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

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This is the third of four articles that are being posted on the webpage of the Chapter 607 Drafting Subcommittee, which is contained on the website (www.flabizlaw.org) of The Florida Bar Business Law Section ("Section"). The four articles comprehensively address many of the key substantive changes made to the Florida Business Corporation Act (Chapter 607 or "FBCA"), and to certain of the other Florida entity statutes, in Chapter 2019-90, Florida Statutes (the revised act). This article, along with a second article, Part II.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 January/February 2020 edition of the Florida Bar Journal.

Previously, two articles were posted on the Subcommittee's webpage covering changes made in the revised act to Article 1 through Article 8 of the FBCA. These two previous articles covered in detail the sections of the revised act that were discussed in a more summary fashion in an article published by the authors in the November/December 2019 edition of the Florida Bar Journal.

This third article addresses changes made in the revised act to Article 10 (amendments to articles of incorporation and bylaws), Article 14 (dissolution), Article 15 (foreign corporations), Article 16 (reports and records), Article 9 (anti-takeover provisions), and the transition rules. Specifically, it addresses amendments to the articles of incorporation, changes in the voluntary dissolution provisions, changes to the judicial dissolution provisions, changes to the administrative dissolution provisions, changes dealing with foreign corporations, changes in the provisions regarding reports and records, changes to the anti-takeover provisions in the FBCA, and provisions addressing transition rules. This article also highlights the corresponding changes to Florida's other entity statutes to harmonize corollary sections of those other entity statutes with the changes made to the FBCA in the revised act.

Overview.

The revised act (designated CS/CS/HB 1009) was unanimously approved by the Florida House of Representatives on April 25, 2019 and by the Florida Senate on April 30, 2019, and Governor DeSantis signed the revised act into law on June 7, 2019. The revised act 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 the changes before they become effective, and hopefully to create new compliant

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forms and other documents, the effectiveness of the revised act was delayed until January 1, 2020.

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 or "FRLLCA").

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

Reference is made to (i) the first two articles previously posted on the Section's website for an overview of the revised act and for specific information about the changes that were made by the revised act to Article 1 through Article 8 of the FBCA and (ii) a fourth article that is being posted on the Section's website simultaneously with this article for specific information about the changes that were made by the revised act to Article 11 through Article 13 of the FBCA.

The following sets forth important changes to the FBCA made to Article 10, Article 14 through Article 16, and Article 9 of the FBCA in the revised act. The discussions below are grouped together by Article of Chapter 607. References to sections are to sections of the Florida Statutes.

Article 10 – Amendment of articles of incorporation and bylaws

Shares; combination or division. In 1993, the FBCA was amended to add a non-Model Act provision, §607.10025, authorizing a Florida corporation with more than 35 shareholders of record to effect a forward stock split or a reverse stock split without shareholder approval, so long as the protective provisions contained in such section were not violated. The protective provisions in the originally adopted statute were designed to prohibit squeeze-outs, forced buy-outs of fractional shares, and dilution, and to make sure that the action being taken did not adversely affect pre-existing shareholder rights without shareholder approval.

The revised act removes the more than 35 shareholder limitation, based on the view that the protective provisions make it impossible for this statute to be used for squeeze-out transactions or to dilute the interests of minority shareholders.

Amendment to articles of incorporation; shareholder approval. The language in §607.1103, which describes the procedures for obtaining shareholder approval of an amendment to a corporation's articles of incorporation, has been modified, largely following the corollary Model Act provision. While most of these changes are not considered substantive, one change that was made that is arguably substantive is that, under the revised act, a full copy of the amendment must be provided to the shareholders for consideration (as required by the Model Act) and not just a summary (as permitted in the current FBCA). Allowing just a summary to be presented to shareholders raises the issue of whether the summary is complete, and, as a result, it is believed best that shareholders receive a full copy of the amendment so they can read and

make their own decisions on the entire provision. Also, it is not believed to be an onerous burden to provide a copy of the full amendment.

Amendment to articles of incorporation; ability of shareholders to amend articles without Board consent. The revised act continues to include a non-Model Act provision (in subsection (7) of §607.1003) that permits shareholders in a corporation with 35 or fewer shareholders to amend the articles of incorporation without approval of the amendment by the corporation's board of directors. However, the definition of shareholder has been modified in this section of the revised act to test the 35 or fewer shareholder provision based on beneficial owners and not record owners, on the view that this provision should only be available for corporations that are truly closely held corporations.

Amendments to articles of incorporation; interest holder liability. New subsections (8) and (9) of §607.1003 add the requirement of separate approval of an amendment to the articles of incorporation where, in what is expected to be rare circumstances, following the amendment a shareholder will have "new interest holder liability." New interest holder liability is defined as interest holder liability resulting from the amendment. For reference in the context of a corporation, "interest holder liability" under §607.01401(45) means (i) personal liability for a liability of the corporation imposed on a shareholder person solely by reason of the status of the person as a shareholder or by the articles of incorporation or bylaws which make one or more specified shareholders or groups of shareholders liable in their capacity as shareholders for all or specified liabilities of the corporation, or (ii) the obligation of a shareholder contained in the articles of incorporation or bylaws to contribute to the entity. Further, the effect of amendments to the articles of incorporation that impose or change interest holder liability are governed by new subsections (2) and (3) of §607.1009.

While the concept of interest holder liability is new to the FBCA, it is a concept already contained in the FRLLCA and is derived from both the Model Act and the Revised Uniform Limited Liability Company Act.

Voting on amendments by voting groups. The provision containing rules regarding when a particular voting group gets a separate vote on an amendment to the articles of incorporation continues to be included in §607.1004. In addition, the rules contained in this provision continue to have application on shareholder votes in other contexts, including mergers, share exchanges, domestications, conversions and dissolutions, where such organic transactions have the effect of amending the corporation’s articles of incorporation.

Restated articles of incorporation. Section 607.1007 continues to cover the topic of restated articles of incorporation. While significant language changes were made to this section based on the more modern wording of the corollary section of the Model Act, the changes are not considered substantive. Practitioners should be careful, however, because these changes may require practitioners to make adjustments to the forms they use for restatements.

Amendment of bylaws by board of directors or shareholders. New subsection (3) of §607.1020, which is based on §10.20 of the Model Act, expressly rejects the concept that an otherwise lawful amendment to a corporation's bylaws might be restricted or invalidated because it modifies particular rights conferred on a shareholder by an original or prior version of the

corporation's bylaws. This is consistent with language regarding changes to articles of incorporation that is found in §607.1001(2). At the same time, new subsection (3) does not override contracts by a corporation outside its bylaws which might be violated by an otherwise lawful amendment to the bylaws or invalidate provisions in bylaws that require procedures for approval of amendments which limit the power to amend the articles of incorporation without particular shareholder consent.

Bylaw provisions relating to the election of directors. New §607.1023 has been added to the FBCA. It deals with bylaws relating to the election of directors and concepts of majority voting and holdover directors. In order for this statutory provision to apply to a particular corporation, it has to be expressly adopted into the corporation's bylaws. This new provision is intended for use mostly by public companies, although all corporations can elect to be governed by this provision.

Article 14 – Dissolution

Voluntary dissolution – generally. The revised act makes numerous language changes to §§607.1401-607.1405 dealing with the process of voluntary dissolution by a Florida corporation. Many of the changes are based on the corollary provisions of the Model Act and while they are non-substantive, they are believed to make the statutory provisions clearer and more understandable. These provisions cover the dissolution of a "dissolved corporation" (as defined in subsection (3) of §607.1403) including a "successor entity" that exists solely for the purpose of prosecuting and defending suits on behalf of the dissolved corporation.

Vote of shareholders required to approve a voluntary dissolution. The revised act in §607.1402 continues to require that the holders of a majority of the outstanding shares of the corporation approve a voluntary dissolution. This can be contrasted to the corollary provision in the Model Act which requires approval by a majority of the quorum in attendance at a meeting called to consider the voluntary dissolution of the corporation. The revised act also continues to include subsection (6) of §607.1402, which is a non-Model Act provision that allows shareholders, by way of a written consent of a majority of the shares entitled to be voted on the proposal, to approve a voluntary dissolution of the corporation even if such dissolution has not been approved by the corporation's board of directors.

Effect of dissolution. The revised act in §607.1405 continues to state the effect of a voluntary dissolution, including continuing to provide that a corporation that has been dissolved continues its corporate existence, but may not carry on its business following the dissolution except to wind up its affairs. It also sets forth the basic requirements of winding up, which requires the corporation to liquidate its assets, pay off its creditors, and distribute the remainder, of its assets, if any, to its shareholders. The changes to this section, for the most part, follow the wording in the corollary sections of the Model Act and are largely considered non-substantive.

This section of the revised act continues to include three non-Model Act provisions: (i) subsection (4), which makes clear that dissolution does not change the duty of care, fiduciary duty, limitations on liability or rights to indemnification for officers, directors, and agents of the dissolved corporation agents of a dissolved corporation, as distinguished from a corporation which is not dissolved (ii) subsection (5), which deals with the use of a corporate name following

dissolution, and (iii) subsection (6), which expressly authorizes a court to appoint a trustee, custodian, or receiver to oversee the dissolution of the corporation if the directors or officers are unwilling or unable to serve or cannot be located.

Director responsibility for overseeing a voluntary dissolution. Section 607.1410(1) provides that the directors shall cause the dissolved corporation to discharge or make reasonable provision for the payment of claims, and make distributions in liquidation of assets to shareholders after payment or provision for claims, and a director who allows a distribution to shareholders before meeting this requirement may be liable for the amount of the unlawful distribution under §607.0834.

Resolution of claims – generally. The provisions in the FBCA that existed prior to the revised act, which provided a rubric for dealing with the resolution of known, unknown, and contingent claims (§607.1406 and §607.1407), were largely Florida-only provisions. The provisions in the revised act (§§607.1406-607.1410) dealing with these topics are significantly different and largely follow the corollary Model Act provisions, although some of the provisions on these topic from the FBCA that existed prior to the revised act have been retained.

These provisions are intended to provide much clearer procedures for liquidating and paying claims against a dissolved corporation in an effort to allow the corporation to wind up its affairs, pay its creditors, and make distributions to its shareholders with the certainty of knowing that these issues are settled and are not subject to challenge (including by eliminating potential liability for boards of directors that approve distributions in liquidation after following these procedures).

In reviewing these sections, the Subcommittee concluded that the existing provisions were cumbersome and did not provide a clear path for that process, and that, as a result, these provisions were in most cases not being followed by Florida corporations in liquidation. The revised act provisions set up procedures that are believed to fairly protect creditors, shareholders, and directors responsible for overseeing the liquidation. As such, these provisions of the revised act are designed (hopefully) to encourage Florida corporations in dissolution to resolve claims following these rules.

Revised §607.1406 and §607.1407 provide a simplified rubric for handling claims against a dissolved corporation and for making distributions to shareholders, and extend certain protections against liability if these provisions are followed. Revised §607.1406 deals with the process of resolving known claims, §607.1407 deals with the process of resolving unknown or subsequently arising claims, new §607.1408 deals with the enforcement of claims (as well as when there would be a bar as to the enforcement of claims) against a dissolved corporation that has followed the provisions of §§607.1406 and 607.1407, new §607.1409 establishes procedures for court supervision of actions to handle unknown and contingent claims, and new §607.1410(2) expressly protects boards of directors that approve a distribution to shareholders in liquidation after following the requirements of these sections.

These provisions are voluntary. If the corporation does not follow these provisions, the directors can still wind up the corporation's claims in dissolution, but the directors and the shareholders will not get the certainty and protections afforded by these provisions.

Resolution of "known" claims. Revised §607.1406 updates the process for disposition of known claims and allows for a shortened statute of limitations for claims against dissolved corporations if these provisions are followed. In revised §607.1406, the dissolved corporation may give written notice to such known claimants no later than 270 days before the date that is 3 years after the effect of the articles of dissolution. A dissolved corporation may dispose of a known claim by giving notice to the holder of the known claims. If a creditor does not properly respond to the notice, the claim will be barred if the statutory requirements have been appropriately followed by the corporation. Further, if the corporation rejects the claim, the creditor then has a certain time period to bring a suit to enforce the claim, and if no such suit is brought, the claim will be barred, again if the statutory requirements have been appropriately followed by the corporation.

A "known" claim is defined in §607.1406(5) as any claim that, as of the date of the written notice contemplated by this section, has matured significantly on or prior to the effective date of the dissolution so as to be legally capable of assertion against the dissolved corporation or, if unmatured at the effective date of dissolution, if the claim will mature solely by the passage of time. This handling of unmatured claims that will mature solely by the passage of time is unlike the corollary Model Act provision. Under the corollary Model Act provision, an unmatured claim that will mature after the dissolution is treated the same as an unknown claim. Examples of this category include promissory notes not yet due or trade account payables that are accrued for accounting purposes but not due as of the date of dissolution.

However, in the revised act (and consistent with the corresponding provision of the Model Act), a known claim does not include (i) except as noted above, a claim based on an event occurring after the effective date of dissolution, or (ii) a claim that is a contingent claim. Examples include a guaranty, a potential default under a lease, or an unasserted claim based on a defective product manufactured by the dissolved corporation.

Resolution of other claims. Section 607.1407 addresses possible claims that might arise long after the dissolution process is complete and the corporate assets have been distributed to shareholders. The issues often presented by these claims are problematic. On the one hand, the application of a mechanical limitation period of a claim for injury that occurs after the period has expired may involve injustice to the plaintiff. On the other hand, to permit these suits generally could make it impossible to ever complete the winding up of the corporation, make suitable provisions for creditors, and distribute the balance of the corporate assets to the corporation's shareholders. The approach taken in §607.1407 is to continue the liability of the dissolved corporation for an arbitrary period of time (three years in the Model Act provision; four years in the current corollary FBCA provision and in the revised act).

This section continues to allow notice to unknown claimants to be made either by making a filing with the Florida Department of State ("department") or publishing a notice in a newspaper of limited circulation. We suspect that, in delivering a notice to unknown claimants, most practitioners will elect to utilize the filing option. In that regard, the department is in the process of developing an updated and even more versatile version of its sunbiz.com website. In advance of the department starting this updating process, we have had discussions with the department about changes we would like to see made. We are hopeful that the new version of

sunbiz.com, once implemented, will enable a user (such as a creditor) to search for a list of all filed notices to unknown claimants, rather than having to search one company at a time.

Under §607.1407, claimants have the ability within the four-year statute of limitations to have recourse to any remaining assets of the corporation or to recover from shareholders. Such recovery from each shareholder is limited to the lesser of the respective shareholder's pro rata share of the claim or the total amount of assets received by the respective shareholder as a liquidating distribution. However, if §607.1407 is not followed, the shareholder could be liable for any claim not barred by the regular statute of limitations up to the amount of the distribution which the shareholder received in liquidation.

Revised §607.1407 allows a dissolved corporation to initiate a court proceeding to establish what, if any, provision should be made for contingent or unknown claims that are not reasonably expected to be barred after the limitations period in §607.1407(2). This provision is designed to permit the court to adopt procedures appropriate to the circumstances. If the dissolved corporation provides for security for claims under §607.1409(4), that section protects shareholders who receive distributions against those claims and also protects directors for a breach of their duty under §607.1410(1) to discharge or make reasonable provision for payment of claims, thereby protecting the directors from liability for those distributions.

The principles of §607.1406 and §607.1407 do not lengthen the statute of limitations under general state law. In other words, the applicable limitations period would end on the earlier of the last day of the four year limitations period set forth in §607.1407 or the date on which the general state law statute of limitations would end (which in many cases would before the end of the four year limitations period). In addition, claims that are not barred under §607.1406 and §607.1407 may be made within the general statute of limitations. Further, claimants who comply with the statutory requirements and are not barred will have the ability to have recourse to the remaining assets of the corporation or to recover from shareholders. Such recovery from each shareholder is limited to the lesser of the respective shareholder's pro rata share of the claim or the total amount of assets received by the respective shareholder as a liquidating distribution. However, if §607.1406 and §607.1407 have not been followed, the shareholder could be liable for any claim not barred by the regular statute of limitations up to the amount of the distribution which the shareholder received in liquidation.

Administrative dissolution. Revised §607.1420, setting forth when a Florida corporation will be administratively dissolved, has been updated extensively so that this section is harmonized with the substance of §605.0714 of FRLLCA. This section also now includes the procedures for and effect of administrative dissolution, and therefore existing §607.1421 has been eliminated. Similarly, §607.1422, dealing with reinstatement of an administratively dissolved Florida corporation, has been harmonized with §605.0715 of FRLLCA, and the FBCA continues to allow reinstatement at any time after administrative dissolution, including many, many years after the administrative dissolution. Finally, §607.1423, dealing with the judicial review of a denial of reinstatement, has been extensively updated so that it is harmonized with §605.0716 of FRLLCA, and both this section and the corollary FRLLCA section (as well as §607.1532 dealing with foreign corporations) have been modified, at the request of the department, to require that lawsuits seeking to overturn the department’s denial of reinstatement

for a particular corporation or limited liability company must be brought in Leon County, Florida.

Judicial dissolution – grounds. The grounds for judicial dissolution under §607.1430 have changed in certain respects. First, under current law, certain grounds for dissolution were only available in a corporation having 35 or fewer shareholders. That 35 shareholder limitation has now been removed from revised §607.1430, although judicial dissolution is not available for shareholders in a corporation that is a public company. Second, the grounds for dissolution in a deadlock situation not only include situations where irreparable injury to the corporation is threatened or being suffered, but also situations where the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally because of the deadlock. Both of these changes brings the FBCA into conformity with the Model Act on those provisions.

Oppression of minority shareholders as a ground for judicial dissolution. In the bill originally presented to the legislature (and following what is included in the Model Act), oppression of minority shareholders was proposed to be included as a ground for judicial dissolution, with certain qualifications. In particular, the proposal would have only allowed a shareholder owning more than 10% of the outstanding shares to assert oppression as a ground for judicial dissolution. During the legislative process, one or more legislators raised concerns about including oppression as a ground for judicial dissolution and a decision was made to remove from the bill the provisions addressing oppression as a ground for judicial dissolution. It is anticipated that the Corporations, Securities and Financial Services Committee of the Business Law Section will consider taking this subject up again in a future bill after having more discussion among the members of the Committee as well as interested litigators, legislators, and others who might have an interest in this topic.

Deadlock sale provision. The revised act, in §607.1430(4), adds a provision addressing the effect of a shareholders' agreement that expressly provides a mechanism for resolving deadlock. This is a non-Model Act provision, but is consistent with the corollary provision on this topic in §605.0702 of FRLLCA. Further, language has been added in §607.0732 (dealing with unanimous agreements among shareholders that change traditional corporate norms) to make clear that provisions in shareholders' agreement that follow the requirements of §607.0732 and provide mechanisms for how deadlocks are to be resolved or addressed are permissible, are not believed to be contrary to public policy, and as a result ought to be enforceable.

Procedures for judicial dissolution. The revised act, in §607.1431(4), requires that if a petition is filed for judicial dissolution, all shareholders (other than the petitioner) must be notified that the shareholders are entitled to avoid the dissolution by electing to purchase petitioner's shares (if the corporation does not elect to exercise its right to purchase the petitioner's shares) as described in §607.1436. This provision is not contained in the existing FBCA.

Election to purchase instead of dissolution. The revised act continues to include §607.1436, which in a proceeding under §607.1430 allows the corporation, or one or more of the shareholders, if the corporation fails to do so, to purchase the shares owned by the petitioning shareholder at fair value. However, following §14.36(g) of the Model Act, §607.1436(7) of the

revised act no longer includes the right of the corporation to dissolve in lieu of completing a purchase elected under this section based on the purchase price determined by the court. This change was made because it was determined that giving the corporation the option to purchase and then allowing it to reverse its course and dissolve would be unfair to petitioning shareholders.

This change also eliminates the concerns raised by the decision in Jones v. Pfaff, 77 So.3d 884 (Fla. 2nd DCA 2012). In that case, the court determined, in a situation where the corporation elected not to complete its purchase of the petitioning shareholders' shares under §607.1436, but rather elected to wind up and liquidate, that such action converted the liquidation into a voluntary dissolution and thus eliminated the jurisdiction of the court to oversee the dissolution proceedings.

Further, in §607.1436(4), the requirement that the court stay the dissolution proceeding (and thus have the court no longer providing oversight and monitoring for operations of the corporation) while determining the fair value of the shares to be purchased has been eliminated in favor of giving the court the option to do so. While it may be appropriate to stay the dissolution proceeding under many circumstances, this change leaves the court with the discretion to continue to monitor the activities of the corporation and to take other equitable actions, as it deems appropriate, and to continue the dissolution proceedings while the purchase process is being completed in those circumstances where the court determines that such oversight remains appropriate. That may also include, for example, the equitable power to require the corporation to post a bond where that may be reasonable or appropriate.

Finally, under §607.1436(8), if the corporation is the purchaser, then after the entry of an order for the purchase under subsection (5) of §607.1436, the petitioner becomes a creditor with respect to the corporation, but any payments to be made by the corporation, other than expenses awarded under subsection (5), fall within the definition of "distribution" under s. 607.06401. Subsection (8) provides that the evaluation of whether the "distribution" is permissible under the requirements of s. 607.06401 shall be tested at the time of the order, unless the order expressly provides that such determination shall be made at some other time, such as at the time of payment. A cross reference of subsection (8) has been added to subsection (6) to make clear that the court should consider the measurement under subsection (8) before dismissing the petition to dissolve the corporation under that subsection.

Article 15 – Foreign Corporations

Article 15 generally. Article 15 is largely based on the substance of Article 9 of FRLLCA, which deals with foreign limited liability companies. Many of these provisions are new or different from existing law. However, they reflect how these same concepts apply to limited liability companies under FRLLCA and reflect how the department has been dealing with these issues. At the same time, a number of sections of Article 15 are in a different order from FRLLCA, and where changes were made to Article 15 following the Model Act, conforming changes have also been made to the corollary sections of FRLLCA.

Article 15 can be divided into three sections: (i) application for, modification to and effect of a certificate of authority (§§607.1503-607.15101), including the name of a foreign

corporation, requirements for a registered agent and a registered office, service of process and delivery of notice; (ii) withdrawal and cancellation of a certificate of authority (§§607.1520-607.1523), including withdrawal in the event of a conversion to a domestic filing entity and in the event of dissolution, merger, or conversion of certain nonfiling entities and based on the action of the Department of Legal Affairs; and (iii) revocation, reinstatement and judicial review of a denial of reinstatement (§§607.1530-607.1532).

Authority to transact business required; activities not constituting transacting business. Section 607.1501 continue to require a foreign corporation to obtain a certificate of authority from the department before transacting business in Florida. The statute also continues to include a non-exclusive list of activities that do not constitute transacting business. That list has not substantively been changed, although in several cases the language has been updated based on the wording in the corollary section of the Model Act.

Ability to prosecute or maintain an action. Consistent with the corollary section of FRLLCA, the revised act, in §607.1502(2), makes clear that a foreign corporation required to be qualified to transact business in Florida may not prosecute or continue an action in Florida until the corporation has obtained a certificate of authority, but may defend an action. The commentary to the corollary section of the Model Act delineates between "maintain" and "defend" in this context as being whether affirmative relief is sought.

Article 16- Records and Reports

Corporate records that must be maintained. Revised §607.1601 updates the list of records that a corporation must maintain. The changes from the existing statute are largely clarifying and are based on the current wording of the Model Act. Although among the required records is a list of current shareholders of record, this subsection expressly provides that the corporation is not required to include as part of that list email addresses for its shareholders.

Inspection of records by shareholders, scope of inspection rights and court ordered inspection. The inspection rights of a shareholder made under §607.1602 continue to require a demand be made in good faith and for a proper purpose. Further, the scope of the inspection request and the procedures for court ordered indemnification continue to be set forth in §607.1603 and §607.1604. Each of these provisions have largely been modified to adopt the Model Act constructs of these provisions, but many of the changes are clarifying in nature and are not considered to be substantive.

However, revised subsection (4) of §607.1602 includes language allowing a corporation to impose reasonable restrictions on the disclosure, use, or distribution of, and reasonable obligations to maintain the confidentiality of records that are provided. Further, under the revised act, a shareholder's rights to inspect records may not be abolished or limited by the corporation's articles of incorporation or bylaws. Finally, the revised act retains the non-Model Act provision that allows a corporation to deny a shareholder demand for inspection (i) if the demand was made for an improper purpose, or (ii) if the demanding shareholder has within the last two years preceding the demand sold or offered for sale any list of shareholders of the corporation or any other corporation, has aided or abetted any person in procuring any list of shareholders for such

purpose, or has improperly used any information secured through any prior examination of the records of the corporation or any other corporation.

Inspection of records by directors. The broad rights of directors to inspect records reasonably related to the performance of the director's duties that are contained in §607.1605 are largely unchanged and continue in large measure to follow the language in the corollary section of the Model Act.

Financial statements for shareholders. Under existing §607.1620, which was based on an earlier version of the Model Act, a corporation was required to furnish shareholders with its annual financial report within 120 days of the close of each fiscal year, but shareholders by resolution were able to waive delivery of such financial statements. It was believed that this financial report delivery requirement was observed in the breach by many Florida corporations and that many corporations were not providing the financial statements unless the financial statements were requested. Accordingly, this section has been revised to follow the 2016 version of the Model Act, which requires that financial statements only be made available on request.

The revised act requires a corporation to furnish such financial information to a shareholder within 5 business days after his, her, or its request if then available, or within 120 days after the request, if not then available. The revised act does not prescribe what constitutes annual financial statements, and there is extensive commentary in the comments to the corollary section of the Model Act that discusses what might constitute annual financial statements of a particular corporation under particular circumstances.

Further, revised subsection (5) of §607.1620 allows the corporation to place reasonable confidentiality restrictions on a shareholder's ability to distribute the annual financial statements, and allows the corporation to decline the request if the corporation determines that it was made in bad faith or for an improper purpose. Subsections (6) and (7) modify the requirements for seeking a court order requiring the corporation to provide such financial statements so as to follow the Model Act provisions.

Other reports to shareholders. Existing §607.1621, which required a Florida corporation to report to shareholders as to certain matters relating to indemnification and advancement of expenses and required disclosure to shareholders when shares were issued by the corporation for promises to render future services, has been eliminated. This section was modeled after an earlier version of the Model Act and is no longer in the Model Act.

In its decision to recommend removal of this section from the FBCA, the Subcommittee was concerned that notwithstanding the fact that this section has been in the statute for many years, it is a trap for the unwary, because many users of the FBCA and most Florida corporations have not been aware of these provisions and, as a result, it was believed that most Florida corporations were not providing these reports to their respective shareholders. The Subcommittee also concluded that, in its view, this section is unnecessary because shareholders can demand information about these types of matters under §607.1602 under appropriate circumstances.

Annual report to the department. Section 607.1622, which requires the filing of an annual report by a Florida corporation or a foreign corporation authorized to transact business in

Florida, has been substantially modified. The revised section is now conformed to the annual report requirements for limited liability companies contained in §605.0212 of FRLLCA. It is important to note that new subsections (8), (9), (10), and (11), consistent with the corollary provision in FRLLCA, require that the corporation must have filed an annual report for the current year (even if such annual report is not yet then due) before the corporation is allowed to make filings regarding mergers, share exchanges, and conversions. Subsection (12) relating to domestications is new, but follows the same premise (and has also been added in the revised act to the corollary provision in FRLLCA).

Article 9 – Affiliated Transactions and Control-Share Acquisitions

Article 9 of the FBCA was adopted in 1987 as part of a panoply of statutes designed to prevent perceived abuses in hostile takeovers of publicly held companies, with the aim of protecting Florida-based corporations and their constituents from unwanted hostile takeover attempts. Article 9 includes two statutory provisions: (i) the "affiliated transaction" statute (§607.0901), which is largely designed to deter coercive "two-step, front-end loaded" tender offers that are not approved by the disinterested directors of the target company (*i.e.*, tender offers that are hostile and not friendly) and accomplishes this purpose by regulating the exercise, as opposed to the acquisition, of corporate control in a way that makes the acquisition unpalatable to the bidder, and (ii) the control-share acquisition statute (§607.0902), under which "control shares" acquired in a "control-share acquisition" have voting rights only if, and to the extent, granted in a resolution of the shareholders of the corporation approved by (1) a majority of all the votes entitled to be cast by each class or series entitled, by virtue of §607.1004, to vote on the proposed control-share acquisition, and (2) a majority of all shares of each class or series entitled to vote separately on the proposal, excluding all of the "interested shares." These provisions often end up being formidable obstacles to completion of a hostile takeover attempt, and each of these sections, or their counterparts in the statutes of other states, has withstood attacks on constitutional grounds.

The revised act makes certain changes to §607.0901 to bring it into conformity with changes made to the corollary provisions in the Delaware General Corporation Act ("DGCL") dealing with these topics. The changes in the definition of "affiliated transaction," including the changes to increase the threshold in subsection (2) from 5% to 10%, are derived from changes made subsequent to the adoption of this statute in §203(c)(3)(ii) of the DGCL, and are similar to the corollary Maryland and Michigan statutes. The change to the definition of "associate" is derived from the corollary provision of the DGCL. Finally, subsection (2), the heart of the "affiliated transaction" statute, has been expanded in order to follow DGCL §203(a) and thus to more clearly provide the exceptions to the "affiliated transaction" statute. While the changes appear extensive, they reflect an understanding of the exceptions that many corporate practitioners understood to be in the statute historically even though unstated.

Although some believed that changes to the control-share acquisition statute might be in order, it was believed that a more intense study and evaluation of such provisions were needed in order to determine what, if any, changes would be appropriate. Accordingly, no changes were made in the revised act to the control-share acquisition statute.

Transition to the Revised Act; Glitches; Harmonization

Effective date. The revised act, although signed into law in June 2019, becomes effective for all corporations on January 1, 2020. This delayed effective date was designed to give users of this statute time to study these statutory changes before they took effect.

Reservation of power to amend or repeal. The revised act continues to include a provision (§607.0102) that reserves the power to amend or repeal this chapter at any time and for all domestic and foreign corporations subject to this chapter to be governed by such amendment or repeal. By virtue of the prior version of this provision, the revised act will automatically apply to all domestic corporations in existence on January 1, 2020 (as confirmed in §607.1701) and to all foreign corporations authorized to transact business in Florida on January 1, 2020 (as confirmed in §607.1702).

Glitch bill. 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 a lack of parallel wording. Although these glitches are not believed to be substantive, a glitch bill has been introduced in the Florida legislature (HB 495; SB 838) to clean up these glitches. If adopted, the glitch bill will become law following its passage and once it is approved by the Governor. As such, it is hoped that these provisions will become effective early in 2020 and will seamlessly become part of the revised act.

Harmonization between Florida entity statutes. In many places, a decision was made to harmonize the FBCA with provisions in FRLLCA. Harmonization was considered appropriate on a wide-range of topics, including filings with the department, entity name, registered agent and registered office, service of process, administrative dissolution, authority to transact business in Florida, and annual reports. In many cases, changes were also made to harmonize certain sections of the Florida Not-For-Profit Corporation Act and the Florida Revised Limited Liability Company Act with changes made in the revised act. However, a more extensive review and updating of the Florida Not-For-Profit Corporation Act would be advisable and may be addressed in the future by the Corporations, Securities and Financial Services Committee of The Florida Bar Business Law Section.

Ratification of Defective Acts

The revised act does not add provisions in the Model Act relating to the ratification of defective acts. Subchapter E of the Model Act covers the topic of ratification of defective corporate acts. These provisions provide non-exclusive mechanisms to ratify defective corporate acts, which are corporate actions purportedly taken that were, at the respective times the actions were taken, within the power of the corporation, but were void or voidable due to a failure of authorization or constituted an overissue (a purported issuance of shares in excess of the number of shares of a class or series that the corporation has the power to issue at the time of such issuance or shares of any class or series that were not then authorized for issuance under the articles of incorporation). These Model Act provisions were published in 2017 in *The Business Lawyer* and, to the knowledge of the Subcommittee, these provisions have only been adopted into the corporate statute of a few other states. The corollary provisions in DGCL §§204 and 205 have been in place for several years and although they have been modified and fine-tuned by the

Delaware legislature since first being enacted, they continue to be the subject of debate and further proposed modification as the mechanics of using these provisions in Delaware continue to be tested and interpreted by the Delaware courts.

While the Subcommittee believes that this topic should be considered for addition in the FBCA at a future time, a decision was made at the time this topic was taken up for consideration by the Subcommittee to defer consideration of these provisions to allow the law on this topic (both in Delaware and in other Model Act states) to further develop before provisions addressing this topic are considered for adoption in the FBCA. Although some of this further development has occurred since the Subcommittee finished its consideration of the Model Act provisions, the Subcommittee was not in a position from a timing perspective to revisit the issue. Accordingly, any provisions that may address this topic will need to be considered at some future time as a separate legislative initiative.