

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** CS/HB 1311 Corporations  
**SPONSOR(S):** Economic Development Policy Committee, McBurney and others  
**TIED BILLS:** **IDEN./SIM. BILLS:** CS/CS/SB 1288

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|    | <b>REFERENCE</b>  | <b>ACTION</b>    | <b>ANALYST</b> | <b>STAFF DIRECTOR</b> |
|----|---|------------------|----------------|-----------------------|
| 1) | Economic Development Policy Committee                   | 20 Y, 0 N, As CS | Malcolm        | Kruse                 |
| 2) | Economic Development & Community Affairs Policy Council | 14 Y, 0 N        | Malcolm        | Tinker                |
| 3) |   |                  |                |                       |
| 4) |   |                  |                |                       |
| 5) |   |                  |                |                       |

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**SUMMARY ANALYSIS**

CS/HB 1311 revises statutes concerning for-profit and not-for-profit corporations. This bill incorporates revisions suggested by the Department of State, Division of Corporations and the Business Law Section of the Florida Bar. The bill revises ch. 607, F.S., of the Florida Business Corporation Act to allow for-profit corporations to supply annual financial statements to shareholders by electronic transmission or mail. Additionally, the bill integrates provisions from the Revised Model Nonprofit Corporation Act, prepared by the American Bar Association, into ch. 617, F.S., the not-for-profit corporate statute. In recent years, ch. 607, F.S., has been changed numerous times without concurrent changes in ch. 617, F.S. Consequently, this bill amends a number of provisions to make the not-for-profit corporate statute consistent with the for-profit corporate statute. The revisions relate to administrative matters, membership rights, distributions, dissolution, and creditors' rights. Finally, the bill provides a number of provisions to recognize a new category of not-for-profit corporations, known as "mutual benefit corporations," in order to clearly distinguish such corporations from other not-for-profit corporations.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Present Situation:**

##### For-profit Corporations

##### *Availability of Corporate Documents*

The Florida Business Corporation Act (FBCA) provides for the incorporation of corporations for-profit.<sup>1</sup> "Corporation" or "domestic corporation" is defined under the act to mean a corporation for-profit that is not a foreign corporation and is subject to the provisions of the act.<sup>2</sup>

Under the FBCA, corporations must file, or are permitted to file, several documents with the Department of State including, articles of incorporation, annual reports, articles of dissolution, application for registered name, and a form to designate a registered agent. Many of these filed documents are posted on the department's Division of Corporation website for the public to view and this service is provided free of charge.<sup>3</sup> The public may also request general information about corporations by telephoning the department. Under current law, the department may not charge the public for telephoning the department for such information.<sup>4</sup> According to the department, the public seldom calls into the department for general information about corporations and if they do, they are usually referred to the department's website to access the information they are seeking.<sup>5</sup>

##### *Delivery of Financial Statements*

Annually, for-profit corporations must "mail" financial statements to shareholders within 120 days after the close of each fiscal year.<sup>6</sup> "Mail" is defined in s. 607.01401(17), F.S., as "the United States Mail, facsimile transmissions, and private mail carriers handling nationwide mail services." There is currently no provision under state law permitting financial statements to be provided to shareholders by electronic transmission.

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<sup>1</sup> Ch. 607, F.S.

<sup>2</sup> Section 607.01401(5), F.S.

<sup>3</sup> See "Document Search," Florida Dept. of State, Divisions of Corporations, available at <<http://www.sunbiz.org/search.html>> (last accessed March 12, 2009).

<sup>4</sup> s. 607.0501, F.S.

<sup>5</sup> See *Long-Range Program Plan for Fiscal Years 2009-2014*, Florida Department of State, measure 28, concerning the number of persons serviced by methods other than electronic means from 2007-2008, available at <<http://www.dos.state.fl.us/lrpp/pdf/lrpp.pdf>>.

<sup>6</sup> See s. 607.1620(3), F.S.

Several states currently allow corporations to provide shareholders with financial statements or annual reports through electronic transmission.<sup>7</sup> For example, California specifically permits corporations to satisfy annual reporting requirements by meeting the Security and Exchange Commission (SEC) reporting requirements.<sup>8</sup>

The SEC provides for the electronic transmission of corporations' financial statements, called "e-proxy" rules.<sup>9</sup> The SEC prescribes mandatory "e-proxy" rules that delineate the manner in which proxy materials for securities registered under Section 12 of the Securities Exchange Act of 1934 must be provided to security holders. Under these rules, corporations must post proxy materials on a publicly accessible website and must provide paper or email copies of the posted material upon a security holder's request. Specifically, a corporation can either choose to use the "full set delivery option" or "notice of Internet availability of proxy materials" option to deliver proxy materials.

The "notice of Internet availability" option requires corporations to post their proxy materials on an Internet website and send a notice to security holders to inform them of the electronic availability of the proxy materials at least 40 days before the security holders' meeting.<sup>10</sup> Corporations that follow this option must respond to security holder requests for copies, including a security holder's permanent request for paper or e-mail copies of proxy materials for all security holder meetings.<sup>11</sup>

The "full set delivery option" allows a corporation to deliver a full set of proxy materials to security holders, along with the "notice of Internet availability" of proxy materials at least 40 days before the security holders' meeting.<sup>12</sup> If a corporation chooses this option, it need not prepare and deliver a separate notice if the materials contain all of the information required by the e-proxy rules to appear in the notice and proxy statement.<sup>13</sup> Moreover, corporations do not have to respond to requests for copies, as is required under the "notice of Internet availability" option.<sup>14</sup>

#### Not-for-profit Corporations

The Florida Not-for-profit Corporation Act provides for the incorporation of corporations not-for-profit.<sup>15</sup> A "corporation not-for-profit" means "a corporation no part of the income or profit of which is distributable to its members, directors, or officers."<sup>16</sup> These corporations vary in size and activities, such as religious institutions, recreational clubs, public service organizations, and charitable organizations. The governing instruments of not-for-profits are statutory requirements, articles of incorporation, and by-laws.

The not-for-profit corporation statute underwent its last major revision in 1990, concurrent with substantial changes to ch. 607, F.S., regarding for-profit corporations. Basic organizational structure, filing requirements, membership provisions, creditor rights, and fiduciary principles are generally very similar for both not-for-profits and for-profit corporations. However, numerous changes have been made in recent years to ch. 607, F.S., without concurrent changes to ch. 617, F.S.<sup>17</sup>

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<sup>7</sup> See A.S. §10.06.433, Ga. Code Ann. §14-3-1620 and §14-2-1620, 15 Pa. C.S.A. §1554, A.R.S. §10-1620, and Cal. Corp. Code §1501.

<sup>8</sup> Cal. Corp. Code §1501(a)(4); See 17 C.F.R. 240.14a-3(b) and 17 C.F.R. 240.14a-16.

<sup>9</sup> Information provided by the Florida Bar Business Law Section (document on file with Economic Development Policy Committee). See 17 C.F.R. 240.14a-3(b) and 17 C.F.R. 240.14a-16.

<sup>10</sup> See 17 C.F.R. 240.14a-3(a)(1); John Koegel, "Shareholder Voting Goes Green With 'E-Proxy' Rule Amendments", Community Banker, August 1, 2008, available at <<http://www.allbusiness.com/legal/banking-law-banking-finance-regulation/11579823-1.html>> (last accessed March 13, 2009).

<sup>11</sup> Koegel *supra* Note 10.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Chapter 617, F.S.

<sup>16</sup> Section 617.01401(5), F.S.

<sup>17</sup> Chapter 617 Revision Committee, the Business Section of The Florida Bar, *Proposed Amendments to Chapter 617 Florida Not-for-profit Corporation Act, Executive Summary* (February, 2008) (on file with Economic Development Policy Committee).

### *Administrative Matters*

Over the years, changes made to ch. 607, F.S., that have not been made to ch. 617, F.S., have resulted in differences in filing and record-keeping requirements by the two different types of corporations, which has created administrative problems for the Department of States' Division of Corporations. Furthermore, the language in existing law has not been modernized to consider or include technological advances. For example, there is no provision allowing for the electronic filing of documents.

Currently, the department provides general information about not-for-profit corporations free of charge to the public via its website or over the telephone.<sup>18</sup> Section 617.0501(4), F.S., specifically prohibits the department from charging a fee for telephone requests of general information about not-for-profits.

### *Membership Rights and Distributions*

Chapter 617, F.S., currently does not address several issues regarding membership rights and distributions. In addition, rights accorded to shareholders of corporations for-profit are not provided for in ch. 617, F.S., such as the right of members to call special meetings, the right to participate in meetings through electronic means, and the right to bring derivative actions in instances of alleged wrongdoing by directors and officers.

Similarly, although the basic rule for not-for-profits is that no dividends or income can be distributed to members, there are exceptions to this rule, especially for private membership-type clubs. However, the scope of the exceptions referenced in the statutory provision is unclear.<sup>19</sup>

### *Creditors' Rights*

Unlike ch. 607, F.S., there are no provisions in ch. 617, F.S., regarding creditors' rights when corporations dissolve. In recent years, provisions have been added to ch. 607, F.S., dealing with both known and unknown claims existing at the time of dissolution, which provide clear standards for how the corporation should treat such claims.

### *Specially-Regulated Not-for-profits*

Not-for-profits are generally formed under, and regulated by, ch. 617, F.S., except for certain organizations for which special statutes apply, such as condominium corporations (ch. 718, F.S.), cooperatives (ch. 719, F.S.), homeowners' associations (ch. 720, F.S.), vacation and timeshare plans (ch. 721, F.S.), and mobile home park lots (ch. 723, F.S.). Because such specially-regulated organizations are not-for-profit corporations formed under ch. 617, F.S., the regulatory relationship between ch. 617, F.S., and the other statutes is not clear. Chapter 617, F.S., provisions are applicable to all not-for-profits in some instances, while specific statutes govern not-for-profits in other instances. But the division is not clear, and substantial questions can, and do, arise as to which statutory provisions should apply to matters such as termination or transfers of memberships, purchases of members' property, and record-keeping requirements.

### *Director Qualifications*

Directors of not-for-profit companies may be appointed or elected according to the terms of the articles of incorporation or bylaws. However, directors must be natural persons 18 years of age or older and must meet any other criteria provided for under the articles of incorporation or bylaws. Therefore, current law does not allow minors to qualify as directors in an official capacity.

## **Effect of Proposed Changes:**

**Section 1** amends s. 607.0501, F.S., which relates to registered offices and agents, to delete the provision that prohibits the department from charging the public a fee for requesting general information about corporations for-profit over the telephone.

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<sup>18</sup> *Supra* note 3.

<sup>19</sup> See s. 617.0505, F.S.

The removal of this restriction is consistent with a change in law that occurred in 2008, which removed the same restriction of law from s. 15.09, F.S.<sup>20</sup> Department fees are governed by this provision and there is no authority granted to charge a fee for requesting general information about corporations for-profit over the telephone. The department reports that people infrequently call for general information about corporations, but when the department receives a request for information, the person is usually referred to the department's website for information, where the information is provided free of charge.

**Section 2** amends s. 607.1406, F.S., which relates to known claims against dissolved corporations, to insert the word "same" to correct a technical error.

**Section 3** amends s. 607.1620, F.S., which relates to financial statements for shareholders, to allow for-profit corporations to furnish annual financial statements to shareholders by electronic transmission or by mail.<sup>21</sup> The addition of "electronic transmission" to this section broadens the methods by which a corporation can provide financial statements to shareholders.

A new subsection (5) is created to not only allow a corporation to furnish annual financial statements by mail or electronic transmission, but also to allow a corporation to satisfy the annual requirement of furnishing financial statements to shareholders by complying with Securities Exchange Commission (SEC) regulations that require a corporation to furnish annual reports to security holders in a certain format and under specified time requirements and allows for reports to be provided through an electronic medium.<sup>22</sup>

**Section 4** amends s. 617.01201, F.S., which relates to filing requirements of not-for-profit corporations, to permit the electronic transmission of a document if allowed by the Department of State and submitted in a specific format. Subsection (6) is amended to be consistent with changes previously made to ch. 607, F.S., regarding signature requirements of documents to be filed with the department.

**Section 5** amends s. 617.0122, F.S., which relates to fees for filing documents and issuing certificates, to provide for payment of a \$35 fee if an agent's statement of resignation from an inactive corporation is filed with the department. This amended provision broadens the scope as to when the department may collect fees. Under the amended provision, the department would be able to collect a fee for resignations from an inactive corporation, regardless of whether the corporation's inactivity is due to an administrative dissolution. The new language is consistent with the language in s. 607.0122, F.S.

**Section 6** amends s. 617.0124, F.S., which relates to correcting filed documents, to increase the time to correct a document filed by the department from 10 business days to 30 calendar days. The Division of Corporations reports that 10 business days is not a sufficient amount of time for the filer of a document to receive acknowledgment after filing, to review the document for accuracy, and to prepare it for possible return for correction.<sup>23</sup> This change in the law would be consistent with s. 607.0124, F.S.

This section also allows for the correction of documents submitted electronically. Consistent with s. 607.0124(2)(a)1., F.S., this section deletes the option to attach a copy of the flawed document with the articles of correction in lieu of providing a description of the document. It is the current practice of the department not to require a copy of the corrected document to be returned.<sup>24</sup>

**Section 7** amends s. 617.01401, F.S., which relates to definitions, to eliminate the consideration of requirements by context and to amend the definition of a "corporation not-for-profit" by adding at the end "except as otherwise provided under this chapter." This is a reference to exceptions provided in the chapter which allow for distributions to members.

A new subsection (6) is added to define the term "department" as the "Department of State."

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<sup>20</sup> See s. 1, ch. 2008-141, Laws of Florida.

<sup>21</sup> See s. 607.01401(9), F.S., for definition of "electronic transmission."

<sup>22</sup> 17 C.F.R. 240.14a-3(b) and 17 C.F.R. 240.14a-16.

<sup>23</sup> Chapter 617 Revision Committee, the Business Section of The Florida Bar, Proposed Amendments to Chapter 617 Florida Not-for-profit Corporation Act, Executive Summary (February, 2008) (on file with Economic Development Policy Committee) .

<sup>24</sup> *Id.*

A new subsection (7) is added to define the term “distribution.” Currently, the term “distribution” is used throughout ch. 617, F.S., but it is not defined in the act. The definition is taken from the Model Act and includes not only the payment of dividends, but also any part of income or profit of a corporation. Explicitly excluded from the definition are donations, corporate assets, or income from another not-for-profit corporation or tax exempt governmental organization.

A new subsection (13) is added to define a “mutual benefit corporation.” A “mutual benefit corporation” is not a charitable, religious, or public service organization, but instead serves the private interests of its members (such as a golf club). The definition of “mutual benefit corporation” in the bill excludes associations organized under chs. 718 (condominium corporations), 719 (cooperatives), 720 (homeowners’ associations), and 721 (vacation and timeshare plans), F.S., or any corporation where membership is required pursuant to a document recorded in county property records. The definition provided in the bill more clearly distinguishes mutual benefit corporations from other corporations.

A new subsection (15) is added to define “successor entity.” “Successor entity” is defined to include entities that receive the remaining assets and liabilities of a dissolved corporation in order to resolve liabilities and distribute assets. This definition is consistent with the definition of “successor entity” in s. 607.1406(15), F.S.

A new subsection (16) is added to define “voting power” as the total number of votes entitled to be cast for the election of directors. There are several provisions of ch. 617, F.S., which use this term, but the act does not define the term. The definition is taken from the Model Act.

**Section 8** amends s. 617.0205, F.S., which relates to organizational meetings of directors, to add the words “of incorporation” after the word “articles” in paragraph (1)(b), F.S. This is a technical, clarifying change to the provision.

**Section 9** amends s. 617.0302, F.S., which relates to corporate powers, to allow corporations to make guaranties. This is consistent with ch. 607, F.S. Also, this section recognizes that a not-for-profit can merge with other business entities as defined in s. 607.1108(1), F.S.

**Section 10** amends s. 617.0501, F.S., which relates to registered offices and agents, to delete the provision that prohibits the department from charging the public a fee for requesting general information regarding not-for-profit corporations over the telephone.

The removal of this restriction is consistent with a change in law that occurred in 2008, which removed the same restriction of law from s. 15.09, F.S. 27.<sup>25</sup> Department fees are governed by this provision and there is no authority granted to charge a fee for requesting general information about corporations not-for-profit over the telephone. The department reports that people infrequently call for general information about corporations, but when the department receives a request for information, the person is usually referred to the department’s website for information, where the information is provided free of charge.

**Section 11** amends s. 617.0503, F.S., which relates to registered agents, to provide the process for withdrawal of a registered agent by an alien business organization. Specifically, an application must be delivered to the department stating, in part, that it is no longer necessary for the corporation to have a registered agent in Florida.

**Section 12** amends s. 617.0505, F.S., which relates to distributions, to prohibit distributions to not-for-profit corporations except under certain circumstances, consistent with s. 617.1302, F.S., created in Section 35 of the bill. A mutual benefit corporation is exempted from the general restriction on distributions. In addition, a reference to s. 617.1302, F.S., is added to clarify that the exemption applies to both mutual benefit corporations and other corporations when they “make distributions upon dissolution in conformity with the dissolution provisions of this chapter.”

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<sup>25</sup> See s. 1, ch. 2008-141, Laws of Florida.

The bill deletes subsections (2) and (3), which refer to the issuance of stock certificates, because s. 617.0601, F.S., is amended by the bill to provide for these provisions. The law is clarified by relocating these provisions because the subject matter of these provisions is not within the ambit of distribution. The catch-line is also revised to delete unnecessary or duplicative language. The definition of the term distribution is added in Section 8 of the bill.

This section also allows the following types of corporations to make certain kinds of distributions: condominium corporations (ch. 718, F.S.), cooperatives (ch. 719, F.S.), homeowners' associations (ch. 720, F.S.), vacation and timeshare plans (ch. 721, F.S.), mobile home park lots (ch. 723, F.S.), or a corporation where membership in the corporation is required pursuant to a document recorded in the county property records.

**Section 13** amends s. 617.0601, F.S., which relates to members, to include the reference to issuance of stock certificates, which is deleted from s. 617.0505, F.S., by Section 11 of the bill. This section is also amended to replace a statutory reference rendered obsolete because of revisions made to the Solicitation of Contributions Act.

Subsection (5) is amended to refer to proposed resignation, expulsion, suspension, and termination provisions in Sections 14 and 15 of the bill.

**Section 14** creates s. 617.0605, F.S., prohibiting the transfer of a membership interest in not-for-profit or mutual benefit corporations, except under certain circumstances. For mutual benefit corporations, transfers are restricted to the terms set forth in the articles of incorporation or bylaws and restrictions pertaining to the transfer of membership interests are not binding on members that held transfer rights before such restrictions were adopted. Proposed subsection (3) establishes the conditions under which restrictions on permissible transfer of rights are binding.

**Section 15** creates s. 617.0606, F.S., to provide for the resignation of members of mutual benefit corporations and the effect thereof on any member obligations previously incurred. Specifically, a member, unless provided for in the articles of incorporation or bylaws, may not transfer a membership or membership right. Additionally, resignation does not relieve a member from his or her obligations incurred prior to the resignation.

**Section 16** creates s. 617.0607, F.S., to provide for the procedures and potential liabilities for involuntary termination of a membership. Specifically, a member may only be terminated, expelled, or suspended by a "fair and reasonable" process, including written notice of the adverse action. The affected member has 1 year to challenge the adverse action. This section is consistent with the Model Act.

**Section 17** creates s. 617.0608, F.S., to provide that no membership interests may be purchased by a corporation, except under certain circumstances. Mutual benefit corporations may purchase the membership of a member, but such purchase is limited to the conditions set forth in its articles of incorporation or bylaws. This proposed change is consistent with Section 12 of the bill which amends s. 617.0505, F.S., and Section 35 of the bill which creates s. 617.1302, F.S.

**Section 18** amends s. 617.0701, F.S., which relates to meetings of members, to permit special meetings to be called by written demand by at least 5 percent of the voting power of members, unless the articles of incorporation or bylaws provide otherwise. There is currently no provision specifically permitting members to call special meetings. This section is consistent with s. 607.0820, F.S., to the extent that it allows for special meetings.

This section also increases from 60 to 90 the number of days for members to provide written consent for corporate action and increases from 10 to 30 the number of days after obtaining written consent to provide notice to members who are entitled to vote on corporate action.

Subsection (6) is amended to exclude application of subsections (1) and (3) to condominium corporations (ch. 718, F.S.), cooperatives (ch. 719, F.S.), homeowners' associations (ch. 720, F.S.), vacation and timeshare plans (ch. 721, F.S.), mobile home park lots (ch. 723, F.S.), or a corporation where membership in the corporation is required pursuant to a document recorded in the county property records.

**Section 19** amends s. 617.0721, F.S., which relates to voting by members, to provide for a member's participation in a meeting through remote communication, if authorized by the board of directors. This change is consistent with ch. 607, F.S. This section also provides that a corporation may reject a vote, consent, waiver, or proxy appointment if there is a reasonable basis for doubting the validity of the signature or the authority to sign for the member.

**Section 20** amends s. 617.0725, F.S., which relates to quorums, to require the approval of a different voting requirement being proposed under an amendment to the articles of incorporation. The proposed voting requirement must be approved by either meeting the new voting requirement or the voting requirement then in effect, whichever is greater. These changes are consistent with ch. 607, F.S.<sup>26</sup>

**Section 21** creates s. 617.07401, F.S., to establish the ability of members to bring derivative actions on behalf of the corporation. A derivative action is a "suit asserted by a shareholder on the corporation's behalf against a third party (usually a corporate officer) because of the corporation's failure to take some action against the third party."<sup>27</sup> The right to bring a derivative action existed in the statute until 1994, when the elimination of the "bridge provision" to ch. 607, F.S., resulted in no specific statutory provision for a derivative action. Case law in Florida indicates that despite the lack of a specific provision, the derivative action exists as a matter of law.<sup>28</sup>

A court may dismiss a derivative action if, on the corporation's motion, the court finds that one of the below-stated groups made a good faith determination after a reasonable investigation that the derivative suit is not in the corporation's best interests. The corporation has the burden of proving the independence and good faith of the group making the determination and the reasonableness of the group's investigation. The determination must be made by:

- A majority vote of independent directors constituting a quorum at a board of directors' meeting;
- A majority vote of a committee of two or more independent directors appointed by a majority vote of independent directors at a board of directors' meeting, regardless if the independent directors constitute a quorum; or
- A court-appointed panel of one or more independent persons.

This section also provides that derivative actions may not be discontinued or settled without a court's approval. If a court determines that a proposed discontinuance or settlement will substantially affect the interest of the members, or a class, series, or voting group of members, the court must require that the affected members are noticed.

If a court finds the proceeding was commenced without reasonable cause, it may require the plaintiff to pay the defendant's reasonable expenses. A successful plaintiff or person commencing the proceeding who receives any relief may be awarded reasonable expenses and may be accountable for the remainder of proceeds to the corporation. However, relief rendered only for the benefit of injured members is limited to a recovery of the loss or damage of the injured members.

**Section 22** amends s. 617.0801, F.S., which relates to duties of the board of directors, to amend the title of the section by deleting "requirements for and." This is a technical change.

**Section 23** amends s. 617.0802, F.S., which relates to qualification of directors, to allow one director of a corporation organized under the provisions of s. 501(c)(3) of the Internal Revenue Code to be 15 years of age or older if permitted by the articles of incorporation, the bylaws, or by a resolution of the

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<sup>26</sup> Section 607.0725(6), F.S.

<sup>27</sup> Black's Law Dictionary (8th ed. 2004) (defining "derivative action").

<sup>28</sup> *Fox v. Professional Wrecker Operators of Florida, Inc.*, 801 So. 2d 175, 180 (Fla. 5th DCA 2001).

board of directors. However, certain not-for-profit corporations, such as homeowners' associations and condominium associations, are prohibited from utilizing this section.

**Section 24** amends s. 617.0806, F.S., which relates to staggered terms of directors, to clarify that the adoption of a staggered board may be authorized in the "articles of incorporation or the bylaws."

**Section 25** amends s. 617.0808, F.S., which relates to removal of directors, to adopt processes for removal of directors not provided for in the current statute. The new language specifies the removal authority of directors and members and ensures directors elected by a particular class can only be removed by a vote of that class. Additionally, directors can only be removed if the number of votes for removal is the same number of votes required to elect the director. If cumulative voting is allowed, a director may not be removed if the number of votes against the removal is the same number sufficient to elect a director. This section also provides for the removal of a director based on absences from meetings, if so provided in the articles or bylaws, and allows directors to remove a director elected or appointed by the directors. This section is consistent with s. 607.0808, F.S.

In addition, this section is amended to include the exception currently afforded to a corporation described in s. 501(c) of the Internal Revenue Code which is contained in s. 617.2103, F.S., which is repealed in Section 53 of the bill. Specifically, a director may be removed from office pursuant to the articles of incorporation or the bylaws.

**Section 26** amends s. 617.0809, F.S., which relates to vacancy on boards, to include a cross-reference to exclude the rules regarding the removal of directors from being applied under this section and to provide for the filling of vacancies created on the board of directors. Specifically, a director that has been removed is not eligible to stand for reelection until the next annual meeting of the members.

Subsection (2) is amended to provide that the respective powers of the members and directors to fill vacancies on the boards are based upon the group or subgroup that made the initial election.

Subsection (3) is amended to provide that the term of a replacement director expires at the next annual meeting. Previously, the subsection required that the replacement director remain until his or her predecessor's term expired. This assures that the replacement director will be eligible for election at the next annual meeting, rather than serving multiple years without election.

**Section 27** amends s. 617.0824, F.S., which relates to quorums and voting, to prohibit directors younger than 18 years of age from being counted toward a quorum. This ensures that a minor will not have a deciding vote when a quorum is required for a certain type of vote.

**Section 28** amends s. 617.0832, F.S., which relates to director conflicts of interest, to provide specific guidelines for quorum and voting by directors on conflict of interest transactions. Specifically, a conflict of interest transaction is authorized, approved or ratified when a majority of the directors having no interest in the transaction vote for it. This provision is consistent with s. 607.0832, F.S. Subsection (3) is a new provision that sets forth standards for member voting on conflict of interest transactions, consistent with shareholder voting provisions in s. 607.0832, F.S. Particularly, a director that has an interest in the transaction may not vote to authorize, approve or ratify the transaction.

**Section 29** amends s. 617.0833, F.S., which relates to loans to directors or officers, to make technical changes to the statute.

**Section 30** amends s. 617.0834, F.S., which relates to officers' and directors' immunity from civil liability, to make technical changes to the statute.

**Section 31** amends s. 617.1007, F.S., which relates to restated articles of incorporation, to clarify that "articles" means "articles of incorporation." This is a technical change to the provision.

**Section 32** amends s. 617.1101, F.S., which relates to plans of merger, to require in the corporation's plan of merger disclosure of the manner and basis of converting memberships into memberships of the

surviving corporation or into other forms of consideration. No disclosure obligation exists in the current statute. Additionally, subsection (3) allows the plan of merger to include amendments to, or a restatement of, the articles of incorporation of the surviving corporation and the effective date of the merger. This section is consistent with s. 607.1101, F.S.

**Section 33** creates s. 617.1102, F.S., to provide that the surviving corporation in a merger between a for-profit and a not-for-profit corporation must be a not-for-profit corporation. This is consistent with the current restriction in s. 617.0302(16), F.S.

**Section 34** creates s. 617.1301, F.S., to prohibit distributions to members unless otherwise provided by s. 617.0505, F.S., as amended by Section 1 of the bill, or s. 617.1302, F.S., which is created in Section 35 of the bill. Generally, distributions to members are prohibited in all instances except for mutual benefit corporations.

**Section 35** creates s. 617.1302, F.S., to provide for authorized distributions to members. Specifically, before a mutual benefit corporation may make distributions, it must be able to pay its debts and the total assets must be at least equal to the sum of its total liabilities. A corporation may also make distributions upon dissolution, consistent with the dissolution provisions in this chapter.

**Section 36** amends s. 617.1405, F.S., which relates to the effects of dissolution, to provide that for a corporation to assume or use the name of a dissolved corporation, the dissolved corporation must provide the Department of State with an affidavit permitting the immediate assumption or use of the name. This change is consistent with s. 607.1405(4), F.S.

**Section 37** creates s. 617.1407, F.S., to provide for the treatment of claims against a corporation which were unknown at the time of dissolution. In the absence of such a provision, there are questions as to the proper treatment of claims that arise after dissolution. A dissolved corporation may choose one of the following options:

- A dissolved corporation may file a notice of dissolution with the Department of State, using the department's form, and may request that unknown claims against the corporation be presented; or
- A dissolved corporation may publish a "Notice of Corporate Dissolution" once a week for 2-consecutive weeks in a newspaper of general circulation in a county in the state in which the corporation has its principal office or where the corporation owns real or personal property. This notice must be published within 10 days of filing the articles of dissolution with the department.

In both instances, the notice must state the name of the corporation and date of dissolution, describe the information that must be included in the claim, provide a mailing address to which claims may be sent, and state that a claim will be barred unless a proceeding is commenced within 4 years after either filing the notice or the last publication of the notice, as applicable.

If a corporation complies with the procedures under this proposed section, claims are barred unless the claimant commences a proceeding within 4 years after the date of filing the notice with the department or 4 years after the date of the second consecutive weekly publication. Claims may be made against the dissolved corporation, to the extent of its undistributed assets, or against distributed assets, as specified.

**Section 38** creates s. 617.1408, F.S., to provide a process for resolving claims that are known to exist at the time of dissolution. If the process is followed, the corporation and its members are protected against subsequent claims by persons who had been given proper notice and who had not asserted their rights during the time frame provided. The provision provides a measure of certainty to the handling of known claims.

Generally, a dissolved corporation must give written notice to all known claimants. If a dissolved corporation rejects a claim, it must do so within 90 days after receiving the claim, and at least 150 days before expiration of 3 years after the effective date of the dissolution. A notice or offer given by the

dissolved corporation does not revive a barred claim, verify a claim, or waive defenses or counterclaims to a claim. Procedures for addressing contingent claims, petitions in circuit court to resolve compensation issues, payment of claims, and distribution of remaining funds (if any) are also provided.

If a corporation does not follow this section's proposed procedures, it must pay or make reasonable provisions to pay, all known claims and obligations. If there are sufficient funds, the claims must be paid in full. If there are insufficient funds, claims must be paid in order of priority and distributed pro rata between those claims of equal priority. Additionally, a dissolved corporation must distribute remaining funds, after claims are settled, to members in accordance with s. 617.1406, F.S., which provides for the plan of distribution of assets.

This section also provides certainty in handling of known claims and sets forth immunity from liability for not-for-profit directors and members who have complied with procedures.

**Section 39** repeals subsection (6) of s. 617.1421, F.S., which relates to restrictions on the use of the name of a dissolved corporation. This provision is transferred to s. 617.1422(4), F.S., in Section 40 of the bill.

**Section 40** amends s. 617.1422, F.S., which relates to reinstatement following administrative dissolution, to reword the conditions and application requirements for reinstatement of corporation. The specific information requirements provided under current law have been deleted, allowing for the department to specify on a form to be provided by the department the information required for reinstatement. This section is amended to be consistent with s. 607.1422, F.S. This section also provides that the name of the dissolved corporation is not available for use until 1 year after the effective date of the dissolution unless the dissolved corporation provides the department with an affidavit permitting the immediate use of the name. This provision is transferred from s. 617.1421(6), F.S., which was repealed in Section 39 of the bill.

**Section 41** amends s. 617.1430, F.S., which relates to grounds for judicial dissolution, to increase the requirement for standing to bring a dissolution suit. As currently written, any member may bring a suit for dissolution. This provision increases that requirement to (a) at least 50 members, (b) members holding 10 percent or more of the voting power, or (c) a director or other person authorized in the articles of incorporation.

**Section 42** amends s. 617.1503, F.S., which relates to applications for certificate of authority, to make style changes to the provision.

**Section 43** amends s. 617.1504, F.S., which relates to amended certificates of authority, to increase the time frame from 30 days to 90 days for filers to make corrections.

**Section 44** amends s. 617.1506, F.S., which relates to corporate names of foreign corporations, to require a corporate label in the title to clearly indicate it is not an "other business entity." The effect of this change is to include limited liability companies, which will prevent name conflicts.<sup>29</sup> This section also provides that an alternate name must be cross-referenced to the real corporate name in the records kept by the Division of Corporations and that the corporate name or alternate corporate name be distinguishable from any corporate name of a corporation for-profit incorporated in this state. This section is amended to be consistent with s. 607.1506, F.S.

**Section 45** amends s. 617.1530, F.S., which relates to grounds for revocation of authority to conduct affairs, to make a technical word change.

**Section 46** amends s. 617.1601, F.S., which relates to corporate records, to clarify that "article" means "articles of incorporation." This is a technical, clarifying change to the provision.

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<sup>29</sup> Chapter 617 Revision Committee, the Business Section of The Florida Bar, *Proposed Amendments to Chapter 617 Florida Not-for-profit Corporation Act, Executive Summary* (February, 2008) (on file with Economic Development Policy Committee) .

**Section 47** amends s. 617.1602, F.S., which relates to inspection of records by members, to permit inspection of certain records to be conducted at either the corporation's principal office "or at a reasonable location specified by the corporation." This section also expands the number of days advance notice is required for a records inspection request, from 5 to 10 days. This section also deletes an obsolete reference to s. 617.0730(6), F.S., which does not exist.

**Section 48** amends s. 617.1605, F.S., which relates to financial reports for members, to require that corporations provide annual financial statements to members who submit written requests. Current law requires that such statements be routinely sent to all members and does not require a written request from members. The section also states the nature of the financial statements to be provided. This section is consistent with the Model Act.

**Section 49** creates s. 617.1703, F.S., to provide that when there is a conflict between ch. 617, F.S., and provisions relating to condominium corporations (ch. 718, F.S.), cooperatives (ch. 719, F.S.), homeowners' associations (ch. 720, F.S.), vacation and timeshare plans (ch. 721, F.S.), and mobile home owners' associations (ch. 723, F.S.), the provisions of those chapters apply.

This section also provides that proposed ss. 617.0605-.0608, F.S., (transfer of membership rights, resignation of members, termination of members, and purchases of memberships) do not apply to corporations regulated by any of the above mentioned chapters or to any corporation where membership in the corporation is required pursuant to a document recorded in the county property records.

**Section 50** amends s. 617.1803, F.S., which relates to domestication of foreign not-for-profit corporations, to describe and clarify the legal consequences of domestication. The provision is taken from the Model Act. Specifically, when domestication becomes effective:

- The title to all real and personal property of the foreign corporation remains in the domesticated corporation;
- The liabilities of the foreign corporation remain the liabilities of the domesticated corporation;
- An action or proceeding against the foreign corporation continues against the domesticated corporation as if the domestication has not occurred;
- The articles of incorporation attached to the certificate of domestication constitute the articles of incorporation of the domesticated corporation; and
- Membership interests in the foreign corporation remain identical in the domesticated corporation.

**Section 51** amends s. 617.1806, F.S., which relates to conversion to a not-for-profit corporation, to provide a cross-reference to s. 617.1805, F.S., which regulates when for-profit corporations may become not-for-profit corporations.

**Section 52** amends s. 617.1907, F.S., which relates to the effect of repeals of prior acts, to add the phrase "or amendment" to each reference to "repeal" to clarify that prior rights and liabilities are not affected by an amendment to any provision of ch. 617, F.S.

**Section 53** repeals s. 617.2103, F.S., which exempts corporations described in s. 501(c) of the Internal Revenue Code of 1986, from ss. 617.0808, 617.1601, 617.1602, 617.1603, 617.1604, 617.1605, or s. 617.2102, F.S., of this chapter. Existing law also provides alternative procedures for removing a director, record keeping requirements, member inspection rights, and financial reporting for these exempt corporations. With this repeal, all not-for-profit corporations under s. 501(c) of the Internal Revenue Code will be subject to the same requirements as other not-for-profit corporations. This proposed change is prospective in effect.

**Section 54** provides an effective date of October 1, 2009, unless otherwise expressly provided for.

**B. SECTION DIRECTORY:**

**Section 1** amends s. 607.0501, F.S., to delete the provision that prohibits the department from charging the public a fee for requesting general information about corporations for-profit over the telephone.

**Section 2** amends s. 607.1406, F.S., to insert the word “same” to correct a technical error.

**Section 3** amends s. 607.1620, F.S., to allow corporations for-profit to furnish annual financial statements to shareholders by electronic transmission or by mail.

**Section 4** amends s. 617.01201, F.S., to permit the electronic transmission of a document if allowed by the Department of State and submitted in a specific format.

**Section 5** amends s. 617.0122, F.S., to provide for payment of a \$35 fee if an agent’s statement of resignation from an inactive corporation is filed with the department.

**Section 6** amends s. 617.0124, F.S., to increase the time to correct a document filed by the department from 10 business days to 30 calendar days.

**Section 7** amends s. 617.01401, F.S., to eliminate the consideration of requirements by context and to amend the definition of a “corporation not-for-profit”; subsection (6) is added to define the term “department” as the “Department of State”; subsection (7) is added to define the term “distribution”; subsection (13) is added to define a “mutual benefit corporation”; subsection (15) is added to define “successor entity”; subsection (16) is added to define “voting power.”

**Section 8** amends s. 617.0205, F.S., to add the words “of incorporation” after the word “articles” in paragraph (1)(b), F.S.

**Section 9** amends s. 617.0302, F.S., to allow corporations to make guaranties.

**Section 10** amends s. 617.0501, F.S., to delete the provision that prohibits the department from charging the public a fee for requesting general information about not-for-profit corporations over the telephone.

**Section 11** amends s. 617.0503, F.S., to provide the process for withdrawal of a registered agent by an alien business organization.

**Section 12** amends s. 617.0505, F.S., to prohibit distributions to not-for-profit corporations except under certain circumstances. The bill deletes subsections (2) and (3), which refer to the issuance of stock. This section also allows certain types of corporations to make certain kinds of distributions.

**Section 13** amends s. 617.0601, F.S., to include the reference to issuance of stock certificates, which is deleted from s. 617.0505, F.S., by Section 11 of the bill. Also, subsection (5) is amended to refer to proposed resignation, expulsion, suspension, and termination provisions in Sections 14 and 15 of the bill.

**Section 14** creates s. 617.0605, F.S., prohibiting the transfer of a membership interest in not-for-profit or mutual benefit corporations, except under certain circumstances.

**Section 15** creates s. 617.0606, F.S., to provide for the resignation of members of mutual benefit corporations and the effect thereof on any member obligations previously incurred.

**Section 16** creates s. 617.0607, F.S., to provide for the procedures and potential liabilities for involuntary termination of a membership.

**Section 17** creates s. 617.0608, F.S., to provide that no membership interests may be purchased by a corporation, except under certain circumstances.

**Section 18** amends s. 617.0701, F.S., to permit special meetings to be called by written demand by at least 5 percent of the voting power of members, unless the articles of incorporation or bylaws provide different rules for calling special meetings. This section also increases the number of days for members to provide written consent for corporate action, from 60 to 90, and increases the number of days after obtaining written consent, from 10 to 30, to provide notice to members who are entitled to vote on corporate action. Subsection (6) is amended to exclude application of subsections (1) and (3) to certain corporate entities.

**Section 19** amends s. 617.0721, F.S., to provide for a member's participation in a meeting through remote communication, if authorized by the board of directors.

**Section 20** amends s. 617.0725, F.S., to require the approval of a different voting requirement being proposed under an amendment to the articles of incorporation.

**Section 21** creates s. 617.07401, F.S., to establish the ability of members to bring derivative actions on behalf of the corporation.

**Section 22** amends s. 617.0801, F.S., to amend the title of the section by deleting "requirements for and."

**Section 23** amends s. 617.0802, F.S., to allow one director of a corporation organized under the provisions of s. 501(c)(3) of the Internal Revenue Code of 1986, as amended, to be 15 years of age or older if permitted by the articles of incorporation, the bylaws, or by a resolution of the board of directors.

**Section 24** amends s. 617.0806, F.S., to clarify that the adoption of a staggered board may be authorized in the "articles of incorporation or the bylaws."

**Section 25** amends s. 617.0808, F.S., to adopt processes for removal of directors not provided for in the current statute and to include the exception currently afforded to a corporation described in s. 501(c) of the Internal Revenue Code.

**Section 26** amends s. 617.0809, F.S., to include a cross-reference to exclude the rules regarding the removal of directors from being applied under this section and to provide for the filling of vacancies created on the board of directors. Subsection (2) is amended to provide that the respective powers of the members and directors to fill vacancies on the boards are based upon the group or subgroup that made the initial election. Subsection (3) is amended to provide that the term of a replacement director expires at the next annual meeting.

**Section 27** amends s. 617.0824, F.S., to prohibit directors younger than 18 years of age from being counted toward a quorum.

**Section 28** amends s. 617.0832, F.S., to provide specific guidelines for quorum and voting by directors on conflict of interest transactions.

**Section 29** amends s. 617.0833, F.S., to make technical changes to the statute.

**Section 30** amends s. 617.0834, F.S., to make technical changes to the statute.

**Section 31** amends s. 617.1007, F.S., to clarify that "articles" means "articles of incorporation."

**Section 32** amends s. 617.1101, F.S., to require in the corporation's plan of merger disclosure of the manner and basis of converting memberships into memberships of the surviving corporation or into other forms of consideration.

**Section 33** creates s. 617.1102, F.S., to provide that the surviving corporation in a merger between a for-profit and a not-for-profit corporation must be a not-for-profit corporation.

**Section 34** creates s. 617.1301, F.S., to prohibit distributions to members unless otherwise provided by s. 617.0505, F.S., or s. 617.1302, F.S.

**Section 35** creates s. 617.1302, F.S., to provide for authorized distributions to members.

**Section 36** amends s. 617.1405, F.S., to provide that for a corporation to assume or use the name of a dissolved corporation, the dissolved corporation must provide the Department of State with an affidavit permitting the immediate assumption or use of the name.

**Section 37** creates s. 617.1407, F.S., to provide for the treatment of claims against a corporation, which were unknown at the time of dissolution.

**Section 38** creates s. 617.1408, F.S., to provide a process for resolving claims that are known to exist at the time of dissolution.

**Section 39** repeals subsection (6) of s. 617.1421, F.S., which relates to restrictions on the use of the name of a dissolved corporation.

**Section 40** amends s. 617.1422, F.S., to reword the conditions and application requirements for reinstatement of a corporation.

**Section 41** amends s. 617.1430, F.S., to increase the requirement for standing to bring a dissolution suit.

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**Section 44** amends s. 617.1506, F.S., to require a corporate label in the title to clearly indicate it is not an "other business entity."

**Section 45** amends s. 617.1530, F.S., to make a technical word change.

**Section 46** amends s. 617.1601, F.S., to clarify that "article" means "articles of incorporation."

**Section 47** amends s. 617.1602, F.S., to permit inspection of certain records to be conducted at either the corporation's principal office "or at a reasonable location specified by the corporation."

**Section 48** amends s. 617.1605, F.S., to require that corporations provide annual financial statements to members who submit written requests.

**Section 49** creates s. 617.1703, F.S., to provide that when there is a conflict between ch. 617, F.S., and provisions relating to certain business entities, the provisions of those chapters apply. This section also provides that proposed ss. 617.0605-.0608, F.S., do not apply to certain corporations.

**Section 50** amends s. 617.1803, F.S., to describe and clarify the legal consequences of domestication.

**Section 51** amends s. 617.1806, F.S., to provide a cross-reference to s. 617.1805, F.S., which regulates when for-profit corporations may become not-for-profit corporations.

**Section 52** amends s. 617.1907, F.S., to add the phrase "or amendment" to each reference to "repeal".

**Section 53** repeals s. 617.2103, F.S., which exempts corporations described in s. 501(c) of the Internal Revenue Code of 1986, from ss. 617.0808, 617.1601, 617.1602, 617.1603, 617.1604, 617.1605, or s. 617.2102, F.S., of this chapter

**Section 54** provides an effective date of October 1, 2009, unless otherwise expressly provided for.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Sections 3, 4, and 19 of the bill allow for electronic filing, reporting, and appearances by the corporation. Corporations may save on administrative costs because the new law would allow for documents that are filed with the department to be filed electronically and allows for financial statements to be provided to shareholders by electronic transmission, reducing the cost of printing and mailing materials. Furthermore, the new law would save directors the time and expense of making physical appearances at meetings by appearing remotely by electronic means.

Additionally, Section 23 of the bill allows not-for-profits to elect or appoint one director that is 15 years of age or older, if it so chooses. Corporations that opt to elect or appoint a youth director may have to review their liability insurance policies to determine if actions by minors would be covered or if they would be subject to higher insurance premiums.

Also, the average office employee uses approximately 10,000 sheets of paper each year, totaling about 27 pounds of paper per person.<sup>30</sup> Each sheet of paper used has less than a 5 percent chance of containing recycled fibers and has a 50 percent chance of ending up in a landfill or incinerator.<sup>31</sup> To the extent this bill gives corporations an option to use the Internet to furnish shareholders financial statements instead of printing and mailing those statements, this bill has the potential to save valuable natural resources and is environmentally friendly.<sup>32</sup>

### D. FISCAL COMMENTS:

None.

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<sup>30</sup> "Using Less Wood: Quick Facts Sheet" Resource Conservation Alliance. Available at <<http://www.woodconsumption.org/products/paper.pdf>> last accessed March 13, 2009.

<sup>31</sup> *Id.*

<sup>32</sup> Koegel *supra* Note 10.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

None.

2. Other:

None.

#### B. RULE-MAKING AUTHORITY:

None.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On March 18, 2009, the Economic Development Policy Committee adopted a strike-all amendment which incorporated eleven technical changes, including:

- Changing the word "act" to the word "chapter" in four lines of the bill;
- Adding the word "same" to the phrase, "substantially the same form";
- Changing the word "shall" to "may" in those provisions concerning the furnishing of financial statements to shareholders to carry out the intent of the bill to permit financial statements to be furnished by electronic transmission;
- Adding the word "suspension" that was unintentionally omitted in the bill;
- Defining the term "majority in interest" to clarify it does not mean a majority of members having a conflict of interest; and
- Clarifying how a director may be removed with cause and without cause by the board.

Additionally, the amendment limited the types of not-for-profit corporations that are permitted to elect or appoint directors that are 15 years of age or older.

Also, the effective date of the bill is amended to specify that the act will take effect on October 1, 2009, except as provided for elsewhere in the bill. This change references a new effective date clause in Section 3 of the bill, making that section effective upon becoming law and applicable to all fiscal years ending on or after December 31, 2008. This allowed not-for-profit corporations to file financial statements by electronic transmission or take advantage of the federal "e-proxy" rules not only prospectively for financial statements furnished after the date of enactment, but also retroactively with respect to fiscal years ending on or after December 31, 2008.