

MEMORANDUM

FROM: Philip Schwartz
Gary Teblum

TO: Stefan Rubin

DATE: Agenda materials for September 5th meeting
of the Corporations, Securities and Financial
Services Committee

Stef:

As you know, the Chapter 607 drafting subcommittee has been actively discussing several issues as to which we have reached a point where we need input from the larger group in order to try to develop a better consensus regarding how to proceed on those issues. With your consent, we would like to put the following issues on the agenda for the upcoming meeting of the Corporations, Securities and Financial Services Committee to be held on Saturday, September 5th from 9:30 AM to noon:

- (i) select issues in the indemnification provisions of the proposed statute,
- (ii) the revised version of s. 607.0832 (director conflict of interest), and
- (iii) the question of whether to include s. 8.42 of the RMBCA (Officer duties) in the proposed statute.

To facilitate discussion on these issues, attached are the following materials for dissemination to the members of the CS&FS committee ahead of the meeting:

A. Indemnification.

- (1) a revised draft of proposed s. 607.0850-607.0859, with commentary,
- (ii) a copy of the side-by-side comparison of the indemnification provisions contained in the RMBCA and the existing FBCA, and
- (iii) a list of questions regarding the indemnification provisions of the proposed statute to be taken up at the CS&FS committee meeting.

B. Director Conflict of Interest. At the June meeting of the CS&FS committee, the committee had an extensive discussion about s. 607.0832 (director conflict of interest).

Following that meeting, there was further extensive discussion among several members of the Chapter 607 drafting subcommittee, which resulted in additional changes being made to the proposed draft of this section. Attached is a revised draft of that section of the statute, along with a marked draft showing the proposed changes to this section of the statute compared to the draft reviewed at the June 25th meeting of the CS&FS committee.

We intend to discuss the revised draft at Saturday's meeting and to seek further input on same from the CS&FS committee members.

C. Section 8.42 of the RMBCA (Officer Duties). Some months ago, the Chapter 607 subcommittee had extensive discussion about whether to include s. 8.42 (Officer duties) of the RMBCA in our proposal. We are going to ask committee members to weigh in on this issue at Saturday's meeting.

To facilitate the discussion about this issue, a document which includes the following, is attached: (i) a copy of s. 8.42 and the materials that were presented to the subcommittee around s. 8.42, (ii) a copy of the summary reporting about the decision made on this issue at the May 28, 2015 meeting of the subcommittee, (iii) a copy of Stu Ames' June 2nd e-mail to the subcommittee on this issue, (iv) a copy of Lou Conti's June 3rd e-mail to Stu Ames and the subcommittee on this issue, (v) a copy of the co-chairs June 3rd e-mail note to the subcommittee members regarding this issue; (vi) a copy of the June 7th e-mail that we received from Stu Cohn about this issue; (vii) a copy of the June 22nd e-mail that we received from Stu Ames about this issue, and (viii) a copy of s. 607.0830 (general standards for directors) as proposed by the subcommittee.

We look forward to seeing you at Saturday's meeting. If you have any questions, please feel free to give us a call.

ISSUES FOR DISCUSSION ON INDEMNIFICATION PROVISIONS OF STATUTE

1. Section 607.0851. Indemnification in the context of a derivative proceeding (s. 607.0851(4))
2. Sections 607.0851 and 607.0859. Limitations on indemnification (s. 607.0859)
3. Sections 607.0851 and 607.0858. Exclusivity of statute (607.0858(1)) – Must further indemnification beyond the statute be in the articles of incorporation as set forth in the RMBCA provisions or may they also be in bylaws, contracts, approved by disinterested directors or by shareholders or otherwise, as in the current statute.
4. Section 607.0852 (Mandatory Indemnification). Should the standard be “successful” or “wholly successful”. Should we expressly override the court-added “good faith” requirement that was identified in Banco Industrial case.
5. Section 607.0853. Advancement of Expenses – Who decides – the Board or the same persons who have to approve indemnification under s. 607.0855.
6. Section 607.0855. Authorization of Indemnification – who decides where there are fewer than two directors who are not parties to the proceeding or where the determination that indemnification is authorized is made by special legal counsel (s. 607.0855(3)).
7. Section 607.0858. Under s. 607.0858(1), are you permitted to indemnify an officer or director beyond the limits of s. 607.0859.

Indemnification

§ 607.0850 (Definitions)

In s. 607.0850 – 607.0859:

(1) “Agent” includes a volunteer.

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

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

(4) “Expenses” includes reasonable counsel fees, including those for appeal.

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

(6) “Not opposed to the best interest of the corporation” describes the actions of a person who acts in good faith and in a manner he or she reasonably believes to be in the best interests of the participants and beneficiaries of an employee benefit plan.

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

(9) “Proceeding” means any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, arbitative, or investigative and whether formal or informal.

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

37 Commentary:

- 38 1. Subsection (2) is derived from the definition of corporation in s. 607.0850(10).
39 2. Subsections (1), (4), (5), (6), (9) and (10) are derived from existing s. 607.0850(11).
40 3. The definition of "official capacity" from s. 8.50 of the RMBCA was not included in the
41 proposal because the proposal does not include different standards for indemnification when a
42 director is acting in an official capacity or otherwise.
43 4. The last sentence of subsection (3) states that "[D]irector" or "officer" includes, unless
44 the context requires otherwise, the estate, heirs, executors, administrators and personal
45 representatives of a director or officer. Although this adds slightly to the list of parties who
46 receive the benefits of indemnity that are currently included in s. 607.0850(8), the changes are
47 believed to be consistent with the intent of the current statute.
48 5. If a definition of "expenses" is added to s. 607.01401 (including within that definition the
49 concept of reasonableness of such expenses), the definition of expenses in subsection (4) will not
50 be necessary.

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52

53 § 607.0851 (Permissible Indemnification)

54 (1) Except as otherwise provided in this section and in s. 607.0859, a corporation may
55 indemnify an individual who is a party to a proceeding because the individual is a director or
56 officer against liability incurred in the proceeding if:

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

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

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

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

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

68 (4) Unless ordered by a court under s. 607.0854(1)(C), a corporation may not
69 indemnify an officer or director in connection with a proceeding by or in the right of the

70 corporation except for expenses and amounts paid in settlement not exceeding, in the judgment
71 of the board of directors, the estimated expense of litigating the proceeding to conclusion,
72 actually and reasonably incurred in connection with the defense of settlement of such
73 proceeding, including any appeal thereof, where such person acted in good faith and in a manner
74 he or she reasonably believed to be in, and not opposed to, the best interests of the corporation."

75 Commentary:

76 1. The RMBCA leaves indemnity of employees and agents to the laws of agency. Although
77 the current Florida statute includes employees and agents in the applicable sections of s.
78 607.0850 that provide for permissible and mandatory indemnification, this proposal follows the
79 RMBCA structure and elects to cover employees and agents under the laws of agency.
80 Notwithstanding, this change is not believed or intended to substantively cut back on the power
81 of a corporation to indemnify its employees or agents. Section 607.0858(6) states that nothing in
82 s. 607.0850-607.0859 limits the power of the corporation to indemnify agents and employees.

83 2. Section 8.56 of the RMBCA provides for indemnification of officers. However, this
84 proposal includes officers as covered persons directly in the applicable sections of proposed s.
85 607.0851, s. 607.0852 and s. 607.0853, thus eliminating the need for inclusion of a parallel of
86 RMBCA s. 8.56.

87 3. Section 8.51(a)(2) of the RMBCA, dealing with indemnity beyond the statutory
88 provisions that is included in the corporation's articles of incorporation, is not included in the
89 proposal. Further, the proposed s. 607.0202 does not include the RMBCA language which would
90 expressly authorize indemnity beyond the statutory provisions, but require such expanded
91 authorization to be included in the articles of incorporation. However, a final decision on
92 whether to incorporate this provision has been deferred until the subcommittee considers the
93 exclusivity provision of the indemnification statute (proposed s. 607.0859).

94 4. The proposal does not follow the RMBCA construct that creates a different standard of
95 what needs to be established for indemnification of directors when they are acting in an "official
96 capacity" compared to when they are not acting in an "official capacity" (under s. 8.51(a)(1)(2)
97 of the RMBCA, if a director is acting in his or her official capacity, to obtain indemnification he
98 or she must establish that he or she reasonably believed that his or her conduct was in the best
99 interest of the corporation, and in all other cases, to obtain indemnification, he or she must
100 establish that he or she reasonably believed that his or her conduct was at least not opposed to the
101 best interests of the corporation.

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103

104 § 607.0852 (Mandatory Indemnification)

105 To the extent that a director or officer of a corporation has been successful on the merits
106 or otherwise in defense of any proceeding referred to in s. 607.0851, or in the defense of any
107 claim, issue or matter therein, he or she shall be indemnified against expense actually and
108 reasonably incurred by him or her in connection therewith.

109

110 Commentary:

111 1. The existing Florida wording from existing s. 607.0850(3), which was originally adopted
112 in 1989 and followed the wording of the earlier version of the RMBCA, was retained in
113 proposed s. 607.0852.

114 2. The use of the term "successful" has been retained, rather than using the term "wholly
115 successful," which is the term included in s. 8.52 of the RMBCA. It is believed that courts should
116 continue to determine when and whether a person seeking mandatory indemnity has been
117 successful on the merits or otherwise under particular circumstances.

118 3. In *Banco Industrial de Venezuela C.A., Miami Agency v. De Saad*, 68 S.3d 895 (Fla.
119 2011), the Florida Supreme Court grafted a good faith requirement into s. 607.0850(3) dealing
120 with mandatory indemnification. TO BE DISCUSSED – Whether the court's statement on this
121 issue are correct or incorrect and whether this should impact the decision to retain "successful" or
122 to adopt the RMBCA "wholly successful" language.

123

124 § 607.0853 (Advance For Expenses)

125 (1) A corporation may, before final disposition of a proceeding, advance funds to pay
126 for or reimburse expenses incurred in connection with the proceeding by an individual who is a
127 party to the proceeding because that individual is a member of the board of directors or an officer
128 if the director or officer delivers to the corporation:

129 (a) a signed written affirmation of the director's or officer's good faith belief
130 that the relevant standard of conduct described in s. 607.0851 has been met by the
131 director or officer; and

132 (b) a signed written undertaking of the director or officer to repay any funds
133 advanced if the director or officer is not entitled to mandatory indemnification under s.
134 607.0852 and it is ultimately determined under s. 607.0854 or s. 607.0855 that the
135 director has not met the relevant standard of conduct described in s. 607.0851 or the
136 director or officer is not entitled to indemnification by virtue of s. 607.0859.

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

140 (3) Authorizations under this section shall be made by the board of directors.¹

141 Commentary:

¹ TO BE DISCUSSED – Should we follow the RMBCA construct of this section which grafts into this provision the language in s. 607.0855 dealing with approval in conflict of interest situations.

142 1. Subsection (3) expressly provides that a decision to advance expenses on behalf of a
143 director or officer is to be made by the board of directors. Although the existing statute (s.
144 607.0850(7)) does not specifically state that the board of directors makes this decision, it is
145 believed to be implied under the current statute.

146 2. The provisions in RMBCA s. 8.53(c), which establish how advancement of expenses is to
147 be determined when there are interested directors, has not been included. The expectation and
148 intent is that in interested director situations, the board of directors will need to consider the
149 application of s. 607.0832 (director conflicts of interest) to its decision-making on this subject.

150 3. [RMBCA s. 8.53(a)(1) regarding advancement of expenses if the proceeding involves
151 conduct for which liability has been eliminated under a provision of the articles of incorporation
152 as authorized by s. 2.02 of the RMBCA has not been included. However, a final decision on
153 whether to include this provision was deferred until the subcommittee considers the exclusivity
154 provision of the indemnification statute (proposed s. 607.0859). See also comment 2 to
155 commentary regarding s. 607.0851.]

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158 § 607.0854 (Court-Ordered Indemnification and Advance for Expenses)

159 (1) Unless the corporation's articles of incorporation provide otherwise,
160 notwithstanding the failure of a corporation to provide indemnification, and despite any contrary
161 determination of the board or of the shareholders in the specific case, a director or officer of the
162 corporation who is a party to a proceeding because he or she is a director or officer may apply
163 for indemnification or an advance for expenses, or both, to a court having jurisdiction over the
164 corporation that is conducting the proceeding, or to a circuit court of competent jurisdiction².
165 After receipt of an application and after giving any notice it considers necessary, the court may:

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

168 (B) order indemnification or advance for expenses³ if the court determines that
169 the director or officer is entitled to indemnification or advance for expenses pursuant to a
170 provision authorized by s. 607.0858(1); or

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

173 1. to indemnify the director or officer, or

² Language has been added to clear that the corporation must be a party to the proceeding in which indemnification is ordered (which is not expressly stated in the existing statute).

³ Existing s. 607.0850(9) adds the word "reasonable" ahead of the word "expenses" in this section. While a decision was made at the last meeting to add the concept of reasonable expenses, to this section, in light of definition of expenses in proposed s. 607.0850 (4), it is unclear whether this addition is necessary.

174 2. to advance expenses to the director or officer;

175 even if he or she has not met the relevant standard of conduct set forth in s.
176 607.0851(1), failed to comply with s. 607.0853 or was adjudged liable in a proceeding
177 referred to in s. 607.0859, but if the director or officer was adjudged so liable,
178 indemnification shall be limited to expenses incurred in connection with the proceeding.

179 (2) If the court determines that the director or officer is entitled to indemnification
180 under subsection (1)(A) or to indemnification or advance for expenses under subsection (1)(B), it
181 shall also order the corporation to pay the director's or officer's expenses incurred in connection
182 with obtaining court-ordered indemnification or advance for expenses. If the court determines
183 that the director or officer is entitled to indemnification or advance for expenses under subsection
184 (1)(C), it may also order the corporation to pay the director's or officer's expenses to obtain
185 court-ordered indemnification or advance for expenses.

186 Commentary:

187 1. The lead in language that has been added to subsection (1) is derived from existing s.
188 607.0850(9).

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

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

192 Current s. 607.0850(9) on Court-ordered indemnification

193 (9) Unless the corporation's articles of incorporation provide otherwise,
194 notwithstanding the failure of a corporation to provide indemnification, and despite any
195 contrary determination of the board or of the shareholders in the specific case, a director,
196 officer, employee, or agent of the corporation who is or was a party to a proceeding may
197 apply for indemnification or advancement of expenses, or both, to the court conducting
198 the proceeding, to the circuit court, or to another court of competent jurisdiction. On
199 receipt of an application, the court, after giving any notice that it considers necessary,
200 may order indemnification and advancement of expenses, including expenses incurred in
201 seeking court-ordered indemnification or advancement of expenses, if it determines that:

202 (a) The director, officer, employee, or agent is entitled to mandatory
203 indemnification under subsection (3), in which case the court shall also order the
204 corporation to pay the director reasonable expenses incurred in obtaining court
205 ordered indemnification or advancement of expenses;

206 (b) The director, officer, employee, or agent is entitled to
207 indemnification or advancement of expenses, or both, by virtue of the exercise by
208 the corporation of its power pursuant to subsection (7); or

209 (c) The director, officer, employee, or agent is fairly and reasonably
210 entitled to indemnification or advancement of expenses, or both, in view of all the

211 relevant circumstances, regardless of whether such person met the standard of
212 conduct set forth in subsection (1), subsection (2), or subsection (7).

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214 § 607.0855 (Determination and Authorization of Indemnification)

215 (1) Unless ordered by a court under s. 607.0854(1)(C), a corporation may not
216 indemnify a director or officer under s. 607.0851 unless authorized for a specific proceeding
217 after a determination has been made that indemnification is permissible because the director or
218 officer has met the relevant standard of conduct set forth in s. 607.0851.

219 (2) The determination shall be made:

220 (a) By the board of directors by a majority vote of a quorum consisting of
221 directors who were not parties to such proceeding; or

222 (b) If such a quorum is not obtainable or, even if obtainable, by majority vote
223 of a committee duly designated by the board of directors (in which directors who are
224 parties may participate) consisting solely of two or more directors not at the time parties
225 to the proceeding; or

226 (c) by special legal counsel:

227 1. Selected by the board of directors prescribed in paragraph (a) or
228 the committee prescribed in paragraph (b); or

229 2. If a quorum of the directors cannot be obtained for paragraph (a)
230 and the committee cannot be designated under paragraph (b), selected by a
231 majority vote of the full board of directors (in which directors who are parties
232 may participate); or

233 (d) by the shareholders by a majority vote of a quorum consisting of
234 shareholders who were not parties to such proceeding or, if no such quorum is obtainable,
235 by a majority vote of shareholders who were not parties to such proceeding.

236 (3) Authorization of indemnification shall be made in the same manner as the
237 determination that indemnification is permissible, except that if there are fewer than two
238 directors who are not parties to the proceedings, authorization of indemnification shall be made
239 by those who would otherwise be entitled to select special legal counsel under subsection (2)(c).

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243 RMBCA § 8.56 (Indemnification of Officers)

244 This section of the RMBCA has not been included in the proposal since officers have been added
245 to the scope of coverage in ss. 607.0851, 607.0852 and 607.0853. See comment 2 to proposed s.
246 607.0851.

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249 § 607.0857 (Insurance)

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

258 Commentary:

259 The existing coverage on insurance is contained in s. 607.0850(12), which reads as follows:

260 12. A corporation shall have power to purchase and maintain insurance on
261 behalf of any person who is or was a director, officer, employee, or agent of the
262 corporation or is or was serving at the request of the corporation as a director, officer,
263 employee, or agent of another corporation, partnership, joint venture, trust, or other
264 enterprise against any liability asserted against the person and incurred by him or her in
265 any such capacity or arising out of his or her status as such, whether or not the
266 corporation would have the power to indemnify the person against such liability under
267 the provisions of this section

268 All jurisdictions contain some insurance provision comparable to Section 8.57. The pre-1994
269 version and the 1969 version are identical. The only differences between the current version and
270 the pre-1994 version are: (i) the pre-1994 version applied to officers, directors, and agents, where
271 the current version applies only to officers and directors, and (ii) the pre-1994 version does not
272 include advancement for expenses.

273 Florida is one of thirty-seven jurisdictions (including Connecticut, Delaware and Georgia) who
274 have adopted the pre-1994 version of Section 8.57. Thirteen jurisdictions, including
275 Massachusetts, have adopted the current version of Section 8.57.

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278 § 607.0858 (Variation by Corporate Action; Application of Subchapter)

279 (1) The indemnification provided pursuant to s. 607.0851 and 607.0852 and the
280 advancement of expenses provided pursuant to s. 607.0853 are not exclusive, and a corporation
281 may, by a provision in its articles of incorporation, bylaws or any contract, or by vote of
282 shareholders or disinterested directors, or otherwise, obligate itself in advance of the act or
283 omission giving rise to a proceeding to provide any other or further indemnification or
284 advancement of expenses to any of its directors or officers. Any such obligatory provision shall
285 be deemed to satisfy the requirements for authorization referred to in s. 607.0853(3) and in s.
286 607.0855(3). Any such provision that obligates the corporation to provide indemnification to the
287 fullest extent permitted by law shall be deemed to obligate the corporation to advance funds to
288 pay for or reimburse expenses in accordance with s. 607.0853 to the fullest extent permitted by
289 law, unless the provision specifically provides otherwise.

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

297 (3) Any provision pursuant to subsection (1) shall not obligate the corporation to
298 indemnify or advance expenses to a director of a predecessor of the corporation, pertaining to
299 conduct with respect to the predecessor, unless otherwise specifically provided. Any provision
300 for indemnification or advance for expenses in the articles of incorporation, bylaws, or a
301 resolution of the board of directors or shareholders of a predecessor of the corporation in a
302 merger or in a contract to which the predecessor is a party, existing at the time the merger takes
303 effect, shall be governed by s. 607.1107(1)(d)⁴.

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

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

310 (6) Sections 607.0850-607.0859 do not limit a corporation's power to indemnify,
311 advance expenses to or provide or maintain insurance on behalf of an employee or agent.

312 Commentary

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

⁴ Discuss whether to retain this RMBCA subsection.

353 Commentary:

354 *Current Provision:* The current applicable provision is contained in subsection (7) of s.
355 607.0850, the applicable provision of which reads as follows:

356 ...However, indemnification or advancement of expenses shall not be made to or on
357 behalf of any director, officer, employee, or agent if a judgment or other final
358 adjudication establishes that his or her actions, or omissions to act, were material to the
359 cause of action so adjudicated and constitute:

360 (a) A violation of the criminal law, unless the director, officer,
361 employee, or agent had reasonable cause to believe his or her conduct was
362 lawful or had no reasonable cause to believe his or her conduct was unlawful;

363 (b) A transaction from which the director, officer, employee, or agent
364 derived an improper personal benefit;

365 (c) In the case of a director, a circumstance under which the liability
366 provisions of s. 607.0834 are applicable; or

367 (d) Willful misconduct or a conscious disregard for the best interests of
368 the corporation in a proceeding by or in the right of the corporation to procure a
369 judgment in its favor or in a proceeding by or in the right of a shareholder.

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

607.0832 Director conflicts of interest.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

607.0832 Director conflicts of interest.

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

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

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

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

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

1. Fair in terms of the director’s dealings with the corporation in connection with that transaction; and
2. Comparable to what might have been obtainable in an arm’s length transaction.

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

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

(2) ~~If the requirements of this section have been satisfied, a transaction between a corporation and one or more of its directors, or another entity in which one or more of the corporation’s directors have a material financial interest or other material interest, a director’s conflict of interest transaction is fair to the corporation at the time it is authorized, approved, effectuated, or ratified:~~

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

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

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

~~(3) If a transaction is fair to the corporation at the time it is authorized, approved, effectuated, or ratified, the fact that a director of the corporation is directly or indirectly a party to the transaction, other than being an indirect party as a result of being a shareholder of the corporation, or has a direct or indirect material financial interest or other material interest in the transaction, other than having an indirect interest as a result of being a shareholder of the corporation, is not grounds for equitable relief and does not give rise to an award of damages or other sanctions.~~(4)(a) In a proceeding challenging the validity of a transaction described in subsection (3) director's conflict of interest transaction or seeking equitable relief, award of damages or other sanctions with respect to a director's conflict of interest transaction, the person challenging the validity or seeking equitable relief, award of damages or other sanctions has the burden of proving the lack of fairness of the transaction if:

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

2. The material facts of the transaction and the director's interest in the transaction were disclosed or known to the shareholders who voted upon such transaction and the transaction was authorized, approved, or ratified by a majority of the votes cast by disinterested shareholders or by the written consent of disinterested shareholders representing a majority of the votes that could be cast by all disinterested shareholders. Shares owned by or voted under the control of a director who has a relationship or interest in the director's conflict of interest transaction described in subsection (2) shall not be considered shares owned by a disinterested shareholder and thus may not be counted in a vote of shareholders to determine whether to authorize, approve, or ratify a director's conflict of interest transaction under this subsection (43)(a)2. The vote of those shares, however, is counted in determining whether the transaction is approved under other sections of this act. A majority of the shares, whether or not present, that are entitled to be counted in a vote on the transaction under this subsection constitutes a quorum for the purpose of taking action under this section.

(b) If neither of the conditions provided in paragraph (a) has been satisfied, the person defending or asserting the validity of a director's conflicting interest transaction described in subsection (3) has the burden of proving its fairness in a proceeding challenging the validity of the transaction.

(54) The presence of or a vote cast by a director with an interest in the transaction does not affect the validity of an action taken under paragraph (43)(a) if the transaction is otherwise authorized, approved, or ratified as provided in subsection (43), but the presence or vote of the director may be counted for purposes of determining whether the transaction is approved under other sections of this act.

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

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

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

Document comparison by Workshare Compare on Monday, July 13, 2015
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MATERIALS ON SECTION 8.42 FOR CONSIDERATION

RMBCA Section 8.42 – Standards of Conduct for Officers

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

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

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

Section 8.42 of the RMBCA

§8.42 STANDARDS OF CONDUCT FOR OFFICERS

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

(1) in good faith;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

All:

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

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

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

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

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

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

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

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

Stuart D. Ames

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

Stu,

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

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

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

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

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

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

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

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

Phil,

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

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

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

Stu

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

Phil and Gary:

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

Regards, Stu

Proposed s. 607.0830 (General standards for directors)

607.0830 General standards for directors.—

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

(a) In good faith;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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