Summary of Recently Adopted Changes to the Florida Business Corporation Act (Chapter 607, Florida Statutes) and Harmonizing Changes to Other Florida Entity Statutes (Part II.B.)

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This is the fourth and final of four articles that are being posted on the webpage of the Chapter 607 Drafting Subcommittee, which is contained on the website (www.flabizlaw.org) of The Florida Bar Business Law Section ("Section"). The four articles comprehensively address many of the key substantive changes made to the Florida Business Corporation Act (Chapter 607 or FBCA) and to certain other Florida entity statutes in Chapter 2019-90, Florida Statutes (the revised act). This article, along with the third article, identified as Part II.A., which is simultaneously being posted on the Drafting Subcommittee's webpage, covers more extensively the sections of the revised act that are discussed in a more summary fashion in an article being published by the authors in the January/February 2020 edition of the Florida Bar Journal.

Previously, two articles were posted on the Drafting Subcommittee's webpage covering changes made in the revised act to Article 1 through Article 8 of the FBCA. These two articles covered in detail the sections of the revised act that were discussed in a more summary fashion in an article published by the authors in the November/December 2019 edition of the Florida Bar Journal.

This fourth article addresses changes made in the revised act to Article 11 (mergers, share exchanges, domestications, and conversions), Article 12 (sales of assets), and Article 13 (appraisal rights) of the FBCA. Specifically, it addresses provisions dealing with (i) approving and effectuating mergers, share exchanges, domestications, and conversions, (ii) short form mergers, (iii) mop-up mergers and mop-up share exchanges following tender offers, (iv) sales of all or substantially all of the assets of a Florida corporation, and (v) appraisal rights.

Overview.

The revised act (designated CS/CS/HB 1009) was unanimously approved by the Florida House of Representatives on April 25, 2019 and by the Florida Senate on April 30, 2019, and Governor DeSantis signed the revised act into law on June 7, 2019. The bill as adopted has been designated as Chapter 2019-90, Florida Statutes. The revised act makes significant changes to existing law, and in an effort to have given users of the FBCA the opportunity to become

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familiar with the changes before they become effective, and hopefully to create new compliant forms and other documents, the effectiveness of the revised act was delayed until January 1, 2020.

This revised act uses the term "chapter" to refer to Chapter 607, Parts I, II and III, and eliminates the use of the term "act." It also uses its defined terms in lower case consistent with the approach taken by existing Chapter 607 and by the Florida Revised Limited Liability Company Act (Chapter 605).

As part of its work, the Drafting Subcommittee has written an extensive commentary which describes each of the changes made in the revised act and from where they were derived. A full version of Chapter 607, annotated with the changes made in the revised act and accompanied by the commentary, is available for download on the Drafting Subcommittee's webpage.

In the course of a focused study of the final version of the revised act, as adopted, a number of glitches in the revised act were discovered (including typographical errors, incorrect wording and lack of parallel wording). Although these glitches are not believed to be substantive, efforts are currently underway to address the cleanup of these glitches, and a glitch bill is expected to be presented to the Florida legislature for consideration during the 2020 legislative session.

Reference is made to (i) the first two articles previously posted on the Section's website for an overview of the revised act and for specific information about the changes that were made by the revised act to Article 1 through Article 8 of the FBCA, and (ii) a third article that is being posted on the Section's website simultaneously with this article for specific information about the changes that were made by the revised act to Article 9, Article 10, and Articles 14 through 16 of the FBCA.

The following sets forth important changes to the FBCA made to Article 11, Article 12, and Article 13 of the FBCA in the revised act. The discussions below are grouped together by Article of Chapter 607. References to sections are to sections of the Florida Statutes.

Article 11 – Mergers, Share Exchanges, Domestications and Conversions

General overview. In the Revised Model Business Corporation Act (the "Model Act"), mergers and share exchanges are addressed in Article 11 and domestications and conversions are addressed in Article 9. The FBCA as in effect prior to the revised act included mergers, share exchanges, and conversions in Article 11 (existing §§607.1101-607.11101) and included domestications in a standalone provision (§607.1801). Because Article 9 of the FBCA already contained two non-Model Act anti-takeover provisions, the revised act continues to include mergers, share exchanges, and conversions in Article 11 and brings domestications (on an expanded basis) into Article 11.

The structure of these merger, share exchange, domestication and conversion provisions are significantly changed from the existing FBCA provisions. New Part A of Article 11 of the revised FBCA now contains the merger and share exchange provisions (§§607.1101-607.1107), new Part B of Article 11 of the revised FBCA now contains the domestication provisions (§§607.607.11920-607.11924), and new Part C of the revised FBCA now contains the conversion provisions (§§607.11930-607.11935).

The merger and share exchange provisions in the revised act are largely derived from Article 11 of the Model Act, while the new domestication and conversion provisions are largely derived from Article 9 of the Model Act. The numbering of sections in revised Article 11 is intended to keep each part separated, in a format similar to the corollary provisions in Article 10 of the Florida Revised Limited Liability Company Act ("FRLLCA") dealing with the same topics. Further, the numbering of sections in Parts B and C of new Article 11 relating to domestications and conversions is intended to make it easy to cross-reference to the corollary sections in Article 9 of the Model Act.

Although much of the prior law's general process for effectuating a merger, share exchange, domestication, or conversion has been incorporated into the revised act, because the structure and organization of the provisions concerning these organic transactions have changed significantly, practitioners would be well advised to study the provisions of Article 11 of the revised act very carefully. Practitioners also should fine tune the operative documents they use in effectuating such transactions to confirm to the revised act. This would include agreements and plans of merger, agreements and plans of share exchange, articles of merger, articles of share exchange, plans of domestication, plans of conversion, articles of conversion, articles of domestication, written consents and authorizing resolutions), including making sure that the statutory references in these documents are correct.

Both Article 9 and Article 11 of the Model Act include a definitional section applicable to such Article. However, in the revised act, most of the required definitions have instead been included in §607.01401, which is the general definitions section of the FBCA.

Overview – merger. Major changes have been made to §607.1101 in the revised act to bring this section into conformity with the current corollary section of the Model Act (§11.02). In the FBCA that was in effect prior to the revised act, provisions addressing the merger of a domestic corporation with another domestic corporation were covered by §§607.1101-607.1107 and cross-jurisdictional mergers with foreign corporations and other business entities were reflected in §§607.1107-607.11101. In restructuring the merger provisions of the FBCA to match the structure of the Model Act, the revised act moves all of these types of different merger transactions into §607.1101.

In §607.1101 of the revised act, the requirements of the plan of merger are expanded (i) to make clear that not only can the terms of a merger effectuate a conversion of shares of the

corporation, but can also effectuate a conversion of rights to acquire shares of the corporation and (ii) to list out the various broad list of types of property (in addition to shares) into which shares and the rights to acquire shares can be converted by virtue of the merger.

Article 11 of the revised act uses the term "eligible entity" (largely as such term is defined in FRLLCA) to describe the types of entities that can be a party to a merger with a domestic corporation. This harmonizes the types of entities that can participate in a merger with a domestic corporation with the types of entities that can participate in a merger with a domestic limited liability company. Eligible entities are defined broadly in §607.01401(28) to include domestic and foreign corporations, not-for-profit corporations, general partnerships (including limited liability partnerships), limited partnerships (including limited liability limited partnerships), limited liability companies, real estate investment trusts and any other foreign or domestic entities that are organized under an organic law (the laws of a jurisdiction where the entity was formed).

In the revised act, subsection (6) has been added to §607.1101 to cover the topic of making amendments to a plan of merger. This topic was previously covered in §607.1103(8) of the existing FBCA.

The revised act includes subsection (7) in revised §607.1101. This subsection deals with the redomestication of a foreign insurer to the state of Florida under §628.520 and was previously in §607.1103(8) of the existing FBCA. This is a non-Model Act provision.

Overview – share exchange. Major changes have been made to §607.1102 in the revised act relative to share exchanges. The changes are largely in parallel with the changes made for mergers in §607.1101 and bring this section into line with the current corollary section of the Model Act (§11.03).

In §607.1102 of the revised act, the requirements of the plan of share exchange are expanded (i) to make it clear that not only can the terms of a share exchange effectuate a conversion of shares of the corporation, but can also effectuate a conversion of rights to acquire shares of the corporation, and (ii) to list out the various broad list of types of property (in addition to shares) into which shares and rights to acquire shares can be converted by virtue of the share exchange.

In the revised act, subsection (6) has been added to §607.1102 to cover the topic of amendments to a plan of share exchange. This topic was previously covered in §607.1103(8) of the FBCA.

In §607.1102 of the revised act, subsection (7), which is not a Model Act provision, is derived from §607.1102(4) of the FBCA that was in effect prior to the revised act. It has been retained to make clear that a corporation may acquire the shares of another corporation or eligible entity outside of §607.1102 through a voluntary exchange or otherwise. While probably

unnecessary, it was retained to avoid confusion that might result if the section were to be removed.

Adopting a plan of merger or a plan of share exchange. The process for adopting a plan of merger or a plan of share exchange is addressed in §607.1103. The version of §607.1103 in effect prior to the revised act follows the 1984 version of Model Act §11.04. This section of the Model Act was substantially revised in 1999. The further revisions to §607.1103 contained in the revised act are intended to provide greater clarity as to what steps are required to be taken in order to approve a merger or share exchange. Among other changes, this section as revised is designed to correct a long-standing ambiguity under Florida law that arguably would allow any class or series of shares to have a separate class vote on a merger or share exchange even under circumstances where the articles of incorporation provide otherwise.

The revised exception in subsection (2) of §607.1103 is intended to allow a shareholder vote without a recommendation from the Board of Directors where there is a "force the vote" provision in a plan of merger or plan of share exchange.

Subsection (5) of §607.1103 of the revised act continues the requirement that a majority of the shares entitled to vote at the meeting (i.e., an absolute majority, rather than just a majority of the quorum) must approve the merger or share exchange. This is consistent not only the existing FBCA, but also with §251(e) of the Delaware General Corporation Law (DGCL).

Subsection (6) of §607.1103 of the revised act sets forth circumstances when voting by a class or series as a separate voting group is required.

New subsection (7) of §607.1103 of the revised act largely follows the Model Act, although the provisions have been modified in light of the changes to subsection (6). Under subsection (7), the general rule is to allow the elimination or limitation of separate voting rights by the addition of a provision in the articles of incorporation. However, that exception is overridden when (i) the plan of merger or plan of share exchange includes what would be an amendment to the articles of incorporation of the surviving corporation that would require a vote by separate voting groups under §607.1004, and (ii) the transaction detailed in such plan of merger or plan of share exchange will not effect a "substantive business combination."

The commentary to the Model Act provides guidance (including examples) as to when a merger or share exchange is considered to be (or not to be) a "substantive business combination," such as a reincorporation or recapitalization where there is no significant change in the enterprise on a consolidated basis. While the term “substantive business combination” might be considered somewhat vague, this section is intended to preclude a corporation from going around the requirements of §607.1004 (dealing with when a class vote is required on changes to the corporation's articles of incorporation) by effecting a merger which seeks to amend the articles of incorporation but does not constitute a substantive business combination.

Subsection (8) of §607.1103 that was in effect prior to the revised act, which dealt with amendments to a plan of merger or a plan of share exchange, has been moved, consistent with the approach taken by the 2016 version of the Model Act, into §§607.1101(6) and 607.1102(6). The topic in previous subsection (9), regarding abandonment of a merger or share exchange, is now covered in new §607.1107.

New subsection (9) of §607.1103, dealing with protections for shareholders who have interest holder liability, has been added in conformity with the corollary Model Act provision.

New subsections (10) and (11) of §607.1103 deal with the two situations in which, unless the articles of incorporation provide otherwise, shareholders do not get a vote on a share exchange.

Shareholder approval of a merger or share exchange in connection with a tender offer. New §607.11035 is derived from subsection (j) of Model Act §11.04. Similar to the Model Act and the current corporate law in Delaware, this new provision allows for a "two step" transaction in which the offeror first makes a tender offer to shareholders through which it acquires enough of an interest in the corporation to satisfy the shareholder approval that otherwise would be required, and then allows the Board of Directors to effectuate what is often called a “mop-up” merger or share exchange without the need to further secure shareholder approval.

Merger between parent and subsidiary or between subsidiaries. The short-form merger provision in §607.1104, which allows for certain mergers without the need to secure shareholder approval, is extensively modified. Among other changes, the revised act eliminates the 30-day advance notice requirement contained in the existing statute. That provision was the subject of much criticism and, as a result, made the use of this provision much less appealing. The revised act also includes new Model Act language that is believed to be clearer and more understandable.

The revised act also retains the 80% threshold for application of this section. Although the Model Act and the DGCL (and the corporate statutes in many other states) use a 90% threshold, because this 80% threshold has been in the FBCA since 1989, it was not changed in the revised act.

Articles of merger or share exchange. Section 607.1105 in the revised act is a comprehensive re-write of this section, largely bringing this section into conformity with the 1999 and 2016 changes to the Model Act. In this regard, the provisions relating to articles of merger (subsection (1)) are broken out from the provisions relating to articles of share exchange (subsection (2)), even though many of the provisions parallel each other. As a result, changes to form articles of merger and form articles of share exchange may be required. Language has been added to make it clear that when a merger involves a foreign entity, the merger will be effective on the later of when the articles of merger filed in Florida are specified to take effect or when the documents have become effective in the foreign jurisdiction.

Effect of merger or share exchange. Revised §607.1106 has been comprehensively updated, largely based on the corollary section of the Model Act. This revised section is designed to provide more clarity as to the effect of a merger or share exchange of one or more domestic or foreign corporations or domestic or foreign eligible entities with a Florida corporation, and to confirm that there can be mergers that result in the formation of a new corporation.

Abandonment of a merger or share exchange. Revised §607.1107 is a new stand-alone provision following the corollary section of the Model Act that addresses abandonment of a merger or share exchange. This topic was previously addressed in §607.1103(9).

Overview- domestications. In the FBCA prior to the adoption of the revised act, only one section (§607.1801) dealt with domestications. Moreover, §607.1801 only allowed foreign corporations (although with corporations being broadly defined in the existing statute) to domesticate to Florida. New §§607.11920-607.11924 expand the concept of domestication to include both inbound and outbound domestications of corporations, so long as the domestication is permitted by the laws of the foreign jurisdiction where the foreign corporation is organized, and to provide greater guidance as to the effect of those domestications. The domestication provisions in the revised act are designated as Part B of Article 11 and largely following the corollary sections in Subchapter B of Article 9 of the Model Act.

Under the domestication provisions in the revised act, domestications of (i) Florida corporations to foreign corporations organized in other states of the United States and in non-United States jurisdictions, and (ii) foreign corporations organized in other states of the United States and in non-United States jurisdictions to become Florida domestic corporations will be permitted; provided, in both cases, the domestication is permitted by the laws of the jurisdiction where the foreign corporation is organized. This expanded scope opens up the opportunity to use domestication as an alternative to conversion or merger to redomesticate a corporation from one jurisdiction to another.

However, the domestication provisions in the revised act do not permit other types of entities (other than corporations) to domesticate to Florida or for Florida corporations to domesticate to other types of foreign entities, based on the view that those types of transactions are beyond the nature of a pure domestication. Nevertheless, these other types of transfers can usually be achieved through either a conversion or a merger.

Plan of domestication. New §607.11921 largely follows §9.21 of the Model Act with respect to the process that is required to be followed and the votes that are required to be obtained in order to effectuate a domestication of a Florida corporation into a corporation formed in another jurisdiction.

Articles of domestication. New §607.11922 largely follows §9.22 of the Model Act with respect to the filing of articles of domestication and the effectiveness of a domestication. It is very

similar to the provisions in the Model Act relating to filings of articles of conversion and the effectiveness of same, as now adopted in new §607.11932 described below.

Amendment of a plan of domestication and abandonment of such a plan. New §607.11923, which addresses amendment of plans of domestication and how and when such plans can be abandoned, largely follows §9.23 of the Model Act and, for the most part, mirrors the corollary provisions in the Model Act with respect to amending and abandoning a plan of merger or a plan of share exchange or a plan of conversion.

Effect of a domestication. New §607.11924, which sets forth the effect of a domestication, largely follows §9.24 of the Model Act, This section resolves one of the major shortcomings of the existing FBCA domestication statute in that the existing provision does not explicitly describe the effects of a domestication.

Overview – conversions. Prior to the revised act, conversions were addressed in four sections, §607.1112, §607.1113, §607.1114 and §607.1115, with the first three addressing conversions of Florida domestic corporations to "other business entities" (domestic or foreign) and the fourth addressing conversions of "other business entities" (domestic or foreign) to a Florida domestic corporation. The current Model Act has six sections addressing conversions and the revised act utilizes the same six section approach (designated §§607.11930 – 607.11935). The conversion provisions in the revised act are identified as Part C of Article 11 and largely following the corollary sections in Subchapter C of Article 9 of the Model Act.

New §607.11930, which is largely based on §9.30 of the Model Act, addresses both (i) conversions by a domestic corporation to a different eligible entity (domestic or foreign), and (ii) conversions by a different eligible entity (domestic or foreign) to a domestic corporation. Certain aspects of each of the remaining designated sections may or may not apply depending on whether the conversion is by a domestic corporation to another entity or by another entity to a domestic corporation.

Part C of Article 11 of the revised act uses the term "converted eligible entity" to mean the converting eligible entity as it continues in existence following the conversion. Put another way, it is the entity to which the converting eligible entity is converted. At the same time, it is the same entity as the converting eligible entity. Thus, there was some concern as to whether the term "converted eligible entity" (not unlike the term currently used in the FBCA, "other business entity") causes confusion. Based on this concern, the Drafting Subcommittee considered using a term other than "converted eligible entity." However, after consideration, the Drafting Subcommittee concluded that all of the terms being considered had the same potential for confusion, so the decision was made, with respect to preparing the draft of what became the revised act, to utilize the terminology from the Model Act.

Plan of conversion. New §607.11931 largely follows §9.31 of the Model Act with respect to what needs to be included in a plan of conversion in order to effectuate a conversion of a Florida

corporation to a different eligible entity, whether domestic or foreign. Although a conversion by another entity to a domestic corporation may also choose to utilize a plan of conversion (and indeed adoption of a plan of conversion may be mandated by the conversion statute in the jurisdiction where the converting entity is organized, new §607.11931 only actually mandates a plan of conversion for a conversion of a domestic corporation to a different eligible entity, whether domestic or foreign.

The revised act specifically allows for converting the domestic corporation's shares into equity or rights to acquire equity of the converted entity or other property, but also specifically authorizes converting the domestic corporation's rights to acquire shares into equity or rights to acquire equity of the converted entity, or other property.

Action on a plan of conversion. New §607.11932 largely follows §9.32 of the Model Act with respect to the process that is required to be followed and the votes that are required to be obtained in order to approve a plan of conversion to effectuate a conversion of a Florida corporation to another eligible domestic or foreign entity. Certain non-Model Act provisions from §607.1112 (i.e., relating to converted eligible entities that are partnerships and the applicability of appraisal rights) are retained.

Articles of conversion. New §607.11933 requires articles of conversion to be filed with the Florida Department of State (the "Department") in all conversions involving a domestic corporation, whether the domestic corporation is the converting entity or the converted entity. This section states what must be included in articles of conversion. In most cases, practitioners will need to update their form articles of conversion, although it is anticipated that a basic compliant form of articles on conversion will ultimately be prepared by the Department and posted in the forms directory on the Department's sunbiz.com website. This section largely follows §9.33 of the Model Act, although it does retain some aspects of the conversion provisions in the existing FBCA.

Amendment of a plan of conversion and abandonment of such a plan. New §607.11934, which addresses amendment of plans of conversion and how and when such plans can be abandoned, largely follows §9.34 of the Model Act and, for the most part, mirrors the corollary provisions in the Model Act with respect to amending and abandoning a plan of merger, a plan of share exchange, or a plan of domestication.

Effect of conversion. New §607.11935 details the effect of a conversion including, among other things, expressly confirming that the converted entity is a continuation of the converting entity, carrying over the assets and liabilities, and dealing with interest holder liability. This new section largely adopts §9.35 of the Model Act and, for the most part, follows the corollary provisions in the Model Act regarding the effect of a merger, a share exchange, or a domestication.

Article 12 – Sale of Assets

Disposition of assets not requiring shareholder approval. New §607.1201 largely conforms this section to the provisions of §12.01 of the Model Act. Although many of the changes made to §607.1201 are not considered substantive, the revised section should have the effect of clarifying situations where shareholder approval would not be required even though one might argue that certain of the identified transactions might be considered a sale of all or substantially all of the assets of the corporation.

New §607.1201 removes from this section language that could have been read as requiring that all sales of assets be approved by the corporation's board of directors. Although most Florida lawyers have not believed that to be the case, revised §607.1201 removes the ambiguous language and appropriately leaves the issue of whether the particular transaction requires board approval to the general corporate governance rules relating to when board approval is or is not required in order to authorize a sale of assets transaction.

Dispositions of assets requiring shareholder approval. Although §12.02 of the Model Act moved away in 1999 from the "all or substantially all of the assets" test for when shareholder approval of a sale of assets is required and has moved instead to an evaluation of whether the disposition would leave the corporation "without a significant continuing business activity," the revised act retains the "all or substantially all of the assets" test that has been in the FBCA since 1990.

In its consideration of §607.1202, the Drafting Subcommittee was concerned that moving away from the current standard for determining whether obtaining shareholder approval is required to approve a sale of all or substantially all of the corporation's assets might very well provide more uncertainty than electing to stay with the existing standard, in light of the fact that much of the significant case law evaluating this topic is found in Delaware (where the traditional "all or substantially all of the assets" test remains the standard).

Further, the Drafting Subcommittee did not recommend adoption of a qualitative safe harbor as set forth in the current version of the Model Act. Although the benefit of adding a quantitative safe harbor was considered, there was disagreement over whether the Model Act safe harbor standard was too high or too low. As a result, a decision was made not to add a quantitative safe harbor to the revised statute.

The addition in §607.1202(1) of the words "but only if" is not intended to be a substantive change, but rather is intended to clarify the meaning of this provision (as it has been applied historically by practitioners), which is that a sale or other disposition of "all or substantially all of the assets" of a Florida corporation "other than in the usual and regular course of business" can only occur with shareholder approval and also, with the exception of very limited carve outs, board of directors approval. It is believed that these clarifying words clear up any question as to what is intended by this provision.

Sections 607.1202(3)-(6) have been updated largely based on §12.02 of the Model Act and are consistent with corollary provisions in the other Parts of Article 11, to the extent applicable. These changes are considered clarifying and not substantive.

Subsection (7) of §607.1202 was added, mirroring the corollary provision of §12.02 of the Model Act, to make it clear that, in addition to pro rata distributions, dissolutions are governed by Article 14 (dissolutions) and not by Article 12 (sales of assets) of the FBCA.

Article 13 – Appraisal Rights

Appraisal rights – generally. For the most part, the changes in Article 13 are designed to parallel the appraisal rights provisions in FRLLCA which, when drafted, borrowed from and adopted much of the approach and language appearing in Article 13 of the Model Act. Among other things, certain definitions have been added, clarity has been added to the process, and the glitch and circularity problems contained in existing FBCA provisions addressing appraisal rights in circumstances where transactions are adopted by written consent of the shareholders have been corrected in the revised act, generally following the approach taken by the Model Act and FRLLCA.

Appraisal rights definitions. With very few exceptions, the changes to the appraisal right definitions in the revised act are considered non-substantive. One of the substantive changes to the definitions is the change in the definition of "fair value." The new "fair value" definition follows FRLLCA by indicating that fair value is determined, in all cases, without any discounting for lack of marketability or minority status. The revised act removes the language that was added to the FBCA in 2005 which qualified the exclusion of discounting for lack of marketability or minority status for corporations with 10 or fewer shareholders (and thus implied that discounting for lack of marketability or minority status was permitted for corporations with more than 10 shareholders). By virtue of the change to the definition, this ambiguity has been resolved with the effect that fair value, in the context of appraisal rights valuation, should now always be determined without any discount for lack of marketability or minority status.

The revised act also adds the definition of an "interested transaction" from §13.01 of the Model Act relating to transactions between the corporation and related parties. Although this definition is only used in three places (§607.1302(2)(d), §607.1302(1)(d)2., and §607.1302(2)(c)), it was decided that the definition of "interested transaction" should be consistent in all three situations and that for that reason it was advisable to have a more fulsome and complete definition identifying transactions with related parties.

Rights of shareholders to appraisal. Consistent with the approach taken in FRLLCA, §607.1302 has been modified to separate conversions and mergers into two separate subparagraphs rather than continuing to include them within the same subparagraph. In addition, with respect to conversions, domestications, mergers, and share exchanges and consistent with the approach of the Model Act, the requirement that the shareholder be entitled to vote on the

transaction in order to have appraisal rights has been removed. Accordingly, if a transaction triggers appraisal rights, all shareholders, whether voting or nonvoting, must be accorded the right to exercise appraisal rights.

Because of the addition in the revised act of §607.11035 relating to "mop up" mergers and share exchanges, the prior requirement with respect to granting appraisal rights in connection with only those mergers where shareholder approval is required has been modified such that appraisal rights would be triggered in connection with those transactions that are subject to §607.11035. In other words, the minority shareholders in a §607.11035 "mop up" merger will be entitled to appraisal rights in connection with such merger even though the statute expressly eliminates any need to secure shareholder approval for such "mop up" merger transactions.

Because the transactions with respect to which domestications can occur have been expanded to follow the expanded scope set forth in the Model Act, the Model Act provision triggering appraisal rights with respect to domestication transactions has been added.

Consistent with the Model Act and FRLLCA, an additional provision has been added to provide appraisal rights in a disposition of all or substantially all of the assets of a corporation pursuant to §607.1202. This provision is subject to an exception if (i) under the terms of the corporate action approved by the shareholders there is to be distributed to shareholders in cash the corporation's net assets, in excess of a reasonable amount reserved to meet claims of the type described in §§607.1406 and 607.1407, within 1 year after the shareholders' approval of the action and in accordance with their respective interests determined at the time of distribution; and (ii) the disposition of assets is not an interested transaction.

The public company override of appraisal rights has been modified to follow the Model Act by referencing "covered securities," by changing the trading in an organized market trigger to at least $20 million of market value instead of $10 million of market value and by adding the reference to issuances by open end management investment companies registered under the Investment Company Act of 1940.

The provisions that have previously been in §607.1302(4) have, consistent with the approach taken by the Model Act, been moved to new §607.1340, with certain clean-up changes to mirror the language syntax used in §607.1340. However, certain of the aspects of §13.40 of the Model Act, which are not covered at all in §607.1302(4) have not been adopted, as more specifically described in the below discussion of §607.1340.

Notice of appraisal rights. Revised §607.1320 has been harmonized with §605.1063 of FRLLCA, which in turn, when drafted, was modeled on the corollary provision in the Model Act. In addition, language addressing coordination with new §607.11035 relating to "mop up" mergers and share exchanges has been added to §607.1320.

Most importantly, consistent with FRLLCA, the provisions of §607.1320 have been modified to eliminate certain circularity and confusion that existed under the prior statute relating to corporate actions that were being approved other than by way of vote at a shareholders' meeting, such as an approval by way of a written consent. The change, which follows the parallel provision in FRLLCA, (i) contemplates providing written notice of the appraisal rights being sent to a shareholder from whom a consent is being solicited at the time the consent of that particular shareholder is first solicited (rather than arguably having to send notice of appraisal rights to all shareholders at the time the first shareholder's consent is being solicited), and (ii) adds a requirement that, when such a transaction is being approved by written consent rather than by a vote at a shareholders meeting, notice of the appraisal rights must be sent at least 10 days before the corporate action becomes effective to any and all nonconsenting or nonvoting shareholders.

Revised §607.1320 has also been updated to make clear that certain financial statements need to be provided to shareholders together with the written notice indicating that appraisal rights may be available, which again is consistent with the provisions of FRLLCA. However, subsection (5) has been added to §607.1320 to make it clear that the right to receive the financial statement information can be waived in writing by any shareholder either before or after the particular corporate action is effected.

Notice of intent to demand payment. Revised §607.1321 (which relates to notice to demand payment) has been updated to be harmonized with §605.1064 of FRLLCA, which in turn had been modeled on the corollary provision in the Model Act. As is the case with §607.1320, the procedure here has been modified so that the provisions relating to transactions that are approved by written consent, rather than at a shareholders' meeting, are separately addressed to avoid the circularity and confusion that existed under the previous version of §607.1321. In addition, because of the addition of §607.11035 relating to "mop up" mergers and share exchanges where no shareholder vote is required, the process for a shareholder to assert appraisal rights in that type of transaction has been added as new subsection (3) of §607.1321.

Appraisal notice and form. The changes to §607.1322 in the revised act are mostly non-substantive. However, subsection (2)(c) of §607.1322 has been deleted because, by the time the appraisal notice and form is being provided to those shareholders who have indicated their intent to exercise appraisal rights, such shareholders should have already received the appropriate financial statements and a copy of the appraisal statute earlier on in the process.

The requirement to provide a shareholder with financial statements that had appeared in §607.1322(3) is now included in §607.1320(4) of the revised act.

Shareholder's acceptance of corporation's offer. The language in §607.1324(2) has been changed in the revised act so as to clarify that, from a technical perspective, a shareholder who exercises appraisal rights and receives payment of an agreed value from the corporation ceases to

have any right to receive any further consideration with respect to the shares rather than using language stating that such shareholder ceases to have any interest in the shares. By virtue of other sections of Article 13, a shareholder who properly exercises appraisal rights will have already ceased, as a result of such exercise, to have any interest in the shares themselves.

After acquired shares. Model Act §13.25 covers after-acquired shares and allows a corporation to withhold payments required by Model Act §13.24 with respect to certain after-acquired shares. This provision coordinates with the provisions of Model Act §13.24 that requires payment of the corporation's estimate of fair value prior to the resolution of the appraised value. Since a decision was intentionally made not to include the concept of an early partial payment in the revised act, this Model Act provision was considered unnecessary and has not been included in the revised act.

Court action. Under §607.1330(2) of the revised act, actions to enforce appraisal rights must be brought in the "applicable county" (as that term is now defined in §607.01401). In addition, language has been added to §607.1330 to deal with (i) situations where the corporation, by virtue of the corporate action becoming effective, has become a foreign entity, and (ii) what to do where the corporation did not have a principal office in Florida prior to the transaction.

In addition, in §607.1330(6) of the revised act, the language has been clarified such that, upon payment of the judgment as to value entered by the court, the shareholder ceases to have any right to receive any further consideration with respect to the shares rather than stating that such shareholder ceases to have any interest in the shares. By virtue of other sections of Article 13, a shareholder who properly exercises appraisal rights will have already ceased, as a result of such exercise, to have any interest in the shares themselves. However, the adjusted language in §607.1330(6) of the revised act was not intended to eliminate rights to receive reimbursement for court costs and attorney fees that might be assessed under §607.1331 (and, accordingly, language has been added to this section of the revised act to make this clear).

Disposition of acquired shares; limitation on corporate payment. These items are addressed in §607.1332 and §607.1333. These sections are not Model Act provisions, but have been part of the FBCA since 2003 and match the corollary provisions in FRLLCA. Accordingly, they have been retained in the revised act and no substantive changes have been made to these sections.

Other remedies limited. Although §607.1340(1) of the revised act is a new provision that follows §§13.40(a) and (b) of the Model Act and addresses the limited ability of a shareholder who is entitled to appraisal rights to challenge a completed corporate action, the general concepts in this new section previously appeared in subsections (1) and (2) of existing §607.1302(4). Although the language in §607.1340(1) of the revised act sets forth somewhat different language from the language currently included in §607.1302(4), the changes were not intended to be and should not be considered substantive changes.

New §607.1340, however, does not add subsections (2)(c) and (2)(d) of Model Act §13.40. Nevertheless, new §607.1340(2) has been added in the revised act to make clear that new §607.1340 is not intended to override the rights or operative provisions in §607.0832 relating to the approval of director conflict of interest transactions. Accordingly, it should be understood that the failure to add subsections (2)(c) and (2)(d) of Model Act §13.40 is not intended to prohibit a shareholder from contesting a completed conflict of interest transaction in accordance with, and subject to the burdens of proof set forth in, §607.0832.