Proposed Modifications to Chapter 607
(Florida Business Corporation Act)

September 25, 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 new corporations and more than 250,000 new LLCs per year (while the net growth is smaller, because many corporations and LLCs are dissolved each year, it is still significant growth under any circumstances). 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 competiveness 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 both its proposed changes to Chapter 607 of the Florida Statutes and the harmonizing changes to other Florida entity statutes to make them consistent with revised Chapter 607 (the "Updated Act"). The Updated Act has been approved as a legislative initiative by the Executive Council of the Section and the Section's legislative position is in the process of being submitted to the legislation committee of The Florida Bar Board of Governors for its approval.

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 interested persons. 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 entirely 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 ("FRLLCA") 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 FRLLCA;

- 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 FRLLCA;

- 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 FRLLCA (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 to plead demand unless demand would be futile, 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 FRLLCA, 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 (subject to a limitation that only a shareholder who holds more than 10% of a corporation's outstanding common stock may bring an action seeking judicial dissolution based on oppression);

- Adds provisions to allow shareholders who enter into a shareholders' agreement complying with s. 607.0732 of the FBCA to include a deadlock sale provision or a shareholder oppressive action sale provision in their shareholders' agreement that, if applicable, will be given effect instead of allowing for judicial dissolution in the event of deadlock or shareholder oppressive action;

- Modifies provisions governing approvals required for certain affiliated party transactions engaged in primarily by public companies, including changes in certain percentage thresholds and clarifications in terms of how boards of directors can bless such transactions without the need for shareholder approval;

- 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).