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# MODERNIZING THE FLORIDA BUSINESS CORPORATION ACT

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Presented By:

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## *What The Newly Revised Corporate Statutes Mean for You & Your Business*

📅 THURS. JAN, 16TH

🕒 10:00 am

# Part One

## Overview

- What is the Florida Business Corporation Act?
- Why are the changes important?

## Specific Changes

- Definitions
- Pre-formation and Formation Issues
- Directors, Officers, Shareholders
- Indemnification and Expenses
- Organizational documents (Articles of Incorporation, Bylaws, Shareholders Agreements)

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# Part Two

## Share and Equity Changes

- Authorized Shares
- Fractional Shares
- Blank Check Shares

## Appraisal Rights

- Definitions
- Changes

# What Is The Florida Business Corporation Act (FBCA)?

- FBCA (F.S. §607) governs corporations in Florida
- Corporate version of Florida Revised LLC Act (updated 2014)
- Based on “Model Act” and other state’s corporate statutes (e.g. Delaware)
- Initial adoption in 1989
- Revisions 1996 and 2003

# Why Update the FBCA?

- LLC Act (§605) significantly revised and modernized 2014
- Model Act updated 2016
- Growing business environment in Florida
  - 1.3m LLCs, adding 300,000 each year
  - 780,000 corporations, adding 100,000 each year
- FBCA hadn't been comprehensively revised since adoption in 1989

# What Do The Changes Mean?

- Updates primarily affect multi-owner corporations
- Updated FBCA allows courts and lawyers to “interpret” statutes
- Pre-2020 organizational documents will not be grandfathered in
- Review organizational documents to comply with new statutes
  - Articles of Incorporation
  - Bylaws
  - Shareholders Agreements
- Forms on Sunbiz will be updated eventually

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# Definitions, Definitions, and More Definitions

## 80 Definitions in Total

- 49 brand-new
- Previous 31 also modified

Why do definitions matter?

# Definitions, Definitions, and More Definitions

## For Example:

- *Document*: Tangible and electronic records
- *Electronic Transmission*: Must be printable by “conventional commercial practice”
- *Insolvency*: Balance sheet test added
- *Qualified Director*: Truly independent director
- *Signed*: Replaced “executed”
- *Authorized Entity*: Entities that can act as registered agents

# Filing and Formation

## Extrinsic Facts

- Terms in filed document can depend on facts *outside* the document
  - Refer to: Other agreements, interest rates, exchange rates
  - E.g. Coupon rate for preferred stock tied to Prime Rate

## “Effective Time”

- Can be up to 5 days prior to date of filing Articles of Incorporation

# Pre-Formation Issues

## Standard of Knowledge

- “Knowing” replaced “having actual knowledge”
- Potential Risk: Court reads as “*should have known*”

## Pre-formation Contracts

- Parties can enter binding contract *before incorporation*
- Must be adopted by formed corporation
- Doesn't matter if parties know corporation isn't formed

# Directors

## Election

- If cumulative voting allowed, unanimous consent needed to elect

## Standards for Directors

- Good faith and best interests of corporation
- Ordinary prudent person in like position
- Reliance
  - Allowed on competent officers, employees, and professionals (e.g. CPA, lawyer)

# Directors

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## Court Removal

- New section
- Allowed when:
  - Fraudulent activity
  - Gross abuse of power
  - Intentional harm to corporation
  - Other remedies are inadequate
- Must be brought in “applicable county”

# Directors

## Conflicts of Interest

- Applies when director's interest could impair objectivity
- Transaction must be "fair to the corporation"
- Burden of proof on challenger
  - If conflict disclosed and transaction approved by majority of qualified directors or disinterested shareholders
- New definition: "Qualified Director"

# Officers

## Standards for Officers

- Good faith and best interests of corporation
- Ordinary prudent person in like position
- Reliance similar to Directors

## Reporting Obligation

- Affairs known or should have been known
- Actual or probable material violation of law or breach of duty
- Potential Risk: Remedy is unclear

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# Indemnification

## Employees and Agents

- *Removed*; common law of agency

## Officers and Directors

- Acting in good faith
- Reasonable best interests of corporation
- No reason to think actions unlawful

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# Indemnification

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## Advance of Expenses

- Officer or Director must agree to repay if not entitled to mandatory indemnification
- Unlimited general obligation
- Authorized by Qualified Directors or shareholders
- Pro Tip: Add to shareholders agreement!

# Articles of Incorporation

## Exclusive Forum Selection

- Allowed for “internal corporate claim”
  - Violation of duty, derivative action, based on FBCA or Bylaws, other “internal affairs”
- Take care with selection

## Fee Shifting Provisions

- Not allowed in Articles or Bylaws
- Only allowed in shareholders agreement

# Entity Names

## Distinguishable on the Record

- Allows abbreviations of same root word (e.g. FLA, FL, Flo.)
- Written consent to use non-distinguishable names (not *identical*)
  - E.g. Gekko & Co. vs. Gekko and Co.
- Doesn't apply to fictitious names

## Name Reservation

- 120-day period *pre-formation*
- Transferrable

## Trademark Law Still In Effect

# Registered Agent

## Authorized Entity

- New definition, includes LLC, LP, LLP, LLLP

## Resignation

- Active or inactive corporation
- File statement, notify corporation
- Termination 31<sup>st</sup> day post-filing

## Failure to Maintain Registered Agent

- Cannot maintain or defend action
- Penalty \$5/day up to \$500

# Service of Process

## Waterfall Approach

- Registered Agent > Chair of Board > President > VP > Secretary
- Last resort: Secretary of State
- Not exclusive

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# Bylaws

## Not Allowed Provisions

- Fee shifting provisions

## Allowed Provisions

- Forum selection
- Electronic notice to Directors
- Remote participation

# Subscription Agreements

## Allowed Before and After Incorporation

- Not enforceable against subscriber unless in writing and signed
- Pro Tip: Add provision to Articles to provide same protection for corporation for subscription agreements entered after formation

# Voting Agreements and Shareholders Agreements

§§607.0731-0732 Renamed to Avoid Confusion

## Voting Agreements (§607.0731)

- Agreement to vote shares
- Specifically enforceable
- Don't have to notify corporation

# Voting Agreements and Shareholders Agreements

## Shareholders Agreements (§607.0732)

- Removed 100 shareholder limit
- Limited by public policy
- Can be inconsistent with FBCA
- Allows for fee shifting provision
- Deadlock resolution

# Shareholders Agreement Issues

## Deadlock Process

- Prevent judicial dissolution
- New 607.0748: Appointment of Custodian or Receiver
  - Directors and Shareholders can't break deadlock
- New 607.0749: Appointment of Provisional Director

## Subset of Shareholders

- Allowed among *less than all* of the shareholders

# Shareholders Agreement Issues

## Certificated Shares

- Pro Tip: Include in Articles of Incorporation!

## Valuation Process

- Determining value
- Fair Value, Fair Market Value, Fractional Interest

## Director Removal

- Define "Irreparable Harm" and removal conditions

# Mergers, Share Exchanges, Conversion, & Domestication

## Massive Changes—Beyond Our Scope

- Structure and organization of sections changed significantly
- Update and refine operational documents to match

## New Definitions

- “Eligible Entity” replaces “other business entity”

## Plan of Merger, Exchange, Conversion, or Domestication

- Requirements for plans *expanded*

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# Questions?

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## Part One Topics

- Definitions
- Formation and Filing Procedure
- Pre-formation Liability and Contracts
- Directors, Officers, Shareholders
- Indemnification and Expenses
- Organizational Documents

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# Coffee Break!

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# Part Two

## Share and Equity Changes

- Authorized Shares
- Fractional Shares
- Blank Check Shares

## Appraisal Rights

- Changes

# Background: Authorized Shares

## Include in Articles of Incorporation

- Number, classes and voting rights, and entitlement to receipt of net assets

## Authorized ≠ Outstanding

## Florida quirks

- Can't call shares with distribution preference "common stock"
- Can't call shares without distribution preference "preferred stock"

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# Changes: Authorized Shares

## Extrinsic Facts

- Terms can depend on facts outside Articles of Incorporation
- E.g. Preferred stock dividends based on prime rate

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# Background: Fractional Shares

## Less Than One Full Share

- Created by stock splits, recapitalization, conversions, mergers

## How to Avoid

- Pay fair value in cash

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# Changes: Fractional Shares

## Conclusive Judgement of Value

- Previously good-faith judgement of Board of Directors as to value presumed “conclusive”
- Board determination no longer “conclusive” if shareholder objects
  - Believed could eliminate fiduciary duty
  - No similar presumption for appraisal rights of share value

# Background: Blank Check Shares

## Uses

- Simplify creation of new classes of preferred stock
- Raise capital from sophisticated investors without shareholder approval
- Blank check authority only if included in Articles of Incorporation
- Amendment needed prior to issuing

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# Changes: Blank Check Shares

## Clarification of Authorization

- Board can classify any unissued shares into other classes or series

# Background: Appraisal Rights

AKA Dissenter's rights

## Shareholders' Rights to Object to Major Corporate Transaction

- Elect to receive fair value of shares
- Only for substantial corporate transactions
  - E.g. mergers, sale of substantially all corporate assets

# Changes: Appraisal Rights

## Definitions

- Fair Value: Determined without any marketability or minority discounting

## Non-voting Shares

- Removed requirement that shareholder be entitled to vote

## Clarification of Further Rights

- After receipt of payment, no further rights with respect to shares

# Changes: Appraisal Rights

## Elimination by Shareholders Agreement

- §607.0732 lists provisions allowed in a shareholders agreement
- Elimination of appraisal rights no longer statutorily “contrary to public policy”
  - Determination depends on the circumstances
- Courts will judge on case by case basis whether abolishing appraisal rights is contrary to public policy
- New subsection 8 states agreements between subset of shareholders still valid
- Delaware allows common stockholders to waive appraisal rights

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# Questions?

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## Part Two Topics

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  - Blank Check Shares
- Appraisal Rights

# Big Takeaways

## Review and Revise Organizational Documents

- The few big changes and many small changes mean your organizational documents are out of date
- All multi-owner corporations should have a shareholders agreement

## Update Corporate Governance Procedures

- Ensure compliance with widespread changes to notice process, meeting requirements, voting rules, etc.

## Work with Qualified Attorneys!

- Focus exclusively on business law and grasp nuances of new laws

# Corporate Documentation Review and Revision

Fixed-fee package, only for seminar attendees

- Review organizational documents affected by the new statutes, including Articles, Bylaws, and Shareholders Agreement
- Identify areas of non-compliance
- Make suggestions for revisions
- Draft revised organizational documents
- File amended Articles of Incorporation (fees included)
- PLUS: 1-year Corporate Veil VIP subscription (\$550 value)



Single-Owner  
Entity

~~\$1,299.99~~

**\$999**



Multi-Owner  
Entity

~~\$5,899.99~~

**\$5399**

# Corporate Veil VIP Program

## VIP PLUS

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### All VIP features PLUS...

- ✚ File company's Florida Annual Report on or before due date. *Filing fees included!*
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- ✚ Hold in-office meeting with owners to review Corporate Compliance survey.

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