HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: CS/HB 1189 Corporate Actions
SPONSOR(S): Regulatory Reform & Economic Development Subcommittee, Abbott
TIED BILLS: **IDEN./SIM. BILLS:** CS/CS/SB 1198

FINAL HOUSE FLOOR ACTION: 114 **Y's** 0 **N's** **GOVERNOR'S ACTION:** Pending

SUMMARY ANALYSIS

CS/HB 1189 passed the House on March 5, 2024, as CS/CS/SB 1198.

Corporations and other business entities that do business in Florida are generally governed by the requirements in the Florida Business Corporation Act, a law that is modeled after the Model Business Corporation Act promulgated by the American Bar Association in 1950, or by related provisions in Florida law.

The Department of State (DOS) is the state's central location responsible for receiving and maintaining a number of corporate records. Florida law requires certain documents to be filed with the Division of Corporations (division) of the DOS in order for a business to be organized as a corporation, partnership, limited liability company (LLC), or other business/commercial entity in Florida.

The bill provides a statutory ratification procedure for corporate actions that may not have been properly authorized and for shares that may have been improperly issued. These improperly authorized corporate actions, that would otherwise be proper, are called "defective corporate actions."

The statutory ratification process provided by the bill is intended to supplement common law ratification. Subsequent ratified defective corporate actions, under these proposed provisions, would remain subject to equitable review. The ratification procedure is intended to be available only where there is objective evidence that a corporate action was defectively implemented. The bill gives specified affected parties the ability to file motions in the circuit court of the applicable county.

The bill also provides a statutory mechanism for a registered agent to resign from more than one business entity at a time, if the specified entity has been dissolved for ten continuous years or longer, by filing a consolidated resignation statement with DOS. This mechanism applies to the following business entity types:

- Domestic and foreign LLCs;
- Domestic corporations; and
- Domestic corporations not for profit.

The bill keeps the fee to file the registered agent resignation the same for the above listed business entity types, even if filing to resign from more than one entity at a time using the consolidated resignation statement.

The bill does not appear to have a fiscal impact on local government expenses and revenues. However, the bill does appear to have an indeterminable negative fiscal impact on state government revenues and an indeterminate positive impact on the private sector.

Subject to the Governor's veto powers, the effective date of this bill is July 1, 2024.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

Corporations and other business entities that do business within Florida are governed generally by the requirements in the Florida Business Corporation Act, a law that is modeled after the Model Business Corporation Act (MBCA) promulgated by the American Bar Association (ABA) in 1950, or by related provisions in Florida law.[1]

Limited Liability Companies (Chapter 605)

A limited liability company (LLC) is a type of business entity recognized by and regulated under chapter 605, F.S., the Florida Revised Limited Liability Company Act. Benefits to forming a business as an LLC include a flexible tax structure and a vertical liability shield, which limits the personal liability of the LLC's members and managers for company obligations. Currently, LLCs are the most popular business entity in Florida, with over 2 million active LLCs as of 2023.[2]

Corporations for Profit (Chapter 607)

A for profit corporation is a type of business entity recognized by and regulated under chapter 607, F.S. In order for a for profit corporation to organize, the entity must file articles of incorporation with the Department of State (DOS), which articles must include specifics such as a corporate name, address, and number of shares, and, must designate a registered office and agent.[3]

Corporations Not for Profit (Chapter 617)

A corporation not for profit is a type of business entity recognized and regulated under chapter 617, F.S., the Florida Not For Profit Corporation Act. The structure of corporations not for profit is similar to that of for profit corporations, and the filing of articles of incorporation is required.

The Department of State

DOS is the state's central location responsible for receiving and maintaining a number of corporate records. Florida law requires certain documents to be filed with the Division of Corporations (division) of the DOS in order for a business to be organized as a corporation, partnership, LLC, or other business/commercial entity. Business entities can file these documents and check their status through an internet portal that is maintained by the division.

FEES

In order to help maintain these records, the DOS is statutorily allowed to collect fees. Florida's fee requirements for business entities are some of the most competitive in the United States; where a corporation in Delaware (the state with the most incorporations, because of their notoriously pro-business laws) will pay no less than $175 and no more than $200,000 in annual fees, Florida only requires an aggregate of $150 in fees per year.[4]

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[1] *See generally* Chapter 607, F.S.
[2] Florida Department of State, *Division of Corporations Yearly Statistics*, https://dos.fl.gov/sunbiz/about-us/yearly-statistics/ (last visited Feb. 14, 2024).
[3] Section 607.0202, F.S.
[4] U.S. Securities and Exchange Commission, *Schedule 14-A, Saga Communications, Inc. Proxy Statement* (Apr. 16, 2020), https://www.sec.gov/Archives/edgar/data/0000886136/000110465921050534/tm2111304-1_def14a.htm, (last visited Feb. 14, 2024).

In 2013, the Legislature passed a law to make fees more uniform across the various business law chapters. The relevant fees, of which each respective business entity must be aware, are as follows:[5]

Corporation Fees	
New Florida/Foreign Corporation	
Filing Fees	$35.00
Registered Agent Designation	$35.00
Annual Reports	
Annual Report of a For Profit Corporation	$150.00
Annual Report of Not For Profit Corporation	$61.25
Resignation of Agent	
Resignation of Registered Agent of an Active Corporation	$87.50
Resignation of Registered Agent of an Administratively Dissolved/Voluntarily Dissolved/Withdrawn Corporation/Inactive Corporation	$35.00

Limited Liability Company Fees	
New Florida/Foreign LLC	
Filing Fee	$100.00
Registered Agent Designation Fee	$25.00
Annual Reports	
Annual Report	$138.75
Resignation of Agent	
Resignation of Registered Agent for an active LLC	$85.00
Resignation of Registered Agent for a dissolved/inactive LLC	$25.00

Defective Corporate Actions

Under the Florida Business Corporation Act, there are certain requirements that a corporation must establish in order to be considered a valid and properly authorized corporation. For instance, a corporation must file its articles of incorporation with the DOS to transact business in the state. If a corporation does not file those articles of incorporation or does not include required information in the articles of incorporation, it may be considered an invalid corporation.[6]

Additionally, a corporation could have filed all documents correctly, but made an error in the appointment of their board of directors. Subsequent actions by the corporation, after that incorrect appointment of the board of directors, may be considered invalid. Another potential scenario of a defective corporate action may arise when a corporation issues shares but did not adhere to the correct share issuing guidelines. Any subsequent action, after that incorrect share issuance, may be considered invalid.

Being an invalid corporation can also be referred to as being a "defective corporation" or an "unauthorized corporation." However, because of their nature, corporations and their agents, whether they be the incorporator, the board of directors, an officer, or the shareholders, can take corporate actions even though the corporation is technically defective, unauthorized, or invalid.

When an unauthorized or defective corporation takes a corporate action, such as improperly issuing shares, legal issues can arise. For example, a corporation that is trying to make a business deal with another entity or raise capital usually has to provide certain corporate records for the other parties' due

[5] The Florida Department of State, Division of Corporations, *Fees*, https://dos.fl.gov/sunbiz/forms/fees/, (last visited Feb. 14, 2024).
[6] Section 607.0120(1), F.S.

diligence, and discovering a defective corporate action can immediately halt a transaction or potential transaction. This is problematic where a business deal has already been agreed upon prior to the discovery of the defective corporate action.

Currently, disputed acts or defective share issuances that are carried out by a corporation are governed by common law in the court system.[7] These disputes can cost business entities time and money to resolve, in addition to the time and resources that have to be allocated by the state to the court system.

Amending Articles of Incorporation

The articles of incorporation govern a corporation. A corporation can amend or add as many articles of incorporation as necessary.[8] The amendment of an articles of incorporation must be adopted and approved. The adopting and approving can be done several ways, including through the provided method in the articles of incorporation, which method may be undertaken by shareholder action, or, where such action is not required, by either the incorporators or board of directors.[9]

Such an amendment can be made with one single amendment form, for a fee of $35.00.[10] This form, called the articles of amendment form, must be signed and delivered to the DOS, among other specific requirements laid out in statute.[11]

Active vs Dissolved Business Entities

The division annually assigns an accompanying status (that is, "active" or "inactive") to a business entity based on whether or not the business entity properly completed all of its filings and paid all applicable fees. When a business entity pays their filing fees and files their initial required filings, (for an LLC it is their articles of organization, and for a corporation it is their articles of incorporation) the division will review the filings and, if everything is satisfactory, the business entity will be assigned an "active" status.

After the initial filings, a business entity remains "active" if it files the statutorily-required annual report and pays the associated fee. Typically, in the fall, the division will go through all of their filings and determine if a business entity is up to date in all of their filings and fees. If the division does not have the required information and associated fee on record, it will assign the business entity an "inactive" status and the business entity will be administratively dissolved or it authority to operate will be administratively revoked.[12]

A business entity can determine its status by logging in to the online portal operated by the DOS, or it can file and pay a fee to have the DOS send them a certificate of status. Such fee is $5 for an LLC and $8.75 for a corporation.[13]

A business entity that is no longer "active" may file a reinstatement application, accompanied by the associated fee, to reactivate their business status and become an "active" business entity again.

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[7] Florida Bar Business Law Section, *Chapter 607 White Paper: Summary of Ratification of Defective Corporate Actions and Resignation of Registered Agent Proposed Legislation* (2024).
[8] Section 607.1001, F.S.
[9] Section 607.1003(1-9), F.S., provides various methods for amending the articles of incorporation.
[10] Florida Department of State, Division of Corporations, *Articles of Amendment form*, https://form.sunbiz.org/pdf/cr2e011.pdf, (last visited on Feb. 14, 2024).
[11] Section 607.1006, F.S.
[12] Note that a general partnership is not required to file an annual report or pay an annual report fee.
[13] For LLCs *see* section 605.0213(12), F.S., and for Corporations *see* section 607.0122(19), F.S.

Registered Agents

Generally, Florida law requires a business entity to designate a registered agent.[14] A registered agent must be an individual who resides in Florida and whose business address is identical to the address of the registered office.[15] The registered agent must also be available at that Florida address during normal business hours and promptly forward any significant legal or state documents to the business. Registered agents are required to serve as the contact for the business and receive service of process, legal notifications, and other official state documents for the business.

The DOS is required to maintain an accurate record of each business's registered agent and registered office for service of process, and must promptly furnish any such information upon request and payment of the required fee.[16] An individual within the business may serve as the entity's registered agent. Additionally, a business entity with an active Florida filling or registration may serve as a registered agent; however, an entity cannot serve as its own registered agent. Further, where a business entity does not appoint and maintain a registered agent, the DOS may administratively dissolve that business entity.[17]

In Florida, a registered agent is required for the following business entities:

- LLCs;
- Corporation/Foreign Corporation (for profit);
- Corporation/Foreign Corporation (not for profit);
- Limited Partnerships (domestic and foreign); and
- Limited Liability Partnerships (domestic and foreign).[18]

In order for a registered agent to resign as the registered agent of the business entity, the registered agent must complete a specific form, accompanied by the payment of the required fee, and mail it in to the division. Currently, a registered agent serving as such for more than one business entity who wishes to resign from all such positions must pay a separate fee to resign as the registered agent of each individual business entity.

Effect of the Bill

Ratification of Defective Corporate Actions

The bill creates statutory procedures for ratifying a defective corporate action and provides a judicial process for contesting the validity of certain corporate actions or putative shares. Under the bill, a defective corporate action is not void or voidable if the defective corporate action was ratified in accordance with the ratification or validation requirements proposed by the bill. The bill also emphasizes that:

- The ratification or validation process is not the exclusive means of ratifying or validating any defective corporate action;
- The absence or failure of ratification will not, in and of itself, affect the validity or effectiveness of any corporate action properly ratified under common law or otherwise; and
- The ratification or validation process does not create a presumption that any such corporate action is or was a defective corporate action or is or was void or voidable.

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[14] S. 607.0501, F.S.
[15] *Id.*
[16] *Id.*
[17] For limited partnerships, s. 620.1809, F.S. governs.
[18] *Note that a general partnership is not required to have a registered agent*. Section 620.8301, F.S., states that each general partner is an agent of the partnership. (Note that a general partnership can still designate a separate registered agent, through their initial general partnership registration form, but partners of the general partnership are deemed to be agents and therefore the statutes do not require a general partnership to have a registered agent.)

DEFINITIONS

The bill defines certain terms, including:

- "Corporate action," meaning any action taken by or on behalf of a corporation, including any action taken by the incorporator or the corporation's board of directors, committee, officer or agent, or shareholders.
- "Date of the defective corporate action," meaning the date, or, of the exact date is unknown, the approximate date, on which the defective corporate action was purported to have been taken.
- "Defective corporate action," meaning any corporate action purportedly taken which is, and at the time such corporate action was purportedly taken would have been, within the power of the corporation, but is void or voidable due to a failure of authorization or an overissue.
- "Failure of authorization," meaning the failure to authorize, approve, or otherwise effect a corporate action in compliance with chapter 607, F.s., the corporation's articles of incorporation or bylaws, a corporate resolution, or any plan or agreement to which the corporation is a party, if and to the extent such failure would render such corporate action void or voidable.
- "Overissue," meaning the purported issuance of shares or a class or series of shares in excess of the number of shares of the class or series the corporation has the power to issue at the time of issuance or shares of any class or series that is not then authorized for issuance by the corporation's articles of incorporation.
- "Putative shares," meaning the shares of any class or series that were created or issued due to a defective corporate action and that would constitute valid shares but for any failure of authorization or cannot be determined by the board of directors to be valid shares.
- "Valid shares," meaning the shares of any class or series that have been duly authorized and validly issued in accordance with chapter 607, F.S.
- "Validation effective time," meaning:
    - The later of the date and time at which the ratification is approved by the shareholders, or if such approval is not required, the date and time the notice required by s. 607.0149, F.S., becomes effective;
    - If no articles of incorporation are required to be filed, the date and time at which the notice required by s. 607.0149, F.S., becomes effective; or
    - If articles of validation are required to be filed, the date and time at which the filed articles of validation become effective.[19]

PROCEDURE FOR REMEDYING AN OVERISSUE

The bill provides that an overissue can be remedied by the adoption of an amendment to the articles of incorporation or other corporate action that authorizes, designates, or creates the putative shares that resulted in the overissue. Under the bill, putative shares will be valid and effective as of the date originally issued or purportedly issued upon such amendment or action. This provision enables a corporation to cure an overissue occurring when shares have been duly authorized but are issued before articles of amendment are filed.

PROCEDURE FOR RATIFYING DEFECTIVE CORPORATION ACTIONS

The bill sets forth specific procedural requirements for the ratification of defective corporate actions. Specifically, the bill provides that, to ratify a defective corporate action, the corporation must act in accordance with s. 607.0148, F.S., and state all of the following:

- The defective corporate action to be ratified;
- The number and type of putative shares purportedly issued (if shares were issued);
- The date of the defective corporate action;
- The nature of the failure of authorization; and

[19] Under the bill, the validation effective time will not be affected by the filing or pendency of a judicial proceeding under s. 607.0152, F.S., or any other law unless otherwise ordered by the court.

- The approval of the ratification of the defective corporate action by the board of directors.

Where the defective corporate action to be ratified relates to the election of the initial board of directors of the corporation, the bill provides that a majority of the persons who, at the time of the ratification, are exercising the powers of directors must take an action stating all of the following:

- The name of the person or persons who first took action in the corporation's name as the initial board of directors.
- The earlier of the date on which either such persons first took such action or were purported to have been elected to the initial board of directors.
- That the ratification of the election of such person or persons as the initial board of directors is approved.

Further, under the bill:

- If any provision of chapter 607, F.S., the corporation's articles of incorporation or bylaws, any corporate resolution, or any plan or agreement requires shareholder approval, or would have required such approval, at the date of the occurrence of the defective corporate action, the ratification approved in the action taken by the directors as specified above must be submitted to the shareholders for approval.
- Unless otherwise provided in the action taken by the board of directions, after such action has been taken and, if required, approved by the shareholders, the board may abandon the ratification at any time before the validation effective time without further shareholder action.

ACTION ON RATIFICATION

Under the bill, if the shareholders are meeting to ratify the election of a director, or if such ratification is to be made through written consent, the bill requires that it must be approved by a majority vote. The bill clarifies that putative shares existing on the record date are only entitled to notice of matters relating to ratification and that such shares are not:

- Entitled to vote,
- Counted for quorum purposes, nor
- Counted in any written consent and that to ratify putative shares, an amendment to the articles of incorporation must be approved.

Under the bill, the quorum and voting requirements applicable to a ratifying action by the board of directors are the quorum and voting requirements applicable to the corporate action proposed to be ratified at the time such ratifying action is taken. Further, with respect to the voting requirements to ratify the election of a director, any quorum and voting requirements applicable to the approval by the shareholders will be the quorum and voting requirements that are applicable, at the time of such shareholder approval, to the defective corporate action proposed to be ratified.

NOTICE REQUIREMENTS – SHAREHOLDER APPROVAL REQUIRED

The bill creates notice requirements where the ratification of the defective corporate action requires shareholder approval. Specifically, if shareholder approval is to be given at a meeting, the corporation must give notice of the meeting, which notice must state that the purpose of the meeting is to consider ratification of a defective corporate action, to each holder of valid and putative shares, regardless of whether entitled to vote, as of the record date for notice of the meeting and as of the date of the occurrence of the defective corporate action; however, the bill clarifies that such notice is not required to be given to holders of valid or putative shares whose identifies or addresses for notice cannot be determined from the corporation's records.

Further, if shareholder approval is instead to be given by written consent, the corporation must give notice of the action taken by such written consent, which notice must state that the purpose of the written consent was to ratify the defective corporate action, to each holder of valid and putative shares as of the record date of the action by written consent and as of the date of the occurrence of the

defective corporate action, regardless of whether entitled to vote; however, notice is not required to be given to holders of valid or putative shares whose identities or addresses for notice cannot be determined from the corporation's records.

In either case, the notice must be accompanied by both of the following:

- Either:
  - A copy of the action taken by the board of directors under s. 607.0147(1); or
  - The information required by chapter 607, F.S.; and
- A statement that any claim asserting that the ratification of such defective corporate action, and any putative shares, should not be effective, or should only be effective on certain conditions, and must be brought, if at all, within 120 days after the applicable validation effective time.

NOTICE REQUIREMENTS – SHAREHOLDER APPROVAL NOT REQUIRED

The bill creates notice requirements where shareholder action to approve the ratification of a defective corporate action is not required. Specifically, the bill requires "prompt" notice to persons holding either valid or putative shares, regardless of whether entitled to vote, following the ratification of a corporate action by the board of directors. Under the bill, such notice must contain both of the following:

- Either:
  - A copy of the action taken by the board of directors under s. 607.0147(1); or
  - The information required by chapter 607, F.S.; and
- A statement that any claim asserting that the ratification of such defective corporate action, and any putative shares, should not be effective, or should only be effective on certain conditions, and must be brought, if at all, within 120 days after the applicable validation effective time.

The bill also:

- Provides that such notice is not required to be submitted to the holders of valid or putative shares if notice is given pursuant to other applicable law.
- Makes a disclaimer that such notice may be given in any manner authorized under s. 607.0141, F.S.
- Provides that, in the case of a public company, such notice may be given by the filing or furnishing of the notice with the United States Securities and Exchange Commission.

EFFECTS OF RATIFICATION

The bill specifies that the following provisions apply upon the validation effective time, without regard to the 120-day period during which a claim may be brought under s. 607.0152, F.S.:

- Each defective corporate action ratified is not void or voidable as a result of the failure of authorization set forth and identified in the action taken, and is deemed a valid corporate action effective as of the date of the defective corporate action.
- The issuance of each putative share or fraction of a putative share purportedly issued pursuant to a defective corporate action identified in the action taken is not void or voidable, and each such putative share is deemed to be an identical share or fraction of a valid share as of the time it was purportedly issued.
- Any corporate action taken subsequent to the defective corporate action ratified in reliance on such defective corporate action having been validly effected, and any subsequent defective corporate action resulting from such original defective corporate action, is valid as of the respective time such corporate action was taken.

FILING REQUIREMENTS

The bill establishes a new filing requirement (known as "articles of validation") for ratified defective corporate actions that would have normally required a filing, regardless of whether or not the filing was properly made. The bill provides specific requirements for the content of the articles of validation,

including that the articles of validation must be filed with the DOS, and provides that the articles of validation will serve to amend or be a substitute for any other filings related to the defective corporate action.

JUDICIAL PROCEEDINGS

The bill provides that a corporation or a director, shareholder, beneficial shareholder, or unrestricted voting trust beneficial owner thereof, or any other person claiming to be substantially and adversely affected by the ratification of a defective corporate action, may, within 120 days after the validation effective time, apply to the court for a determination of the:

- Validity of any corporate action or ratified defective corporate action.
- Validity of any ratification of any defective corporate action.
- Validity of any putative shares.

The bill also confers jurisdiction on the circuit court in the applicable county to hear and determine such claims and authorizes the court, upon such application, to:

- Modify or waive any of the ratification procedures; and
- Make such findings or issue such orders, and take into account a specified, non-exclusive list of factors or considerations, as it deems proper under the circumstances.

Further, the bill provides that service of process for any such proceedings should follow the same rules as set forth in ch. 48, F.S.,[20] for service on a corporation, and no other party need be joined in order for the court to adjudicate the matter. However, under the bill, in an action filed by the corporation, the court may require that notice of the action be provided to other persons specified by the court and permit such other persons to intervene in the action.

Resignation of a Registered Agent

RESIGNATION STATEMENTS

The bill creates a mechanism for a registered agent to resign as the registered agent from multiple dissolved business entities, if the entities in question are of a specified type and have each been dissolved for at least a continuous ten-year period, by filing a single composite resignation statement with DOS. Under the bill:

- Any such composite statement must contain, for each entity covered therein, the name of the respective entity and the date such entity's dissolution became effective.
- Such a mechanism may only be utilized where the entities from which the registered agent wishes to resign are:
    - Domestic or foreign LLCs;
    - Domestic corporations; or
    - Domestic corporations not for profit.

Further, the bill clarifies that any resignation statement must be delivered to the subject entity at its mailing address as it then appears in DOS records. However, under the bill, if a composite resignation statement is filed, the registered agent must promptly mail a copy of either the composite resignation statement or a separate resignation notice to each entity from which he or she is resigning, in each case using the respective mailing address of each such entity that then appears in DOS records.

FEES

The bill specifies that the fee charged to resign as a registered agent of a dissolved LLC, domestic corporation, or domestic corporation not for profit is the same as it under current law, regardless of

[20] Chapter 48, F.S., codifies Florida's Rules of Civil Procedure relating to process and service of process.

whether the registered agent is resigning from one such business entity or multiple such entities using a composite resignation statement.

Effective Date

The bill provides an effective date of July 1, 2024.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill may have an indeterminate negative fiscal impact on state government because the DOS may see a reduced amount in collected fees if a registered agent resigns from more than one corporation at a time by only paying one fee, as opposed to current law which requires a registered agent to pay a fee to resign from each corporation separately.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have an indeterminate positive economic impact on the private sector because registered agents will be able to resign from more than one corporation at a time by only paying one fee in specified circumstances, as opposed to current law which requires a registered agent to pay a fee to resign from each corporation separately.

D. FISCAL COMMENTS:

None.