have or share directly, or indirectly through any contract, arrangement, understanding, relationship, or otherwise:

1. Voting power, which includes the power to vote or to direct the voting of the voting shares;
2. Investment power, which includes the power to dispose of or to direct the disposition of the voting shares; or

3. The right to acquire the voting power or investment power, whether such right is exercisable immediately or only after the passage of time, pursuant to any contract, arrangement, or understanding, upon the exercise of conversion rights, exchange rights, warrants, or options, or otherwise; however, in no case shall a director of the corporation be deemed to be the beneficial owner of voting shares beneficially owned by another director of the corporation solely by reason of actions undertaken by such persons in their capacity as directors of the corporation.

(f) “Control,” including the terms “controlling,” “controlled by” and “under common control with” means the possession, directly or indirectly, through the ownership of voting shares, by contract, arrangement, understanding, relationship, or otherwise, of the power to direct or cause the direction of the management and policies of a person. A person who is the owner of 20% or more of the outstanding voting shares of any corporation, partnership, unincorporated association or other entity shall be presumed to have control of such entity, in the absence of proof by a preponderance of the evidence to the contrary. Notwithstanding the foregoing, a person shall not be deemed to have control of an entity ~~corporation~~ if such person holds voting shares, in good faith and not for the purpose of circumventing this section, as an agent, bank, broker, nominee, custodian, or trustee for one or more beneficial owners who do not individually or as a group have control of such entity corporation.

(g) “Determination date” means the date on which an interested shareholder became an interested shareholder.

(h) Unless otherwise specified in the articles of incorporation initially filed with the ~~d~~Department of State, a “disinterested director” means as to any particular interested shareholder:

1. Any member of the board of directors of the corporation who was a member of the board of directors before the later of January 1, ~~1987~~2020, or the determination date; and

2. Any member of the board of directors of the corporation who was recommended for election by, or was elected to fill a vacancy and received the affirmative vote of, a majority of the disinterested directors then on the board.

(i) “Exchange Act” means the Act of Congress known as the Securities Exchange Act of 1934, as the same has been or hereafter may be amended from time to time.

(j) “Fair market value” means:

1. In the case of shares, the highest closing sale price of a share quoted during the 30-day period immediately preceding the date in question on the composite tape for shares listed on the New York Stock Exchange; or, if such shares are not quoted on the composite tape on the New York Stock Exchange, the highest closing sale price quoted during such period on the New York Stock Exchange; or if such shares are not listed on such exchange, the highest closing sale price quoted during such period on the principal United States securities exchange registered under the Exchange Act on which such shares are listed; or, if such shares are not listed on any such exchange, the highest closing bid quotation with respect to a share during the 30-day period preceding the date in question on the National Association of Securities Dealers, Inc., automated quotations system or any other stock price quotation similar system then in general use; or, if no such quotations are available, the fair market value of a share on the date in question as determined (i) by a majority of disinterested directors or (ii) if, at such time there are no disinterested directors, by the board of directors of such corporation in good faith; and

2. In the case of property other than cash or shares, the fair market value of such property on the date in question as determined by (i) a majority of the disinterested directors or (ii) if, at such time there are no disinterested directors, by the board of directors of such corporation in good faith.

(k) “Interested shareholder” means any person who is the beneficial owner of more than ~~15~~10 percent of the outstanding voting shares of the corporation. However, the term “interested shareholder” shall not include the corporation or any of its subsidiaries; any savings, employee stock ownership, or other employee benefit plan of the corporation or any of its subsidiaries; ~~or~~ any fiduciary with respect to any such plan when acting in such capacity; or any person whose ownership of shares in excess of the 15% limitation set forth herein is the result of action taken solely by the corporation; provided that such person shall be an interested shareholder if thereafter such person acquires additional shares of voting shares of the corporation, except as a result of further corporate action not caused, directly or indirectly, by such person. For the purpose of determining whether a person is an interested shareholder, the number of voting shares deemed to be outstanding shall include shares deemed owned by the interested shareholder through application of subparagraph (e)3. but shall not include any other voting shares that may be issuable pursuant to any contract, arrangement, or understanding, upon the exercise of conversion rights, exchange rights, warrants, or options, or otherwise.

(l) “Shares” means the units into which the proprietary interests in an entity are divided and includes:

1. Any stock or similar security, any certificate of interest, any participation in any profit-sharing agreement, any voting trust certificate, or any certificate of deposit for shares; and

2. Any security convertible, with or without consideration, into shares; or any warrant, call, or other option or privilege of buying shares without being bound to do so; or any other security carrying any right to acquire, subscribe to, or purchase shares.

(m) “Subsidiary” means, as to any corporation, any other corporation of which it owns, directly or indirectly through one or more subsidiaries, a majority of the voting shares.

(n) “Valuation date” means, if the affiliated transaction is voted upon by shareholders, the day before the date of the vote of shareholders or, if the affiliated transaction is not voted upon by shareholders, the date of the consummation of the affiliated transaction.

(o) “Voting shares” means the outstanding shares of all classes or series of the corporation entitled to vote generally in the election of directors.

(2) Except as provided in subsections (4) and (5), but notwithstanding any other provisions of this chapter, a corporation shall not engage in any affiliated transaction with any interested shareholder for a period of 3 years following the time that such shareholder became an interested shareholder, unless:

(a) Prior to the time that such shareholder became an interested shareholder, the board of directors of the corporation approved either the affiliated transaction or the transaction which resulted in the shareholder becoming an interested shareholder; or

(b) Upon consummation of the transaction which resulted in the shareholder becoming an interested shareholder, the interested shareholder owned at least 85% of the voting shares of the corporation outstanding at the time the transaction commenced, excluding for purposes of determining the voting shares outstanding (but not the outstanding voting shares owned by the interested shareholder) those shares owned (i) by persons who are directors and also officers and (ii) employee stock plans in which employee participants do not have the right to determine confidentially whether shares held subject to the plan will be tendered in a tender or exchange offer; or

(c) At or subsequent to the time that such shareholder became an interested shareholder, the affiliated transaction is approved by the board of directors and authorized at an annual or special meeting of shareholders, and not by written consent, by

the affirmative vote of at least two-thirds of the outstanding voting shares which are not owned by the interested shareholder.

~~in addition to any affirmative vote required by any other section of this act or by the articles of incorporation, an affiliated transaction shall be approved by the affirmative vote of the holders of two-thirds of the voting shares other than the shares beneficially owned by the interested shareholder.~~

(3) A majority of the disinterested directors shall have the power to determine for the purposes of this section:

- (a) Whether a person is an interested shareholder;
- (b) The number of voting shares beneficially owned by any person;
- (c) Whether a person is an affiliate or associate of another; and
- (d) Whether the securities to be issued or transferred by the corporation or any of its subsidiaries to any interested shareholder or any affiliate or associate of the interested shareholder have an aggregate fair market value equal to or greater than 105 percent of the aggregate fair market value of all of the outstanding voting shares of the corporation or any of its subsidiaries.

(4) The voting requirements set forth in subsection (2) do not apply to a particular affiliated transaction if all of the conditions specified in any one of the following paragraphs are met:

- (a) The affiliated transaction has been approved by a majority of the disinterested directors;
- (b) The corporation has not had more than 300 shareholders of record at any time during the 3 years preceding the announcement date;
- (c) The interested shareholder has been the beneficial owner of at least 80 percent of the corporation's outstanding voting shares for at least 5 years preceding the announcement date;
- (d) The interested shareholder is the beneficial owner of at least 90 percent of the outstanding voting shares of the corporation, exclusive of shares acquired directly from the corporation in a transaction not approved by a majority of the disinterested directors;
- (e) The corporation is an investment company registered under the Investment Company Act of 1940; or

(f) In the affiliated transaction, consideration shall be paid to the holders of each class or series of voting shares and all of the following conditions shall be met:

1. The aggregate amount of the cash and the fair market value as of the valuation date of consideration other than cash to be received per share by holders of each class or series of voting shares in such affiliated transaction are at least equal to the highest of the following:

a. If applicable, the highest per share price, including any brokerage commissions, transfer taxes, and soliciting dealers' fees, paid by the interested shareholder for any shares of such class or series acquired by it within the 2-year period immediately preceding the announcement date or in the transaction in which it became an interested shareholder, whichever is higher;

b. The fair market value per share of such class or series on the announcement date or on the determination date, whichever is higher;

c. If applicable, the price per share equal to the fair market value per share of such class or series determined pursuant to sub-subparagraph b., multiplied by the ratio of the highest per share price, including any brokerage commissions, transfer taxes, and soliciting dealers' fees, paid by the interested shareholder for any shares of such class or series acquired by it within the 2-year period immediately preceding the announcement date, to the fair market value per share of such class or series on the first day in such 2-year period on which the interested shareholder acquired any shares of such class or series; and

d. If applicable, the highest preferential amount, if any, per share to which the holders of such class or series are entitled in the event of any voluntary or involuntary dissolution of the corporation.

2. The consideration to be received by holders of outstanding shares shall be in cash or in the same form as the interested shareholder has previously paid for shares of the same class or series, and if the interested shareholder has paid for shares with varying forms of consideration, the form of the consideration shall be either cash or the form used to acquire the largest number of shares of such class or series previously acquired by the interested shareholder.

3. During such portion of the 3-year period preceding the announcement date that such interested shareholder has been an interested shareholder, except as approved by a majority of the disinterested directors:

a. There shall have been no failure to declare and pay at the regular date therefor any full periodic dividends, whether or not cumulative, on any outstanding shares of the corporation;

b. There shall have been:

(I) No reduction in the annual rate of dividends paid on any class or series of voting shares, except as necessary to reflect any subdivision of the class or series; and

(II) An increase in such annual rate of dividends as necessary to reflect any reclassification, including any reverse stock split, recapitalization, reorganization, or similar transaction which has the effect of reducing the number of outstanding shares of the class or series; and

c. Such interested shareholder shall not have become the beneficial owner of any additional voting shares except as part of the transaction which results in such interested shareholder becoming an interested shareholder.

4. During such portion of the 3-year period preceding the announcement date that such interested shareholder has been an interested shareholder, except as approved by a majority of the disinterested directors, such interested shareholder shall not have received the benefit, directly or indirectly (except proportionately as a shareholder), of any loans, advances, guaranties, pledges, or other financial assistance or any tax credits or other tax advantages provided by the corporation, whether in anticipation of or in connection with such affiliated transaction or otherwise.

5. Except as otherwise approved by a majority of the disinterested directors, a proxy or information statement describing the affiliated transaction and complying with the requirements of the Exchange Act and the rules and regulations thereunder has been mailed to holders of voting shares of the corporation at least 25 days before the consummation of such affiliated transaction, whether or not such proxy or information statement is required to be mailed pursuant to the Exchange Act or such rules or regulations.

(5) The provisions of this section do not apply:

(a) To any corporation the original articles of incorporation of which contain a provision expressly electing not to be governed by this section;

(b) To any corporation which adopted an amendment to its articles of incorporation prior to January 1, 1989, expressly electing not to be governed by this section, provided that such amendment does not apply to any affiliated transaction of the

corporation with an interested shareholder whose determination date is on or prior to the effective date of such amendment;

(c) To any corporation which adopts an amendment to its articles of incorporation or bylaws, approved by the affirmative vote of the holders, other than interested shareholders and their affiliates and associates, of a majority of the outstanding voting shares of the corporation, excluding the voting shares of interested shareholders and their affiliates and associates, expressly electing not to be governed by this section, provided that such amendment to the articles of incorporation or bylaws shall not be effective until 18 months after such vote of the corporation's shareholders and shall not apply to any affiliated transaction of the corporation with an interested shareholder whose determination date is on or prior to the effective date of such amendment; or

(d) To any affiliated transaction of the corporation with an interested shareholder of the corporation which became an interested shareholder inadvertently, if such interested shareholder, as soon as practicable, divests itself of a sufficient amount of the voting shares of the corporation so that it no longer is the beneficial owner, directly or indirectly, of ~~20~~ percent or more of the outstanding voting shares of the corporation, and would not at any time within the ~~3~~5-year period preceding the announcement date with respect to such affiliated transaction have been an interested shareholder but for such inadvertent acquisition.(6) Any corporation that elected not to be governed by this section, either through a provision in its original articles of incorporation or through an amendment to its articles of incorporation or bylaws may elect to be bound by the provisions of this section by adopting an amendment to its articles of incorporation or bylaws that repeals the original article or the amendment. In addition to any requirements of this chapter ~~act~~, or the articles of incorporation or bylaws of the corporation, any such amendment shall be approved by the affirmative vote of the holders of two-thirds of the voting shares other than shares beneficially owned by any interested shareholder.