

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/CS/SB 1880

SPONSOR: Judiciary and Commerce and Economic Opportunities Committees and Senator Klein

SUBJECT: Corporations

DATE: April 24, 2001 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Gillespie</u>	<u>Maclure</u>	<u>CM</u>	<u>Favorable/CS</u>
2.	<u>Matthews</u>	<u>Johnson</u>	<u>JU</u>	<u>Favorable/CS</u>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill clarifies that Florida or-profit corporations may accept proxy appointments from shareholders by electronic transmission and through the shareholder's attorney in fact. The term "electronic transmission" is defined for purposes of proxy voting to include telegrams, cablegrams, telephone transmissions, and transmissions through the Internet. The bill also removes requirements that certain irrevocable proxies become revocable after three years unless renewed and allows corporations to adopt bylaws authorizing additional procedures for proxy voting.

The bill substantially amends sections 607.01401 and 607.0722 of the Florida Statutes.

II. Present Situation:

Florida Business Corporation Act

The Florida Business Corporation Act comprises the general corporation code that governs the incorporation, management, merger, and dissolution of corporations.¹ It also governs the issuance of corporate shares, shareholders meetings and shareholders voting. Just as its counterpart in the Business Law Section of the American Bar Association recently revised provisions to the model act relating to shareholder meetings and shareholder voting, the Committee on Corporations and Securities Law of the Business Law Section of the Florida Bar

¹ Chapter 607, F.S.; *see also* s. 607.0101, F.S. The act is substantially similar to the Model Business Corporation Act which is a free-standing general corporation statute drafted and revised by the Committee on Corporate Laws of the Section of Business Law of the American Bar Association (ABA).¹ As of 1999, Florida was one of 24 states that enacted substantially the entire model act as its general corporation statute.¹ The model act was last revised in 1999 and includes provisions relating to shareholder meetings and voting by shareholders. Parallel to the ABA's Committee on Corporate Laws, the Business Law Section of The Florida Bar committee consists of practitioners and academics in the field of corporate, securities, and mergers and acquisitions law.

has been continuously reviewing the Florida Business Corporation Act and has similarly recommended several changes relating to shareholder provisions.

Corporations and Shareholders

A corporation is a legal entity having authority, with all the rights, privileges, and responsibilities, to act as a natural person distinct from the shareholders who own it and having rights to issue stock and exist indefinitely. *See* s. 607.01401, F.S. A foreign corporation is one that is incorporated under the laws of another state in the United States. Domestic corporations are those incorporated under the laws of the State of Florida.

The ownership interest in a corporation is divided into “shares.” Those who own these shares are known as “shareholders.” Both natural persons and other corporations may own shares in a corporation. When a corporation is created, articles of incorporation must be filed with the Department of State.² The articles of incorporation must specify, among other things, the number of shares the corporation is authorized to issue.³ In addition, corporations adopt bylaws. The bylaws contain provisions governing the management of the business and regulating the affairs of the corporation.⁴ The bylaws must be consistent with law and the corporation’s articles of incorporation.⁵ Some rights of shareholders are guaranteed by law, but most rights are provided by the articles of incorporation and the bylaws. Generally, the rights of shareholders include approval of amendments to the articles of incorporation, the election of the corporation’s board of directors, and the approval of plans to dissolve the corporation or merge the corporation with another corporation.

Under current law, each Florida corporation is also required to conduct an annual shareholders’ meeting.⁶ Except in certain circumstances or unless the corporation’s articles of incorporation provide otherwise, each shareholder of a corporation is entitled to one vote on each matter submitted to a vote at the meeting of the shareholders. *See* s. 607.0721, F.S. If the shares of a corporation are owned in the name of another corporation, those shares may be voted by an officer, agent, or proxy as governed by the corporate shareholder’s bylaws. In the absence of bylaws, the board of directors of the corporate shareholder may designate who may vote in the name of the corporation. If the board does not designate who may vote, Florida law provides a succession of who may vote in the name of the corporate shareholder: the chair of the board, the president, any vice president, the secretary, and the treasurer, in that order.

Proxy Voting

As business organizations have increased in size and complexity, the number of shareholders has also increased. As a result, proxy voting is an essential step in the governance of many corporations.⁷ Under Florida law, in lieu of personally attending a meeting of the shareholders, a shareholder of a corporation may vote by proxy. A shareholder may appoint a proxy to vote on behalf of the shareholder by signing an appointment form. The shareholder’s attorney in fact may sign the appointment form for the shareholder. Alternatively, the shareholder’s authorized officer, director, employee, or agent may sign the appointment form on behalf of the shareholder.

² Sections 607.0201 & 607.0203, F.S.

³ Section 607.0202(1)(c), F.S.

⁴ Section 607.0206(2), F.S.

⁵ *Id.*

⁶ Section 607.0701, F.S.

⁷ *See* Model Bus. Corp. Act s. 7.22, Official Comment (1999).

An appointment form is sufficient to authorize a proxy if the form is transmitted by telegram, cablegram, or other means of electronic transmission. Photographic or photostatic reproductions and facsimiles of an appointment form are also sufficient. While current law allows appointment forms to be transmitted by “other electronic means,” it is unclear whether a corporation would be permitted to use telephonic menu systems or an Internet-based system to accept proxy appointments. The term “electronic transmission” is defined in the Florida Business Corporation Act (act) to mean “any process of communication not directly involving the physical transfer of paper that is suitable for the retention, retrieval, and reproduction of information by the recipient.”⁸ Under current law, documents may be filed with the Department of State by electronic transmission to the extent permitted by the department.⁹ In addition, the act allows notices provided by electronic transmission to be considered “written notice.”¹⁰ Because the current definition of electronic transmission requires that electronic documents be “suitable for the retention, retrieval, and reproduction of information,” the statute appears to contemplate that documents transmitted electronically must be able to be printed as paper documents. This definition of “electronic transmission” is identical to the definition provided in the model act.¹¹

Corporation’s Acceptance of Votes

A corporation is often asked to accept a written instrument as evidence of action by a shareholder. These instruments often involve appointment forms for a proxy to vote the shares of a shareholder. Usually the corporation or its officers will have no personal knowledge of the circumstances under which the instrument was executed and no way of verifying whether the signature on the instrument is in fact the signature of the shareholder. This problem is particularly acute in large corporations with thousands of shareholders.¹² Under Florida law, a corporation is entitled to accept a proxy appointment and give it effect as the act of the shareholder if the name signed on the proxy appointment corresponds to the name of the shareholder. *See* s.607.0724, F.S. If the proxy appointment is made by a corporate shareholder, the corporation is entitled to accept the proxy appointment if the name signed purports to be that of an officer or agent of the corporate shareholder. In addition, the corporation is entitled to reject a proxy appointment if there is a reasonable basis for doubt about the validity of the signature on the proxy appointment or about the signatory’s authority to sign for the shareholder.¹³ These provisions are consistent with the model act.¹⁴

Irrevocable Proxies

Under Florida law, a proxy appointment is valid for up to 11 months, unless a longer period is expressly provided in the appointment form. *See* s. 607.0722, F.S. The proxy appointment is revocable by the shareholder unless the appointment form conspicuously states that it is irrevocable and the appointment is coupled with an interest. Two examples of appointments coupled with an interest include:¹⁵

⁸ Section 607.01401(9), F.S.

⁹ Sections 607.0120(4), (9), & 609.0125(5), F.S.

¹⁰ Section 607.0141(1), F.S.

¹¹ Model Bus. Corp. Act s. 1.40 (1999).

¹² *See* Model Bus. Corp. Act s. 7.24, *Official Comment* (1999).

¹³ Section 607.0724(3), F.S.

¹⁴ *See* Model Bus. Corp. Act s. 7.24 (1999).

¹⁵ *Id.*

- A creditor of the corporation extends credit to the corporation under terms requiring the appointment. In this example, a corporation may pledge shares in the corporation as collateral for a loan. While the corporation may continue to own the shares, the lending institution may require the corporation to give the lender voting rights for the pledged shares during the duration of the loan.
- A corporate employee is required to make an appointment in his or her employment contract. Similarly, in this example, when a corporation issues shares to its employees as bonuses, the corporation may require the employees to cede their voting rights for the shares to the corporation.

Under Florida law, an irrevocable proxy becomes revocable after the coupled interest is extinguished. *See* s. 607.0722, F.S. Thus, using these examples, the proxy would become revocable after the loan is repaid and after the employee separates from employment with the corporation. However, Florida law specifically imposes an additional requirement upon irrevocable proxies in those instances in which a creditor extends credit to a corporation under terms requiring a proxy appointment or in which an employment contract requires a proxy appointment. In these two instances, the irrevocable proxy becomes revocable after three years unless the proxy appointment is renewed. Therefore, a lender must seek renewal of an irrevocable proxy every three years during the duration of a loan, and a corporation must seek renewal of each employee's irrevocable proxy every three years while the employee works for the corporation.

III. Effect of Proposed Changes:

This bill amends the Florida Business Corporation Act to clarify that proxy appointments made by shareholders of Florida for-profit corporations may be accepted by these corporations when received electronically using telephonic menu systems or Internet-based systems. In addition, the committee substitute retains the ability of shareholders to submit proxy appointments through telegrams or cablegrams. The committee substitute removes the requirements that certain irrevocable proxies become revocable after three years unless renewed and allows corporations to adopt bylaws authorizing additional procedures for proxy voting.

Electronic Transmission (Section 1)

The term "electronic transmission" is redefined to include, but not be limited to, telegrams, cablegrams, telephone transmissions, and transmissions through the Internet for purposes of proxy voting. The term "electronic transmission" is used through section 2 of the bill to clarify that the appointment of proxies may be accomplished by electronic transmission, including by telegrams, cablegrams, telephone transmissions, and transmissions through the Internet. Because, the term "electronic transmission" is used in related statutes when referring to the electronic filing of documents with the Department of State, the committee substitute specifically limits the term to mean telegrams, cablegrams, telephone transmissions, and transmissions through the Internet only in the context of proxy voting.

Proxy Voting and Irrevocable Proxies (Section 2)

A shareholder is allowed to appoint a proxy by electronic transmission in lieu of submitting a signed appointment form. The term "electronic transmission" is defined as any process of

communication not directly involving the physical transfer of paper that is suitable for the retention, retrieval, and reproduction or information by the recipient, including, but not limited to, telegrams, cablegrams, telephone transmissions, and transmissions through the Internet. Consequently, corporations may use telephonic menu systems or an Internet-based system to accept proxy appointments. Conforming amendments are also made by removing current provisions that allow proxy appointments by telegram or cablegram.

The appointment of a proxy by electronic transmission will be considered sufficient if the transmission contains or is accompanied by information, or is obtained under procedures that reasonably ensure the appointment was transmitted by the person entitled to make the appointment. This provision replaces the standard in current law that states that an executed telegram or cablegram appearing to have been transmitted by the person entitled to make the appointment, or a photographic, photostatic, or equivalent reproduction of an appointment form, is a sufficient appointment form. It is also clarified that an appointment of a proxy by electronic transmission is subject to the corporation's entitlement to reject a proxy appointment if there is a reasonable basis for doubt about the validity of the appointment. Several provisions throughout section 3 provide that the shareholder, attorney in fact for the shareholder, or other person entitled to vote on behalf of the shareholder may appoint a proxy.

The bill removes the requirement that irrevocable proxies become revocable after three years except under specified circumstances. Accordingly, all irrevocable proxies would become revocable after the coupled interest is extinguished.

The bill provides that any copy, facsimile transmission, or other reliable reproduction of an appointment form, or an electronic transmission containing a proxy appointment, may be used in lieu of the original paper form or transmission for any purpose that the original could be used if the copy is complete. The bill also allows a corporation to adopt bylaws that authorize other means or procedures for shareholders to appoint proxies.

Effective Date (Section 3)

The bill takes effective on July 1, 2001.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

The bill clarifies several provisions regarding proxy appointments by electronic transmissions and verifications. Thus, some Florida corporations may observe a marginal decrease in costs associated with administering proxy-voting procedures. However, the committee substitute is essentially technical in nature, and the financial impacts on most corporations will be minimal.

C. Government Sector Impact:

The Department of State reports that the committee substitute will have no impact on the operating costs of the Division of Corporations or the Department of State.

VI. Technical Deficiencies:

None.

VII. Related Issues:

In 1996, the Florida Legislature enacted the Electronic Signature Act to facilitate the use of electronic signatures in commerce by authorizing consenting parties to accept and validate electronic signatures as if they were manual signatures to writings, unless otherwise provided by law. *See* ch. 96-224, L.O.F. In 2000, the Florida Legislature enacted the Uniform Electronic Transaction Act to further remove barriers to conducting electronic commerce by validating and effectuating electronic records and signatures in transactions whereby the parties agree to conduct business as such. *See* ch. 2000-164, L.O.F. It is designed to support and complement the digital signature statute. Incorporating a reference to the availability of these provisions may be beneficial as another means by which a corporation could request verification under s. 607.0724, F.S., of an electronic transmission to appoint a proxy. This would also protect the integrity of the shareholder's voting interests whether voting directly, through his or her attorney in fact or by some other person entitled to vote on behalf of the shareholder.

VIII. Amendments:

None.