

STORAGE NAME: h1621.it.doc

DATE: April 9, 2001

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
INFORMATION TECHNOLOGY
ANALYSIS**

BILL #: HB 1621

RELATING TO: Corporations

SPONSOR(S): Representative(s) Ritter

TIED BILL(S):

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) INFORMATION TECHNOLOGY
- (2) ECONOMIC DEVELOPMENT & INTERNATIONAL TRADE
- (3) COUNCIL FOR READY INFRASTRUCTURE
- (4)
- (5)

I. SUMMARY:

HB 1621 would clarify that Florida for-profit corporations may accept proxy appointments from shareholders by electronic transmission and through the shareholder's attorney-in-fact. The bill defines the term "electronic transmission" to include telegrams, cablegrams, telephone transmissions, and transmissions through the Internet. The bill also clarifies who has authority to vote the shares owned by a limited liability company or a partnership, 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.

This bill substantially amends the following sections of the Florida Statutes: 607.01401, 607.0721, and 607.0722.

If enacted, HB 1621 would take effect July 1, 2001.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|---|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Florida Business Corporation Act

The Florida Business Corporation Act (act)¹ is the general corporation code of this state. The act comprises the laws that govern the incorporation, management, merger, and dissolution of corporations. The act governs the issuance of shares by corporations and includes provisions regulating shareholder meetings and voting by shareholders. The act is substantially similar to the Model Business Corporation Act (model act). The model act 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).² As of 1999, Florida was one of 24 states that enacted substantially all of the model act as its general corporation statute.³ The successor to the Uniform Business Corporation Act, the model act was first adopted by the ABA in 1950.⁴ Since 1950, the model act has been periodically reviewed and revised. The model act was last revised in 1999.

The Committee on Corporations and Securities Law of the Business Law Section of The Florida Bar (the "committee") is the Florida counterpart to the ABA's Committee on Corporate Laws. The committee consists of practitioners and academics with expertise in the field of corporate, securities, and mergers and acquisitions law.⁵ The committee's membership includes authors of books regarding Florida corporate law and corporate law professors at Florida law schools. As part of its continuous review of the Florida Business Corporation Act, the committee has recommended several changes relating to shareholder meetings and voting by shareholders. HB 1621 substantially implements these recommendations.

Shareholders and Types of Business Organizations

¹ Chapter 607, F.S.; *see also* s. 607.0101, F.S. ("This act shall be known and may be cited as the 'Florida Business Corporation Act.'").

² Introduction to Model Bus. Corp. Act xix (1999).

³ *Id.*

⁴ The Uniform Business Corporation Act was adopted by the commissioners on uniform state laws in 1928. In 1943, the commissioners withdrew the act as "uniform" and renamed it the Model Business Corporation Act. In 1958, the act was withdrawn by the commissioners altogether. *See id.* at xxi-xxii.

⁵ Business Law Section, The Florida Bar, *Corporations & Securities Committee*, at <http://www.flabuslaw.org/Bankrupt.htm> (last modified June 23, 1999).

Corporations

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 the corporation. A corporation, which may exist indefinitely, has the right, among others, to issue stock. Domestic corporations are defined as those incorporated under the laws of the State of Florida.⁶ The act defines a foreign corporation as one that is incorporated under the laws of another state in the United States.⁷

Ownership interests in a corporation are divided into shares. Natural persons, corporations, and other entities may own shares in a corporation. When a corporation is created, articles of incorporation must be filed with the Department of State.⁸ The articles must specify, among other matters, the number of shares the corporation is authorized to issue.⁹ Some shareholder rights are guaranteed by law, but most rights are provided by the articles of incorporation. 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. Each corporation is also required to conduct an annual meeting of shareholders.¹⁰ The bylaws of a corporation contain provisions governing the management of the business and regulating the affairs of the corporation.¹¹ The bylaws must be consistent with law and the corporation's articles of incorporation.¹²

Partnerships

A partnership is a voluntary association of two or more persons who jointly own and carry on a business for profit as co-owners.¹³ Partnerships are usually divided into two functional categories: general partnerships and limited partnerships. A general partnership is a partnership in which all partners fully participate in running the business and share equally in the profits and losses.¹⁴ A limited partnership is a partnership composed of one or more persons who control the business and who are personally liable for the partnership's debts (general partners) and one or more persons who contribute capital and share profits but who cannot manage the business and are liable only for the amount of their contribution (limited partners).¹⁵ The affairs of a limited partnership and the conduct of its business are governed by a partnership agreement.¹⁶

Limited Liability Companies

A limited liability company is a company that is characterized by limited liability, management by members or managers, and limitations on ownership transfer.¹⁷ A limited liability company is a hybrid form of business entity, combining some attributes of a corporation with some attributes of a

⁶ Section 607.01401(5), F.S.

⁷ Section 607.01401(12), F.S.

⁸ Sections 607.0201 & 607.0203, F.S.

⁹ Section 607.0202(1)(c), F.S.

¹⁰ Section 607.0701, F.S.

¹¹ Section 607.0206(2), F.S.

¹² *Id.*

¹³ *Black's Law Dictionary* 1142 (7th ed. 1999); Division of Corporations, Florida Dep't of State, *Our Role and Filing Responsibilities*, at http://www.dos.state.fl.us/doc/corp_rol.html (last modified Jan. 21, 2000).

¹⁴ *Black's Law Dictionary* 1142 (7th ed. 1999).

¹⁵ *Id.*

¹⁶ *See s. 620.102(9)*, F.S.

¹⁷ *Black's Law Dictionary* 275 (7th ed. 1999).

partnership.¹⁸ The affairs of a limited liability company and the conduct of its business are governed by an operating agreement.¹⁹

Voting Entitlement of Shares

Under Florida law, unless the corporation's articles of incorporation provide otherwise or in certain circumstances, each shareholder of a corporation is entitled to vote on each matter submitted to a vote at a meeting of the shareholders.²⁰ Two examples of circumstances when a shareholder might not be able to vote are when:

- Shares are held by an administrator, executor, guardian, personal representative, or conservator; or
- Shares are held by or under the control of a receiver, a trustee in bankruptcy proceedings or by an assignee for the benefit of creditors.²²

If a corporation owns shares in another corporation, the shares may be voted by an officer, agent, or proxy as governed by the corporate shareholder's bylaws. In the absence of specification by the 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.²¹

Proxy Voting

As business organizations have increased in size and complexity, the number of shareholders has also increased. As a result, proxy voting has become an integral part of the governance of many corporations.²² 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 the shareholder's behalf by signing an appointment form.²³ The shareholder's "attorney in fact"²⁴ may sign the appointment form for the shareholder. Alternatively, a shareholder may have the appointment form signed by the shareholder's authorized officer, director, employee, or agent.

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. Although 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. Except as otherwise provided by law, a corporation may accept the proxy's vote or other action as that of the shareholder making the proxy appointment unless the appointment form expressly limits the proxy's authority.

¹⁸ Division of Corporations, Florida Dep't of State, *Our Role and Filing Responsibilities*, at http://www.dos.state.fl.us/doc/corp_rol.html (last modified Jan. 21, 2000).

¹⁹ See s. 608.423, F.S.

²⁰ Section 607.0721(1), F.S.

²¹ Section 607.0721(5), F.S.

²² See Model Bus. Corp. Act s. 7.22, Official Comment (1999).

²³ Section 607.0722(2)(a), F.S.

²⁴ An "attorney in fact" is an attorney authorized by a person to act on that person's behalf, usually through the execution of a written instrument such as a power of attorney. *Black's Law Dictionary* (7th ed. 1999).

Corporation's Acceptance of Votes

Corporations are often asked to accept a written instrument as evidence of action by a shareholder. These instruments many times involve appointment forms for a proxy to vote the shares of a shareholder. A corporation, especially a large corporation, may 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.²⁷

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.²⁵ A corporation is entitled to accept the proxy appointment of a corporate shareholder if the name signed purports to be that of an officer or agent of the corporate shareholder.²⁶ 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.²⁷ These provisions are consistent with the model act.²⁸

Irrevocable Proxies

Under Florida law, unless a longer period is expressly provided in the appointment form, a proxy appointment is valid for up to 11 months.²⁹ The appointment of a proxy is revocable by the shareholder unless the appointment form conspicuously states that it is irrevocable and the appointment is coupled with an interest.³⁰ Two examples of appointments coupled with an interest are:³¹

- A creditor of the corporation who extended credit to the corporation under terms requiring the appointment; or
- An employee of the corporation whose employment contract requires the appointment.

In the first scenario, a corporation may, for example, pledge shares in the corporation as collateral for a loan. Although 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. Similarly, in the second scenario, when a corporation issues shares to its employees as bonuses, the corporation may require the employees to cede their voting rights to the corporation. Under Florida law, most irrevocable proxies become revocable after the interest coupled with the proxy is extinguished.³² Thus, using these examples, a proxy would become revocable after the loan is repaid or after the employee separates from employment with the corporation, respectively. Florida law, however, specifically imposes an additional requirement upon irrevocable proxies 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.³³ In these two instances, Florida law requires that the irrevocable proxy becomes revocable after three years unless the proxy appointment is renewed.³⁴ 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.

²⁵ Section 607.0724(1), F.S.

²⁶ Section 607.0724(2)(a), F.S.

²⁷ Section 607.0724(3), F.S.

²⁸ See Model Bus. Corp. Act s. 7.24 (1999).

²⁹ Section 607.0722(3), F.S.

³⁰ Section 607.0722(5), F.S.

³¹ *Id.*

³² See s. 607.0722(6), F.S.

³³ See s. 607.0722(5)(c) & (d), F.S.

³⁴ Section 607.0722(6), F.S.

Electronic Transmission

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.”³⁵ Under current law, documents may be filed with the Department of State by electronic transmission to the extent permitted by the department.³⁶ In addition, the act allows notices provided by electronic transmission to be considered “written notice.”³⁷ 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.³⁸

C. EFFECT OF PROPOSED CHANGES:

HB 1621 would amend 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 bill retains the ability of shareholders to submit proxy appointments through telegrams or cablegrams. The bill also clarifies who has authority to vote the shares owned by a limited liability company or a partnership, 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.

Electronic Transmission (Section 1)

The bill would amend the definition of the term “electronic transmission” in subsection (9) of s. 607.01401, F.S., to include, but not be limited to, telegrams, cablegrams, telephone transmissions, and transmissions through the Internet. If enacted, the bill would define the term “electronic transmission” 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, including, but not limited to, telegrams, cablegrams, telephone transmissions, and transmissions through the Internet.

The term “electronic transmission” is used throughout section 3 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. The term “electronic transmission” is used in related statutes when referring to the electronic filing of documents with the Department of State. The current definition of the term requires that electronic documents be suitable for the retention, retrieval, and reproduction of information. Current Internet technology would clearly provide adequate insurance that Internet-based appointments could satisfy these requirements. It is unclear whether amending this term to include “telephone transmissions” would eliminate or modify the requirement that electronically filed documents be suitable for retention, retrieval, and reproduction. An amendment to clarify whether the amended definition of the term “electronic transmission” is intended to apply only to appointment of proxies by shareholders or also to the electronic filing of documents with the Department of State may be advisable.

³⁵ Section 607.01401(9), F.S.

³⁶ Sections 607.0120(4), (9), & 609.0125(5), F.S.

³⁷ Section 607.0141(1), F.S.

³⁸ Model Bus. Corp. Act s. 1.40 (1999).

Voting Entitlement of Shares (Section 2)

To clarify the provisions of existing law that specify who may vote the shares of a corporate shareholder (a corporation that owns shares in another corporation), the bill provides who may vote the shares of a limited liability company, partnership, or other domestic or foreign business entity. Specifically, the bill would amend s. 607.021, F.S., to provide that the member, officer, manager, agent, or proxy specified in the agreement governing the operation of the of the business entity may vote the shares. Thus, the operating agreement of a limited liability company or the partnership agreement of a partnership would govern who votes the entity's shares. In the absence of an agreement, the bill would specify that the shares may be voted by the person designated by the members, partners, managers, or other governing body or persons of the business entity.

If there is no designation made by a limited liability company, or if there is a conflicting designation, the bill provides a succession of who may vote the limited liability company's shares: the president, any vice president, the secretary, the treasurer, and the member with the largest percentage interest in the limited liability company, in that order. Similarly, if there is no designation made by a partnership, or if there is a conflicting designation, the bill provides a succession of who may vote the partnership's shares: the president, any vice president, the secretary, the treasurer, the general partner of a limited partnership, and the partner with the largest percentage interest in the partnership, in that order. Moreover, if there is no designation made by any other type of business entity, or if there is a conflicting designation, the bill provides a succession of who may vote the entity's shares: the president, any vice president, the secretary, and the treasurer, in that order.

Proxy Voting and Irrevocable Proxies (Section 3)

The bill would amend s. 607.0722, F.S., to allow a shareholder to appoint a proxy by electronic transmission in lieu of submitting a signed appointment form. Consequently, corporations would be allowed to use telephonic menu systems or Internet-based systems to accept proxy appointments. The bill makes conforming amendments by removing current provisions that allow proxy appointments by telegram or cablegram because these methods are defined within the scope of the term electronic transmission.

When a person entitled to appoint a proxy makes the appointment through an electronic transmission, the bill provides that the transmission is a sufficient appointment if it 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. The bill adds this standard to replace the standard in current law 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. In addition, the bill clarifies that the 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.

The bill clarifies that the attorney in fact who may vote a shareholder's shares must be the attorney in fact for the shareholder. The bill also clarifies in several provisions throughout section 3 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 would also remove the requirement in subsection (5) of s. 607.0722 that irrevocable proxies become revocable after three years unless the proxy appointment is renewed in the following scenarios:

- A creditor of the corporation who extended credit to the corporation under terms requiring the appointment, or

- An employee of the corporation whose employment contract requires the appointment.

Accordingly, all irrevocable proxies would become revocable after the coupled interest is extinguished. Thus, if a corporation gives stock to an employee during employment subject to an irrevocable proxy held by the corporation, the corporation would not be required to renew the proxy every three years and the irrevocable proxy would exist through the life of the employment.

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 4)

The bill takes effect July 1, 2001.

D. SECTION-BY-SECTION ANALYSIS:

Please refer to the discussion above.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

HB 1621 does not appear to impact state revenues.

2. Expenditures:

HB 1621 does not require the state to expend any funds.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

HB 1621 does not appear to impact local government revenues.

2. Expenditures:

HB 1621 does not require local governments to expend funds.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill clarifies that proxy appointments may be accepted by Florida for-profit corporations by electronic transmissions. The bill also makes clarifications to provisions relating to the verification of proxy appointments transmitted electronically. Thus, some Florida corporations may observe a marginal decrease in costs associated with administering proxy voting procedures. However, the bill is essentially technical in nature, and the financial impacts on most corporations will be minimal.

D. FISCAL COMMENTS:

N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

None.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

None.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

None.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

N/A

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON INFORMATION TECHNOLOGY:

Prepared by:

Staff Director:

Richard Martin

Charles M. Davidson