Chapter 607

Article 7

Proposed Changes

607.0701 Annual meeting.—

(1) Unless directors are elected by written consent in lieu of an annual meeting as permitted by s. 607.0704, a~~A~~ corporation shall hold a meeting of shareholders annually, for the election of directors and for the transaction of any proper business, at a time stated in or fixed in accordance with the bylaws; provided, however, that if a corporation's articles of incorporation authorize shareholders to cumulate their votes when electing directors pursuant to s. 607.0728, directors may not be elected by written consent of the shareholders unless the consent is unanimous.

(2) Annual shareholders' meetings may be held in or out of this state at a place stated in or fixed in accordance with the bylaws or, when not inconsistent with the bylaws, stated in the notice of the annual meeting. If no place is stated in or fixed in accordance with the bylaws, or stated in the notice of the annual meeting, annual meetings shall be held at the corporation's principal office.

(3) The failure to hold the annual meeting at the time stated in or fixed in accordance with a corporation's bylaws or pursuant to this act does not affect the validity of any corporate action and shall not work a forfeiture of or dissolution of the corporation.

(4) Participation of shareholders and proxy holders at an annual meeting of shareholders by remote communication shall be governed by and subject to the provisions of s.607.0709. ~~If authorized by the board of directors, and subject to such guidelines and procedures as the board of directors may adopt, shareholders and proxy holders not physically present at an annual meeting of shareholders may, by means of remote communication:~~

~~(a) Participate in an annual meeting of shareholders.~~

~~(b) Be deemed present in person and vote at an annual meeting of shareholders, whether such meeting is to be held at a designated place or solely by means of remote communication, provided that:~~

~~1. The corporation shall implement reasonable measures to verify that each person deemed present and permitted to vote at the annual meeting by means of remote communication is a shareholder or proxy holder;~~

~~2. The corporation shall implement reasonable measures to provide such shareholders or proxy holders a reasonable opportunity to participate in the annual meeting and to vote on~~

~~matters submitted to the shareholders, including, without limitation, an opportunity to communicate and to read or hear the proceedings of the annual meeting substantially concurrently with such proceedings; and~~

~~3. If any shareholder or proxy holder votes or takes other action at the annual meeting by means of remote communication, a record of such vote or other action shall be maintained by the corporation.~~

Commentary:

1. Although this language does not appear in the RMBCA, the words "and shall not work a forfeiture of or dissolution of the corporation" were left in subsection (3). There was a belief that whether or not this language is included, this is a correct statement of the law. However, a concern was expressed that removing this language might be misinterpreted as a change in the law. As a result, the language was left in the statute.

2. Subsection (4) was removed in favor of adding new Section 607.0709, which will include all provisions regarding participation in shareholder meetings by remote communications.

3. The Subcommittee decided that companies should be allowed to hold an annual meeting solely by remote communication or by way of a written consent under Section 607.0704, even if one or more shareholders object and would prefer to hold an in-person meeting.

607.0702 Special meeting.—

(1) A corporation shall hold a special meeting of shareholders:

(a) On call of its board of directors or the person or persons authorized to do so by the articles of incorporation or bylaws; or

(b) If the holders of not less than 10 percent, unless a greater percentage not to exceed 50 percent is required by the articles of incorporation, of all the votes entitled to be cast on any issue proposed to be considered at the proposed special meeting sign, date, and deliver to the corporation's secretary one or more written demands for the meeting describing the purpose or purposes for which it is to be held. Unless otherwise provided in the articles of incorporation, a written demand for a special meeting may be revoked by a writing to that effect received by the corporation prior to the receipt by the corporation of demands sufficient in number to require the holding of a special meeting.

(2) Special shareholders' meetings may be held in or out of the state at a place stated in or fixed in accordance with the bylaws or, when not inconsistent with the bylaws, in the notice of

the special meeting. If no place is stated in or fixed in accordance with the bylaws or in the notice of the special meeting, special meetings shall be held at the corporation's principal office.

(3) Only business within the purpose or purposes described in the special meeting notice required by s. 607.0705 may be conducted at a special shareholders' meeting.

(4) Participation of shareholders and proxy holders at a special meeting of shareholders by remote communication shall be governed by and subject to the provisions of s.607.0709. ~~If authorized by the board of directors, and subject to such guidelines and procedures as the board of directors may adopt, shareholders and proxy holders not physically present at a special meeting of shareholders may, by means of remote communication:~~

~~(a) Participate in a special meeting of shareholders.~~

~~(b) Be deemed present in person and vote at a special meeting of shareholders, whether such meeting is to be held at a designated place or solely by means of remote communication, provided that:~~

~~1. The corporation shall implement reasonable measures to verify that each person deemed present and permitted to vote at the special meeting by means of remote communication is a shareholder or proxy holder;~~

~~2. The corporation shall implement reasonable measures to provide such shareholders or proxy holders a reasonable opportunity to participate in the special meeting and to vote on matters submitted to the shareholders, including, without limitation, an opportunity to communicate and to read or hear the proceedings of the special meeting substantially concurrently with such proceedings; and~~

~~3. If any shareholder or proxy holder votes or takes other action at the special meeting by means of remote communication, a record of such vote or other action shall be maintained by the corporation.~~

Commentary:

1. Subsection (4) was removed in favor of adding new Section 607.0709, which will include all provisions regarding participation in shareholder meetings by remote communications.

607.0703 Court-ordered meeting.—

(1) The circuit court of the county where a corporation's principal office is located, if located in this state, or where a corporation's registered office is located if its principal office is

not located in this state, may~~, after notice to the corporation,~~ summarily order a meeting to be held:

(a) On application of any shareholder ~~of the corporation~~ entitled to vote ~~in~~ at an annual meeting if neither an annual meeting has ~~not~~ been held nor action by written consent in lieu thereof has become effective within any ~~13~~ 15-month period; or

(b) On application of a shareholder who signed a demand for a special meeting valid under s. 607.0702, if:

1. Notice of the special meeting was not given within 60 days after the date the demand was delivered to the corporation's secretary; or

2. The special meeting was not held in accordance with the notice.

(2) The court may fix the time and place of the meeting, determine the shares entitled to participate in the meeting, specify a record date or dates for determining shareholders entitled to notice of and to vote at the meeting, prescribe the form and content of the meeting notice, fix the quorum by voting group required for matters to be considered at the meeting (or direct that the votes of a voting group represented at the meeting constitute a quorum of such voting group for action on those matters), and enter other orders ~~as may be appropriate~~ necessary to accomplish the purpose or purposes of the meeting.

Commentary:

1. The words "after notice to the corporation" were deleted in subsection (1). This language is not in the RMBCA. This change is not intended to be a substantive change, since the company will have to be notified of the action through the service of process in the lawsuit. Further, this change is not intended to authorize or allow an ex parte action.

2. The word "summarily" has been added to the language at the end of subsection (1) regarding the Court's power to order a meeting. This language matches the language in Section 7.03(a) of the RMBCA and corresponds with other existing similar references throughout Chapter 607 and in the Delaware corporate statute. The use of the word "summarily" is intended to urge courts to act quickly on this type of request, possibly through, within the applicable power and discretion of the court, expedited briefing and a quick decision.

3. The words "of the corporation" were removed from (1)(a). This is not intended to be a substantive change, since the definition of "shareholder" in Section 607.0141(24) states that a shareholder is a holder of shares in the corporation.

4. The time frame in subsection (1)(a) was changed from 13 months to 15 months so that it is consistent with Section 7.03(a)(1) of the RMBCA. The 60 day provision in Section 607.0703(1)(b) was not changed, despite the shorter 30 day period contained in Section

7.03(a)(2) of the RMBCA. Under the commentary that was prepared at the time of adoption of the current FBCA, this longer period was an intentional deviation from the RMBCA and was intended to give public companies more time to comply with applicable Exchange Act requirements if a demand for a meeting has been received.

5. Section 607.0703(1)(a) was amended to make clear that a court may not order an annual meeting if shareholders have acted by written consent to elect directors, in accordance with Section 607.0701(1), within the 15-month period.

6. The words "or dates was added to Section 607.0703(2) to recognize the ability of a corporation, at its option, to establish bi-furcated record dates. In addition, the broader RMBCA language in Section 7.03(b) replaces the language in current Section 607.0703(2). Further, language was added to make clear that courts have the authority to establish quorum requirements for separate voting groups.

607.0704 Action by shareholders without a meeting.—

(1) Unless otherwise provided in the articles of incorporation, action required or permitted by this act to be taken at an annual or special meeting of shareholders may be taken without a meeting, without prior notice, and without a vote if the action is taken by the holders of outstanding stock of each voting group entitled to vote thereon having not less than the minimum number of votes with respect to each voting group that would be necessary to authorize or take such action at a meeting at which all voting groups and shares entitled to vote thereon were present and voted. In order to be effective the action must be evidenced by one or more written consents describing the action taken, dated and signed by approving shareholders having the requisite number of votes of each voting group entitled to vote thereon, and delivered to the corporation by delivery to its principal office in this state, its principal place of business, the corporate secretary, or another officer or agent of the corporation having custody of the book in which proceedings of meetings of shareholders are recorded. No written consent shall be effective to take the corporate action referred to therein unless, within 60 days of the date of the earliest dated consent delivered in the manner required by this section, written consents signed by shareholders owning a sufficient number of shares ~~the number of shareholders~~ required to authorize or take the action are delivered to the corporation by delivery as set forth in this section.

(2) Any written consent may be revoked prior to the date that the corporation receives the required number of consents to authorize the proposed action. No revocation is effective unless in writing and until received by the corporation at its principal office or received by the corporate

secretary or other officer or agent of the corporation having custody of the book in which proceedings of meetings of shareholders are recorded.

(3) Within 10 days after (i) written consents sufficient to authorize or take the action have been delivered to the corporation, or (ii) such later date that tabulation of consents is completed pursuant to an authorization under subsection (4) ~~obtaining such authorization by written consent~~, notice must be given to those shareholders who have not consented in writing or who are not entitled to vote on the action. The notice shall fairly summarize the material features of the authorized action and, if the action be such for which appraisal ~~dissenters'~~ rights are provided under this act, the notice shall contain a clear statement of the right of shareholders entitled to assert appraisal rights under this act with respect to the action ~~dissenting therefrom~~ to be paid the fair value of their shares upon compliance with further provisions of this act regarding the rights of ~~dissenting~~ shareholders entitled to assert appraisal rights under this act with respect to the action.

(4) A consent signed under this section has the effect of a meeting vote and may be described as such in any document. Unless the articles of incorporation, bylaws or a resolution of the board of directors provides for a reasonable delay to permit tabulation of written consents, the action taken by written consent shall be effective when written consents signed by shareholders owning a sufficient number of shares required to authorize or take the action are delivered to the corporation.

(5) In the event that the action to which the shareholders consent is such as would have required the filing of a certificate under any other section of this act if such action had been voted on by shareholders at a meeting thereof, the certificate filed under such other section shall state that written consent has been given in accordance with the provisions of this section.

(6) Whenever action is taken pursuant to this section, the written consent of the shareholders consenting thereto or the written reports of inspectors appointed to tabulate such consents shall be filed with the minutes of proceedings of shareholders.

(7) The notice requirements in subsection (3) shall not delay the effectiveness of actions taken by written consent, and a failure to comply with such notice requirement shall not invalidate actions taken by written consent, provided that this subsection shall not be deemed to limit judicial power to fashion any appropriate remedy in favor of a shareholder adversely affected by a failure to give such notice within the required time period.

Commentary:

1. Subsection (4) of Section 607.0704 has been modified to add the RMBCA language in Section 7.04(d) addressing an ability to delay effectiveness of a written consent for a reasonable period of time to permit tabulation of the written consents received. A parallel change was also made in subsection (3) requiring notice of an action taken by written consent to non-consenting

shareholders within ten days after authorization of the action. The Subcommittee decided not to include any specific outside time limit on the time to tabulate written consents, relying instead on the ability of practitioners (and ultimately the courts) to determine what is "reasonable." However, it is important to remember that this provision is only intended to give the corporation a reasonable (likely short) period of time to tabulate written consents received and is not intended to allow a corporation to inappropriately delay effecting an action taken by the corporation's shareholders by written consent.

2. The language in RMBCA Section 7.04(g) was added as new subsection 607.0704(7) (expressing that the failure to give the required notice does not delay the effectiveness of the action taken or invalidate the action taken, subject to the right of a court to fashion an appropriate remedy for failure to give such notice). It is believed that this new language merely codifies the existing state of court decisions relative to this issue.

607.0705 Notice of meeting.—

(1) A corporation shall notify shareholders of the date, time, and place of each annual and special shareholders' meeting no fewer than 10 or more than 60 days before the meeting date. The notice shall include the record date for determining the shareholders entitled to vote at the meeting, if such date is different than the record date for determining shareholders entitled to notice of the meeting. If the board of directors has authorized participation by means of remote communication pursuant to s. 607.0709 for any class or series of shareholders, the notice to such class or series of shareholders shall describe the means of remote communication to be used. Unless this act or the articles of incorporation require otherwise, the corporation is required to give notice only to shareholders entitled to vote at the meeting as of the record date for determining the shareholders entitled to notice of the meeting. Notice shall be given in the manner provided in s. 607.0141, by or at the direction of the president, the secretary, or the officer or persons calling the meeting. If the notice is mailed at least 30 days before the date of the meeting, it may be done by a class of United States mail other than first class. Notwithstanding s. 607.0141, if mailed, such notice shall be deemed to be delivered when deposited in the United States mail addressed to the shareholder at her or his address as it appears in the record of shareholders of the corporation (maintained in accordance with s. 607.1601(3)~~on the stock transfer books of the corporation~~, with postage thereon prepaid.

(2) Unless this act or the articles of incorporation require otherwise, notice of an annual meeting need not include a description of the purpose or purposes for which the meeting is called.

(3) Notice of a special meeting must include a description of the purpose or purposes for which the meeting is called.

(4) Unless the bylaws require otherwise, if an annual or special shareholders' meeting is adjourned to a different date, time, or place, or to add or modify the terms of participation by remote communication, notice need not be given of the new date, time, ~~or~~ place or terms of participation by remote communication if the new date, time, ~~or~~ place or terms of participation by remote communication is announced at the meeting before an adjournment is taken, and any business may be transacted at the adjourned meeting that might have been transacted on the original date of the meeting. If a new record date for the adjourned meeting is or must be fixed under s. 607.0707, however, notice of the adjourned meeting must be given under this section to persons who are shareholders as of the new record date who are entitled to notice of the meeting.

(5) Notwithstanding the foregoing, whenever notice is required to be given to any shareholder under any provision of this act or the articles of incorporation or bylaws of any corporation to whom~~no notice of a shareholders' meeting need be given to a shareholder if~~:

(a) Notice of two consecutive annual meetings, and all notices of meetings or the taking of action by written consent without a meeting to such person during the period between such two consecutive annual meetings,~~An annual report and proxy statements for two consecutive annual meetings of shareholders~~ or

(b) All, and at least two~~, checks in~~ payments of dividends or interest on securities during a 12-month period,

have been sent by first-class United States mail, addressed to the shareholder at ~~her or his~~ such person's address as it appears in the record of shareholders ~~on the share transfer books~~ of the corporation (maintained in accordance with s. 607.1601(3)), and returned undeliverable, then the giving of such notice to such person shall not be required. Any action or meeting which shall be taken or held without notice to such person shall have the same force and effect as if such notice has been duly given. ~~The obligation of the corporation to give notice of a shareholders' meeting to any such shareholder shall be reinstated once the corporation has received a new address for such shareholder for entry on its share transfer books.~~ If any such person shall deliver to the corporation a written notice setting forth such person's then current address, the requirement that a notice be given to such person with respect to future notices shall be reinstated.

Commentary:

1. Language was added to subsection (1), with a cross reference to Section 607.0709 which now contains all of the provisions regarding attendance at shareholders' meetings, whether the meeting is an annual meeting or a special meeting, using remote communications, to the effect that if the board of directors has agreed to allow participation by remote communication at a

shareholders' meeting, the notice shall be required to describe the means of remote communication to be used.

2. Language has been added to subsection (4) to address the obligation to communicate the terms of remote communication for the continuation of an adjourned meeting.

3. Section 607.0705(1) should be read as requiring that any notice given with respect to an adjourned meeting must include a description of the methods of participation by remote communication if the board has authorized participation in the meeting by remote communication.

4. The language in subsection (5), which authorizes the corporation not to have to give notice to certain missing stockholders under certain circumstances, is proposed to be modified to follow the language used in the current version of DGCL Section 230 (upon which this FBCA provision was originally based).

607.0706 Waiver of notice.—

(1) A shareholder may waive any notice required by this act, the articles of incorporation, or bylaws before or after the date and time stated in the notice. The waiver must be in writing, be signed by the shareholder entitled to the notice, and be delivered to the corporation for inclusion in the minutes or filing with the corporate records. Neither the business to be transacted at nor the purpose of any regular or special meeting of the shareholders need be specified in any written waiver of notice unless so required by the articles of incorporation or the bylaws.

(2) A shareholder’s attendance at a meeting:

(a) Waives objection to lack of notice or defective notice of the meeting, unless the shareholder at the beginning of the meeting objects to holding the meeting or transacting business at the meeting; or

(b) Waives objection to consideration of a particular matter at the meeting that is not within the purpose or purposes described in the meeting notice, unless the shareholder objects to considering the matter when it is presented.

Commentary:

1. The language at the end of subsection (1), which confirms that the purpose of the meeting need not be included in the waiver of notice in order for the waiver of notice to be valid, was retained despite such language not appearing in the RMBCA. The language is in Section 229 of the DGCL.

607.0707 Record date.—

(1) The bylaws may fix or provide the manner of fixing the record date or dates for one or more voting groups in order to determine the shareholders entitled to notice of a shareholders' meeting, to demand a special meeting, to vote, or to take any other action. If the bylaws do not fix or provide for fixing such a record date, the board of directors of the corporation may fix the record date. In no event may a record date fixed by the board of directors be a date preceding the date upon which the resolution fixing the record date is adopted.

(2) If not otherwise provided by or pursuant to the bylaws, the record date for determining shareholders entitled to demand a special meeting is the date the first shareholder delivers his or her demand to the corporation.

(3) The bylaws may fix or provide the manner of fixing the record date for determining shareholders entitled to take action by the written consent of shareholders. If not otherwise provided by or pursuant to the bylaws, the board of directors of the corporation may set a record date for determining shareholders entitled to take action by the written consent of shareholders. In no event may a record date fixed by the board of directors be a date preceding the date upon which the resolution fixing the record date is adopted. If the bylaws do not fix or provide for the manner of fixing such a record date and if no such record date is fixed by the board of directors, the record date for determining shareholders entitled to take such action shall be ~~If not otherwise provided by or pursuant to the bylaws and no prior action is required by the board of directors pursuant to this act, the record date for determining shareholders entitled to take action without a meeting is~~ the date that the first signed written consent is delivered to the corporation under s. 607.0704~~. If not otherwise fixed, and prior action is required by the board of directors pursuant to this chapter, the record date for determining shareholders entitled to take action without a meeting is at the close of business on the day on which the board of directors adopts the resolution taking such prior action~~.

(4) If not otherwise provided by or pursuant to the bylaws, or by a court order pursuant to s. 607.0703, the record date for determining shareholders entitled to notice of and to vote at an annual or special shareholders' meeting is the close of business on the day before the first notice is delivered to shareholders.

(5) A record date for purposes of this section may not be more than 70 days before the meeting or action requiring a determination of shareholders.

(6) A determination of shareholders entitled to notice of or to vote at a shareholders' meeting is effective for any adjournment of the meeting unless the board of directors fixes a new

record date or dates, which it must do if the meeting is adjourned to a date more than 120 days after the date fixed for the original meeting.

(7) If a court orders a meeting adjourned to a date more than 120 days after the date fixed for the original meeting, it may provide that the original record date or dates continues in effect or it may fix a new record date or dates.

(8) The record date for a shareholders' meeting fixed by or in the manner provided in the bylaws or by the board of directors shall be the record date for determining shareholders entitled both to notice, of and to vote at, the shareholders' meeting, unless in the case of a record date fixed by the board of directors and to the extent not prohibited by the bylaws, the board, at the time it fixes the record date for shareholders entitled to notice of the meeting, fixes a later record date on or before the date of the meeting to determine the shareholders entitled to vote at the meeting.

(9) Shares of a corporation's own stock acquired by the corporation between the record date for determining shareholders entitled to notice of or to vote at a meeting of shareholders and the time of the meeting may be voted at the meeting by the holder of record as of the record date and shall be counted in determining the total number of outstanding shares entitled to be voted at the meeting.

Commentary:

1. The bifurcated record date provisions that have been added to this section (and to corresponding places in other Article 7 sections) are designed to provide corporations, if the directors so choose, with greater flexibility to align shareholder ownership and voting by setting a record date for voting closer to the meeting date. Delaware enacted similar provisions in 2009, and those provisions are contained in Section 213 of the DGCL. The Model Act commentators noted that, although the corporate law would provide this flexibility, public corporations would need to consider the SEC's proxy rules and the practicalities of proxy voting and vote counting mechanisms in using this flexibility.

2. The option to establish bi-furcated record dates is not limited to public companies. However, it is most likely to be utilized primarily in public company situations.

3. The proposed changes in subsection (3): (i) are based in part on Section 213(b) of the DGCL, (ii) make clear that the board may set a record date for determining shareholders entitled to take action by written consent of shareholders, and (iii) set a default rule for determining the record date if the board doesn't set a specific record date. However, the language for the bylaws override for fixing or establishing the method for fixing such record date has been changed to parallel the syntax appearing in the lead-in to subsection (2). Further, the last sentence of subsection (1) has also been added to subsection (3).

4. The "unless" language contained in new subsection (8), which is based on Section 7.07(e) of the RMBCA, is meant only to refer to bi-furcated record dates.

5. New subsection (9) has been added to resolve an inconsistency between Section 607.0707(1), which states that shareholders of record on the record date are to receive notice of and are authorized to vote at a shareholders' meeting, and Section 607.0631, which provides that shares acquired by a corporation shall become, when acquired by the corporation, authorized but not issued and outstanding shares of the corporation (or authorized and issued but not outstanding, treasury shares under the circumstances set forth in 607.0631(5)). Because of these inconsistent positions, a Florida corporation might be reluctant to reacquire its shares between the record date and a meeting date because of the uncertainty as to how to deal with voting of those shares given the fact that under Section 607.0631(1) these shares would not be outstanding on the meeting date, even though they were issued and outstanding on the record date. This provision is based on a similar provision contained in Maryland's corporate statute.

607.0708. Conduct of the Meeting.—

Section 7.08 of the RMBCA, which creates default rules regarding the conduct of shareholders' meetings, has not been added to the proposal. It is believed that remedies already exist for dealing with manipulations of the shareholder voting machinery and that adding this section to the FBCA is therefore unnecessary.

However, the poll closing provision that is contained in Section 7.08 of the RMBCA has been added to Section 607.0729(6).

607.0709. Remote Participation in Annual and Special Meetings.—

(1) Shareholders of any voting group, other persons entitled to vote on behalf of shareholders pursuant to s. 607.0721, attorneys in fact for shareholders and holders of proxies appointed pursuant to s. 607.0722, may participate in any annual or special meeting of shareholders by means of remote communication to the extent the board of directors authorizes such participation for such voting group. Participation by means of remote communication shall be subject to such guidelines and procedures as the board of directors adopts, and shall be in conformity with subsection (2).

(2) Shareholders, other persons entitled to vote on behalf of shareholders pursuant to s. 607.0721, attorneys in fact for shareholders and holders of proxies appointed pursuant to s.

607.0722, participating in a shareholders' meeting by means of remote communication authorized in conformity with subsection (1) shall be deemed present in person and may vote at such a meeting, whether such meeting is to be held at a designated place or solely by means of remote communication, if the corporation has implemented reasonable measures:

(a) to verify that each person participating remotely is a shareholder, other person entitled to vote on behalf of a shareholder pursuant to s. 607.0721, an attorney in fact for a shareholder or a holder of a proxy appointed pursuant to s. 607.0722, and

(b) to provide such shareholders, such other persons entitled to vote on behalf of shareholders pursuant to s. 607.0721, such attorneys in fact for shareholders and such holders of proxies appointed pursuant to s. 607.0722, a reasonable opportunity to participate in the meeting and to vote on matters submitted to the shareholders, including, without limitation, an opportunity to communicate, and to read or hear the proceedings of the meeting, substantially concurrently with such proceedings.

(3) If any shareholder, any other person entitled to vote on behalf of a shareholder pursuant to s. 607.0721, any attorney in fact for a shareholder or any holder of a proxy appointed pursuant to s. 607.0722, votes or takes action at a shareholder's meeting by means of remote communication authorized in conformity with this section, a record of such vote or other action shall be maintained by the corporation.

(4) If the board of directors is authorized to determine the place of a shareholders' meeting, the board of directors may, in its sole discretion, determine that the meeting shall be held solely by means of remote communication.

Commentary:

1. This new Section 607.0709 replaces the language previously contained in Sections 607.0701 and 607.0702 regarding participation in a shareholders meeting by remote communication. The language is based on RMBCA Section 7.09.

2. The language in subsection (1) that allows the corporation's board of directors to authorize remote participation for less than all shareholders (selecting between classes and series that can participate by remote participation) is based on subsection (1) of the RMBCA provision. It is believed that the Board should have the flexibility to decide which classes or series of shares can participate in a meeting by remote participation, and that any abuse by the board in inappropriately using this provision should be able to be addressed by way of remedies available to shareholders for breaches of fiduciary duties.

3. The term "voting groups" has been substituted for "classes and series" in subsection (1), since it means the same thing.

607.0720 Shareholders' list for meeting.—

(1) After fixing a record date for a meeting, a corporation shall prepare an alphabetical list of the names of all its shareholders who are entitled to notice of a shareholders' meeting~~,~~ ~~arranged by voting group with the address of, and the number and class and series, if any, of shares held by, each~~. If the board of directors fixes a different record date under s, 607.0707(8) to determine the shareholders entitled to vote at the meeting, the corporation shall also prepare an alphabetical list of the names of all its shareholders who are entitled to vote at the meeting. Each list must be arranged by voting group (and within each voting group by class or series of shares) and show the address of and number of shares held by each shareholder.

(2) The shareholders' list for notice must be available for inspection by any shareholder for a period of 10 days prior to the meeting or such shorter time as exists between the record date and the meeting and continuing through the meeting at the corporation's principal office, at a place identified in the meeting notice in the city where the meeting will be held, or at the office of the corporation's transfer agent or registrar. Any separate shareholders' list for voting, if different, must be similarly available for inspection promptly after the record date for voting. A shareholder or the shareholder's agent or attorney is entitled on written demand to inspect and, ~~the list (~~subject to the requirements of s. 607.1602(3)~~)~~, copy a list during regular business hours and at his or her expense, during the period it is available for inspection.

(3) The corporation shall make the ~~shareholders'~~ list of shareholders entitled to vote available at the meeting, and any shareholder or the shareholder's agent or attorney is entitled to inspect the list at any time during the meeting or any adjournment.

(4) The shareholders' list is prima facie evidence of the identity of shareholders entitled to examine the shareholders' list or to vote at a meeting of shareholders.

(5) If the requirements of this section have not been substantially complied with or if the corporation refuses to allow a shareholder or the shareholder's agent or attorney to inspect a ~~the~~ shareholders' list (or copy a list as permitted by subsection (2)) before or at the meeting, the meeting shall be adjourned until such requirements are complied with on the demand of any shareholder in person or by proxy who failed to get such access, or, if not adjourned upon such demand and such requirements are not complied with, the circuit court of the county where a corporation's principal office (or, if none in this state, its registered office) is located, on application of the shareholder, may summarily order the inspection or copying at the corporation's expense and may postpone the meeting for which the list was prepared until the inspection or copying is complete.

(6) Refusal or failure to comply with the requirements of this section shall not affect the validity of any action taken at such meeting.

(7) A shareholder may not sell or otherwise distribute any information or records inspected under this section, except to the extent that such use is for a proper purpose as defined in s. 607.1602(3). ~~Any person who violates this provision shall be subject to a civil penalty of $5,000.~~

Commentary:

1. Subsection (2) was modified to make clear that shareholders have an absolute right to inspect the corporation's shareholders' list in connection with a meeting, but that the right to obtain a copy of the shareholders' list is subject to the requirements of Section 607.1602 (requiring a demand made in good faith and with a proper purpose).

2. Language was added to subsection (2) to correspond with the addition of the possibility of a bi-furcated record date. Such additional new language deals with the requirement to have a separate list of those entitled to vote, in those cases where a bi-furcated record date has been established.

3. Subsection (4), which subsection sets forth that the shareholder' list is prima facie evidence as to the identity of shareholders entitled to examine the list or to vote at the meeting, was retained, even though this subsection is not in the corresponding section of the RMBCA.

4. While it is not in the RMBCA, the language in subsection (7), which has been in the Florida statute since 1994, was retained. However, the second sentence in subsection (7), which provides that any person who violates this provision shall be subject to a civil penalty of $5,000, was removed. By removing this sentence, the penalty for improperly selling a shareholders' list is left to the Courts to determine.

607.0721 Voting entitlement of shares.—

(1) Except as provided in subsections (2), (3), and (4) or unless the articles of incorporation or this act provides otherwise, each outstanding share, regardless of class, is entitled to one vote on each matter submitted to a vote at a meeting of shareholders. Only shares are entitled to vote. If the articles of incorporation provide for more or less than one vote for any share on any matter, every reference in this act to a majority or other proportion of shares shall refer to such a majority or other proportion of votes entitled to be cast.

(2) The shares of a corporation are not entitled to vote if they are owned, directly or indirectly, by a second corporation, domestic or foreign, and the first corporation owns, directly or indirectly, a majority of the shares entitled to vote for directors of the second corporation.

(3) Subsection (2) does not limit the power of a corporation to vote any shares, including its own shares, held by it in a fiduciary capacity.

(4) Redeemable shares are not entitled to vote on any matter, and shall not be deemed to be outstanding, after notice of redemption is mailed to the holders thereof and a sum sufficient to redeem such shares has been deposited with a bank, trust company, or other financial institution upon an irrevocable obligation to pay the holders the redemption price upon surrender of the shares.

(5) Shares standing in the name of another corporation, domestic or foreign, may be voted by such officer, agent, or proxy as the bylaws of the corporate shareholder may prescribe or, in the absence of any applicable provision, by such person as the board of directors of the corporate shareholder may designate. In the absence of any such designation or in case of conflicting designation by the corporate shareholder, the chair of the board, the president, any vice president, the secretary, and the treasurer of the corporate shareholder, in that order, shall be presumed to be fully authorized to vote such shares.

(6) Shares held by an administrator, executor, guardian, personal representative, or conservator may be voted by him or her, either in person or by proxy, without a transfer of such shares into his or her name. Shares standing in the name of a trustee may be voted by him or her, either in person or by proxy, but no trustee shall be entitled to vote shares held by him or her without a transfer of such shares into his or her name or the name of his or her nominee.

(7) Shares held by or under the control of a receiver, a trustee in bankruptcy proceedings, or an assignee for the benefit of creditors may be voted by him or her without the transfer thereof into his or her name.

(8) If a share or shares stand of record in the names of two or more persons, whether fiduciaries, members of a partnership, joint tenants, tenants in common, tenants by the entirety, or otherwise, or if two or more persons have the same fiduciary relationship respecting the same shares, unless the secretary of the corporation is given notice to the contrary and is furnished with a copy of the instrument or order appointing them or creating the relationship wherein it is so provided, then acts with respect to voting have the following effect:

(a) If only one votes, in person or by proxy, his or her act binds all;

(b) If more than one vote, in person or by proxy, the act of the majority so voting binds all;

(c) If more than one vote, in person or by proxy, but the vote is evenly split on any particular matter, each faction is entitled to vote the share or shares in question proportionally;

(d) If the instrument or order so filed shows that any such tenancy is held in unequal interest, a majority or a vote evenly split for purposes of this subsection shall be a majority or a vote evenly split in interest;

(e) The principles of this subsection shall apply, insofar as possible, to execution of proxies, waivers, consents, or objections and for the purpose of ascertaining the presence of a quorum.

(9) Subject to s. 607.0723, nothing herein contained shall prevent trustees or other fiduciaries holding shares registered in the name of a nominee from causing such shares to be voted by such nominee as the trustee or other fiduciary may direct. Such nominee may vote shares as directed by a trustee or other fiduciary without the necessity of transferring the shares to the name of the trustee or other fiduciary.

Commentary:

No changes were made to this section of the FBCA. It was noted that subsections (5) – (9) are not in the RMBCA. However, since these sections have been in the FBCA since 1989, they were retained.

607.0722 Proxies.—

(1) A shareholder, other person entitled to vote on behalf of a shareholder pursuant to s. 607.0721, or attorney in fact for a shareholder may vote the shareholder's shares in person or by proxy.

(2)(a) A shareholder, other person entitled to vote on behalf of a shareholder pursuant to s. 607.0721, or attorney in fact for a shareholder may appoint a proxy to vote or otherwise act for the shareholder by signing an appointment form or by electronic transmission. Any type of electronic transmission appearing to have been, or containing or accompanied by such information or obtained under such procedures to reasonably ensure that the electronic transmission was, transmitted by such person is a sufficient appointment, subject to the verification requested by the corporation under s. 607.0724.

(b) Without limiting the manner in which a shareholder, other person entitled to vote on behalf of a shareholder pursuant to s. 607.0721, or attorney in fact for a shareholder may appoint a proxy to vote or otherwise act for the shareholder pursuant to paragraph (a), a shareholder, other person entitled to vote on behalf of a shareholder pursuant to s. 607.0721, or attorney in fact for a shareholder may make such an appointment by:

1. Signing an appointment form, with the signature affixed, by any reasonable means including, but not limited to, facsimile or electronic signature.

2. Transmitting or authorizing the transmission of an electronic transmission to the person who will be appointed as the proxy or to a proxy solicitation firm, proxy support service

organization, registrar, or agent authorized by the person who will be designated as the proxy to receive such transmission. However, any electronic transmission must set forth or be submitted with information from which it can be determined that the electronic transmission was authorized by the shareholder, other person entitled to vote on behalf of a shareholder pursuant to s. 607.0721, or attorney in fact for a shareholder. If it is determined that the electronic transmission is valid, the inspectors of election or, if there are no inspectors, such other persons making that determination shall specify the information upon which they relied.

(3) An appointment of a proxy is effective when a signed appointment form or an electronic transmission of the appointment is received by the inspector of election or by the secretary or other officer or agent authorized to count ~~tabulate~~ votes. An appointment is valid for the term ~~up to 11 months unless a longer period is expressly~~ provided in the appointment form and, if no term is provided, is valid for 11 months unless the appointment is irrevocable under subsection (5).

(4) The death or incapacity of the shareholder appointing a proxy does not affect the right of the corporation to accept the proxy's authority unless notice of the death or incapacity is received by the secretary or other officer or agent authorized to tabulate votes before the proxy exercises his or her authority under the appointment.

(5) An appointment of a proxy is revocable by the shareholder unless the appointment form or electronic transmission conspicuously states that it is irrevocable and the appointment is coupled with an interest. Appointments coupled with an interest include the appointment of:

(a) A pledgee;

(b) A person who purchased or agreed to purchase the shares;

(c) A creditor of the corporation who extended credit to the corporation under terms requiring the appointment;

(d) An employee of the corporation whose employment contract requires the appointment; or

(e) A party to a voting agreement created under s. 607.0731.

(6) An appointment made irrevocable under subsection (5) becomes revocable when the interest with which it is coupled is extinguished.

(7) Unless it otherwise provides, an appointment made irrevocable under subsection (5) continues in effect after a transfer of the shares and a transferee takes subject to the appointment, except that a ~~A~~ transferee for value of shares subject to an irrevocable appointment may revoke the appointment if the transferee did not know of its existence when he or she acquired the shares

and the existence of the irrevocable appointment was not noted conspicuously on the certificate representing the shares or on the information statement for shares without certificates.

(8) Subject to s. 607.0724 and to any express limitation on the proxy's authority appearing on the face of the appointment form or in the electronic transmission, a corporation is entitled to accept the proxy's vote or other action as that of the shareholder making the appointment.

(9) If an appointment form expressly provides, any proxy holder may appoint, in writing, a substitute to act in his or her place.

(10) Any copy, facsimile transmission, or other reliable reproduction of the writing or electronic transmission created under subsection (2) may be substituted or used in lieu of the original writing or electronic transmission for any purpose for which the original writing or electronic transmission could be used if the copy, facsimile transmission, or other reproduction is a complete reproduction of the entire original writing or electronic transmission.

(11) A corporation may adopt bylaws authorizing additional means or procedures for shareholders to use in exercising rights granted by this section.

Commentary:

1. Changes to subsection (3) follow the recently adopted changes to Section 7.22(c) of the RMBCA. The new language clarifies that a proxy is valid for the period specified in the appointment form (which can be less than 11 months, 11 months or more than 11 months), and that if no term is specified, the term would be defaulted to 11 months unless such appointment is irrevocable under (5) (because it is coupled with an interest).

2. The language throughout this provision on "electronic transmission" will be finalized once the subcommittee takes up generally the sections of the FBCA that deal with electronic communications.

3. The additional language added to subsection (7) follows recently adopted changes to Section 7.22 of the RMBCA. This language makes clear that unless the appointment otherwise provides, an appointment made irrevocable under subsection (5) continues in effect after a transfer of the shares and a transferee takes subject to the appointment, except if such transferee is a transferee for value who did not know (or have reason to know from a notation on the certificate or in a related information statement) that there was an irrevocable appointment associated with such shares. This is not intended to be a substantive change from the existing language.

607.0723 Shares held by intermediaries and nominees.—

(1) A corporation's board of directors may establish a procedure under ~~by~~ which a person on whose behalf ~~the beneficial owner of~~ shares that are registered in the name of an intermediary or ~~a~~ nominee may elect to be treated ~~is recognized~~ by the corporation as the record shareholder by filing with the corporation a beneficial ownership certificate. The extent ~~of this recognition may be determined in the procedure~~ terms, conditions, and limitations of this treatment shall be specified in the procedure. To the extent such person is treated under such procedure as having rights or privileges that the record shareholder otherwise would have, the record shareholder shall not have those rights or privileges.

(2) The procedure shall specify ~~may set forth~~:

(a) The types of intermediaries or nominees to which it applies;

(b) The rights or privileges that the corporation recognizes in a person with respect to whom a beneficial ~~owner~~ ownership certificate is filed;

(c) The manner in which the procedure is selected ~~by the nominee~~, which shall include that the beneficial ownership certificate be signed or assented to by or on behalf of the record shareholder and the person or persons on whose behalf the shares are held;

(d) The information that must be provided when the procedure is selected;

(e) The period for which selection of the procedure is effective; ~~and~~

(f) Requirements for notice to the corporation with respect to the arrangement; and

(g) the form and contents of the beneficial ownership certificate.

(3)~~(f)~~ The procedure may specify any o~~O~~ther aspects of the rights and duties created by the filing of a beneficial ownership certificate.

Commentary:

1. The changes made in this section follow the recently adopted changes to Section 7.23 of the RMBCA. The new language modernizes this provision of the FBCA to better deal with issues of beneficial ownership of shares.

607.0724 ~~Corporation's~~ A~~a~~cceptance of votes.—

(1) If the name signed on a vote, ballot, consent, waiver, or proxy appointment corresponds to the name of a shareholder, the corporation if acting in good faith is entitled to accept the vote, ballot, consent, waiver, or proxy appointment and give it effect as the act of the shareholder.

(2) If the name signed on a vote, ballot, consent, waiver, or proxy appointment does not correspond to the name of its shareholder, the corporation if acting in good faith is nevertheless entitled to accept the vote, ballot, consent, waiver, or proxy appointment and give it effect as the act of the shareholder if:

(a) The shareholder is an entity and the name signed purports to be that of an officer or agent of the entity;

(b) The name signed purports to be that of an administrator, executor, guardian, personal representative, or conservator representing the shareholder and, if the corporation requests, evidence of fiduciary status acceptable to the corporation has been presented with respect to the vote, ballot, consent, waiver, or proxy appointment;

(c) The name signed purports to be that of a receiver, trustee in bankruptcy, or assignee for the benefit of creditors of the shareholder and, if the corporation requests, evidence of this status acceptable to the corporation has been presented with respect to the vote, ballot, consent, waiver, or proxy appointment;

(d) The name signed purports to be that of a pledgee, beneficial owner, or attorney in fact of the shareholder and, if the corporation requests, evidence acceptable to the corporation of the signatory's authority to sign for the shareholder has been presented with respect to the vote, ballot, consent, waiver, or proxy appointment; or

(e) Two or more persons are the shareholder as cotenants or fiduciaries and the name signed purports to be the name of at least one of the coowners and the person signing appears to be acting on behalf of all the coowners.

(3) The corporation is entitled to reject a vote, ballot, consent, waiver, or proxy appointment if the ~~secretary or other officer or agent~~ person authorized to count ~~tabulate~~ votes, acting in good faith, has reasonable basis for doubt about the validity of the signature on it or about the signatory's authority to sign for the shareholder.

(4) ~~The corporation and its officer or agent who~~ Neither the corporation nor the person authorized to count votes, including an inspector of election under s. 607.0729, that accepts or rejects a vote, ballot, consent, waiver, or proxy appointment in good faith and in accordance with the standards of this section ~~are not~~ is liable in damages to the shareholder for the consequences of the acceptance or rejection.

(5) Corporate action based on the acceptance or rejection of a vote, ballot, consent, waiver, or proxy appointment under this section is valid unless a court of competent jurisdiction determines otherwise.

(6) If an inspector of election has been appointed under s. 607.0729, the inspector of election also has the authority to request information and make determinations under subsections

(1), (2), and (3). Any determination made by the inspector of election under those subsections is controlling.

Commentary:

1. The clarifying changes to Section 7.24 of the RMBCA that were recently adopted, including references to "ballot" and language designed to coordinate with the inspector of election provisions in Section 7.29, have been added to this section of the FBCA.

607.0725 Quorum and voting requirements for voting groups.—

(1) Shares entitled to vote as a separate voting group may take action on a matter at a meeting only if a quorum of those shares exists with respect to that matter. Unless the articles of incorporation or this act provides otherwise, a majority of the votes entitled to be cast on the matter by the voting group constitutes a quorum of that voting group for action on that matter.

(2) Once a share is represented for any purpose at a meeting, it is deemed present for quorum purposes for the remainder of the meeting and for any adjournment of that meeting unless a new record date is or must be set for that adjourned meeting.

(3) If a quorum exists, action on a matter (other than the election of directors) by a voting group is approved if the votes cast within the voting group favoring the action exceed the votes cast opposing the action, unless the articles of incorporation or this act requires a greater number of affirmative votes.

(4) The holders of a majority of the shares represented, and who would be entitled to vote at a meeting if a quorum were present, where a quorum is not present, may adjourn such meeting from time to time.

(5) The articles of incorporation may provide for a greater voting requirement or a greater or lesser quorum requirement for shareholders, or voting groups of shareholders, than is provided by this act, but in no event shall a quorum consist of less than one-third of the shares entitled to vote.

(6) An amendment to the articles of incorporation that adds, changes, or deletes a greater or lesser quorum or voting requirement shall meet the same quorum requirement and be adopted by the same vote and voting groups required to take action under the quorum and voting requirements then in effect or proposed to be adopted, whichever is greater.

(7) The election of directors is governed by s. 607.0728.

(8) Whenever a provision of this act provides for voting of classes or series as separate voting groups, the rules provided in s. 607.1004(3) for amendments of articles of incorporation apply to that provision.

Commentary:

The following was discussed with respect to Section 607.0725:

1. The language in subsection (4) of Section 607.0725 (dealing with the ability of the holders of a majority of the shares in attendance at a meeting for which a quorum is not present to adjourn the meeting), which has been in the statute since 1989 but is not in the RMBCA, has been retained.

2. The issue of whether subsection (5), which deals with quorum requirements, is consistent with Section 607.1021 (dealing with the adoption of bylaws increasing quorum and addressing voting requirements for shareholders), has been deferred until the subcommittee considers Section 607.1021.

3. Subsection (f) of RMBCA Section 7.25 has been added as new subsection (8). It states; "Whenever a provision of this act provides for voting of classes or series as separate voting groups, the rules provided in Section 607.1004(3) for amendments of articles of incorporation apply to that provision." It is unclear why the junction box with respect to this issue is placed in 607.1004 rather than in this provision. This question has been deferred until the subcommittee considers Section 607.1004.

4. Practitioners are reminded that the best way to avoid the possibility that a separate vote of each voting group will be required under particular circumstances is to expressly and clearly state in the corporation's articles of incorporation that all shares will vote together as a single voting group on such matters.

607.0726 Action by single and multiple voting groups.—

(1) If the articles of incorporation or this act provides for voting by a single voting group on a matter, action on that matter is taken when voted upon by that voting group as provided in s. 607.0725.

(2) If the articles of incorporation or this act provides for voting by two or more voting groups on a matter, action on that matter is taken only when voted upon by each of those voting groups counted separately as provided in s. 607.0725. Action may be taken by one voting group on a matter even though no action is taken by another voting group entitled to vote on the matter.

Commentary:

This section of the FBCA follows the current version of the corresponding section of the RMBCA. No changes have been made.

607.0728 Voting for directors; cumulative voting.—

(1) Unless otherwise provided in the articles of incorporation, or in a bylaw that fixes a greater voting requirement for the election of directors and that is adopted by the board of directors or shareholders of a corporation having shares listed on a national securities exchange at the time of adoption, directors are elected by a plurality of the votes cast by the shares entitled to vote in the election at a meeting at which a quorum is present. A bylaw provision or amendment adopted by shareholders which specifies the votes necessary for the election of directors may not be further amended or repealed by the board of directors.

(2) Each shareholder who is entitled to vote at an election of directors has the right to vote the number of shares owned by him or her for as many persons as there are directors to be elected and for whose election the shareholder has a right to vote. Shareholders do not have a right to cumulate their votes for directors unless the articles of incorporation so provide.

(3) A statement included in the articles of incorporation that "all or a designated voting group of shareholders are entitled to cumulate their votes for directors," or words of similar import, means that the shareholders designated are entitled to multiply the number of votes they are entitled to cast by the number of directors for whom they are entitled to vote and cast the product for a single candidate or distribute the product among two or more candidates.

Commentary:

1. The language in the first sentence of subjection (2) is not included in RMBCA Section 7.28(b). However, this language is believed to be the general rule with respect to shares entitled to vote for the election of directors, and therefore the language has been retained.

2. The language in Section 7.28(d) of the RMBCA dealing with the rules for cumulative voting was determined not to be necessary and was not included in this section of the statute.

3. The subcommittee discussed the language that was added to the Florida statute in 2009, which language allows directors of a public company (a company with shares listed on a national securities exchange at the time of adoption) to amend the corporation's bylaws to fix a greater voting requirement for the election of directors, without requiring action by the shareholders. There was some concern expressed that this added language could be viewed as in conflict with the language in Section 607.1021 (although it was agreed that the drafters of the 2009 change did

not intend for Section 607.1021 to override the authority granted to directors to act alone to fix the greater voting requirement). It was suggested that a cross reference be added to Section 607.1021 so as to eliminate any potential for conflict and make it clear that the 2009 change to Section 607.0728 constitutes an exception to the more general rule in Section 607.1021 that shareholders must vote to amend bylaws to fix a greater voting requirement. [Suggested language to add to Section 607.1021 – "Except as otherwise provided in Section 607.0728(1), if authorized…..] There was no consensus on whether this additional cross reference override is necessary or, even if so, whether this is the best language to use, and a decision on this issue was deferred until the subcommittee takes up Section 607.1021.

607.0729. Voting Procedures; Inspectors of Election

(1) A [public corporation] shall, and any other corporation may, appoint one or more inspectors to act at a meeting of shareholders in connection with determining voting results. Each inspector will faithfully execute the duties of inspector with strict impartiality and according to the best of the inspector's ability. An inspector may be an officer or employee of the corporation. The inspectors may appoint or retain other persons to assist the inspectors in the performance of the duties of inspector under subsection (2), and may rely on information provided by such persons and other persons, including those appointed to count votes, unless the inspectors believe reliance is unwarranted.

(2) The inspectors shall:

(a) ascertain the number of shares outstanding and the voting power of each;

(b) determine the shares represented at a meeting;

(c) determine the validity of proxy appointments and ballots;

(d) count the votes; and

(e) make a written report of the results.

(3) In performing their duties, the inspectors may examine (i) the proxy appointment forms and any other information provided in accordance with s. 607.0722(2), (ii) any envelope or related writing submitted with those appointment forms, (iii) any ballots, (iv) any evidence or other information specified in s. 607.0724, and (v) the relevant books and records of the corporation relating to its shareholders and their entitlement to vote, including any securities position list provided by a depository clearing agency.

(4) The inspectors also may consider other information that they believe is relevant and reliable for the purpose of performing any of the duties assigned to them pursuant to subsection (2), including for the purpose of evaluating inconsistent, incomplete or erroneous information and reconciling information submitted on behalf of banks, brokers, their nominees or similar persons that indicates more votes being cast than a proxy is authorized by the record shareholder to cast or more votes being cast than the record shareholder is entitled to cast. If the inspectors consider other information allowed by this subsection, they shall, in their report under subsection (2), specify the information considered by them, including the purpose or purposes for which the information was considered, the person or persons from whom they obtained the information, when the information was obtained, the means by which the information was obtained, and the basis for the inspectors' belief that such information is relevant and reliable.

[(5) Determinations of law by the inspectors of election are subject to de novo review by a court in a proceeding under s. 607.07291 or other judicial proceeding.]

(6) The chair of the meeting shall announce at the meeting when the polls close for each matter voted upon. If no announcement is made, the polls shall be deemed to have closed upon the final adjournment of the meeting. After the polls close, no ballots, proxies or votes nor any revocations or changes thereto may be accepted.

Commentary:

1. This new section of the FBCA adopts the current version of Section 7.29 of the RMBCA dealing with inspectors of election.

2. Section 7.29(a) of the RMBCA applies this provision to all public companies and to "any other corporation" that appoints an inspector to act at a meeting of directors (compared to Section 231 of the DGCL, which, in covering this subject, only applies it to public companies). This proposal follows the approach taken on this issue in the RMBCA. However, the provision has been changed to a requirement to faithfully execute the duties of an inspector with strict impartiality rather than a provision that requires an inspector to "certify in writing" that they will faithfully execute the duties of inspector with strict impartiality. While best practices might be to arrange for a certification in writing, requiring a written certification was viewed as a potential trap for companies who don't get it technically right, even though their inspectors appropriately execute their duties.

3. There was a concern expressed about the cause of action implications of new Section 7.29(e), which provides that "determinations of law by the inspectors of election are subject to a de novo review by a court in a proceeding " challenging the actions at the meeting, particularly if the Drafting Subcommittee decides not to adopt RMBCA Section 7.29A dealing with "Judicial Determination of Corporate Offices and Review of Elections and Shareholder Votes." After discussion, the subcommittee deferred discussion on this subsection (e) until the subcommittee reviews RMBCA Section 7.29A.

4. The subcommittee decided to defer discussion on the definition of "public corporation" for purposes of this section pending receipt of the report from the task force of the ABA Corporate Laws Committee that is studying all sections of the RMBCA with implications to public companies.

5. New subsection (6) with respect to the closing of the polls on any a matter to be considered at a shareholders meeting has been added. The language adopted was derived from Section 7.08(d) of the RMBCA and is consistent with a similar provision in Section 231 of the DGCL (which DGCL Section deals generally with voting procedures and inspectors of election).

607.07291 Judicial Determination of Corporate Offices and Review of Elections and Shareholder Votes —

Section 7.29A of the RMBCA establishes procedures for judicial resolution of certain governance disputes involving corporations incorporated under or subject to provisions of [the state's] corporate statute. There is currently no comparable provision in the FBCA.

It is believed that the matters dealt with in Section 7.29A are matters that Florida courts in equity already have the power and authority to deal with (and have dealt with) under appropriate circumstances. Therefore, this section of the RMBCA has not been added to the proposal.

607.0730 Voting trusts.—

(1) One or more shareholders may create a voting trust, conferring on a trustee the right to vote or otherwise act for him or her or for them, by signing an agreement setting out the provisions of the trust (which may include anything consistent with its purpose) and transferring their shares to the trustee. When a voting trust agreement is signed, the trustee must ~~shall~~ prepare a list of the names and addresses of all voting trust beneficial owners ~~of beneficial interests in the trust~~, together with the number and class of shares each transferred to the trust, and deliver copies of the list and agreement to the corporation's principal office. After filing a copy of the list and agreement in the corporation's principal office, such copy shall be open to inspection by any shareholder of the corporation (subject to the requirements of s. 607.1602(3)) or any beneficiary of the trust under the agreement during business hours.

(2) A voting trust becomes effective on the date the first shares subject to the trust are registered in the trustee's name.

Commentary:

1. The language in the last sentence of subsection (1), dealing with the requirement that a copy of the trust should be available to beneficial holders of an interest in the trust and, subject to the requirements of Section 607.0602(3), to shareholders of the company, was retained.

2. Subsection (1) was revised to follow the newer language in RMBCA Section 7.30 ("must prepare a list of the names and addresses of all voting trust beneficial owners" instead of "shall prepare a list of the names and addresses of all owners of beneficial interests in the trust"). While the language is believed to have the same meaning as in the current Florida statute, the RMBCA language is clearer and is therefore recommended.

3. The language in the first sentence of section (c) of RMBCA Section 7.30, which provides that the duration of a voting trust shall be as set forth in the voting trust agreement, has not been added. The question of whether a voting trust without an expiration date can continue indefinitely is left to the Courts to decide.

4. Since Florida has not included a limitation on the duration of a voting trust to ten years since this statute was modified in 1998, the transition language contained in Section 7.30(c) of the RMBCA was considered unnecessary and was not added to this section of the FBCA.

607.0731 ~~Shareholders'~~ Voting agreements.—

(1) Two or more shareholders may provide for the manner in which they will vote their shares by signing an agreement for that purpose. A ~~shareholders'~~ voting agreement created under this section is not subject to the provisions of s. 607.0730.

(2) A ~~shareholders'~~ voting agreement created under this section is specifically enforceable.

(3) [A transferee of shares in a corporation the shareholders of which have entered into an agreement authorized by subsection (1) shall be bound by such agreement if the transferee takes shares subject to such agreement with notice thereof. A transferee shall be deemed to have notice of any such agreement or any ~~such~~ renewal thereof if the existence of such agreement ~~thereof~~ is noted on the face or back of the certificate or certificates representing such shares or on the information statement for such shares required by s. 607.0626(2).]

Commentary:

1. The name of this section is proposed to be changed to "Voting Agreements." This section only deals with voting agreements and the current heading ("Shareholders' Agreements") is misleading and creates confusion with Section 607.0732. A corresponding change is proposed to

the language in subsections (1) and (2) to change the words "shareholders' agreement" in each subsection to the words "voting agreements."

2. The language in subsection (3), dealing with the issue of whether transferees take their shares subject to a voting agreement, has been retained, even though this language is not in the corresponding section of the RMBCA. There is a concern that taking this subsection out could possibly be misconstrued by judges as a change in the law, when confronted with addressing whether a holder in due course who is not aware of a voting agreement should take free of the agreement. However, the language has been modernized.

3. Users of the statute are reminded that as a matter of good practice, legends with respect to voting agreements placed on stock certificates should be carefully worded so that the legend not only covers the particular agreement, but also all extensions, amendments or renewals of such agreement.

607.0732 Shareholder agreements.—

(1) An agreement among the shareholders of a corporation ~~with 100 or fewer shareholders at the time of the agreement,~~ that complies with this section, is effective among the shareholders and the corporation, even though it is inconsistent with one or more other provisions of this chapter, if it:

(a) Eliminates the board of directors or restricts the discretion or powers of the board of directors;

(b) Governs the authorization or making of distributions whether or not in proportion to ownership of shares, subject to the limitations in s. 607.06401;

(c) Establishes who shall be directors or officers of the corporation, or their terms of office or manner of selection or removal;

(d) Governs, in general or in regard to specific matters, the exercise or division of voting power by the shareholders and directors or by or among any of them, including use of weighted voting rights or director proxies;

(e) Establishes the terms and conditions of any agreement for the transfer or use of property or the provision of services between the corporation and any shareholder, director, officer, or employee of the corporation or among any of them;

(f) Transfers to any shareholder or other person any authority to exercise the corporate powers or to manage the business and affairs of the corporation, including the resolution of any issue about which there exists a deadlock among directors or shareholders; ~~or~~

(g) Requires dissolution of the corporation at the request of one or more of the shareholders or upon the occurrence of a specified event or contingency; or~~.~~

(h) Otherwise governs the exercise of the corporate powers or the management of the business and affairs of the corporation or the relationship between the shareholders, the directors, and ~~or~~ the corporation, or among any of them, and is not contrary to public policy. [For purposes of this paragraph, agreements contrary to public policy include, but are not limited to, agreements that reduce the duties of care and loyalty to the corporation as required by ss. 607.0830 and 607.0832, exculpate directors from liability that may be imposed under s. 607.0831, adversely affect shareholders' rights to bring derivative actions under s. 607.07401, or abrogate appraisal ~~dissenters'~~ rights under ss. 607.1301-607.1320.] [revisit when we get to 607.0830]

[what authorizes agreements where not all shareholders are parties and transfer restrictions and buy sell provisions and standstills and the like?]

(2) An agreement authorized by this section shall be:

(a)1. Set forth in the articles of incorporation or bylaws and approved by all persons who are shareholders at the time the agreement; or

2. Set forth in a written agreement that is signed by all persons who are shareholders at the time of the agreement and such written agreement is made known to the corporation; and~~.~~

(b) Subject to termination or amendment only by all persons who are shareholders at the time of the termination or amendment, unless the agreement provides otherwise ~~with respect to termination and with respect to amendments that do not change the designation, rights, preferences, or limitations of any of the shares of a class or series~~.

(3) The existence of an agreement authorized by this section shall be noted conspicuously on the front or back of each certificate for outstanding shares or on the information statement required by s. 607.0626(2). If at the time of the agreement the corporation has shares outstanding which are represented by certificates, the corporation shall recall such certificates and issue substitute certificates that comply with this subsection. The failure to note the existence of the agreement on the certificate or information statement shall not affect the validity of the agreement or any action taken pursuant to it. Any purchaser of shares who, at the time of purchase, did not have knowledge of the existence of the agreement shall be entitled to rescission of the purchase. A purchaser shall be deemed to have knowledge of the existence of the agreement if its existence is noted on the certificate or information statement for the shares in

compliance with this subsection and, if the shares are not represented by a certificate, the information statement is delivered to the purchaser at or prior to the time of the purchase of the shares. An action to enforce the right of rescission authorized by this subsection must be commenced within the earlier of 90 days after discovery of the existence of the agreement or 2 years after the time of purchase of the shares.

(4) An agreement authorized by this section shall cease to be effective when shares of the corporation [are listed on a national securities exchange or regularly quoted in a market maintained by one or more members of a national or affiliated securities association] [ALT: becomes a public corporation]. If the agreement ceases to be effective for any reason, the board of directors may, if the agreement is contained or referred to in the corporation's articles of incorporation or bylaws, adopt an amendment to the articles of incorporation or bylaws, without shareholder action, to delete the agreement and any references to it.

(5) An agreement authorized by this section that limits the discretion or powers of the board of directors shall relieve the directors of, and impose upon the person or persons in whom such discretion or powers are vested, liability for acts or omissions imposed by law on directors to the extent that the discretion or powers of the directors are limited by the agreement.

(6) The existence or performance of an agreement authorized by this section shall not be a ground for imposing personal liability on any shareholder for the acts or debts of the corporation even if the agreement or its performance treats the corporation as if it were a partnership or results in failure to observe the corporate formalities otherwise applicable to the matters governed by the agreement.

(7) Incorporators or subscribers for shares may act as shareholders with respect to an agreement authorized by this section if no shares have been issued when the agreement is made.

(8) This section shall not apply to, limit or invalidate agreements that are otherwise valid or authorized without regard to this section, including without limitation shareholder agreements between or among some or all of the shareholders or agreement between or among the corporation and one or more shareholders.

Commentary:

1. Subsection (1) currently limits the use of this section to corporations that have 100 or fewer shareholders at the time of the agreement. The comparable RMBCA provision does not contain this limitation. This proposal removes the 100 or more shareholder limitation, which is not contained in the corresponding section of the RMBCA. The 100 or more shareholders limitation was an artificial limitation that was originally included in the statute with a view that traditional corporate norms should only be allowed to be changed in closely held entities. However, in an era of providing flexibility for corporations and other entities to agree upon how they will operate, this distinction may no longer make sense.

2. Discussion on subsection (4) has been deferred until the definition of what is a "public corporation" is taken up at a future date.

3. There was a discussion about whether to continue to include the language in the last sentence of subsection (h) in Section 607.0732, even though such language is not in the comparable RMBCA provision (Section 7.32 (a)(8)). This language (underlined below) provides as follows:

> "(h) Otherwise governs the exercise of the corporate powers or the management of the business and affairs of the corporation or the relationship between the shareholders, the directors, or the corporation, and is not contrary to public policy. For purposes of this paragraph, agreements contrary to public policy include, but are not limited to, agreements that reduce the duties of care and loyalty to the corporation as required by ss. 607.0830 and 607.0832, exculpate directors from liability that may be imposed under s. 607.0831, adversely affect shareholders' rights to bring derivative actions under s. 607.07401, or abrogate dissenters' rights under ss. 607.1301-607.1320."

The members of the subcommittee in attendance at this meeting noted that this language essentially makes these provisions similar to non-waivable provisions under the limited liability company act. There was also a discussion about whether some of these provisions (such as the provision on appraisal rights), ought to be included on this list (if the decision is made to keep the list in this statute).

After discussion, the subcommittee decided to defer consideration of this provision until the subcommittee takes up Section 607.0830 (General Standards for Directors), but agreed that if the reference to 607.1301-607.1320 is left in the provision, the provision should be cleaned up to change the words "dissenters' rights" to "appraisal rights."

4. Subsection (8) was added to make clear that shareholders' agreements which are not executed by all persons who are shareholders at the time the agreements are entered into may still be enforceable against the shareholders who are parties to such agreement and against the corporation under certain circumstances. This is in addition to the two sections of the FBCA that expressly permit enforcement of these types of agreements: (i) Sections 607.0731 (Voting Agreements) and (ii) Section 607.0627 (Restriction on Transfer of Shares and Other Securities).

The addition of subsection (8) with respect to shareholder agreements that do not cover the topics contained in Section 607.0731(1) is not considered a change in the law and reflects what is considered to be the current state of the common law on this issue. It is added to eliminate any ambiguity in that regard and to provide express supporting language.

[The language added to Section 607.0732(8) does not address whether the provisions of Section 607.0732 are the exclusive method for reaching an agreement on the topics set forth in Section 607.0732(1). That question is left to the determination of the Courts. Practitioners are cautioned that if they want certainty as to whether an agreement covering one or more of the topics contained in Section 607.0732(1) is enforceable, they should follow the requirements of Section 607.0732.**]**

[SUBSECTION 8 AND THE COMMENTARY TO BE DISCUSSED AT A FUTURE MEETING OF THE SUBCOMMITTEE].

~~607.07401 Shareholders' derivative actions.~~

~~(1) A person may not commence a proceeding in the right of a domestic or foreign corporation unless the person was a shareholder of the corporation when the transaction complained of occurred or unless the person became a shareholder through transfer by operation of law from one who was a shareholder at that time.~~

~~(2) A complaint in a proceeding brought in the right of a corporation must be verified and allege with particularity the demand made to obtain action by the board of directors and that the demand was refused or ignored by the board of directors for a period of at least 90 days from the first demand unless, prior to the expiration of the 90 days, the person was notified in writing that the corporation rejected the demand, or unless irreparable injury to the corporation would result by waiting for the expiration of the 90-day period. If the corporation commences an investigation of the charges made in the demand or complaint, the court may stay any proceeding until the investigation is completed.~~

~~(3) The court may dismiss a derivative proceeding if, on motion by the corporation, the court finds that one of the groups specified below has made a determination in good faith after conducting a reasonable investigation upon which its conclusions are based that the maintenance of the derivative suit is not in the best interests of the corporation. The corporation shall have the burden of proving the independence and good faith of the group making the determination and the reasonableness of the investigation. The determination shall be made by:~~

~~(a) A majority vote of independent directors present at a meeting of the board of directors, if the independent directors constitute a quorum;~~

~~(b) A majority vote of a committee consisting of two or more independent directors appointed by a majority vote of independent directors present at a meeting of the board of directors, whether or not such independent directors constitute a quorum; or~~

~~(c) A panel of one or more independent persons appointed by the court upon motion by the corporation.~~

~~(4) A proceeding commenced under this section may not be discontinued or settled without the court's approval. If the court determines that a proposed discontinuance or settlement will substantially affect the interest of the corporation's shareholders or a class, series, or voting group of shareholders, the court shall direct that notice be given to the shareholders affected. The court may determine which party or parties to the proceeding shall bear the expense of giving the notice.~~

~~(5) On termination of the proceeding, the court may require the plaintiff to pay any defendant's reasonable expenses, including reasonable attorney's fees, incurred in defending the proceeding if it finds that the proceeding was commenced without reasonable cause.~~

~~(6) The court may award reasonable expenses for maintaining the proceeding, including reasonable attorney's fees, to a successful plaintiff or to the person commencing the proceeding who receives any relief, whether by judgment, compromise, or settlement, and require that the person account for the remainder of any proceeds to the corporation; however, this subsection does not apply to any relief rendered for the benefit of injured shareholders only and limited to a recovery of the loss or damage of the injured shareholders.~~

~~(7) For purposes of this section, "shareholder" includes a beneficial owner whose shares are held in a voting trust or held by a nominee on his or her behalf.~~

Commentary:

1. The FBCA includes all of the derivative action sections in a single statutory section. On the other hand, the RMBCA breaks this topic into multiple sections (Section 7.41-7.47). The revisions follow the approach of the RMBCA and thus break the derivative action provisions into multiple sections in a manner similar to the RMBCA.

2. **[NOTE: THIS PROVISION WILL BE INCORPORATED INTO THE FORWARD OF THE COMMENTARY TO THE PROPOSED STATUTE]**

Florida's corporate statute follows the RMBCA and its LLC and partnership statutes follow the Uniform Acts, and the RMBCA and the respective Uniform Acts often differ in procedure and substance for valid reasons. In many instances in the various Florida entity statutes, these differences have been respected, in whole or in part; yet in certain other instances where the same concept is addressed and where deemed appropriate, efforts have been made to harmonize the approach by using the same language with the same general structure. The process sections of the derivative action provisions of the FBCA are an example of provisions where this proposal seeks to harmonize the FBCA with the most recent uniform act adopted in Florida, the FRLLCA. On the other hand, there are other sections within the FBCA derivative action provisions where, because of the different nature of the different types of entities, trying to achieve harmonization of language and approach could actually end up defeating the intended differences of the respective entities (for example, in Section 607.0742). In those cases, the language and structure

were not harmonized, even though the subject matter of the provision was comparable. As a general matter, wherever possible, efforts were made to follow the model on which this proposed statute is based (the RMBCA) and not to stray from that model unless there was a compelling reason to do so.

607.0741 Standing.—

A shareholder may not commence or maintain a derivative proceeding unless the shareholder is a shareholder at the time the action is commenced and:

(1) was a shareholder when the conduct giving rise to the action occurred; or

(2) whose status as a shareholder devolved on the person through transfer or by operation of law from one who was a shareholder when the conduct giving rise to the action occurred.

Commentary:

1. Under proposed Section 607.07401(1), a person may not commence a derivative action proceeding unless the person was a shareholder of the corporation when the transaction complained of occurred or unless the person became a shareholder through transfer by operation of law from one who was a shareholder at that time. Section 7.41 of the RMBCA provides that a shareholder may not commence **or maintain** a derivative action proceeding unless the shareholder was a shareholder of the corporation at the time of the act or omission complained of or became a shareholder through transfer by operation of law from one who was a shareholder at that time. Section 7.41 also adds a requirement that "the shareholder must fairly and adequately represent the interests of the corporation in enforcing the rights of the corporation" to maintain a derivative action proceeding. Section 605.0803 of the FRLLCA is substantively similar to the current FBCA section regarding who is a proper plaintiff, except that it adds the requirement that the member must also be a member at the time the action is commenced.

2. The revised standing provision does not add any specific language to the effect that a shareholder must remain a shareholder throughout the derivative action proceeding in order to continue to proceed with an otherwise properly brought derivative action. Imposing any such condition to continuing to maintain such an action should be based on the equities in each respective situation and thus should be left to the courts to decide. Further, the RMBCA concept contained in Section 7.41(b) requiring that the shareholder fairly and adequately represent the interests of the corporation in enforcing the rights of the corporation was not included in the proposal out of a concern that this additional standing requirement is an invitation to litigation that would be costly and would unduly delay the process, thus operating as an inappropriate

hindrance to derivative actions. Any such determination should be based on the equities in each respective situation and thus should be left to the courts to decide.

607.0742 Demand.—

(1) No shareholder may commence a derivative proceeding until:

(a) a written demand has been made upon the corporation to take suitable action; and

(b) 90 days have expired from the date delivery of the demand was made unless the shareholder has earlier been notified that the demand has been rejected by the corporation or unless irreparable injury to the corporation would result by waiting for the expiration of the 90 day period.

[(2) The demand must set forth facts concerning share ownership and be sufficiently specific to appraise the corporation of the action sought to be taken and the grounds for that action.]

Commentary:

1. Under current Section 607.07401(2), a derivative proceeding cannot be brought unless the complainant alleges that demand was made to obtain action of the Board of Directors and the demand was refused or ignored by the Board of Directors for a period of at least 90 days from the first demand, unless irreparable injury to the corporation would result from waiting the 90 days. The RMBCA continues to include a required universal demand before a derivative action may be brought.

On the other hand, the FRLLCA, in Section 605.0802(2) contemplates that if making a demand on the other members (in a member-managed LLC) or on the other managers (in a manager managed LLC) would be futile or would cause irreparable injury to the company, then such demand shall not be required in order to maintain a derivative proceeding against the LLC. This provision follows RULLCA on this issue. Further, while not in the DGCL, the case law that has developed in Delaware dealing with derivative actions excuses the requirement of making a demand based upon futility.

Consideration was given to the following items:

- the reasons why futility might or might not be an appropriate excuse to demand in the LLC context and in the corporate context;

- the reasons why futility was not adopted in the FBCA when it was originally adopted in 1989 and why it has not been added to the FBCA as the Delaware law on the subject has continued to develop; and

- whether because of acknowledged harmonization efforts to rationalize among entity statutes in Florida, either demand futility should be added to the FBCA or the FRLLCA should be modified to remove demand futility.

After taking an analysis of these items into account, the revised demand provision retains a universal demand requirement and does not add the concept of demand futility.

[2. Subsection (3) is taken from the RMBCA commentary on this section and provide guidance on the required content of the demand.]

607.0743 Stay of proceedings.

If the corporation commences an inquiry into the allegations made in the demand or complaint, the court may stay any derivative proceeding for such period as the court deems appropriate.

Commentary:

The language is identical to the last sentence of subsection (2) of prior Section 607.07401.

607.0744 Special litigation committee.—

(1) If a corporation is named as or made a party in a derivative action, the corporation may appoint a special litigation committee to investigate the claims asserted in the derivative action and determine whether pursuing the action is in the best interest of the corporation. If the corporation appoints a special litigation committee, on motion, except for good cause shown, the court may stay any derivative action for the time reasonably necessary to permit the committee to make its investigation. This subsection does not prevent the court from:

(a) enforcing a person's rights under the corporation's articles of incorporation, bylaws or this chapter, including the person's rights to information under s. 607.1602; or

(b) exercising its equitable or other powers, including granting extraordinary relief in the form of a temporary restraining order or preliminary injunction.

(2) A special litigation committee must be composed of one or more disinterested and independent individuals, who may be shareholders.

(3) A special litigation committee may be appointed:

(a) by the consent of the shareholders who are not named as parties in the derivative action, who are otherwise disinterested and independent, and who hold a majority of the issued and outstanding shares owned by all of the shareholders of the corporation who are not named as parties in the derivative action and who are otherwise disinterested and independent;

(b) by a majority of qualified directors present at a meeting of the board of directors if the qualified directors constitute a quorum;

(c) by a majority vote of a committee consisting of two or more qualified directors appointed by majority vote of qualified directors present at a meeting of the board of directors, regardless of whether such qualified directors constitute a quorum; or

(c) upon motion by the corporation, consisting of a panel of one or more disinterested and independent persons.

(4) After appropriate investigation, a special litigation committee shall determine what action is in the best interest of the corporation, including continuing, dismissing, or settling the derivative action or taking another action that the special litigation committee deems appropriate.

(5) After making a determination under subsection (4), a special litigation committee shall file or cause to be filed with the court a statement of its determination and its report supporting its determination and shall serve each party to the derivative action with a copy of the determination and report. Upon motion to enforce the determination of the special litigation committee, the court shall determine whether the members of the committee were disinterested and independent and whether the committee conducted its investigation and made its recommendation in good faith, independently, and with reasonable care, with the committee having the burden of proof. If the court finds that the members of the committee were disinterested and independent and that the committee acted in good faith, independently, and with reasonable care, the court may enforce the determination of the committee. Otherwise, the court shall dissolve any stay of derivative action entered under subsection (1) and allow the derivative action to continue under the control of the plaintiff.

Commentary:

1. Section 607.07401(3) currently states that a court may dismiss a derivative proceeding under certain circumstances. Similarly, Section 605.0804(5) of the FRLLCA gives the court discretion to dismiss a derivative action based on the recommendation of a disinterested litigation committee in a situation where the committee is disinterested and independent and the committee has acted in good faith, independently and with reasonable care. Both of these provisions are

different from the RMBCA, which requires a court to dismiss the derivative action on the recommendation of a disinterested special litigation committee (Section 7.44 – "A derivative proceeding shall be dismissed…." under certain enumerated circumstances). Given the complexities that may exist within derivative actions, and the multiplicity of issues, and to maintain consistency with the approach taken in both the current FBCA and in the recently-enacted FRLLLCA, maintaining court discretion with regard to a motion to dismiss is warranted. The use of the more discretionary term "may" does not preclude a court from granting a motion where it finds the report to be well-founded. See, e.g. *Atkins v. Topp Telecom*, Inc., 874 So. 2d 626 (4th DCA 2004). However, there often may be circumstances where a court should not be bound to accept or reject in toto the report of a special litigation committee, and Florida cases have not revealed any problem with the current standard that grants judicial discretion.

2. Subsection (5) follows the approach of Section 607.07401(3) relative to this issue, utilizing the language used in Section 605.0804(5) of the FRLLCA, and thus allowing a court to dismiss a derivative proceeding based on the recommendation of a disinterested special litigation committee, but not requiring such dismissal. Subsection (5), which is consistent with existing Section 607.07401(3), places on the committee (which is acting for the corporation) the burden to prove that the committee is independent and that the investigation was conducted in good faith and with reasonable care. In contrast, the RMBCA in subsection (c) and (d) of Section 7.44 places on the shareholder bringing the derivative action the burden to prove the negative in those cases where the special litigation committee was composed of so-called qualified directors. [This shift in the burden was not considered to be appropriate in Florida, and there was no compelling reason to deviate from the approach taken in the FRLLCA relative to the placement of the burden of proof]. Questions of independence (or qualification) and the nature of the investigation are much more within the capacity of the corporation to address. Consistent with the approach that is taken in the FRLLCA, placing the burden of proving the negative on the shareholder bringing the derivative action was viewed an inappropriate burden on a shareholder's ability to pursue the action and therefore has not been reflected in this section.

[Note: 3. A discussion was commenced relative to whether a special litigation committee should be obligated to file its report with the court (as required by Section 605.0804). The subcommittee will continue its discussion on this issue at a future meeting of the subcommittee.]

607.0745. Dismissal or settlement; notice.—

(1) A derivative action on behalf of a corporation may not be voluntarily dismissed or settled without the court's approval.

(2) If the court determines that a proposed voluntary dismissal or settlement will substantially affect the interest of the corporation's shareholders or a class, series, or voting group of shareholders, the court shall direct that notice be given to the shareholders affected. The court may determine which party or parties to the derivative action shall bear the expense of giving the notice.

Commentary:

1. This provision is substantially the same as Section 607.07401(4). The language is modeled on the language in Section 605.0806 of the FRLLCA and, except as noted below, is substantively similar to Section 7.45 of the RMBCA.

2. The language in the last sentence of (2) which allows the court to determine which party or parties to the derivative action shall bear the expense of giving the notice is not in the corresponding RMBCA provision, but is in the current Florida statute, and has been carried forward.

607.0746 Proceeds and expenses.—

(1) Except as otherwise provided in subsection (2):

(a) proceeds or other benefits of a derivative action under s. 607.0742, whether by judgment, compromise, or settlement, belong to the corporation and not to the plaintiff; and

(b) if the plaintiff receives any proceeds, the plaintiff shall remit them immediately to the corporation.

(2) If a derivative action under s. 607.0742 is successful in whole or in part, the court may award the plaintiff reasonable expenses, including reasonable attorney fees and costs, from the recovery of the corporation.

Commentary:

1. The current Florida derivative action statute on this subject includes the following language:

> (6) The court may award reasonable expenses for maintaining the proceeding, including reasonable attorney's fees, to a successful plaintiff or to the person commencing the proceeding who receives any relief, whether by judgment, compromise, or settlement, and require that the person account for the remainder of any proceeds to the corporation; however, this subsection does not apply to any relief rendered for the benefit of injured

shareholders only and limited to a recovery of the loss or damage of the injured shareholders.

The substance of Section 607.0746 as drafted is, for the most part, similar to the existing statute, but is different than RMBCA Section 7.46 (which states that any payment to plaintiff requires a "substantial benefit" to the corporation). "Substantial" is an ambiguous term and could well lead to extensive argumentation. Settlements of derivative actions often deal principally with procedural matters, and may involve only a small amount of monetary recovery and non-monetary elements. Defendants may argue that the term "substantial" precludes a plaintiff from recovering expenses in many instances. As a result, such arguments should be avoided and, instead, judicial discretion should be allowed.

(2) TO BE DISCUSSED:

(a) Florida's current provision requires only "any relief" as a basis for awarding expenses. In order to create a firmer standard yet still retain judicial discretion, it has been suggested that the Florida provision be modified to read "taking into account the benefit and the relief obtained on behalf of the corporation as a result of the proceeding."

(b) The language in RMBCA Section 7.46(2) allowing the plaintiffs to pay the defendant's fees if the action was filed without reasonable cause or for an improper purpose was not added. If a proceeding is commenced in bad faith or for an improper purpose, courts already have the ability to deal with it.

(c) Should we consider a prevailing party standard as an alternative?

607.0747 Applicability to foreign corporations.—

In any derivative proceeding in the right of a foreign corporation brought in the courts of this state, the matters covered by this subchapter shall be governed by the laws of the jurisdiction of incorporation of the foreign corporation except for ss. 607.0743, 607.0744. 607.0745 and 607.0746.

Commentary:

There is currently no analogous provision in the FBCA. The section carve outs relate to judicial discretionary decisions that are appropriately governed by Florida local standards and do not implicate the internal affairs doctrine.

[607.0748 Shareholder action to appoint custodian or receiver.—

(1) A circuit court may appoint one or more persons to be custodians, or, if the corporation is insolvent, to be receivers, of and for a corporation in a proceeding by a shareholder where it is established that:

(a) the directors are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock, and irreparable injury to the corporation is threatened or being suffered; or

(b) the directors or those in control of the corporation are acting fraudulently and irreparable injury to the corporation is threatened or being suffered.

(2) The court

(a) may issue injunctions, appoint a temporary custodian or temporary receiver with all the powers and duties the court directs, take other action to preserve the corporate assets wherever located, and carry on the business of the corporation until a full hearing is held;

(b) shall hold a full hearing, after notifying all parties to the proceeding and any interested persons designated by the court, before appointing a custodian or receiver; and

(c) has jurisdiction over the corporation and all of its property, wherever located.

(3) The court may appoint an individual or domestic or foreign corporation (authorized to transact business in this state) as a custodian or receiver and may require the custodian or receiver to post bond, with or without sureties, in an amount the court directs.

(4) The court shall describe the powers and duties of the custodian or receiver in its appointing order, which may be amended from time to time. Among other powers,

(a) a custodian may exercise all of the powers of the corporation, through or in place of its board of directors, to the extent necessary to manage the business and affairs of the corporation; and

(b) a receiver (i) may dispose of all or any part of the assets of the corporation wherever located, at a public or private sale, if authorized by the court; and (ii) may sue and defend in the receiver's own name as receiver in all courts of this state.

(5) The court during a custodianship may redesignate the custodian a receiver, and during a receivership may redesignate the receiver a custodian, if doing so is in the best interests of the corporation.

(6) The court from time to time during the custodianship or receivership may order compensation paid and expense disbursements or reimbursements made to the custodian or receiver from the assets of the corporation or proceeds from the sale of its assets.]

Commentary:

Proposed Section 607.0748 is based on Section 7.48 of the RMBCA. Section 607.0748 provides a basis for shareholders of any corporation to obtain the appointment of a receiver or custodian in two situations arising outside the context of seeking a judicial dissolution: (i) when directors are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock and irreparable injury to the corporation is threatened or is being suffered, or (ii) when the directors or those in control of the corporation are acting fraudulently and irreparable injury to the corporation is threatened or being suffered. This section is also designed to provide some additional guidance to the courts relative to the latitude of the court's authority to make such appointments in these situations. Without this section, the express statutory power and authority to appoint a receiver or custodian is only available ancillary to an action for judicial dissolution (although Florida courts, through common law equitable powers, may be able to fashion, and have from time to time fashioned, such a remedy under current law). The RMBCA provision upon which this proposal is based is itself based on Section 226 of the DGCL.

The members of the Subcommittee decided, on a preliminary basis, to recommend the addition of this RMBCA section to the proposed draft of the FBCA. It was decided to add this section to the working draft of Article 7 in brackets, with a notation that adoption of this proposal is subject to the following qualifiers:

- the Subcommittee leaders will bring this provision to the attention of those members of the Business Litigation Committee who are reviewing the litigation aspects of the Subcommittee's proposal in order to obtain the thinking of those litigators as to whether they believe that adding this provision to the FBCA is advisable and/or desired;

- the Subcommittee will also further evaluate the addition of this section when the Subcommittee takes up review and analysis of the judicial dissolution provisions of the FBCA; and

- The Subcommittee's leaders will seek to have a Subcommittee member research and report to the Subcommittee at a future meeting relative to the extent to which this RMBCA provision has been adopted in other jurisdictions and relative to the form in which it has been adopted in those other jurisdictions.

Definitions Used in the Derivative Action Provisions – To be added to Section 607.01401

(__) "Derivative proceeding" means a civil suit in the right of a domestic corporation or, to the extent provided in s. 607.0747, in the right of a foreign corporation.

(__) "Qualified director" is defined in s. 607.0143.

§ 607.0143 qualified director.

(1) A "qualified director" is a director who, at the time action is to be taken under:

(a) s. 607.0744, does not have (i) a material interest in the outcome of the proceeding, or (ii) a material relationship with a person who has such an interest;

(b) s. 607.0853 or s. 607.0855, (i) is not a party to the proceeding, (ii) is not a director as to whom a transaction is a director's conflicting interest transaction or who sought a disclaimer of the corporation's interest in a business opportunity under s. 607.0870, which transaction or disclaimer is challenged in the proceeding, and (iii) does not have a material relationship with a director described in either clause (i) or clause (ii) of this subsection (1)(b);

(c) s. 607.0862, is not a director (i) as to whom the transaction is a director's conflicting interest transaction, or (ii) who has a material relationship with another director as to whom the transaction is a director's conflicting interest transaction; or

(d) s. 607.0870, would be a qualified director under subsection (1)(c) if the business opportunity were a director's conflicting interest transaction.

(2) For purposes of this section:

(a) "material relationship" means a familial, financial, professional, employment or other relationship that would reasonably be expected to impair the objectivity of the director's judgment when participating in the action to be taken; and

(b) "material interest" means an actual or potential benefit or detriment (other than one which would devolve on the corporation or the shareholders generally) that would reasonably be expected to impair the objectivity of the director's judgment when participating in the action to be taken.

(3) The presence of one or more of the following circumstances shall not automatically prevent a director from being a qualified director:

(a) nomination or election of the director to the current board by any director who is not a qualified director with respect to the matter (or by any person that has a material relationship with that director), acting alone or participating with others;

(b) service as a director of another corporation of which a director who is not a qualified director with respect to the matter (or any individual who has a material relationship with that director), is or was also a director; or

(c) with respect to action to be taken under s. 607.0744, status as a named defendant, as a director against whom action is demanded, or as a director who approved the conduct being challenged.

(__) "Shareholder" includes a beneficial owner whose shares are held in a voting trust or held by a nominee on the beneficial owner's behalf.]

Notes:

1. The RMBCA uses the term "qualified" in place of disinterested or independent and defines qualification in RMBCA s. 1.43. The defined term is applicable for the SLC in derivative actions and is also used in the conflict of interest provision.

2. Our subcommittee believes that adoption of the "qualified" term as defined in 1.43(a)(1) is appropriate, as well as the definition of "material" in 1.43(b). However, we do not recommend the safe harbor carve-outs applicable to derivative actions contained in 1.43(c). Although the carve-outs retain judicial discretion and do not mandate a decision regarding qualification, our concern is that the inclusion of the carve-outs could influence a court to regard the carve-outs as matters of presumptive legislative policy. We do not favor any limitation of a court's role in determining qualification. The careful way in which courts have examined the qualification issue under Florida's current law is testimony to maintaining judicial discretion and alerts corporations to the importance of creating truly independent SLCs. See, e.g., *McDonough v. American Int'l Corp*., 905 F. Supp. 916 (M.D. Fl. 1995), *Kloha v. Duda*, 226 F. Supp. 2d 1342 (M.D. Fl. 2002), and *Klein v. FPL Group, Inc.*, 2004 WL 302292 (S.D. Fl. 2004).

3. The definition of shareholder is from subsection (7) of Section 607.07401 of the FBCA.