MEMORANDUM

FROM: Philip Schwartz
Gary Teblum

TO: Members of the Corporations, Securities and Financial Services Committee (the "Committee")

DATE: January 19, 2016

DATE: Agenda materials for January 28th meeting of the Committee

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Recently, there have been several issues actively discussed by the Chapter 607 drafting subcommittee (the "Subcommittee") as to which we have reached a point where we really feel we need input and direction from the larger group. Stefan Rubin has been kind enough to accord us time at the upcoming meeting of the Corporations, Securities and Financial Services Committee to hopefully secure such input and direction. To this end, we intend to raise the following issues regarding the proposed corporate statute at the January 28th meeting of the Committee:

Proposed indemnification provisions of the FBCA

As you probably know, over the last few months, the subcommittee has been actively working on a revised draft of the indemnification provisions of the FBCA. Indeed, at prior meetings of the Corporations, Securities and Financial Services Committee, we sought input on select aspects of these indemnification provisions. We now have what we believe to be a close to final version of the indemnification provisions. This version of the proposed indemnification provisions, draft dated December 21, 2015, is attached. Before we put these provisions to bed, we want to give the members of the Corporations, Securities and Financial Services Committee one last opportunity to provide comments on these provisions.

Section 607.0832 (Director Conflict of Interest)

At the last meeting of the Corporations, Securities and Financial Services Committee, we reviewed this proposed section of the FBCA. Following that meeting, additional clean up changes were made, and an updated version of the proposed revised Section 607.0832 is attached. We will be asking for comments at the upcoming meeting on the proposed Section 607.0832, which we believe to be in final form.

Proposed Section 8.42 (Officer duties)

Some months ago, the Subcommittee had extensive discussion about whether to include Section 8.42 (Officer duties) of the RMBCA in our proposal. At the Subcommittee level, there were mixed views. Accordingly, we are going to ask the members of the Corporations, Securities and Financial Services Committee to weigh in on this topic at the upcoming meeting. To facilitate the discussion about this issue, a document which includes the following is attached: (i) a copy of Section 8.42 and the materials that were presented to the Subcommittee with respect to Section 8.42, (ii) a copy of a summary reporting on the decision that was preliminarily made by the Subcommittee concerning this issue at the Subcommittee's May 28, 2015, (iii) a copy of Stu Ames' June 2nd e-mail to the Subcommittee on this issue, (iv) a copy of Lou Conti's June 3rd e-mail to Stu Ames and the Subcommittee on this issue, (v) a copy of the co-chairs June 3rd e-mail note to the Subcommittee members regarding this issue; (vi) a copy of the June 7th e-mail that we received from Stu Cohn about this issue; (vii) a copy of the June 22nd e-mail that we received from Stu Ames about this issue, and (viii) by way of comparison, a copy of Section 607.0830 (general standards for directors) as proposed by the Subcommittee.

Proposed subsection (e) of Section 6.01 of the RMBCA

In connection with the Subcommittee's review of Article 6 of the RMBCA, the Subcommittee is considering whether to add subsection (e) of Section 6.01 of the RMBCA (dealing with the topic of whether a Florida corporation may vary the terms of shares within the same class or series so long as such variations are expressly set forth in the corporation's articles of incorporation) to the proposed statute. Materials on this topic are attached. We will be seeking input from Committee members at the upcoming meeting on this topic.

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Please bring copies to the meeting of all of the attachments to this memorandum, since we will not have extra copies of this material at the meeting.

We look forward to seeing you at the upcoming meeting of the Committee. If you have any questions, please feel free to give us a call.

Indemnification

§ 607.0850 (Definitions)

In ss. 607.0850 through 607.0859:

(1) "Agent" includes a volunteer.

(2) "Corporation" includes, in addition to the resulting corporation, any constituent corporation (including any constituent of a constituent) absorbed in a merger, so that any person who is or was a director or officer of a constituent corporation, or is or was serving at the request of a constituent corporation as a director or officer, member, manager, partner, trustee, employee or agent of another corporation, limited liability company, partnership, joint venture, trust, or other enterprise, is in the same position under this section with respect to the resulting or surviving corporation as he or she would have been with respect to such constituent corporation if its separate existence had continued.

(3) "Director" or "officer" means an individual who is or was a director or officer, respectively, of a corporation or who, while a director or officer of the corporation, is or was serving at the corporation's request as a director or officer, manager, partner, trustee, employee or agent of another domestic or foreign corporation, limited liability company, partnership, joint venture, trust, employee benefit plan, or another enterprise or entity. A director or officer is considered to be serving an employee benefit plan at the corporation's request if the individual's duties to the corporation or such plan also impose duties on, or otherwise involve services by, the individual to the plan or to participants in or beneficiaries of the plan. "Director" or "officer" includes, unless the context requires otherwise, the estate, heirs, executors, administrators and personal representatives of a director or officer.

(4) "Expenses" includes reasonable counsel fees and expenses, including those incurred in connection with any appeal.

(5) "Liability" means the obligation to pay a judgment, settlement, penalty, fine (including an excise tax assessed with respect to an employee benefit plan), or reasonable expenses incurred with respect to a proceeding.

(6) "Party" means an individual who was, is, or is threatened to be made, a defendant or respondent in a proceeding.

(7) "Proceeding" means any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, arbitrative, or investigative and whether formal or informal.

(8) "Serving at the corporation's request" includes any service as a director, officer, employee, or agent of the corporation that imposes duties on such persons, including duties relating to an employee benefit plan and its participants or beneficiaries.

Commentary:

1. Subsection (2) is derived from the definition of corporation in s. 607.0850(10).

2. Subsections (1), (4), (5), (7) and (8) are derived from existing s. 607.0850(11).

3. The definition of "official capacity" from s. 8.50 of the RMBCA was not included in the proposal because the proposal does not include different standards for indemnification when a director is acting in an official capacity or otherwise.

4. The last sentence of subsection (3) states that "[D]irector" or "officer" includes, unless the context requires otherwise, the estate, heirs, executors, administrators and personal representatives of a director or officer. Although this adds slightly to the list of parties who receive the benefits of indemnity that are currently included in s. 607.0850(8), the changes are believed to be consistent with the intent of the current statute.

5. If a definition of "expenses" is added to s. 607.01401 (including within that definition the concept of reasonableness of such expenses), the definition of expenses in subsection (4) will not be necessary.

§ 607.0851 (Permissible Indemnification)

(1) Except as otherwise provided in this section and in s. 607.0859, and not in limitation of indemnification permitted under s. 607.0858(1), a corporation may indemnify an individual who is a party to a proceeding because the individual is or was a director or officer against liability incurred in the proceeding if:

(a) the director or officer acted in good faith; and

(b) the director or officer acted in a manner he or she reasonably believed to be in, or not opposed to, the best interests of the corporation; and

(c) in the case of any criminal proceeding, the director or officer had no reasonable cause to believe his or her conduct was unlawful.

(2) The conduct of a director or officer with respect to an employee benefit plan for a purpose the director or officer reasonably believed to be in the best interest of the participants in, and the beneficiaries of, the plan is conduct that satisfies the requirement of subsection (1)(b).

(3) The termination of a proceeding by judgment, order, settlement, or conviction, or upon a plea of nolo contendere or its equivalent, does not, of itself, create a presumption that the director or officer did not meet the relevant standard of conduct described in this section.

(4) Unless ordered by a court under s. 607.0854(1)(c), a corporation may not indemnify an officer or director in connection with a proceeding by or in the right of the corporation except for expenses and amounts paid in settlement not exceeding, in the judgment of the board of directors, the estimated expense of litigating the proceeding to conclusion, actually and reasonably incurred in connection with the defense or settlement of such proceeding, including any appeal thereof, where such person acted in good faith and in a manner he or she reasonably believed to be in, or not opposed to, the best interests of the corporation."

Commentary:

1. The RMBCA leaves indemnity of employees and agents to the laws of agency. Although the current Florida statute includes employees and agents in the applicable sections of s. 607.0850 that provide for permissible and mandatory indemnification, this proposal follows the RMBCA structure and elects to cover employees and agents under the laws of agency. Notwithstanding, this change is not believed or intended to substantively cut back on the power of a corporation to indemnify its employees or agents. Section 607.0858(6) states that nothing in s. 607.0850-607.0859 limits the power of the corporation to indemnify agents and employees.

2. Section 8.56 of the RMBCA provides for indemnification of officers. However, this proposal includes officers as covered persons directly in the applicable sections of proposed s. 607.0851, s. 607.0852 and s. 607.0853, thus eliminating the need for inclusion of a parallel of RMBCA s. 8.56.

3. Section 8.51(a)(2) of the RMBCA, dealing with indemnity beyond the statutory provisions that is included in the corporation's articles of incorporation, is not included in the proposal. Further, proposed s. 607.0202 of the proposed statute does not include the RMBCA language which would expressly authorize indemnity beyond the statutory provisions, but would require any such authorization, in order to be effective, to be set forth in the corporation's articles of incorporation.

Under this proposal, subject to the limitations contained in s. 607.0859(1), Section 607.0858(1) allows the corporation to provide any other or further indemnification or advancement of expenses beyond that permitted in the statute. However, in comparison to the corollary RMBCA provisions, this proposal, consistent with the existing Florida statute, allows this expanded indemnification to be included in the corporation's articles of incorporation, in its bylaws or in any agreement, or to be approved by a vote of shareholders or disinterested directors, or otherwise. See comment 2 to proposed s. 607.0858(1).

4. The proposal does not follow the RMBCA construct that creates a different standard of what needs to be established for indemnification of directors when they are acting in an "official capacity" compared to when they are not acting in an "official capacity." Under s. 8.51(a)(1)(ii) of the RMBCA, if a director is acting in his or her official capacity, to obtain indemnification he or she must establish that he or she reasonably believed that his or her conduct was in the best interest of the corporation, and in all other cases, to obtain indemnification, he or she must establish that he or she reasonably believed that his or her conduct was at least not opposed to the best interests of the corporation.

§ 607.0852 (Mandatory Indemnification)

A corporation shall indemnify an individual who is or was a director or officer who was wholly successful, on the merits or otherwise, in the defense of any proceeding to which the individual was a party because he or she is or was a director or officer of the corporation against expenses incurred by the individual in connection with the proceeding.

Commentary:

1. The standard for statutory mandatory indemnification under the proposed statute follows the RMBCA requirement that an officer or director must be "wholly successful" to be entitled to mandatory indemnification. This is in contrast with the "successful" standard in current s. 607.0850(3). The commentary to s. 8.52 of the RMBCA provides:

> A defendant is "wholly successful" only if the entire proceeding is disposed of on a basis which does not involve a finding of liability. A director who is precluded from mandatory indemnification by this requirement may still be entitled to permissible indemnification under section 8.51(a) [s. 607.0851(1)] or court-ordered indemnification under section 8.54(a)(3) [s. 607.0854(1)(C)].

Under the structure of the proposed statute, those corporations that desire to continue to be obligated to provide mandatory indemnification based on some other standard, such as the "successful" standard in current s. 607.0850(3), are entitled to do so by way of provisions in articles, bylaws, agreements or otherwise, consistent with the authorization in proposed new s. 607.0858, but subject to the restrictions provided for in new s. 607.0859.

2. In *Banco Industrial de Venezuela C.A., Miami Agency v. De Saad*, 68 S.3d 895 (Fla. 2011), the Florida Supreme Court, in *dicta*, grafted a good faith requirement into s. 607.0850(3) dealing with mandatory indemnification, despite the fact that no such express requirement appears to be required under the current statute in the context of mandatory indemnification. The *Banco* case appeared to base its grafting of the good faith requirement, in significant part, on the cross reference in s. 607.0850(3) to subsections (1) and (2) of s. 607.0850.

Because of the concerns about the *Banco* court's reading of the intent of the cross reference, a comparable cross reference to s. 607.0851 has not been included in the proposed s. 607.0852. The decision not to bring forward such cross reference is designed to more clearly reflect that any such cross reference was intended to merely identify the type of proceeding to which mandatory indemnification applied and not to link to the good faith requirement that applies to permissive indemnification. It is also believed that the change in the standard for mandatory indemnification from "successful" to "wholly successful" makes it unlikely that a situation such as the *Banco* case will arise in the future. However, if there were to be such a case where, for technical reasons, a defendant (who had not necessarily acted in good faith) were to have been wholly successful by virtue of some procedural grounds rather than on the merits, it is the view of the drafting subcommittee that such defendant would have a right to mandatory

indemnification, with no requirement under proposed s. 607.0853 to demonstrate good faith on the part of the defendant. As set forth in the RMBCA commentary to s. 8.52:

> While this standard may result in an occasional defendant becoming entitled to indemnification because of procedural defenses not related to the merits, *e.g.* the statute of limitations or disqualification of the plaintiff, it is unreasonable to require a defendant with a valid procedural defense to undergo a possible prolonged and expensive trial on the merits in order to establish eligibility for mandatory indemnification.

§ 607.0853 (Advance For Expenses)

(1) A corporation may, before final disposition of a proceeding, advance funds to pay for or reimburse expenses incurred in connection with the proceeding by an individual who is a party to the proceeding because that individual is or was a director or an officer if the director or officer delivers to the corporation a signed written undertaking of the director or officer to repay any funds advanced if

(a) the director or officer is not entitled to mandatory indemnification under s. 607.0852, and

(b) it is ultimately determined under s. 607.0854 or s. 607.0855 that the director has not met the relevant standard of conduct described in s. 607.0851 or the director or officer is not entitled to indemnification by virtue of s. 607.0859.

(2) The undertaking required by subsection (1)(b) must be an unlimited general obligation of the director or officer but need not be secured and may be accepted without reference to the financial ability of the director or officer to make repayment.

(3) Authorizations under this section shall be made:

(a) by the board of directors:

1. if there are two or more directors who are not parties to the proceeding at the time of authorization, by a majority vote of such directors (a majority of whom shall for such purpose constitute a quorum) or by a majority of the members of a committee appointed by such vote and comprised of two or more directors who are not parties to the proceeding at the time of authorization; or

2. if there are fewer than two directors who are not parties to the proceeding at the time of authorization, by the vote necessary for action by the board of directors under s. 607.0824(3), in which

authorization vote directors who are parties to the proceeding at the time of authorization may participate; or

(b) by the shareholders, but shares owned by or voted under the control of a director or officer who at the time of the authorization is a party to the proceeding may not be counted as a vote in favor of the authorization.

Commentary:

1. Subsection (2) is intended to mean that the undertaking may, but need not, be secured and may, but need not, be accepted without reference to the financial ability of the director or officer to make the repayment. It is up to the board of directors to decide whether these issues should or should not be considered in agreeing to advance expenses in the proper exercise of their fiduciary duties.

2. Subsection (3) expressly provides that a decision to advance expenses on behalf of a director or officer is to be made by the board of directors or the shareholders. Although the existing statute (s. 607.0850(6)) does not specifically state who makes this decision, it is believed to be implied under the current statute.

2. The provisions in RMBCA s. 8.53(c), which establish how advancement of expenses is to be determined when there are directors who are parties to the proceeding at the time of authorization, has been included in the statute to clearly reflect how this decision is to be made under different circumstances. The language on shareholder votes in subsection (3)(b) is modeled on the language in the RMBCA and not the language in current s. 607.0850(4)(d). However, the term "qualified director", which is used in the RMBCA, is not used, since that defined term was not used in the proposed revisions to the director conflict of interest provision of the FBCA (s. 607.0832).

3. RMBCA s. 8.53(a)(1) regarding advancement of expenses if the proceeding involves conduct for which liability has been eliminated under a provision of the articles of incorporation as authorized by s. 2.02 of the RMBCA has not been included. See Comment 3 to Commentary regarding s. 607.0851 above.

§ 607.0854 (Court-Ordered Indemnification and Advance for Expenses)

(1) Unless the corporation's articles of incorporation provide otherwise, notwithstanding the failure of a corporation to provide indemnification, and despite any contrary determination of the board of directors or of the shareholders in the specific case, a director or officer of the corporation who is a party to a proceeding because he or she is or was a director or officer may apply for indemnification or an advance for expenses, or both, to a court having jurisdiction over the corporation that is conducting the proceeding, or to a circuit court of competent jurisdiction. After receipt of an application and after giving any notice it considers necessary, the court may:

(a) order indemnification if the court determines that the director or officer is entitled to mandatory indemnification under s. 607.0852;

(b) order indemnification or advance for expenses if the court determines that the director or officer is entitled to indemnification or advance for expenses pursuant to a provision authorized by s. 607.0858(1); or

(c) order indemnification or advance for expenses if the court determines, in view of all the relevant circumstances, that it is fair and reasonable

1. to indemnify the director or officer, or

2. to advance expenses to the director or officer;

even if, in the case of subsection (1) and (2) above, he or she has not met the relevant standard of conduct set forth in s. 607.0851(1), failed to comply with s. 607.0853 or was adjudged liable in a proceeding referred to in s. 607.0859, but if the director or officer was adjudged so liable, indemnification shall be limited to expenses incurred in connection with the proceeding.

(2) If the court determines that the director or officer is entitled to indemnification under subsection (1)(a) or to indemnification or advance for expenses under subsection (1)(b), it shall also order the corporation to pay the director's or officer's expenses incurred in connection with obtaining court-ordered indemnification or advance for expenses. If the court determines that the director or officer is entitled to indemnification or advance for expenses under subsection (1)(c), it may also order the corporation to pay the director's or officer's expenses to obtain court-ordered indemnification or advance for expenses.

Commentary:

1. The lead in language that has been added to subsection (1) is derived from existing s. 607.0850(9). Further, language has been added to subsection (1) to make clear that the corporation must be a party to the proceeding in which indemnification is ordered (which, while not expressly stated in the existing statute, is believed to be the current rule).

2. In subsection (1), the word "shall" in RMBCA s. 8.54 was changed to "may" based on the view that such action is within the discretion of the court.

3. Subsection (2) is consistent with existing s. 607.0850(9).

§ 607.0855 (Determination and Authorization of Indemnification)

(1) Unless ordered by a court under s. 607.0854(1)(c), a corporation may not indemnify a director or officer under s. 607.0851 unless authorized for a specific proceeding

after a determination has been made that indemnification is permissible because the director or officer has met the relevant standard of conduct set forth in s. 607.0851.

(2) The determination shall be made:

(a) If there are two or more directors who are not parties to such proceeding at the time of the determination, by the board of directors by a majority vote of the directors who were not parties to such proceeding at the time of the determination (a majority of whom shall for such purposes constitute a quorum), or by a majority of the members of a committee of two or more directors who were not parties to such proceeding at the time of the determination appointed by such a vote; or

(b) by independent special legal counsel:

1. Selected in the manner prescribed in paragraph (a); or

2. If there are fewer than two directors who are not parties to such proceeding at the time of the determination, selected by the board of directors (in which selection directors who are parties to the proceeding at the time of the determination may participate); or

(c) by the shareholders, but shares owned by or voted under the control of a director who, at the time of the determination, is a party to the proceeding may not be counted as votes in favor of the determination.

(3) Authorization of indemnification shall be made in the same manner as the determination that indemnification is permissible, except that if the determination of permissibility has been made by independent special legal counsel under subsection (2)(b), any authorization of indemnification associated with such determination shall be made by either such independent special legal counsel or by those who otherwise would be entitled to select independent special legal counsel under subsection (2)(b).

Commentary:

This section combines the substance and the wording of RMBCA s. 8.55 with the existing language contained in s. 607.0850(4) and (5) of the FBCA. Further, while the "qualified director" definition contained in this section of the RMBCA is not used in this proposal (since it was not otherwise used in other sections of the proposed statute where such definition was included in the corollary RMBCA provisions), the requirement in the proposal that the vote for a determination and authorization of indemnification will be based on "directors who are not parties to the proceeding at the time of the determination" is believed to be substantively the same as using the concept of "qualified directors."

RMBCA § 8.56 (Indemnification of Officers)

This section of the RMBCA has not been included in the proposal since officers remain in the scope of coverage under ss. 607.0851, 607.0852 and 607.0853. See comment 2 to proposed s. 607.0851.

§ 607.0857 (Insurance)

A corporation shall have the power to purchase and maintain insurance on behalf of and for the benefit of an individual who is or was a director or officer of the corporation, or who, while a director or officer of the corporation, is or was serving at the corporation's request as a director, officer, manager, member, partner, trustee, employee, or agent of another domestic or foreign corporation, limited liability company, partnership, joint venture, trust, employee benefit plan, or other enterprise or entity, against liability asserted against or incurred by the individual in that capacity or arising from his or her status as a director or officer, whether or not the corporation would have power to indemnify or advance expenses to the individual against the same liability under this chapter.

Commentary:

The language contained in existing s. 607.0850(12) has been largely followed in this proposed s. 607.0857. Minor changes have been made to add limited liability companies to the types of entities to which a director or officer can be serving at the corporation's request and to eliminate employees and agents from the coverage of this provision (with respect to this second issue, see Comment 1 to proposed s. 607.0851).

§ 607.0858 (Variation by Corporate Action; Application of Subchapter)

(1) The indemnification provided pursuant to s. 607.0851 and 607.0852 and the advancement of expenses provided pursuant to s. 607.0853 are not exclusive, and a corporation may, by a provision in its articles of incorporation, bylaws or any agreement, or by vote of shareholders or disinterested directors, or otherwise**,** obligate itself in advance of the act or omission giving rise to a proceeding to provide any other or further indemnification or advancement of expenses to any of its directors or officers. Any such obligatory provision shall be deemed to satisfy the requirements for authorization referred to in s. 607.0853(3) and in s. 607.0855(3). Any such provision that obligates the corporation to provide indemnification to the fullest extent permitted by law shall be deemed to obligate the corporation to advance funds to pay for or reimburse expenses in accordance with s. 607.0853 to the fullest extent permitted by law, unless the provision specifically provides otherwise.

(2) A right of indemnification or to advance for expenses created by this chapter or under subsection (1) and in effect at the time of an act or omission shall not be eliminated or impaired with respect to such act or omission by an amendment of the articles of incorporation or bylaws or a resolution of the directors or shareholders, adopted after the occurrence of such act or omission, unless, in the case of a right created under subsection (1), the provision creating such right and in effect at the time of such act or omission explicitly authorizes such elimination or impairment after such act or omission has occurred.

(3) Any provision pursuant to subsection (1) shall not obligate the corporation to indemnify or advance for expenses to a director or officer of a predecessor of the corporation, pertaining to conduct with respect to the predecessor, unless otherwise specifically provided. Any provision for indemnification or advance for expenses in the articles of incorporation, bylaws, or a resolution of the board of directors or shareholders of a predecessor of the corporation in a merger or in a contract to which the predecessor is a party, existing at the time the merger takes effect, shall be governed by s. 607.1107(1)(d).

(4) Subject to subsection (2), a corporation may, by a provision in its articles of incorporation, limit any of the rights to indemnification or advance for expenses created by or pursuant to this chapter.

(5) Sections 607.0850-607.0859 do not limit a corporation's power to pay or reimburse expenses incurred by a director, an officer, an employee or an agent in connection with appearing as a witness in a proceeding at a time when he or she is not a party.

(6) Sections 607.0850-607.0859 do not limit a corporation's power to indemnify, advance expenses to or provide or maintain insurance on behalf of or for the benefit of an individual who is or was an employee or agent.

Commentary

1. This proposal follows the construct of s. 8.57(f) of the RMBCA and leaves the issue of indemnification of employees and agents to the laws of agency and related principles. See comment 1 to proposed s. 607.0851.

2. The existing wording of s. 607.0850(7), which sets forth how a corporation may obligate itself to provide indemnification beyond the provisions contained in s. 607.0851-607.0853 has been retained in proposed s. 607.0858(1), rather than following the more limited corollary provision contained in the RMBCA. However, even under this subsection, as in the current FBCA provision, indemnification cannot be provided under the circumstances described in proposed s. 607.0859.

3. The elimination of the wording from existing s. 607.0850, which references both acting in an official capacity or acting in any other capacity, is not intended in any way to limit the ability of a corporation to vary or expand indemnification. The broad language contained in this proposal in subsection (1) is intended to operate as broadly as the language in existing s. 607.0850, thus allowing a corporation to indemnify and to advance expenses for an action taken by a director or officer, in whatever capacity (whether official or otherwise). No substantive change from the broad authorization provided in the existing statute is intended.

§ 607.0859 (Overriding Restrictions on Indemnification)

(1) Unless ordered by a court under s. 607.0854(1)(c), a corporation may not indemnify a director or officer under s. 607.0851 or s. 607.0858 or advance expenses to a director or officer under s. 607.0853 or s. 607.0858 if a judgment or other final adjudication establishes that his or her actions, or omissions to act, were material to the cause of action so adjudicated and constitute:

(a) Willful or intentional misconduct or a conscious disregard for the best interests of the corporation in a proceeding by or in the right of the corporation to procure a judgment in its favor or in a proceeding by or in the right of a shareholder; or

(b) A transaction in which a director or officer derived an improper personal benefit; or

(c) A violation of the criminal law, unless the director or officer had reasonable cause to believe his or her conduct was lawful or had no reasonable cause to believe his or her conduct was unlawful; or

(d) In the case of a director, a circumstance under which the liability provisions of s. 607.0834 are applicable.

(2) A corporation may provide indemnification or advance expenses to a director or an officer only as permitted by ss. 607.0850 - 607.0859.

Commentary:

1. The limits of permitted indemnification are contained in subsection (1). They are derived from existing s. 607.0850(7).

2. In conformity with s. 8.59 of the RMBCA, ss. 607.0850-607.8059 are expressly stated to be the exclusive source for the power of a corporation to indemnify or advance expenses to a director or officer. While this exclusivity was not expressly stated in the current statute, this is not believed to be a substantive change.

3. General comment: When the indemnification sections of the FBCA are completed, we will need to make sure that the proposed indemnity provisions as drafted work with other Florida statutes (such as Chapter 617 dealing with not-for-profit corporations and statutes dealing with condo associations and cooperatives) that incorporate by reference the existing corporate indemnity provision into their statute.

4. General comment – Need to make a global search for "willful" and replace that word in the proposed statute with "willful or intentional" following the terminology used in Chapter 605.

5. General comment – To avoid challenges presented by existing articles and bylaws, new Chapter 607 should have a delayed effective date, similar to the approach taken in 1989/1990 when the FBCA was adopted and to the approach taken in 2013 when FRLLCA (Chapter 605) was adopted.

607.0832 Director conflicts of interest.

(1) As used in this section, the following terms and definitions apply:

(a) A director is “indirectly” a party to a transaction if that director has a material financial interest in or is a director, officer, member, manager, or partner of a person, other than the corporation, who is a party to the transaction.

(b) A director has an “indirect material financial interest” if a family member has a material financial interest in the transaction, other than having an indirect interest as a shareholder of the corporation, or if the transaction is with an entity, other than the corporation, which has a material financial interest in the transaction and controls, or is controlled by, the director or another person specified in this subsection.

(c) “Director’s conflict of interest transaction” means a transaction between a corporation and one or more of its directors, or another entity in which one or more of the corporation’s directors is directly or indirectly a party to the transaction, other than being an indirect party as a result of being a shareholder of the corporation, and has a direct or indirect material financial interest or other material interest.

(d) “Fair to the corporation” means that the transaction, as a whole, is beneficial to the corporation and its shareholders, taking into appropriate account whether it is:

1. Fair in terms of the director’s dealings with the corporation in connection with that transaction; and

2. Comparable to what might have been obtainable in an arm’s length transaction.

(e) “Family member” includes (i) the director’s spouse, or (ii) a child, stepchild, parent, step parent, grandparent, sibling, step sibling or half sibling of the director or the director’s spouse.

(f) “Material financial interest” means a financial interest in the transaction that would reasonably be expected to impair the objectivity of the director's judgment when participating in the action on the authorization of the transaction.

(2) If a director’s conflict of interest transaction is fair to the corporation at the time it is authorized, approved, effectuated, or ratified:

(a) such transaction is not void or voidable; and

(b) the fact that the transaction is a director’s conflict of interest transaction is not grounds for any equitable relief, an award of damages or other sanctions,

because of that relationship or interest, because such director or directors are present at the meeting of the board of directors or a committee thereof which authorizes, approves, or ratifies such transaction, or because his or her or their votes are counted for such purpose.

(3)(a) In a proceeding challenging the validity of a director's conflict of interest transaction or seeking equitable relief, award of damages or other sanctions with respect to a director's conflict of interest transaction, the person challenging the validity or seeking equitable relief, award of damages or other sanctions has the burden of proving the lack of fairness of the transaction if:

1. The material facts of the transaction and the director's interest in the transaction were disclosed or known to the board of directors or committee which authorizes, approves, or ratifies the transaction and the transaction was authorized, approved or ratified by a vote of a majority of the disinterested directors even if the disinterested directors constitute less than a quorum of the board or the committee; however, the transaction cannot be authorized, approved, or ratified under this subsection solely by a single director; or

2. The material facts of the transaction and the director's interest in the transaction were disclosed or known to the shareholders who voted upon such transaction and the transaction was authorized, approved, or ratified by a majority of the votes cast by disinterested shareholders or by the written consent of disinterested shareholders representing a majority of the votes that could be cast by all disinterested shareholders. Shares owned by or voted under the control of a director who has a relationship or interest in the director's conflict of interest transaction shall not be considered shares owned by a disinterested shareholder and thus may not be counted in a vote of shareholders to determine whether to authorize, approve, or ratify a director's conflict of interest transaction under this subsection (3)(a)2. The vote of those shares, however, is counted in determining whether the transaction is approved under other sections of this act. A majority of the shares, whether or not present, that are entitled to be counted in a vote on the transaction under this subsection constitutes a quorum for the purpose of taking action under this section.

(b) If neither of the conditions provided in paragraph (a) has been satisfied, the person defending or asserting the validity of a director's conflicting interest transaction has the burden of proving its fairness in a proceeding challenging the validity of the transaction.

(4) The presence of or a vote cast by a director with an interest in the transaction does not affect the validity of an action taken under paragraph (3)(a) if the transaction is otherwise authorized, approved, or ratified as provided in subsection (3), but the presence or vote of the director may be counted for purposes of determining whether the transaction is approved under other sections of this act.

(5) In addition to other grounds for challenge, a party challenging the validity of the transaction is not precluded from asserting and proving that a particular director or shareholder was not disinterested on grounds of financial or other interest for purposes of the vote on, consent to, or approval of the transaction.

(6) Where directors' action under this section does not otherwise satisfy a quorum or voting requirement applicable to the authorization of the transaction by directors as required by the articles of incorporation, the bylaws, this act or any other provision of law, an action to satisfy those authorization requirements, whether as part of the same action or by way of another action, must be taken by the board of directors or a committee in order to authorize the

transaction. In such action, the vote or consent of directors who are not disinterested may be counted.

(7) Where shareholders' action under this section does not satisfy a quorum or voting requirement applicable to the authorization of the transaction by shareholders as required by the articles of incorporation, the bylaws, this act or any other provision of law, an action to satisfy those authorization requirements, whether as part of the same action or by way of another action, must be taken by the shareholders in order to authorize the transaction. In such action, the vote or consent of shareholders who are not disinterested shareholders may be counted.

MATERIALS ON SECTION 8.42 FOR CONSIDERATION

RMBCA Section 8.42 – Standards of Conduct for Officers

This section, which first became part of the RMBCA in 1984 and was amended in 1999 and again in 2005, relates to standards of conduct for officers and largely parallels Section 607.0830 of the Florida statutes and Section 8.30 of the RMBCA related to standards of conduct for directors. This section was intentionally not included in Florida's 1989 corporate statute. Commentary to Chapter 607 adopted at the time that the FBCA was enacted explained the rationale for the omission as follows:

> "Currently, Florida does not have a statute dictating standards of conduct for officers. These standards are currently imposed under common law and general contract law. Although Georgia has recently adopted a statute that is similar to RMBCA Section 8.42, the Committee believes there is no need to adopt a similar statute at this time".

As of today, 28 of the 34 model act jurisdictions, including Georgia, Massachusetts, North Carolina, Oregon, Pennsylvania, Washington DC, and Washington State, have adopted either the 1984 or updated versions of this RMBCA provision. As this section has been adopted by the vast majority of model act jurisdictions, it should be considered anew by this Subcommittee. What follows is the current version of the s. 8.42 of the RMBCA; however, it should be noted that, if the Subcommittee determines that it is in the state's best interest to add this section to the FBCA, the changes previously proposed to be made to Section 607.0830 should probably be mirrored into this section. A proposed draft of s. 607.0830 as previously adopted by the subcommittee is at the end of this memorandum.

Section 8.42 of the RMBCA

§8.42 STANDARDS OF CONDUCT FOR OFFICERS

(a) An officer, when performing in such capacity, has the duty to act:

(1) in good faith;

(2) with the care that a person in a like position would reasonably exercise under similar circumstances; and

(3) in a manner the officer reasonably believes to be in the best interests of the corporation.

(b) The duty of an officer includes the obligation:

(1) to inform the superior officer to whom, or the board of directors or the committee to which, the officer reports of information about the affairs of the corporation known to the officer, within the scope of the officer's functions, and known to the officer to be material to such superior officer, board or committee; and

(2) to inform his or her superior officer, or another appropriate person within the corporation, or the board of directors, or a committee thereof, of any actual or probable material violation of law involving the corporation or material breach of duty to the corporation by an officer, employee, or agent of the corporation, that the officer believes has occurred or is likely to occur.

(c) In discharging his or her duties, an officer who does not have knowledge that makes reliance unwarranted is entitled to rely on:

(1) The performance of properly delegated responsibilities by one or more employees of the corporation whom the officer reasonable believes to be reliable and competent in performing the responsibilities delegated; or

(2) Information, opinions, reports or statements, including financial statements and other financial data, prepared or presented by one or more employees of the corporation whom the officer reasonably believes to be reliable and competent in the matters presented or by legal counsel, public accountants, or other persons retained by the corporation as to matters involving skills or expertise the officer reasonably believes are matters (i) within the particular person's professional or expert competence or (ii) as to which the particular person merits confidence.

(d) An officer shall not be liable to the corporation or its shareholders for any decision to take or not to take action, or any failure to take any action, as an officer, if the duties of the office are performed in compliance with this section. Whether an officer who does not comply with this section shall have liability will depend in such instance on applicable law, including those principles of section 8.31 that have relevance.

Discussion of s. 8.42 from summary of 5/28/15 subcommittee meeting

Section 8.42 of the RMBCA (Standards for conduct of officers)

The subcommittee members in attendance at the meeting discussed whether to add RMBCA s. 8.42 to the FBCA. RMBCA s. 8.42 has been in the RMBCA since 1984 and was amended in 1999 and 2005. It contains proscribed standards of conduct for officers and largely parallels s. 607.0831 of the Florida statutes and s. 8.31 of the RMBCA, which proscribe standards of conduct for directors. This section was intentionally not included in Florida's 1989 corporate statute. The commentary to the 1989 statute explained the rationale for the omission as follows:

> Currently, Florida does not have a statute dictating standards of conduct for officers. These standards are currently imposed under common law and general contract law. Although Georgia has recently adopted a statute that is similar to RMBCA Section 8.42, the Committee believes there is no need to adopt a similar statute at this time.

It was noted, however, that 28 of the 34 model act jurisdictions have adopted either the 1984 or updated versions of this RMBCA provision.

The subcommittee members in attendance at the meeting discussed whether to add RMBCA s. 8.42 to the FBCA at this time. Following such discussion, it was the consensus of those participating in the meeting not to add this section to the FBCA, based on the continued belief that common law already covers the duties of officers and that it is not necessary to proscribe standards for conduct of officers, particularly given that there does not appear to be confusion in the law about the duties of officers.

Notwithstanding, the subcommittee decided that before a final decision is made, the co-chairs will discuss this issue with Stu Ames (the Florida representative on the Corporations Laws Committee of the ABA Business Law Section) to see if he has any different and strongly held thoughts on whether this section should be added to the FBCA.

Stu Ames' e-mail to subcommittee on June 2, 2015 at 6:01 PM

All:

I regret that I was unable to join your discussion last week, particularly with respect to the point on which Phil has solicited my views – namely, §607.0842 (Standards of conduct of officers).

I wish my memory was sharp enough, which it isn't, to recall why, in 1988-89, the 607 drafting committee decided not to adopt the 1984 MBCA counterpart of §607.0842 and, instead, decided to rely on common law rules of agency. I gather the four other members of our current committee who were also on the original committee do not have a better recollection (which may have something to do with our advanced age ☺).

We should keep in mind that the version of the MBCA we are looking at now is quite a bit more robust than the 1984 version that our original committee considered but did not recommend. Moreover, the Official Comment to the 1984 MBCA predecessor to §8.42 was a short paragraph, which simply likened the standard of conduct applicable to officers to the standard applicable to directors under §8.30. As you know, the current Official Comment is very lengthy and quite detailed, which I believe is a result of an excellent article (copy attached) in The Business Lawyer, 48 Bus. Law. 215 (1992), "Common Law Duties of Non-Director Corporate Officers" by Gil Sparks and Larry Hamermesh (Gil is a recent past Chair of Corporate Laws Committee, and Larry currently serves on the CLC as the Reporter for the MBCA Annotated). Although the entire MBCA is continuously reviewed by various task forces of the CLC, the CLC has not shown any inclination to amend either §8.42 or its Official Comment.

My view has changed over the last 25 years. Having sat on the CLC for the last nine years and observed first-hand how much hard work, thought and debate goes into amending provisions of the MBCA, by some of best corporate lawyers in the country (I don't count myself among them), I believe we in Florida should have a very good reason not to follow that Committee's lead when considering amendments to the FBCA. I admit to some degree of bias in that regard.

It seems to me that a statute should provide clear guidance to its audience (i.e., we as counselors to corporate officers and directors) with as little as possible left to interpretation. I believe that the current version of §8.42 and its Official Comment do that, and do it well, particularly the implicit adoption of the BJR as applicable to corporate officers. §607.0842 does not.

I also think that the more specific guidance provided by §8.42 could be helpful in determining an officer's entitlement to indemnification and in providing offensive and defensive arguments when an officer is named as a defendant in litigation (derivative or otherwise). Other aspects of §8.42 that I like are the specific requirements for "up the line" reporting and transparency, and very specific (and corporate structure-related) definitions of reasonable "reliance", something that I am not sure would a part of traditional agency rules.

Delaware does not have a counterpart to §8.42. And, as we all know, Florida follows Delaware case law where our respective statutes are similar or where our statute does not provide an answer and Delaware's case law does. But the fact that Delaware has not chosen to include a provision like §8.42 (or any other MBCA provision for that matter) should not be taken as an indication that it is not worthwhile. The Delaware Bar derives a significant part of its corporate business because it has a terrific judiciary (the Chancery Court) which is well-versed in corporate law. I know from speaking to prominent Delaware lawyers that they are very reluctant to change the DGCL. Sparks and Hamermesh (who are among the best corporate lawyers in Delaware and very involved in the GCL legislative process) in their article speak highly of the MBCA provision we are discussing.

I hope my thoughts are of some assistance. Best regards, Stu

Stuart D. Ames

Lou Conti's e-mail to Stu Ames and subcommittee on June 3, 2015 at 9:32 AM

Stu,

Thank you for your comments, which are indeed Insightful and constructive in considering the duties applicable to corporate officers.

I have not had time to recently examine Florida case law on corporate officers duties, but I am not aware of any recent opinions which created any controversy. We have relied, without obvious adverse consequences, on common law agency fiduciary duties for officers; however, I believe perhaps it is time to change.

The statutory construct is helpful for practitioners and the courts. I like the RMBCA provisions and believe they reflect a consensus which seeks to stay in harmony with common law, and which are an improvement over leaving it to the courts to get it right.

However, I would appreciate hearing from other members of the drafting committee who have contrary views, particularly if they believe there are any significant adverse consequences which might arise from the RMBCA statutory framing of duties for officers.

Co-Chairs note to subcommittee members about s. 8.42 in e-mail transmitted on June 3, 2015 at 4:09 PM

Finally, at the last meeting of the subcommittee, a decision was made by those participating in the meeting not to include s. 8.42 of the RMBCA (Standards of conduct of officers) in the subcommittee's proposal. Following our circulation of the summary of the matters discussed and decisions made at that

meeting, we received thoughtful comments on this subject from Stu Ames and Lou Conti (who were not in attendance at the last meeting) suggesting reasons why they believe this RMBCA section should be included in our draft (as more particularly set forth in their respective e-mails that you all received). In light of the questions raised by Stu and Lou, we intend to put back on the table for further discussion the question of whether or not to include s. 8.42 in our proposal (and if we decide to include this RMBCA provision in our proposal, whether we should adopt it in the RMBCA form or make changes to the RMBCA provision). Because of scheduling and our desire to focus our attention at the upcoming meeting on the indemnification provisions to be included in the proposal, we will not take this issue up at next week's meeting. However, we intend to put this issue on the agenda for a future meeting of the subcommittee.

Stu Cohn's e-mail to Phil Schwartz on Sunday, June 7 at 1:57 PM about this issue

Phil,

I am sorry that I am so far out of it, although I have no regrets visiting family and finally enjoying a true vacation.

I have my doubts as to the advisability of setting forth officer duties. Spelling out officer duties may be unnecessary and could lead to issues that are better left to executive decision-making and agency law. As agents officers are subject to the full panoply of agency duties, including fiduciary duties and other obligations that arise under agency law. Moreover, to the extent that officer obligations are spelled out it might be more difficult for boards or senior officers to discharge officers who could argue that they have satisfied the statutory mandates and therefore have been improperly treated. Detailing director duties makes sense because there is no higher check on directors. The same is not true for officers, who are under the direction and control of the board and senior officers.

But, I also have no strong feelings on this issue and as I noted before, I have full confidence in whatever direction the group decides.

Stu

E-Mail from Stu Ames to Phil Schwartz and Gary Teblum on June 22, 2015 about this issue

Phil and Gary:

At the Corporate Laws Committee meeting this past weekend, I spoke to a couple of the members who were involved in drafting 8.42 many years ago (prior to 1984) and asked them why the Committee thought it necessary to include that section. The best answer they could give me was that the Committee wanted to include a roadmap for courts as to the duties of officers, rather than rely on common law principles of agents' duties.

Regards, Stu

Proposed s. 607.0830 (General standards for directors)

607.0830 General standards for directors.—

(1) Each member of the board of directors, when discharging the duties of a director, including in discharging his or her duties as a member of a committee, shall act: ~~A director shall discharge his or her duties as a director, including his or her duties as a member of a committee:~~

(a) In good faith;

(b) ~~With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and~~

~~(c)~~ In a manner he or she reasonably believes to be in the best interests of the corporation.

(2) The members of the board of directors or a committee of the board, when becoming informed in connection with their decision-making function or devoting attention to their oversight function, shall discharge their duties with the care that a person in a like position would reasonably believe appropriate under similar circumstances. ~~In discharging his or her duties, a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:~~

~~(a) One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;~~

~~(b) Legal counsel, public accountants, or other persons as to matters the director reasonably believes are within the persons' professional or expert competence; or~~

~~(c) A committee of the board of directors of which he or she is not a member if the director reasonably believes the committee merits confidence.~~

(3) In discharging board or committee duties a director who does not have knowledge that makes reliance unwarranted is entitled to rely on the performance by any of the persons specified in subsection (5)(a) or subsection (5)(b) to whom the board may have delegated, formally or informally by course of conduct, the authority or duty to perform one or more of the board's functions that are delegable under applicable law.

(4) In discharging board or committee duties a director who does not have knowledge that makes reliance unwarranted is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, prepared or presented by any of the persons specified in subsection (5).

(5) A director is entitled to rely, in accordance with subsection (3) or (4), on:

(a) one or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the functions performed or the information, opinions, reports or statements provided;

(b) legal counsel, public accountants, or other persons retained by the corporation or by a committee of the board of the corporation as to matters involving skills or expertise the director reasonably believes are matters (i) within the particular person's professional or expert competence or (ii) as to which the particular person merits confidence; or

(c) a committee of the board of directors of which the director is not a member if the director reasonably believes the committee merits confidence.

(~~3~~6) In discharging his or her duties, a director may consider such factors as the director deems relevant, including the long-term prospects and interests of the corporation and its shareholders, and the social, economic, legal, or other effects of any action on the employees, suppliers, customers of the corporation or its subsidiaries, the communities and society in which the corporation or its subsidiaries operate, and the economy of the state and the nation.

~~(4) A director is not acting in good faith if he or she has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (2) unwarranted.~~

(~~5~~7) A director is not liable for any action taken as a director, or any failure to take any action, if he or she performed the duties of his or her office in compliance with this section.

Subsection 6.01(e) of the RMBCA

The Subcommittee is currently considering whether to add subsection (e) of Section 6.01 of the RMBCA to the FBCA. Subsection (e) reads as follows:

> "(e) Any of the terms of shares may vary among holders of the same class or series so long as such variations are expressly set forth in the articles of incorporation."

In contrast, the current Florida statute, in Section 607.0602, provides, with respect to this issue, that:

> "(4) All shares of a series must have preferences, limitations, and relative rights identical with those of other shares of the same series and, except to the extent otherwise provided in the description of the series, of those of other series of the same class."

This provision, from the existing Florida statute, is not in the corollary section of the RMBCA, although it appears that this provision may well have been in an earlier version of the RMBCA. As a result of this provision in the existing Florida statute, it would appear that current Florida law requires each share in a class to have the same rights, preferences and limitations, unless the class has been divided into series, in which case, each share issued within a particular series must have the same rights, preferences and limitations.

Subsection (e) was added to Section 6.01 of the RMBCA in 2003 to allow for variance of the terms of shares within the same class or series so long as such variations are expressly set forth in the articles of incorporation. The commentary in the RMBCA with respect to this subsection provides as follows:

> **F. VARIATION AMONG HOLDERS**
>
> Section 6.01(e) permits the creation of classes of shares or series with terms that may vary among holders of the same class or series of shares so long as such variations are expressly set forth in the articles of incorporation. An example of the authority to vary terms among holders would be a provision that shares held by a bank or bank holding company in excess of a certain percentage would not have voting rights.

Thus far, only 7 jurisdictions (including Maryland and Connecticut) have adopted this subsection or a similar subsection.

While Florida currently allows limited variation in the terms of shares of the same class or series under Section 607.0624 with respect to rights, options and warrants, the right to vary does not appear to apply to shares themselves within a class or series.

This provision was discussed extensively at the January 7, 2016 meeting of the Subcommittee. While the initial decision was made not to include this provision in the proposed statute, it was agreed that the issue would be taken up for further discussion at the upcoming meeting of the Corporations, Securities and Financial Services Committee.