

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: CS/CS/SB 1288

INTRODUCER: Judiciary Committee, Commerce Committee, Senator Aronberg, and others

SUBJECT: Corporations

DATE: March 27, 2009

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Callaghan	Cooper	CM	Fav/CS
2.	Treadwell	Maclure	JU	Fav/CS
3.			FT	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

- A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes
- B. AMENDMENTS..... Technical amendments were recommended
- Amendments were recommended
- Significant amendments were recommended

I. Summary:

The bill makes revisions to statutes concerning for profit and not for profit corporations. The revisions relate to administrative matters, membership rights, distributions, dissolution, and creditors' rights. This bill integrates provisions from the Revised Model Nonprofit Corporation Act, prepared by the American Bar Association. This bill also incorporates revisions suggested by the Division of Corporations of the Department of State and the Business Law Section of the Florida Bar. It also amends a number of provisions to make ch. 617, F.S., consistent with ch. 607, F.S.

In addition, the bill includes a number of provisions to recognize a new category of not for profit corporations, known as "mutual benefit corporations."

This bill amends the following sections of the Florida Statutes: 607.0501, 607.1406, 607.1620, 617.01201, 617.0122, 617.0124, 617.01401, 617.0205, 617.0302, 617.0501, 617.0503, 617.0505, 617.0601, 617.0701, 617.0721, 617.0725, 617.0801, 617.0802, 617.0806, 617.0808, 617.0809, 617.0824, 617.0832, 617.0833, 617.0834, 617.1007, 617.1101, 617.1405, 617.1422, 617.1430, 617.1503, 617.1504, 617.1506, 617.1530, 617.1601, 617.1602, 617.1605, 617.1803, 617.1806, and 617.1907.

The bill creates the following sections of the Florida Statutes: 617.0605, 617.0606, 617.0607, 617.0608, 617.07401, 617.1102, 617.1301, 617.1302, 617.1407, 617.1408, and 617.1703.

This bill repeals subsection (6) of section 617.1421, F.S., and repeals section 617.2103, F.S.

II. Present Situation:

For Profit Corporations

The Florida Business Corporation Act, codified in ch. 607, F.S., provides for the incorporation of corporations for profit. “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.¹

Corporations must file, or are permitted to file, several documents with the Department of State (department), 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 Corporations website for the public to view. This service is provided free of charge.² 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.³ According to the department, people seldom call 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.⁴

Annually, corporations for profit must “mail” financial statements to shareholders within 120 days after the close of each fiscal year.⁵ “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.” Therefore, there is currently no provision under Florida’s law permitting financial statements to be provided to shareholders by “electronic transmission.”

Several states, including Alaska, Georgia, Pennsylvania, Arizona, and California, currently allow corporations to provide shareholders with financial statements or annual reports through electronic transmission.⁶ California specifically permits corporations to satisfy annual reporting requirements by meeting the Security and Exchange Commission reporting requirements specified under 17 C.F.R. 240.14a-3(b), as amended, and 17 C.F.R. 240.14a-16, as amended.⁷ The Securities and Exchange Commission (SEC) provides for the electronic transmission of corporations’ financial statements, called “e-proxy” rules, under 17 C.F.R. 240.14a-3(b), as

¹ Section 607.01401(5), F.S.

² Department of State, Division of Corporations website, <http://www.sunbiz.org/search.html> (last visited Mar. 20, 2009).

³ Section 607.0501(4), F.S.

⁴ Department of State’s Long-Range Program Plan for Fiscal Years 2009-2014 for statistics concerning the number of persons serviced by methods other than electronic means from 2007-2008, p. 29, *available at* <http://www.dos.state.fl.us/lrpp/pdf/lrpp.pdf> (last visited Mar. 20, 2009).

⁵ Section 607.1620(3), F.S.

⁶ See A.S. s. 10.06.433, Ga. Code Ann. ss. 14-3-1620 and 14-2-1620, 15 Pa. C.S.A. s. 1554, A.R.S. s. 10-1620, and Cal. Corp. Code s. 1501.

⁷ Cal. Corp. Code s. 1501(a)(4).

amended, and 17 C.F.R. 240.14a-16, as amended.⁸ 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 materials 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.⁹ 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.¹⁰

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.¹¹ 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.¹² Moreover, corporations do not have to respond to requests for copies, as is required under the “notice of Internet availability” option.¹³

Corporations Not For Profit

The Florida Not For Profit Corporation Act, codified in ch. 617, F.S., provides for the incorporation of corporations not for profit. 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.”¹⁴ 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 bylaws.

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. Because 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, chs. 617 and 607, F.S., are generally sought to be in conformity as much as is appropriate.

⁸ Information provided by the Florida Bar Business Law Section (document on file with Judiciary Committee).

⁹ 17 C.F.R. 240.14a-3(a)(1) and John Koegel, *Shareholder Voting Goes Green With 'E-Proxy' Rule Amendments* (Aug. 1, 2008), <http://www.allbusiness.com/legal/banking-law-banking-finance-regulation/11579823-1.html> (last visited Mar. 20, 2009).

¹⁰ Koegel, *supra* note 9.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Section 617.01401(5), F.S.

However, numerous changes have been made in recent years to ch. 607, F.S., without concurrent changes to ch. 617, F.S.¹⁵

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 to the public, via its website or over the telephone, general information about not for profit corporations free of charge.¹⁶ 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 on behalf of the corporation 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.¹⁷

Creditors' Rights

Unlike ch. 607, F.S., there are no provisions in ch. 617, F.S., regarding how to deal with creditors 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, and providing 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

¹⁵ Chapter 617 Revision Committee, the Business Law Section of The Florida Bar, *Proposed Amendments to Chapter 617 Florida Not for Profit Corporation Act, Executive Summary* (February, 2008) (on file with Judiciary Committee).

¹⁶ Department of State, Division of Corporations website, <http://www.sunbiz.org/search.html> (last visited Mar. 20, 2009).

¹⁷ Section 617.0505, F.S.

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. This division is not clear, and substantial questions can, and do, arise as to whether and which statutory provisions should apply to important matters such as termination or transfers of memberships, purchases of members' property, and record-keeping requirements.

Director Qualifications

Directors of not for profit corporations 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.

III. Effect of Proposed Changes:

The bill makes revisions to statutes concerning for profit and not for profit corporations. The revisions relate to administrative matters, membership rights, distributions, dissolution, and creditors' rights. Provisions from the Revised Model Nonprofit Corporation Act (Model Act), prepared by the American Bar Association, are integrated into the bill. This bill also incorporates revisions suggested by the Division of Corporations of the Department of State and the Business Law Section of the Florida Bar. The following is a section-by-section of the bill:

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.

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.¹⁸ 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 corporations for profit to furnish annual financial statements to shareholders by electronic transmission or by mail.¹⁹ The addition of "electronic transmission" to this section broadens the methods by which a corporation can provide financial statements to shareholders.

"Electronic transmission" is defined in s. 607.01401(9), F.S., as:

¹⁸ Chapter 2008-141, s.1, Laws of Fla.

¹⁹ Section 607.01401(9), F.S., for a definition of "electronic transmission."

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. For purposes of proxy voting in accordance with ss. 607.0721, 607.0722, and 607.0724, the term includes, but is not limited to, telegrams, cablegrams, telephone transmissions, and transmissions through the Internet.

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 17 C.F.R. s. 240.14a-3(b), as amended. This federal provision, in conjunction with 17 C.F.R. s. 240.14a-16, as amended, requires 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.²⁰ These federal rules are often referred to as “e-proxy” rules.²¹

The amendatory clause for this section makes this section of the bill effective upon becoming law and makes this section applicable to all fiscal years ending on or after December 31, 2008. This would allow 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.

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.²² This change in the law would be consistent with s. 607.0124, F.S., which also allows for 30 days to correct a document filed with

²⁰ 17 C.F.R. s. 240.14a-3(b)(2)(ii) for format specifications of reports delivered through an electronic medium.

²¹ Information provided by the Florida Bar Business Law Section (document on file with Judiciary Committee).

²² Chapter 617 Revision Committee, the Business Law Section of The Florida Bar, *Proposed Amendments to Chapter 617 Florida Not for Profit Corporation Act, Executive Summary* (February, 2008) (on file with Commerce Committee).

the department.

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.²³

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.”

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 of “distribution” 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.” There are several provisions in ch. 617, F.S., specifically directed at this type of corporation (distributions, transfers of interests, and dissolutions). A “mutual benefit corporation,” which is not a charitable, religious, or public service organization, but instead serves the private interests of its members (such as a golf club), has different rules in the current statute regarding various matters such as distributions, transfers of interest, and dissolution. Other states make a distinction between mutual benefit corporations and other not for profit corporations under their laws.²⁴

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 others.

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.” 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

²³ *Id.*

²⁴ For example, see IC 23-17-2-19 (Indiana), 215 ILCS 5/316 (Illinois), Cal. Corp. Code s. 5059 (California), N.J.S.A. 17:45-1 (New Jersey), and 18 Del. C. s. 5502 (Delaware).

from the Model Act and defines voting power by reference to the number of votes that a member is entitled to cast in the election of directors.

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). 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 change makes this section 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.²⁵ Section 607.1108(1), F.S., defines “other business entity” as “a limited liability company, a foreign corporation, a not for profit corporation, a business trust or association, a real estate investment trust, a common law trust, an unincorporated business, a general partnership, a limited partnership, or any other entity that is formed pursuant to the requirements of applicable law.”

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 about 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.²⁶ 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. This section is consistent with s. 607.0505(12), F.S.

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. (created by the bill), 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.”

²⁵ Section 607.1108(1), F.S. defines “other business entity” as “a limited liability company, a foreign corporation, a not-for-profit corporation, a business trust or association, a real estate investment trust, a common law trust, an unincorporated business, a general partnership, a limited partnership, or any other entity that is formed pursuant to the requirements of applicable law.”

²⁶ Chapter 2008-141, s. 1, Laws of Fla.

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 7 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 12 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 15 and 16 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.

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 one 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 different rules for calling special meetings. 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 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 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. If any member or proxy holder votes or takes other action by means of remote location, a record of the member's participation in the meeting must be maintained by the not for profit corporation.

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 similar provisions in ch. 607, F.S.²⁷

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 brought by a shareholder to enforce a corporate cause of action.²⁸ 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.²⁹

A court may dismiss a derivative action if, on the corporation's motion, the court finds that one of the groups below 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'

²⁷ Section 607.0725(6), F.S.

²⁸ *Chemplex Florida v. Norelli*, 790 So. 2d 547, 549 (Fla. 4th DCA 2001).

²⁹ *Fox v. Professional Wrecker Operators of Florida, Inc.*, 801 So. 2d 175, 180 (Fla. 5th DCA 2001).

- 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 any defendant's reasonable expenses, including reasonable attorney's fees. A successful plaintiff or person commencing the proceeding who receives any relief may be awarded reasonable expenses, including reasonable attorney's fees, and may be accountable for the remainder of proceeds to the corporation. The bill provides an award of attorney's fees to the plaintiff or person commencing the action if he or she receives a judgment, compromise, or settlement. Typically, attorney's fees are not awarded when parties reach a settlement or compromise in an action. Finally, 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 that removes redundant language.

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 of 1986, as amended, to be 15 years of age or older if permitted by the articles of incorporation, the bylaws, or a resolution of the board of directors. However, minors are excluded from directorship in corporations regulated by ch. 718, F.S. (condominium corporations), ch. 719, F.S. (cooperatives), ch. 720, F.S. (homeowners' associations), ch. 721, F.S. (vacation and timeshare plans), and ch. 723, F.S. (mobile home park lots), as well as certain corporations in which membership is required by a recorded document.

The bill does not specify whether youth participants would have the same fiduciary duties as directors over the age of 18 and whether they are bound to obligations or contracts in the same manner as other directors. In the absence of any law specifying the extent of youths' obligations or fiduciary duties, it may be presumed that they are held to the same standard as any other director of a corporation.

As a director, the minor would serve in a representative capacity of the not for profit corporation. The minor would be authorized to vote on any board resolution to enter into a contract on behalf of the corporation, but an officer of the corporation would sign the contract, not the board member. Thus, the inability of a minor to enter into an enforceable contract would not be an issue under the bill.

Not for profit corporations that opt to allow minors to serve as directors of their corporations must be aware of, and abide by, federal and state child labor laws.³⁰

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 of 1986, as amended, 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 serve 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.

³⁰ See Fair Labor Standards Act, 29 U.S.C. 203(1)(2) and 29 C.F.R. ss. 570.31-34. See also Florida’s Child Labor Law, under part I of ch. 450, F.S.

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, clarifying 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 12 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 is doubt as to the proper treatment of unknown claims that arise after dissolution. This amendment is adapted from s. 607.1407, F.S.

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 two 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 four 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 four years after the date of filing the notice with the department or four 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 three 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. These provisions are consistent with s. 607.1406, F.S.

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 the 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 one 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:

- at least 50 members;
- members holding 10 percent³¹ or more of the voting power; or
- 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.³² 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.

³¹ The Model Act suggests a 5-percent voting power threshold.

³² Chapter 617 Revision Committee, the Business Law Section of The Florida Bar, *Proposed Amendments to Chapter 617 Florida Not for Profit Corporation Act, Executive Summary* (Feb. 2008) (on file with Judiciary Committee).

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.

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. 617.0605-617.0608, 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 corporation not for profit, 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. 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 and should not affect current practices for existing corporations.

Section 54 provides an effective date of October 1, 2009, unless otherwise expressly provided in the act.

Other Potential Implications:

In the United States, the average U.S. office employee uses approximately 9,999 sheets of paper each year, totaling about 27 pounds of paper per person.³³ 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.³⁴ 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.³⁵

Additionally, modernizing the language in the for profit corporation statute to allow corporations to provide shareholders with financial statements through electronic transmission may be an incentive for some companies to move to Florida from states that still require financial statements to be mailed and are, therefore, more expensive states in which to do business.

Allowing persons 15 years of age or older to serve as a director for a corporation may give corporations a new and different perspective in their decision-making processes, which may be beneficial to those corporations. Furthermore, this bill allows corporations to encourage young people to participate in a unique civic experience, which may make them more likely to remain active in their communities.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

³³ Resource Conservation Alliance, *Paper Consumption*, available at <http://www.woodconsumption.org/products/paper.pdf> (last visited Mar. 20, 2009).

³⁴ *Id.*

³⁵ Koegel, *supra* note 9.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

Section 5 of the bill, which deletes the provision requiring agents to file a statement of resignation from “administratively dissolved” corporations to instead require agents to file a statement of registration from “inactive” corporations, broadens the scope as to when the department may charge the corresponding \$35 filing fee.

B. Private Sector Impact:

Sections 3, 4, and 19 of the bill would modernize the law to 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.

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. Otherwise, corporations may have to find a different insurance provider.

C. Government Sector Impact:

Incorporation of provisions from the Model Act should create consistency with the for profit corporation statutes (ch. 607, F.S.), providing a more streamlined process for the Department of State.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Judiciary on March 24, 2009:

The committee substitute excludes minors from directorships in corporations regulated by ch. 718, F.S. (condominium corporations), ch. 719, F.S. (cooperatives), ch. 720, F.S. (homeowners' associations), ch. 721, F.S. (vacation and timeshare plans), and ch. 723, F.S. (mobile home park lots), as well as in certain corporations in which membership is required by a recorded document.

CS by Commerce on March 10, 2009:

The committee substitute makes several technical corrections to the bill including:

- 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.
- Changing the references to “act” to “chapter.”

The committee substitute also changed the effective date of the bill to specify that the act will take effect on October 1, 2009, except as provided for elsewhere in the committee substitute. This change references a new effective date clause in the amendatory clause for Section 3 of the committee substitute, which makes this section of the committee substitute effective upon becoming law and makes this section applicable to all fiscal years ending on or after December 31, 2008. This would allow 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.

- B. **Amendments:**

None.