

**Presentation to the Executive Council of The Florida Bar Business Law
Section on Proposed Modifications to Chapter 607
(Florida Business Corporation Act)**

September 3, 2018

The Florida Bar Business Law Section ("Section") has a long history of proposing entity statutes for our state. The Section comprehensively updated and modernized Florida's corporate statute in the late 1980s, updated Florida's partnership statute in the mid 1990s, updated Florida's limited partnership statute in the early 2000s, and updated Florida's LLC statute in the late 1990s and, in a far more comprehensive fashion in 2013, and the Section is now – once again – working to update and modernize Florida's corporate statute.

Florida is a Model Act/Uniform Laws state with respect to its entity statutes, but unlike Delaware, for example, the Section is not in a position to propose and pursue significant changes to our State's entity statutes on a year-in and year-out basis. Thus, the Section's efforts to update and modernize the State's entity statutes have tended to be to present large comprehensive bills to replace older entity statutes with updated and modernized ones. That is not to say that the Section has not previously made proposals to update and modernize provisions of the Florida Business Corporation Act ("FBCA"), but that these previous efforts since 1989 have generally been on selected topics and have not been on a comprehensive basis.

When it comes to for-profit corporations in Florida, Florida generally follows the revised Model Business Corporation Act (the "MBCA" or the "Model Act"), which is promulgated by the Corporate Laws Committee of the ABA Business Law Section. Although the Model Act has changed extensively over the past thirty-five years, Chapter 607 has been overhauled only once (in 1989) and otherwise has endured patchwork amendments, with more significant changes in 1996 and 2003. Recently, in 2016, the MBCA itself was updated and modernized in its entirety. For all of these reasons, it has been deemed a necessity to consider comprehensively amending Florida's corporate statute so that Florida keeps pace with modern statutory developments relating to corporations.

There are a large number of entities organized in Florida. At the beginning of 2018, Florida had 760,000 corporations and almost 1.2 million limited liability companies in existence - probably more than any other state – growing at the rate of about 100,000 corporations and more than 250,000 LLCs per year. Because so many of the users of Florida's entity statutes are private companies, Florida's entity laws have tended to be as proscriptive as possible to offer clarity in our law for users that range from non-lawyers, to lawyers who are not necessary experts in entity matters, and to judges, all of whom are able to benefit from the proscriptive guidance in our State's entity statutes.

In 2014, a drafting task force (the "Drafting Subcommittee" or the "Subcommittee") was organized under the auspices of the Corporations, Securities and Financial Services Committee of the Section to make recommendations as to proposed changes to the FBCA. The Drafting Subcommittee's mission statement was to comprehensively study Florida's business corporation statute and to propose a more cohesive revision and set of amendments with the purpose of (i) bringing Florida's

business corporation statute in line with the revisions to the MBCA and the trends affecting the use of corporations by businesses today, (ii) maintaining Florida's competitiveness with other jurisdictions, (iii) seeking to fix issues presented by the existing statute that have been experienced by practitioners in practice and in litigating disputes concerning the operations of Florida corporations, and (iv) continuing to encourage formation and use of Florida corporations, where appropriate.

The FBCA is comprised of 17 articles. At the present time, the Subcommittee has completed (subject to just a few select items) its review of Articles 1-8, 10, 11, 12, 13, 14, 15, 16 and 17 of the FBCA (the "Updated Act"). The Subcommittee is currently considering whether to make changes to Article 9 (containing two non-Model Act anti-takeover provisions that the Subcommittee may or may not propose to change at this point) and is working on completing certain harmonizing provisions that are to be made in other Florida entity statutes (which are discussed by way of footnotes and commentary in the draft of the Updated Act, but have not yet been completed). Further, at the Section's upcoming Labor Day retreat (the "Retreat"), there will be three meetings at which a limited short list of further proposed modifications of the Updated Act will be considered. A list of these open issues that will be considered at the upcoming meetings is contained in Exhibit A. In its presentation to the Executive Council at its upcoming meeting about the proposal, the Subcommittee will report to the Executive Council on any changes that are to be made on any of the issues described in Exhibit A.

It is further anticipated that the Corporations, Securities and Financial Services Committee will consider and approve the proposed Updated Act at its meeting at the Retreat and recommend its adoption to the Section's Executive Council. Then, assuming the Corporations, Securities and Financial Services Committee makes such a recommendation, the Executive Council, at its meeting at the Retreat, will be asked to approve the Updated Act for presentation to The Florida Bar legislation committee for its approval and thereafter to the Florida legislature for its consideration. A copy of the resolutions proposed to be adopted by the Executive Council approving the Updated Act are attached hereto as Exhibit B. The resolutions contemplate delegating to the Executive Committee the authority to approve additional non-substantive changes to the proposal that are made following the Retreat.

The following bullet point summary of the Updated Act has been prepared by the co-chairs of the Subcommittee to facilitate the review of the proposed statute by members of the Executive Council. References in this bullet point summary to "Existing Law" refer to existing Chapter 607 of the Florida Statutes. References to "Updated Act" refer to Chapter 607, as proposed to be revised. Unlike the recent revision to Florida's limited liability company statute, where Chapter 608 was replaced by Chapter 605, the proposed revisions to the FBCA, although extensive, are all expected to be made within existing Chapter 607 of the Florida Statutes.

The Updated Act updates existing Chapter 607, which, assuming adoption in the 2019 legislative session, is planned to become effective for all Florida corporations as of January 1, 2020.

OVERVIEW OF THE UPDATED ACT

The Updated Act follows, for the most part, the 2016 version of the Model Act, yet deviates in a number of respects by:

- (i) retaining certain non-Model Act provisions already contained in existing Chapter 607;
- (ii) borrowing language from the Delaware General Corporation Law ("DGCL"); and
- (iii) borrowing parallel language and approaches from the Florida Revised Limited Liability Company Act ("FRLLLCA") for purposes of harmonizing the two statutes on issues where harmonization is considered appropriate.

The Updated Act introduces more definitions than were set forth in Existing Law, many of which are necessary because of new provisions not contained in Existing Law. The Updated Act also updates and tries to become more consistent in the use of certain defined terms and terminology (such as references to the "department" and the "chapter" and the use of the term "signed" rather than "executed").

Some of the more important changes reflected in the Updated Act are as follows:

- Clarifies the extent to which plans and filed documents can be dependent on facts objectively ascertainable outside a plan or filed document;
- Modifies and expands the terms as to the date and time when a filed document under Chapter 607 is effective, paralleling (for the most part) the comparable provision in FRLLLCA;
- Modifies the provisions relating to correcting filed documents such that corrections can be filed at any time, and would no longer be limited to the 30 day period following the initial filing;
- In several places, and at the request of the Florida Department of State, Division of Corporations (the "Department"), modifies the proper jurisdiction for bringing actions against the Florida Department of State from the county where a corporation's principal place of business is located to Leon County, Florida;
- Harmonizes the specifics to be contained in a certificate of status with how the department currently operates, paralleling (for the most part) the comparable provision in FRLLLCA;
- Updates definitions of "electronic," "electronic record," "electronic transmission," "record," and "sign" and methods of giving, transmitting and delivering notice to be more in tune with current and anticipated electronic technology;

- Adds the concept of "qualified director" to identify who should be considered a truly independent director for purposes of the updated derivative action provisions, the updated director conflict of interest provisions, and the updated indemnification provisions;
- Consistent with what is considered implicit under the Existing Law, expressly authorizes Articles of Incorporation and/or bylaws to include exclusive forum provisions relative to proceedings addressing internal corporate claims;
- Expressly prohibits provisions in Articles of Incorporation or in bylaws purporting to impose liability upon a shareholder for attorneys' fees or expenses in connection with an internal corporate claim proceeding, but allowing such a provision in an approved shareholders' agreement that complies with the requirements of s. 607.0732 of the FBCA;
- Makes it expressly clear that proxy access provisions in corporate bylaws are permissible;
- Adds language to expressly authorize a corporation (consistent with current Department practice) to adopt an otherwise prohibited name if written consent from the other entity using that name is obtained and filed;
- Adds back the concept of a short term reservation of a corporate name prior to incorporation, which was removed from the statute in 1998;
- Expands the types of entities that can serve as a registered agent for a corporation, paralleling the comparable provision in FRLUCA (for the most part);
- Updates service of process provisions for corporations;
- Authorizes boards of directors to delegate to committees and/or any officers authorization to issue equity compensation awards, without specifying limits;
- Updates provisions dealing with participation in meetings by way of remote communications in order to take into account technological developments;
- Expressly allows for bi-furcated record dates for shareholders meetings (i.e., who get notice vs. who gets to vote);
- Consistent with what is already considered implicit under the Existing Law, expressly states that the failure to provide the 10-day notice of an action taken by written consent does not invalidate or delay the effectiveness of the action taken;
- Seeks to clarify obligations with respect to the maintaining of, and rights to access, shareholder lists;
- Clarifies when shares of a corporation are considered owned by that corporation and thus not entitled to a vote;

- Changes the language used to identify public companies by keying into corporations with shares registered under section 12 of the Securities Exchange Act of 1934;
- Adds a separate provision addressing in detail and, by way of guidance, the way in which inspectors of election operate, particularly for public companies;
- Through changes to section titles, clarifies that there is a difference between "voting agreements" and "shareholders agreements;"
- Eliminates the statutory restriction that shareholder agreements that change traditional corporate norms can only be implemented by corporations with 100 or fewer shareholders;
- Expressly validates fee shifting provisions in certain shareholders' agreements unanimously adopted under s. 607.0732 of the FBCA;
- In the context of what is not permitted to be included in shareholders' agreements that change traditional corporate norms, removes the examples of what is considered contrary to public policy, instead leaving that determination to the courts;
- Clarifying what is considered the current law to the effect that, notwithstanding the statutorily authorized shareholder agreements which require all shareholders to be parties to be enforceable, agreements among selected groups of shareholders (yet less than all) will still be enforceable between and among such contracting shareholders to the extent otherwise valid under general contract law principles;
- Provides greater detail and instruction for addressing derivative actions by expanding provisions and breaking out the procedural aspects of derivative actions into seven separate sections (addressing standing, the requirement of universal demand, stay of proceedings, process for evaluating whether to dismiss the action, discontinuance or settlement of the action, payment of expenses, and nonapplicability to foreign corporations);
- Adds statutory language expressly authorizing a court to appoint a custodian or receiver in a proceeding by a shareholder, but outside the context of a dissolution proceeding and, as for appointing a receiver, without any need to show insolvency;
- Adds statutory language expressly authorizing the appointment by a court of a provisional director in a proceeding by a shareholder where a deadlock exists and outside the context of a dissolution;
- Adds statutory language expressly authorizing a court to remove a director, in a derivative proceeding, under certain specified circumstances;
- Modifies how director vacancies in director positions that have been elected by a separate voting group shall be filled;

- Updates provisions relating to the composition, operation and authority of board committees, including authorizing board committees comprised of one board member and modifying what actions cannot be delegated to a board committee;
- Eliminates the provision in current law that imposes limits on the ability of a board of directors to delegate the issuance or sale of shares, or the designation of relative rights preferences and limitations of a voting group, to a Board committee, and instead authorizes such ability to delegate without the need to establish parameters;
- Clarifies the statutory language addressing director fiduciary duty standards and the business judgment rule, but without intending to make any substantive change;
- Adds an express authorization for a corporation to enter into an agreement containing a "force the vote" provision;
- Includes extensive modifications to the director conflicts of interest provision to match the conflict of interest approach adopted in FRLICA, and particularly to make clear that (i) an "unfair" conflict of interest transaction cannot be "sanitized" by an approval of disinterested directors (now called qualified directors) or disinterested shareholders, and (ii) approval of a conflict of interest transaction by qualified directors or disinterested shareholders nevertheless shifts the burden of who has to prove that such transaction is fair or unfair;
- Adds a statutory provision expressly addressing in some detail the standards of conduct for officers, paralleling the statutory fiduciary duties of directors, with the intent of replacing common law agency principles, and adds "up the line" reporting obligations and rights to reasonably rely on certain others and certain information;
- Provides greater detail and instruction with respect to indemnification of directors and officers by expanding provisions and breaking out the existing "long" indemnification statute into ten separate sections (providing certain definitions, addressing permissive versus mandatory indemnification (including the need to be "wholly successful" to obtain statutorily mandated indemnification), advancing of expenses, court ordered indemnification, determination of whether standards for permissible indemnification have been met, power to purchase indemnification insurance, ability to indemnify beyond statutory indemnification, and the outside limits on the ability to indemnify);
- Allows the authorization for director approved share splits or combinations without shareholder approval, which are already available under Existing Law to corporations with 35 or more shareholders, to also be available to corporations with fewer than 35 shareholders;
- With respect to amendments to the articles of incorporation that need to be approved by shareholders, modifies the statute to require that a full copy of the amendment (and not just a summary) must be provided to shareholders for approval;

- Adds "interest holder liability" concepts in various places including with respect to amendments to articles of incorporation, mergers, share exchanges, conversions, and domestications;
- Adds provisions relating to authorizing bylaws to include certain provisions relating to majority voting for directors and holdover directors;
- Modifies provisions for judicial dissolution and appointment of receivers and custodians in the context of judicial dissolution proceedings, including adding oppression as one of the grounds for judicial dissolution;
- Modifies provisions governing organic transactions like mergers, share exchanges, conversions, domestications, and sales of all or substantially all of the assets;
- Adds provisions permitting the merger of corporations without a shareholder vote following a tender offer, if certain conditions are met;
- Modifies provisions regarding conversions so as to more clearly address both inbound and outbound conversions;
- Modifies provisions governing domestications so as to expand domestications to include in-bound domestications by foreign corporations and out-bound domestications by Florida corporations into foreign corporations, so long as the domestication is permitted under the laws of the foreign jurisdiction, such that moving a corporation into a different state of organization can be achieved, at the election of the corporation, by either a domestication, a merger, or a conversion;
- Modifies appraisal rights provisions, including adding events that trigger appraisal rights, and providing clarifications to the procedural aspects of the appraisal rights provisions, particularly in dealing with organic transactions approved by way of written consent; and
- Modifies provisions that address the obligations of corporations to make financial statements available to shareholders, the maintenance of corporate records, and the inspection rights of shareholders and directors.

A few things did not change from before and a few of the new items in the Model Act are not proposed to be adopted. The Drafting Subcommittee:

- Did **NOT** add the provisions in the Model Act relating to "ratification of defective acts."
- Did **NOT** add the provision permitting corporations to include in their articles of incorporation a provision that limits or eliminates a director's or an officer's duty to present a business opportunity to the corporation.
- Did **NOT** add the provision that requires shareholder approval of any share issuances of more than 20% of voting power.

- Did **NOT** add the default rules for the conduct of a shareholders meeting.
- Did **NOT** include the provision requiring the duration of a voting trust to be expressly set forth in the voting trust instrument.

If you have any questions about the Updated Act, please feel free to contact the co-chairs of the Subcommittee, Philip B. Schwartz (philip.schwartz@akerman.com) and Gary I. Teblum (gteblum@trenam.com).

EXHIBIT A

LIST OF REMAINING OPEN TOPICS TO BE DISCUSSED AT RETREAT MEETINGS PRIOR TO THE EXECUTIVE COUNCIL MEETING

(EC to be updated at its meeting held during the Retreat regarding these topics)

- Expansion of the use of domestications as set forth in the proposal.
- Whether to add a quantitative safe harbor to the FBCA for sales of "all or substantially all of a corporation's assets" without shareholder approval.
- In a merger, share exchange, domestication, or conversion, whether non-voting shares should be accorded appraisal rights.
- Whether to modify s. 607.0901 (Affiliated transactions) and s. 607.0902 (Control-share acquisitions).
- Whether to add "demand futility" as an exception to the universal demand requirement in the derivative action provisions of the FBCA (being discussed with the Business Litigation Committee).
- Whether to add an exception to the general rule that shareholders entitled to appraisal rights may not challenge the completed corporate act for (i) interested transactions, and (ii) shareholders who have not signed a written consent with respect to such corporate action (who may challenge the transaction within an enumerated period of time following notice of that a less than unanimous shareholders' consent has been executed approving the corporate action).
- Clarifications to the FBCA dealing with the effect of repeals of prior acts (Saving provision).

EXHIBIT B

PROPOSED RESOLUTION TO BE ADOPTED BY THE EXECUTIVE COUNCIL

RESOLVED, that the Florida Bar Business Law Section (the "Section") supports proposed legislation updating and modernizing the Florida Business Corporation Act (Chapter 607 of the Florida Statutes), harmonizing certain of those provisions with provisions in other Florida entity statutes, including within Chapters 605 and 620, and cleaning up certain glitches within such other Florida entity statutes (the "Proposed Legislation"), substantially in the form of the draft legislation, draft dated as of August 22, 2018 presented to the Executive Council of the Section, and subject to such further changes as are deemed appropriate and approved by (i) the Chapter 607 Drafting Subcommittee of the Corporations, Securities and Financial Services Committee of the Section, and (ii) the Executive Committee of the Section; and it is further

RESOLVED, that the Proposed Legislation:

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