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

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

This first article discusses substantive changes made in the revised act to Article 1 (general provisions), Article 2 (incorporation), Article 3 (purposes and powers), Article 4 (corporate names), Article 5 (office and agent) and Article 6 (shares and distributions) of the FBCA. It specifically provides background on the revised act and addresses provisions in the revised act dealing with overriding administrative matters, various new definitions, formation and organizational matters, forum selection provisions, corporate names, registered agents, service of process, authorized shares, rights to acquire shares, share rights, options, warrants and awards, restrictions on transfer of shares and other securities, and distributions to shareholders.

Overview.

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

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

Florida's corporate statute (Part I of the FBCA) is largely modeled on the Revised Model Business Corporation Act (the "Model Act"). The Model Act is promulgated by the Corporate Laws Committee of the Business Law Section of the American Bar Association (the "Corporate Laws Committee"). In preparing the revised act, the drafting subcommittee that developed the proposed statute that became the revised act initially considered the version of the Model Act published through the 2013 Supplement to the Model Act. It also reviewed and considered additional changes to the Model Act that were made in the 2016 version of the Model Act (the current version of the Model Act).

Although the Model Act has changed extensively over the past thirty-five years, the FBCA has been overhauled only once (in 1989, based on the 1984 version of the Model Act) and has otherwise endured patchwork amendments, with more significant changes in 1996 and 2003. Thus, it was considered necessary to comprehensively amend Florida's corporate statute so that Florida can keep pace with modern statutory developments relating to corporations.

The revised act is the work of the Chapter 607 Drafting Subcommittee (the "Subcommittee") of the Corporations, Securities and Financial Services Committee of the Section. The 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 Model Act and the trends affecting the use of corporations by businesses today, (ii) maintaining Florida's competiveness with the corporate statutes in 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 Subcommittee met about 100 times during the almost five year period that it took to complete the proposal that became the revised act.

The revised act includes (i) a large number of changes based on the current version of the Model Act, (ii) language changes that make the statutory provisions more understandable and usable by those who have to work with the statute (including judges who have to interpret the statute), (iii) fixes to a number of substantive provisions in the existing statute where problems have been identified over the years, (iv) changes that borrow parallel language and approaches from the Florida Revised Limited Liability Company Act ("FRLLCA") for purposes of harmonizing the two statutes on issues where harmonization was considered appropriate, and (v) necessary corrections to cross references appearing in other Chapter 607 sections and in other Florida Statutes. It also retains certain non-Model Act provisions already contained in existing Chapter 607 and continues, in certain cases, to borrow language from the Delaware General Corporation Law ("DGCL").

During the course of drafting the revised act, extensive input was secured from representatives of the Florida Department of State, Division of Corporations (the "Department"). In that process, it was discovered that certain of the procedures being followed by the Department were processes that, while not expressly provided for in the existing statute, were designed to make things easier for both practitioners and business entities and to ease certain burdens on the Department. Thus, the revised act includes a number of changes designed to fine tune the existing provisions and to conform the statutory language more specifically to the procedures currently being followed by the Department.

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

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

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

The following sets forth important changes to the FBCA made in the revised act. The discussions below are grouped together by Article of revised Chapter 607. References to sections are to sections of the Florida Statutes.

Article 1 – General Provisions.

Filings with the Department generally. With respect to the process for filing documents with the Department, as a general matter no substantive changes have been made by the revised act. Nevertheless, the concept of "signed" has replaced the term "executed" to tie in with the new more flexible definition of the concept of being "signed." However, this change is largely in accord with how the Department has already been operating and, thus, the filing process will not be changing as a result of the revised act.

It is important to note that the Department is in the process of modernizing and expanding the capabilities of its www.sunbiz.org website, and when those updates are implemented, it is possible that certain aspects of the filing process will be changed at that time, with the expectation of seeing improvements and greater flexibilities.

Filed documents - Effective dates and times. The changes to §607.0123 relating to effective dates and times of filings are fairly extensive. However, these changes (i) merely harmonize these provisions with the provisions of §605.0207 of FRLLCA, (ii) are largely consistent with the changes to the corollary provision in the Model Act, and (iii) largely follow the positions on these items already followed by the Department. Thus, these changes are designed to incorporate the current Department views concerning effective dates and times into the actual statutory language and thus seek to eliminate any potential for ambiguity.

Correcting filed documents. Although the provisions in §607.0124 are largely the same as under existing law, there is one significant change that should be a welcome change for practitioners and their clients. The language contained in the existing statute in subsection (1) of the existing statute, which provides that a document can only be corrected within 30 days of the date of filing, has been removed from the statute, thus allowing a correction to be made at any time – even many years after the fact. This change follows both the corresponding provision in the Model Act and the filing correction provision already contained in §605.0209 of FRLLCA. Of course, as under existing law, any such correction will not be retroactively effective against persons relying on the uncorrected document and adversely affected by the correction.

Certificate of Status. Although the language of §607.0128 has been extensively revised, the changes are not substantive and are, in large part, designed to (i) marry up with the practices currently being followed by the Department, and (ii) harmonize with the language already contained in §605.0211 of FRLLCA.

New definitions (including a definition of Qualified Director). There are many changes in the definitions provisions of Chapter 607. Most definitions appear in §607.01401. However, new §607.0143 is a stand-alone section that defines the newly added concept of "Qualified Director." Further, many other new definitions appear alongside or within the substantive provisions to which those definitions relate. Some of the new definitions come from the Model Act, others are derived from definitions already contained in FRLLCA, and a few are peculiar to Florida law.

Several of the new and/or revised definitions relate to 2010 changes to the Model Act that are designed to facilitate electronic transmission and e-signatures, with certain corresponding changes to §607.0120 and §607.0141. Although existing Florida law already permitted electronic transmission and e-signatures, the expanded language added by the revised act is intended to further refine the language and tie in more precisely to the digital economy.

The definition of eligible entity (§607.01401(28)) is derived from the definition of entity in §605.0102(23) of FRLLCA. The definition of eligible entity also excludes certain categories of persons and entities, based on the corollary section of FRLLCA. The Model Act and the existing statute include governmental entities as entities. In contrast, §605.0102(23) of FRLLCA

considers them non-entities – and the revised act follows the definition in FRLLCA and excludes governmental entities from the definition of an eligible entity.

A definition of "applicable county" (§607.01401(3)) has been added to make clear where proceedings must be brought by a corporation or against a corporation under various circumstances. The new "applicable county" definition creates a waterfall to identify the proper county where an action can take place, as follows:

- First, in the county in Florida in which the corporation's principal office is located or was located when an action is or was commenced;
- Second, if the corporation has, and at the time of such action had, no principal office in Florida, then in the county in which the corporation has, or at the time of such action had, an office in Florida; or
- Third, if the corporation does not have an office in Florida, then in the county in which the corporation's registered office is or was last located.

The definition of "insolvent" in §607.01401(42) has been modified to add a balance sheet test to the definition. This makes the definition consistent with §607.06401 (dealing with director liability for unlawful distributions to shareholders) and §736.103 (Florida's fraudulent transfer law).

A definition of "authorized entity" has been added to clarify the types of entities that may act as the registered agent for a Florida corporation or for a foreign corporation authorized to transact business in Florida, including expressly adding limited liability companies that are either organized in Florida or authorized to transact business in Florida. A similar definition has been added by the revised act to FRLLCA and to the Florida Not-For-Profit Corporation Act (Chapter 617).

Some of the new definitions that are carried over from FRLLCA include "governor," "interest," "interest holder," "interest holder liability," "jurisdiction of formation," "organic law," "organic rules," "private organic rules," "protected agreement," "public organic record," and "type of entity." Other new definitions, particularly those relating to mergers, share exchanges, conversions and domestications, are derived from the Model Act. Those include (i) subsection (1) – acquired eligible entity; subsection (2) – acquiring eligible entity; (iii) subsection (51) – new interest holder liability; (iv) subsection (55) – party to a merger; (iv) subsection (73) – survivor; (v) subsection (10) – conversion; (vi) subsection (11) – converted eligible entity; (vii) subsection (12) – converting eligible entity; (viii) subsection (20) – domestic; (ix) subsection (21) – domesticated corporation; (x) subsection (22) – domesticating corporation; and (xi) subsection (23) – domestication.

A new concept of "qualified director" has been added in new §607.0143. It is based on the definition contained in §1.43 of the Model Act and is used in the revised derivative action

provisions of Article 7 of Chapter 607 and in the revised director conflict of interest and indemnification provisions contained in Article 8 of Chapter 607. The definition of "qualified director" is used in these revised provisions to make clear that only truly independent directors are the ones who are entitled to make the decisions called for under those respective provisions.

Notices (including electronic notices). The changes to §607.0141 concerning the giving of notices adopt most of the changes made in the notice requirements in §1.41 of the Model Act. In the commentary to the Model Act, the Corporate Laws Committee stated that many of these changes were made to incorporate terms from the Uniform Electronic Transmissions Act and the Electronic Signatures in Global and National Commerce Act (often called the E-Sign act) into the Model Act. With the substantial growth of electronic transmission (and a corresponding decline in mailed correspondence), a corresponding modernization of Chapter 607 was believed necessary.

However, the language in §1.41(b) of the Model Act, which allows notice to be given by means of a broad non-exclusionary distribution to the public if the methods of delivery approved in the corresponding section are found to be impracticable, has not been incorporated in the revised act.

Section 607.0141(6) in the revised act adds a clarification that if the corporation's articles or bylaws authorize notice or other communications to directors by way of electronic transmission, then no consent of a recipient director shall be required for the corporation to provide notice or other communication to the recipient director by electronic transmission. However, this can be a trap for the unwary. If the articles or bylaws do not expressly authorize notice to directors by electronic transmission, notice can be given to directors by electronic transmission only if the particular director has consented in writing to receiving notices in such fashion. Accordingly, unless electronic transmission notices to directors are frowned upon by the particular corporation, it is probably advisable for the corporation’s bylaws (or articles of incorporation) to include express authorization for such electronic transmission of notices to directors.

Although the Model Act includes a section on the topic of householding in a stand-alone section (§1.44), the FBCA continues to include the householding provisions in §607.0141(3). The revised act includes a modification from the current version of §1.44 of the Model Act providing that if a shareholder revokes its consent to householding, the corporation must begin sending notices to the revoking shareholder no later than 30 days after delivery of the revocation notice.

Section 607.0141(12) in the revised act implements E-Sign §7002(a)(2), which exempts from the federal preemption provisions of E-Sign certain state laws that modify, limit or supersede E-Sign, and that also make specific reference to E-Sign.

Section 607.0141 will need to be read together with new §607.05032. This new section sets forth the permissible means of delivering notice to a corporation, including delivery by hand, the United States Postal Service, a commercial delivery service, and electronic transmission, and clearly states that delivery to the Department is effective only when a notice or other communication is actually received by the Department (except with respect to an annual report payment which, once actually received, will be deemed received retroactive to the postmark date appearing on the envelope or package transmitting the check).

Facts ascertainable outside plan or filed document. New subsection (11) of §607.0120 is derived from the Model Act. It permits any of the terms of a filed document (including, for example, articles of incorporation) or a plan (including, for example, a plan of merger, a plan of share exchange, a plan of conversion, or a plan of domestication) to be made dependent on facts outside the document or plan, except to the extent provided in subsection (11)(c) of that section. The facts on which the filed document or plan is to be dependent need not be within the control of the corporation, but must be ascertainable, and the filed document or plan must state the manner in which the facts will operate. Subsection (11)(d) of that section establishes a procedure that assists shareholders in determining what facts are the underlying facts on which a filed document or plan is dependent.

Many Florida practitioners, under existing law, have already been filing documents and/or plans that incorporate facts that are outside the document or plan, and many believe that such filings and plans were proper under existing law (and thus adoption of new subsection (11) of §607.0120 should not be considered to mean that prior filings or plans that are dependent on facts outside the document or plan are invalid). Although the position of those practitioners should be correct, the addition of new subsection (11) is designed to eliminate any potential for ambiguity in that regard.

Article 2 – Incorporation

Articles of incorporation generally. The changes that the revised act makes to the sections concerning articles of incorporation do not effectively change the mandated requirements for articles of incorporation in Florida. Rather, the changes are largely designed to address items that may be added to the articles of incorporation and, in at least one case, to identify one topic that cannot be included in articles of incorporation. As a result, most practitioners who employ their own form of articles of incorporation (rather than using the online preprinted form), will be able to continue to use their form under the revised act. Nevertheless, it still would be advisable for each practitioner to compare his or her existing form of articles of incorporation against the changes included in §607.0202 of the revised act.

Exclusive forum provisions expressly permitted in Articles of Incorporation and Bylaws. New subsection (2)(b)6. of §607.0202 expressly permits articles of incorporation to include exclusive forum provisions, to the extent permitted by new §607.0208. Similarly, new subsection

(4) of §607.0206 authorizes bylaws to include exclusive forum provisions. Even though the Subcommittee believed that exclusive forum provisions were already permissible under the generic catch-all language in subsection (2)(d) of §607.0202, because of extensive discussions about such provisions around the country and the fact that this authority is expressly included in both the DGCL and the Model Act, the express authority has been added.

New §607.0208, which relates to forum selection provisions in articles of incorporation and bylaws, largely follows §2.08 of the Model Act. It authorizes a provision in either the articles of incorporation or the bylaws creating exclusive jurisdiction for consideration of an "internal corporate claim." Under new §607.0208(1), the provision, in order to be valid, must include all of the courts of Florida or any specified court or courts of Florida. The provision may also, but is not required to, include additional courts sitting within Florida (including federal courts) or in one or more additional jurisdictions with a reasonable relationship to the corporation.

New §607.0208 defines an "internal corporate claim" as (i) any claim that is based upon a violation of a duty under the laws of Florida by a current or former director, officer, or shareholder in such capacity, (ii) any derivative action or proceeding brought on behalf of the corporation, (iii) any action asserting a claim arising pursuant to Chapter 607 or the corporation's articles of incorporation or bylaws; or (iv) any action asserting a claim governed by the internal affairs doctrine that is not included in the categories enumerated.

Fee shifting provisions are not permitted, except in limited circumstances. In contrast, new subsection (5) of §607.0202 expressly prohibits the inclusion in articles of incorporation of provisions that purport to impose liability upon a shareholder for the attorney fees or expenses of the corporation or any other party in connection with an "internal corporate claim" (often referred to as a "fee shifting provision"). A similar provision has been added as new subsection (5) in §607.0206 relating to prohibited bylaws provisions.

As a policy matter, the Subcommittee did not believe that a fee shifting provision ought to be based on simple majority decisions to place them in either articles of incorporation or bylaws. However, the Subcommittee recognized that such a provision might still be adopted by unanimous shareholder approval in conformity with a shareholders' agreement that meets the requirements of §607.0732, and language to that effect has been added in that section.

Liability for pre-incorporation transactions. The revisions to §607.0204 implemented by the revised act are based on language changes in the current version of §2.04 of the Model Act and are arguably substantive. The first change, dropping "actual knowledge," could lead to a "should have known" judicial finding for "knowing." However, making this change makes the FBCA consistent in other places where knowledge is considered (such as §607.0834 dealing with director liability for unlawful distributions to shareholders). Further, unlike the current statute, it will now be possible, under the new provision in the revised act, for the parties to a pre-

incorporation contract to enter into a valid contract intended to eventually bind the corporation even if both sides know, at the time of entering into the contract, that the corporation has not yet been formed.

Bylaws. Although extensive changes have been made to the language of §607.0206 relating to a corporation's bylaws, the changes are largely designed to address items that may, but need not, be included in bylaws, and to describe one item that cannot be included in bylaws. As discussed above, the changes expressly confirm that exclusive forum provisions can be included in a Florida corporation's bylaws but that fee shifting provisions may not be included.

New §607.0206(3) expressly authorizes the inclusion in corporate bylaws of proxy access provisions that require a corporation to include individuals nominated by shareholders for election as directors in its proxy statement and to require the reimbursement by the corporation of expenses incurred by the shareholders in soliciting proxies in connection with an election of directors. While these provisions can be adopted by any Florida corporation, they are largely designed for use by public companies organized in Florida that, for corporate governance purposes, determine to add these provisions to their bylaws. While many believe that proxy access provisions were already permissible in a Florida corporation's bylaws under existing law, this language has been added to eliminate any ambiguity in that regard.

The change to subsection (2) of §607.0206 is designed to bring the language in the FBCA into line with the Model Act and thus to avoid any potential of claim that the words "for managing the business and regulating the affairs of the corporation" were intended to be limiting.

Because substantial substantive changes are being made throughout Chapter 607, and given that most corporate bylaws cover a wide range of internal governance issues, most if not all practitioners will need to update their standard form bylaws for Florida corporations for use beginning January 1, 2020; and bylaws of existing Florida corporations will need to be reviewed, and in many cases may need to be amended.

Article 3 – Purposes and Powers

Although Florida's existing corporate statute dealing with the powers of a corporation was very similar to the Model Act, it used somewhat different wording. Because the wording of the Model Act seemed clearer and more organized than the wording in the existing Florida statute, subsections (1) and (2) of §607.0301 have been amended to follow the Model Act language. As a result, under the amendments included in the revised act, the default will be that every corporation incorporated under Chapter 607 will have the purpose of engaging in any lawful business, even if not expressly so stated in the articles of incorporation. However, if desired, the articles of incorporation may, by express language, narrow or limit the authorized purposes of the corporation.

Article 4 – Corporate Names

Corporate name. The revised act makes a significant change to §607.0401 (the corporate names provision). The change allows a corporation to register under a name that is not otherwise distinguishable on the records of the Department with the consent of the other entity if the consent is filed with the Department at the time of registration of such name. The one limitation to this provision is that identical names are not permitted. A similar provision has been added in §607.1506(5) dealing with the corporate name in Florida of foreign corporations. Further, a corresponding corollary change has also been made to §605.0112(1)(b) of FRLLCA and to §620.1108(4) of the Florida Revised Uniform Limited Partnership Act to bring them into conformity with the revised FBCA provision on this topic.

Reservation of corporate name. New §607.04021 once again allows a one-time 120 day reservation of a corporate name. The new provision is modeled after §4.02 of the Model Act. The FBCA parallel statute was removed from the FBCA in 1998 (according to available commentary, because of then budgetary concerns affecting the Department). Unlike the Model Act, but consistent with most jurisdictions that allow for name reservations, new §607.04021 includes, in subsection (2), an express authorization for transfers of a reserved name.

A corollary change to allow reservations of entity names has also been added to FRLLCA (in new §605.01125), to the Florida Not-For-Profit Corporation Act (in new §617.05015), and to the Florida Revised Uniform Limited Partnership Act (in new §620.11085).

Article 5 – Office and Agent

Registered Agent and Registered Office. The bulk of the changes that have been made in §§607.0501 through 607.05031 are either clarifying or designed to mirror similar provisions already contained in FRLLCA. Although the requirements and the processes will largely continue to operate as they do under existing law, certain clarifying updates have been added to make both these provisions and the provisions in FRLLCA (in §605.0113, §605.0114 and §605.0115) and in the Florida Not-For-Profit Corporation Act (in new §617.1507) work better or work the way that the Department has been administering these provisions.

Of note, and unlike existing law, in additional to individuals and corporations, other types of domestic entities (such as domestic limited liability companies) and other foreign entities authorized to transact business in Florida will be able to serve as a registered agent in Florida. The statute uses the definition, "authorized entity," to designate which types of entities may serve as registered agents.

The scope of the changes to subsection (6) of §607.0501, which is modeled after the corresponding provision in FRLLCA, is being modified to clarify that a domestic corporation cannot prosecute or maintain an action in this state unless it has complied with its obligation to maintain a registered agent and registered office in Florida, but may defend an action in Florida

even if it is not so compliant. This modification is also being made to §605.0113 of FRLLCA for harmonization purposes. Allowing a corporation to defend an action (even if the corporation is not in compliance with the registered agent and registered office provisions) is consistent with the corollary Model Act provision and with §607.1502 (relating to the consequences of transacting business in this state without authority).

The change in subsection (6) of §607.0501 relating to payment of a penalty reflects the current position of the Department not to collect this penalty unless required to do so by a court of competent jurisdiction.

New subsection (7) of §607.0501 is modeled after §607.1502(3) and allows a court to stay a proceeding commenced by a corporation until the corporation complies with the FBCA's registered agent and registered office provisions.

The procedures for a corporation changing its registered agent or office, for a registered agent to resign, and for a registered agent to change its name and/or its office address are now broken out into separate sections under the revised act, harmonizing this language and the structure of these sections to that already set forth in FRLLCA. Because of these changes, the forms available on www.sunbiz.org for taking these actions will need to be changed slightly.

Service of process. Under §607.0504 of the revised act relating to service of process, giving notice and making demand, there are two key changes. First, the revised act bifurcates the statutory provisions between those provisions relating to service of process and those provisions dealing with notices or demands on the corporation. The language in the revised section is derived from existing §605.0117 of FRLLCA. As for service of process, the revised section establishes a "waterfall" approach for proper service of process on a corporation, consistent with FRLLCA.

A Section task force is currently working on a comprehensive proposed revision to and modernization of Chapter 48, Florida Statutes, which, if adopted, is likely to cause all aspects of service of process for all types of entities to be moved into Chapter 48.

Service of process provisions in the Florida RICO Act. Although no substantive changes were made to §607.0505 by the revised act, practitioners are reminded that this special section exists under Florida law and is peculiar to Florida. Enacted as part of Florida's RICO Act, this section expands the registered agent and registered office requirements under the FBCA to foreign corporations and other types of entities that are not required to qualify to transact business in Florida under the FBCA if such foreign corporations or other entities fall into the category of "alien business organizations," as defined in subsection 11(a) of this section. Thus, the reach of §607.0505 is much broader than the other provisions of the FBCA insofar as the section attempts to impose registered agent and registered office requirements on entities (including non-corporate entities) that otherwise would not be subject to the FBCA. Section

607.0505 imposes substantial reporting, notification, waiver of immunity, and disclosure requirements on registered agents of corporations, both domestic and foreign, as well as alien business organizations, and it includes criminal penalties for non-compliance with its terms.

Article 6 – Shares and Distributions

Authorized shares. Revisions to §607.0601 in the revised act add the concept of a "series" of shares to this section, consistent with the Model Act language. But since the FBCA already includes the concept of a "series" of shares, this particular change should be largely viewed as non-substantive.

The Model Act, in the corollary provision to §607.0601, changes the word "unlimited" in subsection (2) to "full." This change has not been made in the revised act. The commentary to the Model Act provision states that the phrase "full voting rights" refers to the right to vote on all matters for which voting is required by either the act or the corporation's articles of incorporation. The corollary Delaware provision, §151(a) of the DGCL, also uses the term "full" in this context. Nevertheless, because the Florida provision using the phrase "unlimited" has been in place since 1989, has never been misinterpreted, and is believed to be substantively the same, the term "unlimited" has been retained in this section.

Subsection (5) of §607.0601 has been added to make clear, following the corollary Model Act section (which has been added to the FBCA in subsection (11) of §607.0120), that the terms of shares may be made dependent on facts ascertainable outside the articles of incorporation. However, this section has been revised to use the term "ascertainable" instead of the Model Act wording "objectively ascertainable." The corollary provision in FRLLCA (§605.1005) and the corollary provision in the DGCL (§102(d)), do not use the word "objectively." Notwithstanding, since reasonableness is generally required in interpreting a provision of this type, the words are believed to be substantively the same.

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

Blank check shares. Section 607.0602 allows articles of incorporation to provide for the ability of a board of directors to take action, without shareholder approval, to classify or reclassify unissued shares into one or more classes or into one or more series within a class, often referred to as "blank check shares." The changes in §607.0602, although fairly extensive from the perspective of language changes, are based on 2003 changes to the Model Act but are not considered to be substantive changes. Rather, the modern language is considered clearer and easier to understand.

Fractional shares. Subsection (5) of §607.0604, which currently includes a conclusive presumption of fair value in setting the value of fractional shares but which is not in the corollary section of the Model Act, has been eliminated in the revised act. The board of directors of a corporation has fiduciary duties with respect to the valuation of fractional shares, and it is believed that those duties provide sufficient discretion to the board of directors in making this determination. Further, there was a concern that the term "conclusive" as it had been used in this subsection could have been deemed to inappropriately eliminate fiduciary duties under these circumstances or eliminate judicial oversight of this decision. Moreover, by way of comparison, in the context of appraisal rights, no such conclusive presumption exists. As a result, it was decided that, in the revised act, the conclusive presumption provision would be removed from this section of the statute.

Share dividends. To the extent there was any prior ambiguity, a change has been made to §607.0623 relative to share dividends and, consistent with the Model Act, to the effect that the record date for share dividends, as is true with respect to cash dividends, may not be retroactive.

Share rights, options, warrants and awards. There are a number of substantive changes made to §607.0624 by the revised act relative to share rights, options, warrants and awards. There are also many language changes that are designed to adopt the more modern language contained in §6.24 of the Model Act but which are not intended to be substantive changes.

Subsection (2) of §607.0624, which provides express authorization for the creation of rights required for adoption of a shareholders' rights plan (a/k/a a "poison pill"), is being revised to adopt the more concise language in §6.24(b) of the Model Act. While the language changes are extensive, they are not intended to change the substance of this provision.

New subsection (3) of §607.0624 clarifies that not only the board of directors, but also committees of the board charged with dealing with these matters (such as a compensation committee acting under a stock incentive plan adopted by the board of directors and/or the shareholders), may be authorized by the board to make equity compensation decisions; and unlike current §607.0825, which requires limits to be specified for such an authorization, the authorization under this new subsection, although limited to equity compensation, may be absolute rather than within specified limits. Nevertheless, as a matter of good corporate governance, boards that choose to delegate authorization under this new subsection would be well advised to specify at least certain broad limits in making any such delegation.

Further, and of particular note, new subsection (3) of §607.0624 allows delegations of authority to "officers" (not just "senior executive officers") to make equity compensation decisions without imposing an obligation on the board of directors to set forth specified limits for such officers' authority. This new subsection is broader than §607.0825 (dealing with the creation of board committees that can act on behalf of the board) in two key respects: (i) the new subsection will authorize delegation to "officers" rather than to just "senior executive officers"

and (ii) the new subsection will not require limits to be specified in the delegation of authority to officers. Section 607.0825 is intended to operate independently of this new subsection and is not intended in any way to limit the equity compensation delegation authorized by this new subsection.

Restriction on transfer of shares and other securities. Section 607.0627, which expressly sets forth the authority and parameters associated with setting restrictions on the transfer of shares and other securities, is largely left untouched. Accordingly, the existing law in Florida with respect to what is enforceable from the perspective of such transfer restrictions remains as currently in effect. Some practitioners had suggested that Florida deviate from the Model Act and follow what is a broader authorization allowing a complete restraint on alienation, as is arguably permitted in Delaware. But this broader change was not adopted by the Subcommittee in its proposal.

Distributions to shareholders. With respect to the broad concept of "distributions" (as defined in §607.01401 and which includes dividends, redemptions, etc.), §607.06401 continues to set forth when such distributions are permitted and when they are not. Most of the changes to §607.06401 in the revised act are to build in clarifying changes from the latest version of the Model Act and to mirror changes in the corresponding provision in FRLLCA.

The new language in subsection (7) of §607.06401 in the revised act is being modified to make it clear that a corporation is not precluded from securing/collateralizing indebtedness which is owed to a shareholder and incurred by reason of a distribution, so long as it does not violate a law other than the provisions of Chapter 607.

The new language in subsection (8) of §607.06401 in the revised act is being added to follow language from FRLLCA and to make clear that the provisions of §607.06401 are not intended to apply to distributions in liquidation (which are covered by Article 14).

Part I.B. of this Article

The second article in this series (Part I.B.) is being posted simultaneously with this article. It addresses provisions in the revised act that are contained in Article 7 (shareholders) and Article 8 (directors and officers) of the FBCA. Specifically, the second article discusses provisions in the revised act dealing with meetings of shareholders, shareholder written consents, meeting notices, proxies, shareholder quorum and voting, voting agreements and shareholder agreements, derivative and direct actions, director qualifications, director voting, terms of office, removal of directors and filling vacancies, director written consents, director quorum and voting, board committees, force the vote provisions, director and officer duties, standards and liability, conflicts of interest, and director and officer indemnification.