

Director Conflict of Interest

What the Florida statute would look like if the RMBCA versions of the director conflict of interest provisions (RMBCA Sections 8.60, 8.61, 8.62, 8.63 and 8.70) were folded into the statute. This draft of proposed Section 607.0832 combines Sections 8.60 and 8.61 of the RMBCA). This draft also includes new Sections 607.08321, 607.08322 and 607.08323, which are based on Section 8.62, 8.63 and 8.70 of the RMBCA.

607.0832 Director conflicts of interest and judicial action.—

(1) For purposes of ss. 607.08321, 607.08322, and 607.08323 only:

(a) "Director's conflicting interest transaction" means a transaction effected or proposed to be effected by the corporation (or by an entity controlled by the corporation) (i) to which, at the relevant time, the director is a party; or (ii) respecting which, at the relevant time, the director had knowledge and a material financial interest known to the director; or (iii) respecting which, at the relevant time, the director knew that a related person was a party or had a material financial interest.

(b) "Control" (including the term "controlled by") means (i) having the power, directly or indirectly, to elect or remove a majority of the members of the board of directors or other governing body of an entity, whether through the ownership of voting shares or interests, by contract, or otherwise, or (ii) being subject to a majority of the risk of loss from the entity's activities or entitled to receive a majority of the entity's residual returns.

(c) "Relevant time" means (i) the time at which directors' action respecting the transaction is taken in compliance with s. 607.08321, (ii) if the transaction is not brought before the board of directors of the corporation (or a committee thereof) for action under s. 607.08321, at the time the corporation (or an entity controlled by the corporation) becomes legally obligated to consummate the transaction.

(d) "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.

(e) "Related person" means (i) the director's spouse; (ii) a child, stepchild, parent, step parent, grandparent, sibling, step sibling, half sibling, aunt, uncle, niece, or nephew (or any spouse thereof) of the director or the director's spouse; (iii) an individual living in the same home as the director; (iv) an entity (other than the corporation or an entity controlled by the corporation) controlled by the director or any person specified in this subsection (e); (v) a domestic or foreign (A) business or nonprofit corporation (other than the corporation or an entity controlled by the corporation), (B) unincorporated entity of which the director is a general partner or a member of the governing body, or (C) individual, trust or estate for whom or of which the director is a trustee, guardian,

personal representative or like fiduciary; or (vi) a person that is, or an entity that is controlled by, an employer of the director.

(f) "Fair to the corporation" means that the transaction as a whole was beneficial to the corporation, taking into appropriate account whether it was (i) fair in terms of the director's dealings with the corporation, and (ii) comparable to what might have been obtainable in an arm's length transaction given the consideration paid or received by the corporation.

(g) "Required disclosure" means (i) disclosure of the existence and nature of the director's conflicting interest, and (ii) all facts known to the director respecting the subject matter of the transaction that a director free of such conflicting interest would reasonably believe to be material in deciding whether to proceed with the transaction.

(2) A transaction effected or proposed to be effected by the corporation (or by an entity controlled by the corporation) may not be the subject of equitable relief, or give rise to an award of damages against a director of the corporation, in a proceeding by the shareholder or by or in the right of the corporation, on the grounds that the director has an interest respecting the transaction, if it is not a director's conflicting interest transaction.

(3) A director's conflicting interest transaction may not be the subject of equitable relief, or give rise to an award of damages or other sanctions against a director of the corporation, in a proceeding by a shareholder or by or in the right of the corporation, on the ground that the director has an interest respecting the transaction, if:

(a) directors' action respecting the transaction was taken in compliance with s. 607.08321 at any time;

(b) shareholders' action respecting the transaction was taken in compliance with s. 607.08322 at any time; or

(c) the transaction, according to the circumstances at the relevant time, is established to have been fair to the corporation.

607.08321 Directors' action in director conflicts of interest.—

(1) Directors' action respecting a directors' conflicting interest transaction is effective for purposes of s. 607.0832(3)(a) if the transaction has been authorized by the affirmative vote of a majority (but no fewer than two) of the directors who are not conflicted under s. 607.0832 who voted on the transaction, after required disclosure by the conflicted director of information not already known by such qualified directors, or after modified disclosure in compliance with subsection (2), below, provided that:

(a) Such directors have deliberated and voted outside the presence of and without participation by any other director; and

(b) Where the action has been taken by a committee, none of the members of the committee were parties to the director conflict of interest transaction, and either (i) the committee was composed of all of such directors on the board of directors, or (ii) the members of the committee were appointed by the affirmative vote of a majority of such directors on the board.

(2) Notwithstanding subsection (1), when a transaction is a director's conflicting interest transaction only because of a related person described in clause (v) or (vi) of s. 607.0832(1)(e) is a party to or has a material financial interest in the transaction, the conflicted director is not obligated to make required disclosure to the extent that the director reasonably believes that doing so would violate a duty imposed under law, a legally enforceable obligation of confidentiality, or a professional ethics rule, provided that the conflicted director discloses to all directors voting on the transaction:

- (a) all information required to be disclosed that is not so violative;
- (b) the existence and nature of the director's conflicting interest; and
- (c) the nature of the conflicted director's duty not to disclose confidential information.

(3) A majority (but no fewer than two) of the voters qualified to vote under this section, or on the committee, constitutes a quorum for purposes of action that comply with this section.

(4) Where directors' action under this section does not satisfy a quorum or voting requirement applicable to the authorization of the transaction by reason of the articles of incorporation, the bylaws or this Act, independent action to satisfy those authorization requirements must be taken by the board of directors or a committee in which action all directors may participate.

607.08322 Shareholders' action in director conflicts of interest.—

(1) Shareholders' action respecting a director's conflicting interest transaction is effective for purposes of s. 607.0832(3)(b) if a majority of the votes cast by holders of qualified shares are in favor of the transaction after:

- (a) notice to shareholders describing the action to be taken respecting the transaction;
- (b) provision to the corporation of the information referred to in subsection (2), below; and
- (c) communication to the shareholders entitled to vote on the transaction of the information that is subject to required disclosure, to the extent that the information is not known by them.

In the case of shareholders' action at a meeting, the shareholders entitled to vote shall be determined as of the record date for notice of the meeting.

(2) A director who has a conflicting interest respecting the transaction shall, before the shareholders' vote, inform the secretary or other officer or agent of the corporation authorized to tabulate votes, in writing, of the number of shares that the director knows are not qualified to vote under subsection (3) below, and the identity of the holders of those shares.

(3) For purposes of this section:

(a) "Holder" means and "held by" refers to shares held by both a record shareholder and a beneficial shareholder; and

(b) "Qualified shares" means all shares entitled to be voted with respect to the transaction except for shares that the secretary or other officer or agent of the corporation authorized to tabulate votes either knows, or under subsection (2) is notified, are held by (i) a director who has a conflicting interest respecting the transaction or (ii) a related person of the director (excluding a person described in s. 607.0832(1)(e)(vi)).

(4) A majority of the votes entitled to be cast by the holders of all qualified shares constitutes a quorum in accordance with this section. Subject to the provisions of subsection (5), shareholders' action that otherwise complies with this section is not affected by the presence of holders, or by the voting, of shares that are not qualified shares.

(5) If a shareholders' vote does not comply with subsection (1) solely because of a director's failure to comply with subsection (2), and if the director establishes that the failure was not intended to influence and did not in fact determine the outcome of the vote, the court may take such action respecting the transaction and the director, and may give such effect, if any, to the shareholders' vote, as the court considers appropriate in the circumstances.

(6) Where shareholders' action under this section does not satisfy a quorum or voting requirement applicable to the authorization of the transaction by reason of the articles of incorporation, the bylaws or a provision of law, independent action to satisfy those authorization requirements must be taken by the shareholders, in which action shares that are not qualified shares may participate.

607.08323 Business opportunities.—

(1) A director's taking advantage, directly or indirectly, of a business opportunity may not be the subject of equitable relief, or give rise to an award of damages or other sanctions against the director, in a proceeding by or in the right of the corporation on the ground that such opportunity should have first been offered to the corporation, if before becoming legally obligated respecting the opportunity the director brings it to the attention of the corporation and:

(a) action by qualified directors disclaiming the corporation's interest in the opportunity is taken in compliance with the procedures set forth in section [607.0831], as if the decision being made concerned a director's conflicting interest transaction, or

(b) shareholders' action disclaiming the corporation's interest in the opportunity is taken in compliance with the procedures set forth in section [607.0832], as if the decision being made concerned a director's conflicting interest transaction; except that, rather than making "required disclosure" as defined in section [607.0832], in each case the director shall have made prior disclosure to those acting on behalf of the corporation of all material facts concerning the business opportunity that are then known to the director.

(2) In any proceeding seeking equitable relief or other remedies based upon an alleged improper taking advantage of a business opportunity by a director, the fact that the director did not employ the procedure described in subsection (a) before taking advantage of the opportunity shall not create an inference that the opportunity should have been first presented to the corporation or alter the burden of proof otherwise applicable to establish that the director breached a duty to the corporation in the circumstances.

Current FBCA Director Conflict of Interest Statute

607.0832 Director conflicts of interest.

(1) No contract or other transaction between a corporation and one or more of its directors or any other corporation, firm, association, or entity in which one or more of its directors are directors or officers or are financially interested shall be either void or voidable because of such 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 contract or transaction, or because his or her or their votes are counted for such purpose, if:

(a) The fact of such relationship or interest is disclosed or known to the board of directors or committee which authorizes, approves, or ratifies the contract or transaction by a vote or consent sufficient for the purpose without counting the votes or consents of such interested directors;

(b) The fact of such relationship or interest is disclosed or known to the shareholders entitled to vote and they authorize, approve, or ratify such contract or transaction by vote or written consent; or

(c) The contract or transaction is fair and reasonable as to the corporation at the time it is authorized by the board, a committee, or the shareholders.

(2) For purposes of paragraph (1)(a) only, a conflict of interest transaction is authorized, approved, or ratified if it receives the affirmative vote of a majority of the directors on the board of directors, or on the committee, who have no relationship or interest in the transaction described in subsection (1), but a transaction may not be authorized, approved, or ratified under this section by a single director. If a majority of the directors who have no such relationship or interest in the transaction vote to authorize, approve, or ratify the transaction, a quorum is present for the purpose of taking action under this section. The presence of, or a vote cast by, a director with such relationship or interest in the transaction does not affect the validity of any action taken under paragraph (1)(a) if the transaction is otherwise authorized, approved, or ratified as provided in that subsection, but such presence or vote of those directors may be counted for purposes of determining whether the transaction is approved under other sections of this act.

(3) For purposes of paragraph (1)(b), a conflict of interest transaction is authorized, approved, or ratified if it receives the vote of a majority of the shares entitled to be counted under this subsection. Shares owned by or voted under the control of a director who has a relationship or interest in the transaction described in subsection (1) may not be counted in a vote of shareholders to determine whether to authorize, approve, or ratify a conflict of interest transaction under paragraph (1)(b). 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.

Conflict of interest section of FRLLCA

605.04092 Conflict of interest transactions.—

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

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

(b) A member or manager 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 member or manager of the limited liability company, or if the transaction is with an entity, other than the limited liability company, which has a material financial interest in the transaction and controls, or is controlled by, the member or manager or another person specified in this subsection.

(c) “Fair to the limited liability company” means that the transaction, as a whole, is beneficial to the limited liability company and its members, taking into appropriate account whether it is:

1. Fair in terms of the member’s or manager’s dealings with the limited liability company in connection with that transaction; and
2. Comparable to what might have been obtainable in an arm’s length transaction.

(2) If the requirements of this section have been satisfied, a transaction between a limited liability company and one or more of its members or managers, or another entity in which one or more of the limited liability company’s members or managers have a financial or other interest, is not void or voidable because of that relationship or interest; because the members or managers are present at the meeting of the members or managers at which the transaction was authorized, approved, effectuated, or ratified; or because the votes of the members or managers are counted for such purpose.

(3) If a transaction is fair to the limited liability company at the time it is authorized, approved, effectuated, or ratified, the fact that a member or manager of the limited liability company is directly or indirectly a party to the transaction, other than being an indirect party as a result of being a member or manager of the limited liability company, or has a direct or indirect material financial interest or other interest in the transaction, other than having an indirect interest as a result of being a member or manager of the limited liability company, 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), the person challenging the validity has the burden of proving the lack of fairness of the transaction if:

1. In a manager-managed limited liability company, the material facts of the transaction and the member's or manager's interest in the transaction were disclosed or known to the managers or a committee of managers who voted upon the transaction and the transaction was authorized, approved, or ratified by a majority of the disinterested managers even if the disinterested managers constitute less than a quorum; however, the transaction cannot be authorized, approved, or ratified under this subsection solely by a single manager; and

2. In a member-managed limited liability company, or a manager-managed limited liability company in which the managers have failed to or cannot act under subparagraph 1., the material facts of the transaction and the member's or manager's interest in the transaction were disclosed or known to the members who voted upon such transaction and the transaction was authorized, approved, or ratified by a majority-in-interest of the disinterested members even if the disinterested members constitute less than a quorum; however, the transaction cannot be authorized, approved, or ratified under this subsection solely by a single member; or

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

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

(6) 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 member or manager was not disinterested on grounds of financial or other interest for purposes of the vote on, consent to, or approval of the transaction.