

FLORIDA NOT FOR PROFIT CORPORATION ACT 2009 AMENDMENTS

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The 2009 amendments to the Florida Not For Profit Corporation Act, Florida Statutes Chapter 617 (the “FNFPCA”), effected more significant changes to that statute than any other amendment to it in more than a decade, and perhaps since its plenary revision in 1990.

A detailed summary and analysis of amendments to the respective sections of the FNFPCA effected by Laws 2009 Chapter 2009-72, effective on May 27, 2009 (denoted by 2/) and Chapter 2009-205, effective on October 1, 2009 (*i.e.*, all sections listed below other than Sections 617.1420, 617.1421, 617.1530, and 617.1531) follows an explanation below of the significant substantive revisions effected by those amendments. This writer’s analysis of the amendment to each such section is set forth in parentheses within the summary for that section.

Reference is made to the Committee Substitute for Committee Substitute for Senate Bill No. 1780 and to Senate Bill No. 2330 for the specific amendments.

Significant Substantive Revisions Effected by 2009 Amendments:

1. Addition of procedures for documents transmitted electronically or in typewritten or printed form, respectively, and signatures on all documents, for filing with the the Division of Corporations of the Department of State of Florida (the “Department”). (617.01201)
2. Application of filing fee to agent’s statement of resignation from any inactive corporation. (617.0122)
3. Changes to deadline and procedure for correcting a document filed by the Department. (617.0124)
4. Exclusion from distributions restricted by the FNFPCA of donations or transfers between a corporation qualified as tax-exempt under Internal Revenue Code (“IRC”) Section 501(c) or a governmental organization exempt from federal or state income taxes if the recipient is a member of the donor or transferor. (Section 617.01401(7))

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5. Authorization of guaranties by not for profit corporations. (Section 61.0302(7))
6. Identification of the business entities with which a not for profit corporation may merge. (Sections 617.0302(16) and 617.1102)
7. Authorization of charges by the Department for responses to telephone inquiries. (Section 617.0501)
8. Addition of procedures for withdrawal by an alien business organization (essentially, an entity organized, or 10% or more of which is owned or controlled, directly or indirectly, by an entity organized, under laws of a jurisdiction outside the United States) of its registered agent designation. (Section 617.0503(12))
9. Authorization of a mutual benefit corporation, as that term is defined in Section 617.01401(13), that is a private club established for social, pleasure or recreational purposes in which the equity interests are held by the members, and perhaps other mutual benefit corporations, to purchase the equity membership interest of its members. (Section 617.0505(1))
10. Authorization of condominium, cooperative, homeowners' and mobile home associations, timeshare organizations, and corporations in which membership is required pursuant to documents recorded in county property records ("Real Estate and Mobile Home Organizations") to make refunds, give credits, or disburse or pay insurance proceeds or settlements to their members. (Section 617.0505(5))
11. Extension of the requirement of recordation of membership termination in the membership book to resignation, expulsion or suspension of a member under Section 617.0606 or 617.0607. (Section 617.0601(5))
12. Addition of restriction, and provisions for exception for mutual benefit corporations from restriction, upon transfer of membership in a not for profit corporation. (Section 617.0605)
13. Addition of provision regarding effect of resignation by a member of a mutual benefit corporation and perhaps of any not for profit corporation. (Section 617.0606)
14. Changes to the procedure for member or membership termination, expulsion or suspension, including adding the requirement that such procedure be "fair and reasonable and . . . carried out in good faith." (Section 617.0607)
15. Addition of restriction, and provisions for exception for mutual benefit corporations from restriction, upon purchase of memberships by a not for profit corporation. (Section 617.0608)
16. Changes to the procedures for calling a special meeting of members. (Section 617.0701(3))

17. Extension of duration of periods (a) during which members having the requisite number of votes must sign written consents in lieu of a meeting of members in order to authorize action by members to 90 days and (b) after obtaining that authorization during which notice of that action must be given to members entitled to vote on it that did not consent in writing to 30 days. (Section 617.0701(4)).
18. Extension of exemption of homeowner's associations from requirements for annual and special meetings of members under Section 617.0701(1) and (3) to the other Real Estate and Mobile Home Organizations. (Section 617.0701(6))
19. Authorization for rejecting a member's vote, consent, waiver or proxy appointment if the officer or other agent authorized to tabulate votes, "*acting in good faith, has a reasonable basis* for doubting the validity of the signature on it or the signatory's authority to sign for the member." (Section 617.0721(2)(b))
20. Authorization, pursuant to prescribed conditions, for participation, inclusion in determining existence of a quorum, and voting of members and proxy holders at a members' meeting by "remote communication." (Section 617.0721(3))
21. Extension of procedures for approval of an amendment to the articles of incorporation ("Articles") or bylaws to an amendment having the effect of raising or otherwise changing (not only the effect or lowering or deleting) quorum or voting requirements and change in the choice of the quorum, voting requirements, vote and voting groups required for adoption of that amendment. (Section 617.0725)
22. Addition of provisions governing members' derivative actions, substantially similar to those provided by Section 607.07401 in the Florida Business Corporation Act and codifying existing Florida judicial authority. (Section 617.07401)
23. Authorization of an IRC 501(c)(3) organization other than Real Estate and Mobile Home Organizations to have one director at least 15 but less than 18 years of age (a "youth director") if permitted in the Articles or bylaws or by resolution of the board of directors, that "youth director" to be excluded from the count of directors in determining the presence of a quorum at a meeting of the board of directors. (Sections 617.0802(1) and 617.0824(1))
24. Restriction of division of directors into classes unless authorized by the Articles or bylaws. Removal of express provision that the terms of office of the several classes need not be uniform. (Section 617.0806)
25. Changes to the procedure for director removal, including additional procedures for such removal by action of the board of directors even of a not for profit corporation having voting members, conditions for removal by the board of directors of a director for missing a specified number of board of directors meetings or without cause, vote required and other conditions for removal by the members of a director, including limitation to

removal by members of directors elected or appointed by the members. Changes time that removed director first becomes eligible to stand for reelection or be appointed by the board of directors to fill a vacancy to the next annual meeting at which directors are elected by directors or members. Exemption for an IRC 501(c) organization from statutory procedures for director removal formerly included in repealed Section 617.2103. (Sections 617.0808 and 617.0809(1))

26. Requirement that a vacancy with respect to a director elected by a class, chapter, unit, or group (each, a “Group”) be filled only by members of that Group or by a majority of the directors then in office elected by that Group. (Section 617.0809(2))

27. Change to the term of a director elected or appointed to fill a vacancy to a period expiring at the next annual meeting at which directors are elected by directors or members. (Section 617.0809(3))

28. Changes to the procedures for approval of a 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 the first corporation’s directors are directors or officers or are financially interested (a “conflict-of-interest transaction”). (Section 617.0832(2) and (3))

29. Requirement that a plan of merger include the manner and basis, if any, of converting memberships of each merging corporation into memberships, obligations, or securities of the surviving corporation of the merger or any other corporation, or, in whole or in part, into cash or other property. Changes to contents of plan of merger. (Section 617.1101)

30. Requirement of solvency, in both the bankruptcy and equity sense, for purchase by a mutual benefit corporation of its memberships under Sections 617.0505 and 617.0608. (Section 617.1302(1))

31. Authorization of distributions upon dissolution in conformity with the provisions of Section 617.1406 regarding a plan of distribution of assets. (Section 617.1302(2))

32. Addition of procedure to permit assumption or use of the name of a dissolved corporation before the 120th day after the effective date of dissolution. (Section 617.1405)

33. Addition of procedures for resolving claims against a dissolved corporation. (Sections 617.1407 and 617.1408)

34. Extension of deadlines for filing an annual report or, for a domestic corporation, paying the annual report filing fee, to 5 p.m. Eastern Time on the third Friday of September after the May 1 on which that report is due, solely for the purposes of avoiding commencement by the Department of a proceeding of administrative dissolution

or revocation of certificate of authority to conduct affairs in Florida. (Sections 617.1420 and 617.1530)

35. Addition of procedures by the Department for automatic dissolution of a domestic corporation and revocation of certificate of authority of a foreign corporation. (Sections 617.1421(1) and (2) and 617.1531(1) and (2))

36. Changes to document required to be filed with the Department to effect reinstatement after automatic dissolution. (Section 617.1422)

37. Changes to requirement of standing to commence a proceeding for judicial dissolution under the circumstances of “deadlock” or misapplication or waste of corporate assets. (Section 617.1430)

38. Postponement of deadline of a foreign corporation’s application to the Department for an amended certificate of authority to 90 days after occurrence of the change mentioned in Section 617.1504(1). (Section 617.1504(2))

39. Addition of provisions regarding the name and alternate name, if any, of a foreign corporation used to transact business in Florida. (Section 617.1506)

40. Authorization of the not for profit corporation to provide to its member the opportunity to inspect and copy corporate records at “a reasonable location specified by the corporation” as an alternative to the corporation’s principal office. Increase to ten (10) business days of the period of prior notice required by the member to the corporation to exercise the member’s right to inspect and copy. (Section 617.1602)

41. Changes to requirements for delivery by the corporation to its members of financial information. (Section 617.1605)

42. Clarification that the FNFPCA is preempted by the respective other Florida statutes governing Real Estate and Mobile Home Organizations and that provisions of the FNFPCA governing transfer or purchase of memberships or resignation, termination, expulsion, or suspension of members do not apply to Real Estate and Mobile Home Organizations. (Section 617.1703)

43. Clarification of the legal consequences of domestication of a not for profit corporation, including any not for profit incorporated organization. (Section 617.1803)

44. Clarification that provisions of the FNFPCA regarding conversion to a not for profit corporation apply solely to a corporation for profit incorporated under a Florida statute, subject to the conditions stated in, and pursuant to, Section 617.1805. (617.1806)

45. Extension of legal effect of a repeal of a statute by the FNFPCA to an amendment of a statute by the FNFPCA and clarification that any proceeding, reorganization, or dissolution commenced before such a repeal or amendment is not affected by the repeal

or amendment and may be completed as if no statute had been repealed or amended. (Section 617.1907)

46. Making IRC 501(c) organizations subject to provisions of the FNFPCA regarding corporate records and reports and fines and penalties against members. (Sections 617.1601-.1605, 617.2102, and former 617.2103).

Summary and Analysis of 2009 Amendments:

617.01201: Requires (i) a document transmitted electronically for filing by the Department to be in a format that may be retrieved or reproduced in typewritten or printed form (subsection (4)), and (ii) any document for filing by the Department to be signed by a director or officer of the domestic or foreign corporation (not the chair or vice chair of the board of directors) or, if directors or officers have not been selected or the corporation has not been formed, then by an incorporator (subsection (6)), and accompanied by the correct filing fee and any other tax or penalty required by law (not only by the FNFPCA)(subsection (9)). Permits electronic transmission only if and to the extent allowed by the Department (subsection (9)). If the document is delivered in typewritten or printed form, not transmitted electronically, authorizes the Department to require delivery with the document of one exact or conformed copy except for a change with respect to the registered office or registered agent under Section 617.1508 (subsection (9)).

617.0122: Applies \$35 filing fee for agent’s statement of resignation to any inactive corporation (not only to an administratively dissolved corporation) (subsection (7)).

617.0124: Changes the deadline for correcting a document filed by the Department from ten (10) business days to 30 days after filing and adds to circumstances permitting the correction the electronic transmission of the document being defective (subsection (1)). Deletes the alternative correction procedure of attaching a copy of the document to be corrected to the articles of correction (subsection (2)(a)).

617.01401: Provides that definitions therein of terms used in the FNFPCA apply exclusively (not only “unless the context otherwise requires”). Adds definitions, summarized below, of the following terms:

(1) *Department*, as used throughout the FNFPCA, the Department (subsection (6)),

(2) *Distribution*, as used in Section 617.0505, 617.1301 and 617.1302, payment by the corporation of any part of its income or profit to its members, directors or officers, excluding a donation or transfer to or from a corporation qualified as tax-exempt under Internal Revenue Code (“IRC”) Section 501(c) or a governmental organization exempt from federal or state income taxes if the recipient is a member of the donor or transferor (subsection (7)),

(3) *Mutual benefit corporation* (distribution and redemption by which from its members and transfer and resignation by members of which are now permitted to the extent provided in Sections 617.0505, 617.1302, 617.0605, 617.0606, and 617.0608), a Florida corporation, excluding (i) a corporation organized primarily or exclusively for religious purposes, (ii) a person recognized as tax-exempt under IRC Section 501(c)(3), (iii) a person required upon its dissolution to distribute its assets to the United States, a state, a local subdivision thereof, or a person recognized as tax-exempt under IRC Section 502(c)(3), and (iv) Real Estate and Mobile Home Organizations other than mobile home associations (non-exclusion of mobile home associations perhaps reflecting the draftsmen’s oversight) (subsection (13)),

(4) *Successor entity*, as used in new Sections 617.1407 and 617.1408, any legal entity governed by Florida law to which assets and liabilities of a dissolved corporation are transferred solely for the purposes of handling outstanding litigation, settling and closing the business, disposing of and conveying property, and distributing to members any remaining assets, of the corporation, but not for continuing its business (subsection (15)), and

(5) *Voting power*, as used in new Section 617.0701(3)(e), the total number of votes entitled to be cast for election of directors, excluding contingent votes if the contingency has not occurred, the voting power of a class, if any, being based on the percentage of the total number of authorized directors the class is entitled to elect, or if directors are not elected by members, unless otherwise provided in the Articles or bylaws, on a one-member, one-vote basis (subsection (16)).

617.0205: Corrects non-substantive scrivener’s error.

617.0302: Authorizes the not for profit corporation to make guaranties (subsection (7)), and identifies the business entities with which it may merge as limited liability companies, foreign corporations, not for profit corporations, business trusts or associations, real estate investment trusts, common law trusts, unincorporated businesses, general partnerships, limited partnerships, and other entities formed pursuant to the requirements of applicable law, both for profit and not for profit, domestic and foreign, subject to the condition that the surviving business entity has been organized as a not for profit entity under applicable law that permits such a merger (subsection (16)). (See summary of amendment to Section 617.1102.)

617.0501: Deletes proscription against the Department’s charging for responding to telephone requests for general corporate information, including the corporation’s status, names of officers and directors, address of principal place of business, and name and address of resident [*sic.*] agent (subsection (4)).

617.0503: Permits any “alien business organization” as defined in this section (essentially, an entity organized, or 10% or more of which is owned or controlled, directly or indirectly, by an entity organized, under laws of a jurisdiction outside the United States), to withdraw its registered agent designation by delivering to the

Department for filing an application for certificate of withdrawal, which application sets forth its name and jurisdiction of incorporation or organization and that it is no longer required to maintain a registered agent in Florida (subsection (12)).

617.0505: Reflects movement to Sections 617.1301 and 617.1302 of provisions restricting distributions and some of the provisions stating exceptions to that restriction. Permits a mutual benefit corporation, subject to Section 617.1302, to purchase the equity membership interest of any member (it is unclear from the text whether this authority is limited to a mutual benefit corporation that is a private club that is established for social, pleasure, or recreational purposes in which equity interests are held by the members, although at least one commentator indicates that such limitation was intended by the draftsmen) (subsection (1)). (Contrast Section 617.1406(3)(d), not amended in 2009, which provides that a plan of distribution of assets in connection with dissolution of a not for profit corporation must provide that any assets disposition of which is not controlled by Section 617.1406(3)(a)-(c) must be distributed in accordance with provisions, if any, of the Articles or bylaws determining the distributive rights of members, any class or classes of members, or others.) Permits Real Estate and Mobile Home Organizations to make refunds, give credits, or disburse or pay insurance proceeds or settlements to their members (subsection (5)). (Powers of the respective entities referenced in this section are not subject to contrary provisions of the Articles or bylaws, perhaps reflecting the draftsmen's oversight.) Reflects deletion of redundant authorization of certificates evidencing stock or membership in the not for profit corporation provided by Section 617.0601(2), as amended by Chapter 2009-205.

617.0601: Corrects reference to "Solicitation of Funds Act" to read "Solicitation of Contributions Act"; corrects citation to that statute (subsection (1)(b)). Reflects movement to new Section 617.0607 of provision regarding membership termination and extends the requirement of recordation of membership termination in the membership book to resignation, expulsion or suspension of a member under Section 617.0606 or 617.0607 (subsection (5)).

617.0605: Prohibits transfer of membership except in a mutual benefit corporation the Articles or bylaws of which expressly permit such transfer. If transfer rights have been provided to one or more members of a mutual benefit corporation, renders any restriction on such transfer rights not binding with respect to any member holding a membership interest issued before adoption of the restriction unless the restriction is approved by the members and that member. (See summary of amendment to Section 617.1703.)

617.0606: Although the text of clause (1) is redundant of the provision regarding transfer of membership in a mutual benefit corporation in Section 617.0605, as added by Chapter 2009-205, at least one commentator indicates that the draftsmen intended to provide that a member of a mutual benefit corporation has the right to resign except as may be provided in the Articles or bylaws. The text, read with its caption, "Resignation of members" (including the word "not" that the commentator apparently overlooked), more likely was intended by the draftsmen to prohibit resignation of membership except

in a mutual benefit corporation the Articles or bylaws of which expressly permit such resignation, however. Provides that resignation of a member of a mutual benefit corporation does not relieve that member from any obligations thereof to the corporation resulting from obligations incurred or commitments made before that resignation. (See summary of amendment to Section 617.1703.)

617.0607: Replaces the requirement in Section 617.0601(5) in effect before 2009 that membership termination be “in the manner provided by law, by the articles of incorporation, or by the bylaws” by the express requirements with respect to member or membership termination, expulsion, or suspension (each, a “Removal”), that (i) the procedure therefor be “*fair and reasonable and . . . carried out in good faith*” (emphasis supplied), (ii) any written notice given by mail must be delivered by certified or first class mail [*sic.*] to the last address of the member shown on the records of the corporation, (iii) any proceeding challenging the Removal, including (the text omits “without limitation,” perhaps reflecting the draftsmen’s oversight) a proceeding in which the defective notice is alleged, must be commenced within one year after the effective date of the Removal (contrast Florida Statutes Section 95.11(2)(b), not amended in 2009, which provides that an action, other than for recovery of real property, constituting a legal or equitable action on a contract, obligation, or liability founded on a written instrument, other than an action to enforce a claim against a payment bond, must be commenced within five years), (iv) any expelled or suspended member may be liable to the corporation for dues, assessments, or fees as a result of obligations incurred or commitments made before expulsion or suspension (but not before termination, perhaps reflecting the draftsmen’s oversight). (See summary of amendment to Section 617.1703.)

617.0608: Prohibits purchase by a not for profit corporation of any of its memberships or any right arising from membership except (i) as provided in Section 617.0505 (*i.e.*, by a mutual benefit corporation) and (ii) that a mutual benefit corporation may purchase the membership of a member who resigns, or whose membership is terminated, for the amount and pursuant to the conditions set forth in its Articles or bylaws, in each case subject to Section 617.1302. (See summary of amendment to Section 617.1703.)

617.0701: Validates provisions of the Articles or bylaws purporting to preempt the default rule that a special meeting of members may be called by the president, the chair of the board of directors, the board of directors, or any other persons provided in the Articles or bylaws; authorizes a special meeting to be called by holders of at least 5% of the voting power of a corporation upon delivery to a corporate officer of one or more signed and dated written demands for the meeting, describing its purpose; authorizes any signatory to any such demand to set the time and place and give notice of the meeting if that notice is not otherwise given on behalf of the corporation within 30 days after receipt by that corporate officer of that demand (subsection (3)). Extends the duration of the period during which the members having the requisite number of votes must sign written consents in lieu of a meeting of members in order to authorize action by members from 60 to 90 days; extends the period after obtaining that authorization during which notice of that action must be given to members entitled to vote on it that did not consent in writing

from ten (10) to 30 days; applies the requirement of disclosure that action was authorized by written consent under this section to any articles as well as any certificate filed to effect that action (subsection (4)). Extends the exemption of homeowner's associations from requirements for annual and special meetings of members to other Real Estate and Mobile Home Organizations (subsection (6)).

617.0721: Permits a corporation to reject a member's vote, consent, waiver or proxy appointment if the officer or other agent authorized to tabulate votes, "*acting in good faith, has a reasonable basis* for doubting the validity of the signature on it or the signatory's authority to sign for the member" (emphasis supplied) (subsection (2)(b)). Authorizes participation, inclusion in determining existence of a quorum, and voting of members and proxy holders at a members' meeting by "remote communication" (this term is not defined in this section or in its Florida Business Corporation Act counterparts, Sections 607.0701 and 607.0702; at least one commentator indicates that the term refers to communication through the Internet, computer, video or "similar capabilities," and the requirement in all three sections that participants have an opportunity to "read or hear" the proceedings of the meeting indicates that the term perhaps was intended by the draftsmen to reference conference telephone as well as electronic media) if, and subject to guidelines, authorized by the board of directors, subject to the further conditions that (i) the corporation implements "*reasonable means*" of verifying membership and proxy holder status and "*reasonable measures*" to provide such members or proxy holders with "*a reasonable opportunity*" to participate and vote at the meeting, "including an opportunity to communicate and to read or hear the proceedings of the meeting substantially concurrent with the proceedings," and (ii) if any member or proxy holder votes or takes other action by means of remote communication, a record of that member's participation (but not that proxy holder's participation, perhaps reflecting the draftsmen's oversight) in the meeting is maintained by the corporation in accordance with the provisions of Section 617.1601 (emphasis supplied) (subsection (3)).

(Contrast Sections 607.0820 in the Florida Business Corporation Act and 617.0820, authorizing the board of directors, unless the Articles or bylaws provide otherwise, to permit directors to participate in a meeting thereof by means of "communication by which all directors participating may simultaneously hear [not "read or hear"] each other during the meeting": Authorization of members' meetings by "remote communication" is not subject to contrary provisions of the Articles or bylaws, perhaps reflecting the draftsmen's oversight. Unlike members' meetings, authorization of meetings of directors by audio media is not extended to visual media, also perhaps reflecting the draftsmen's oversight, although corporate statutory draftsmen have traditionally eschewed written consents of directors in lieu of meetings unless unanimous (see Sections 607.0821 in the Florida Business Corporation Act and 617.0821), unlike written consents of shareholders and members in lieu of meetings (Sections 607.0704 in the Florida Business Corporation Act and 617.0701(4).)

(Unlike Section 617.0701 and other provisions of the FNFPCA described in this Summary, the exemption from the provisions of this section to the effect that voting rights are conferred only by the Articles or bylaws, and concerning proxy voting,

cumulative voting and sole voting power of directors in a corporation having no members with voting rights was not extended to associations and corporations other than homeowners' associations, perhaps reflecting the draftsmen's oversight.)

617.0725: Provides that (i) an amendment to the Articles or bylaws that adds, changes or deletes a greater or lesser (*i.e.*, an amendment having the effect of raising, lowering, deleting or otherwise changing, not only the effect of lowering or deleting) quorum or voting requirement of members, must be adopted by the members in accordance with that provision, and (ii) adoption of such amendment must be in accordance with *either* the quorum, voting requirements, vote and voting groups "then in effect" (perhaps intended by the draftsmen to mean "in effect when the amendment is voted upon or consented to in writing by members") *or* the quorum, voting requirement, vote and voting groups "proposed to be adopted, whichever is greater" (*i.e.*, not necessarily the quorum, voting requirement, vote and voting group "prescribed in the provision being amended").

(Although this section, both before and as amended in 2009, does not provide that it is limited to quorum and voting requirements for members, Section 617.0824 and the reference to voting groups indicate that Section 617.0725 applies only to meetings of members. Because, before the 2009 statutory amendments, Section 617.0725 applied only to an amendment to the Articles or bylaws changing or deleting a "greater quorum or voting requirement," the quorum and voting requirements for members' adoption of such an amendment under that section before 2009, *i.e.*, the quorum and voting requirements "prescribed in the provision being amended," were the same as under the section as amended in 2009.)

617.07401: Adds provisions governing members' derivative actions, substantially similar to those provided by Section 607.07401 in the Florida Business Corporation Act, except that a court may dismiss a derivative proceeding in the right of a not for profit corporation based upon a "good faith determination" by one of the groups specified in Section 617.07401, as contrasted with its dismissal of a derivative proceeding in the right of a business corporation based upon a "determination in good faith," in each case "after conducting a reasonable investigation upon which its conclusions are based that the maintenance of the derivative suit is not in the best interests of the corporation." At least one commentator indicates that these provisions merely codify existing Florida judicial authority.

617.0801: Changes the caption of this section in order to clarify that, if the Articles so provide, a not for profit corporation may be managed by its members instead of a board of directors.

617.0802: Permits a person recognized as tax-exempt under IRC Section 501(c)(3) (reference in Section 617.0802 to "a corporation *organized* according to the provisions of s. 501(c)(3). . ." (emphasis supplied) perhaps reflects the draftsmen's oversight) other than Real Estate and Mobile Home Organizations, to have one director at least 15 but less than 18 years of age (*i.e.*, a "youth director") if so permitted by the Articles or bylaws or

by resolution of the board of directors (subsection (1)). (See summary of amendment to Section 617.0824.)

617.0806: Clarifies that division of directors into classes may be effected only by provisions of the Articles or bylaws. Deletes the provision, “the terms of office of the several classes need not be uniform.” (It is uncertain how Florida courts will interpret that deletion; perhaps it was the belief of the draftsmen that the deleted phrase was redundant of “Each director shall hold office for the term to which he or she is elected or appointed. . . .”)

617.0808: Changes the mandatory procedure for removal of directors from (i) by vote or written agreement of a majority of all membership votes to (ii) (a) for removal without cause of a director elected or appointed by the board (use of “board” instead of “board of directors,” the term defined in Section 617.01401, perhaps reflecting the draftsmen’s oversight), by a vote of 2/3 of the directors then in office or such greater number as is set forth in the Articles or bylaws, (b) for (1) removal with cause of a director elected or appointed by the directors (use of “directors” instead of “board of directors” perhaps reflecting the draftsmen’s oversight), or (2) removal of any director for missing a specified number of board (again, use of “board” perhaps reflecting the draftsmen’s oversight) meetings if, at the beginning of the term of that director, the Articles or bylaws provide that the director may be removed for this reason, by a majority of all votes of the directors (perhaps intended by the draftsmen to read “a vote of a majority of the directors then in office,” but not stating, “or such greater number as is set forth in the Articles or bylaws,” perhaps reflecting the draftsmen’s oversight), or (c) for removal with or without cause of a director elected or appointed by the members, by a majority of all votes of the members (not a majority of all “voting power,” but not stating, “or such greater number as is set forth in the Articles or bylaws,” perhaps reflecting the draftsmen’s oversight), or, if the director was elected by a class, chapter, or other organizational unit, or by region or other geographic grouping, then by the members of that class, chapter, unit or grouping (not “a majority of all votes of” the members of that class, chapter, unit or grouping, and not stating, “or such greater number as is set forth in the Articles or bylaws,” each such omission perhaps reflecting the draftsmen’s oversight), except that a director may be removed, otherwise than by vote of the board of directors for missing board of directors meetings under the circumstances described in clause (b)(2) above, only if (i) the number of votes of the members cast for removal would be sufficient to elect that director, and (ii) the number of votes of the members sufficient to elect the director under cumulative voting, if authorized, is *not* voted against that removal; changes other provisions to reflect that removal may be by action of directors as well as by action of members, and that a removed director first becomes eligible to stand for reelection at the next annual meeting at which directors are elected by directors or members (subsection (1)). Regarding the exemption from the provisions of this section for a corporation described in IRC Section 501(c), see the summary of Section 617.2103 below (subsection (2)).

(The provisions of this section do not permit removal of a director by vote or written consent of members, even for cause or for missing meetings of the board of directors,

unless that director was elected or appointed by the members, perhaps reflecting the draftsmen's oversight. Except for a corporation described in IRC Section 501(c), the Articles or bylaws of which may provide otherwise, the provisions of this section as amended continue not to preclude a corporation subject to the FNFPCA and having no members entitled to vote for directors from having a self-perpetuating board of directors; although at least one commentator indicates that a self-perpetuating board of directors can be authorized only by the Articles or bylaws, the provisions of Section 617.0721 suggest that a board of directors of a no-voting-member corporation subject to the FNFPCA can be self-perpetuating even if the Articles and bylaws are silent regarding this authorization.)

617.0809: Subjects the authority of the board of directors to fill any vacancy thereon to the restriction under Section 617.0808(1)(f) that a removed director is not eligible to stand for reelection until the next annual meeting at which directors are elected by directors or members (subsection (1)). Restricts filling of a vacancy with respect to a director elected by a Group (use of "group" instead of "grouping" perhaps reflecting the draftsmen's oversight) to filling that vacancy by members of that Group, or by a majority of the directors then in office elected by such Group (perhaps intended by the draftsmen to read "a majority of all votes of the members of that class, chapter, unit, or group, or by a majority of all votes of the directors then in office elected by such class, chapter, unit or group" but not stating, "or such greater number in each case as is set forth in the Articles or bylaws," each such omission perhaps reflecting the draftsmen's oversight) (subsection (2)). Changes the term of the director elected or appointed to fill a vacancy from "the unexpired term of his or her predecessor in office" to a period expiring at the next annual meeting at which directors are elected by directors or members (subsection (3)).

(Although at least one commentator indicates that this limitation on the term of a director elected or appointed to fill a vacancy is not applicable to such a director elected or appointed before the October 1, 2009 effective date of this amendment, this writer found no such exception to that effective date as to all domestic and foreign corporations subject to the FNFPCA under Section 617.0102 (the "reservation of powers" provision of the FNFPCA) unless the continuance of the term for which such a director was elected or appointed before October 1, 2009 is deemed to result from "action taken under [the statute] before its . . . amendment" or constitute a "right . . . [or] privilege. . . acquired, accrued, or incurred under the statute before its. . . amendment" for the purposes of Section 617.1907, as amended.)

617.0824: Excludes a "youth director" from the count of directors in determining the presence of a quorum at a meeting of the board of directors (but not a meeting of a committee of the board of directors, perhaps reflecting the draftsmen's oversight) (subsection (1)). (See summary of amendment to Section 617.0802. A "youth director" has a vote at the meeting but, because Section 617.0803 requires a not for profit corporation to have at least three directors and the affirmative vote of a majority of directors present (*i.e.*, a quorum) is the act of the board of directors unless the Articles or bylaws require the vote of a greater number of directors, a "youth director" cannot act on

behalf of the board of directors, either alone or in concert with one or more other directors.)

617.0832: Replaces (i) inclusion of common or interested directors in the count of directors in determining the presence of a quorum at a meeting of the board or directors or a committee thereof authorizing, approving, or ratifying a contract or other transaction between the corporation and one or more of its directors or any other corporation, firm, association or entity in which one or more of the first corporation's directors are directors or officers or are financially interested by (ii) specific voting requirements of directors (*i.e.*, affirmative vote of a majority of directors on the board of directors or committee having "no relationship or interest in the transaction") and members (*i.e.*, vote of a majority in interest of the members entitled to vote under this section, excluding any director having "a relationship or interest in the transaction") in order to authorize, approve, or ratify a "conflict-of-interest transaction" (without defining that term, and without stating, "or such greater number in each case as is set forth in the Articles or bylaws," each such omission perhaps reflecting the draftsmen's oversight). (Thus excludes a director's vote from the vote count in determining whether a "conflict-of-interest transaction" is authorized, approved, or ratified by the members, not only in determining whether it is authorized, approved, or ratified by the board of directors or a committee thereof, if that director has any relationship or interest in the transaction, not only a relationship or interest of the nature described in clause (i) above (*i.e.*, overlapping management between parties to the transaction or financial interest).) Provides that, (a) if a majority of the directors having no relationship or interest in the transaction vote to authorize, approve, or ratify it, a quorum is present, and a majority of the voting shares or other voting units allotted to the members of the corporation and entitled to vote on the transaction under this section constitutes a quorum, in each case for the purpose of taking that action under this section, and (b) the presence and vote of a director having a relationship or interest in the transaction may be counted for purposes of determining whether the transaction is approved by directors or members under other sections of the FNFPCA. (Subsections (2) and (3).)

617.0833: Effects non-substantive editorial changes.

617.0834: Effects non-substantive editorial changes.

617.1007: Corrects non-substantive scrivener's errors.

617.1101: Requires a plan of merger to include the manner and basis, if any, of converting the memberships of each merging corporation into memberships, obligations, or securities of the surviving corporation into which each other corporation plans to merge, or of any other corporation, or, in whole or in part, into cash or other property (subsection (2)(d)). Replaces (i) general permission to include in the plan of merger other provisions with respect to the merger by (ii) permission to include (a) amendments to, or a restatement of, the Articles of the surviving corporation, (b) the effective date of the merger, which may be on or after the date of filing the Articles or articles of merger, or (c) other provisions relating to the merger (subsection (3)).

617.1102: Reiterates the limitation on merger by a not for profit corporation set forth in Section 617.0302, as amended.

617.1301: Reflects movement from Section 617.0505 of provisions restricting distributions.

617.1302: Reflects movement from Section 617.0505 of some of the provisions stating exceptions to restrictions upon distributions: Restricts purchase by a mutual benefit corporation of its memberships pursuant to Section 617.0505 or 617.0608 unless, after the purchase is completed, the mutual benefit corporation is able to pay its debts as they become due in the usual course of its activities and its total assets at least equal (perhaps the draftsmen intended to state, “are equal to or greater than”) the sum of its total liabilities (subsection (1)). Authorizes distributions upon dissolution in conformity with the provisions of Section 617.1406 (subsection (2)).

617.1405: Permits another corporation to assume or use the name of a dissolved corporation before the 120th day after the effective date of dissolution if the dissolved corporation provides the Department with an affidavit, executed pursuant to the provisions of Section 617.01201, authorizing the immediate assumption or use of the name by another corporation (subsection (4)).

617.1407: Provides for resolving payment of claims against a dissolved corporation unknown at the time of dissolution, substantially identical to the provisions of Section 607.1407 in the Florida Business Corporation Act.

617.1408: Provides for resolving payment of claims against a dissolved corporation known at the time of dissolution, substantially identical to the provisions of Section 607.1406 in the Florida Business Corporation Act.

617.1420 2/: Provides that the Department may commence a proceeding of administrative dissolution of a corporation that does not file its annual report or pay the annual report filing fee (due under Sections 617.1622 and 617.0122 on May 1 of each calendar year after the Florida corporation was incorporated or the foreign corporation was authorized in Florida) by 5 p.m. Eastern Time on the third Friday in September (extending the deadline for filing and payment to avoid administrative dissolution to that date and time from May 1) (subsection (1)(a)).

617.1421 2/ and Ch. 2009-205: Provides for (a) automatic administrative dissolution of a corporation on the fourth Friday in September of each year (perhaps intended by the draftsmen to read “the year of failure of the corporation to file its annual report or pay the annual report filing fee under Section 617.1420”), on the grounds stated in Section 617.1420, after service by the Department upon the corporation, by electronic transmission if the corporation provided to the Department an electronic mail address, of written notice of its intent of administrative dissolution, and (b) issuance by the Department to the dissolved corporation of a certificate of dissolution, by electronic

transmission if the corporation provided to the Department an electronic mail address (the provision regarding issuance of the certificate of dissolution being stated twice in this section, perhaps reflecting the draftsmen's oversight) (subsections (1) and (2)). Reflects movement of the provision regarding use of the name of an administratively dissolved corporation from this section to Section 617.1422(4).

617.1422: Replaces prescribed contents of an application for reinstatement following administrative dissolution by reference to a "reinstatement form prescribed and furnished by the [D]epartment or a current uniform business report [*sic.*] signed by a registered agent and an officer or director" (subsection (1)). Reflects movement of the provision regarding use of the name of an administratively dissolved corporation from Section 617.1421(6) to this section (subsection (4)).

(The reference to "uniform business report" instead of the term "annual report," the term used in Sections 617.1420, 617.1421 and 617.1622, in notices from the Department and on www.sunbiz.org, and the change in subsection (3) from "carrying on its affairs" to "carrying on its business" despite the provisions of Section 617.1421, as amended, proscribing a corporation administratively dissolved from "conduct[ing] any affairs," perhaps reflect the draftsmen's oversight.)

617.1430: Denies a single member standing to commence a proceeding for judicial dissolution of a corporation under the circumstances of "deadlock" or misapplication or waste of corporate assets described in this section, and grants that standing to (i) 50 members or members holding at least 10% of the voting power, whichever is less, (ii) a member or group or percentage of members otherwise provided in the Articles or bylaws, (iii) a director, and (iv) any person authorized in the Articles (not in the bylaws, thereby distinguishing "any person" from members or this purpose) (subsection (2)).

617.1503: Effects non-substantive editorial changes.

617.1504: Postpones deadline for a foreign corporation's application to the Department for an amended certificate of authority to conduct its affairs in Florida from 30 to 90 days after occurrence of a change mentioned in subsection (1) of this section (subsection (2)).

617.1506: Permits the corporate name of a foreign corporation to distinguish it from a business entity other than a partnership, as well as from a partnership or a natural person (subsection (1)(a)). Prescribes procedures with respect to the Division of Corporations (not the Department, perhaps reflecting the draftsmen's oversight) for use of an alternate name to transact business (not "conduct its affairs," the term used in Sections 617.1501-.1505, perhaps reflecting the draftsmen's oversight) in Florida if the corporation's real name is unavailable (subsection (1)(b)).

617.1530 2/ and Ch. 2009-2005: Conforms to the provisions of Section 617.1420 the time period for filing by a foreign corporation of its annual report with the Department (but not for paying the annual report filing fee, perhaps reflecting the draftsmen's

oversight), extending the deadline for filing in order to avoid the Department's commencing a proceeding to revoke the certificate of authority to conduct its affairs in Florida to 5 p.m. Eastern Time on the third Friday in September after the May 1 on which that annual report is due under Section 617.1622 (subsection (1)).

617.1531 2/: Conforms the procedures for revocation of certificate of authority of a foreign corporation to the provisions of Section 617.1421 regarding administrative dissolution of a domestic corporation (subsections (1) and (2)).

617.1601: Effects a non-substantive editorial change.

617.1602: Permits a corporation to provide to its member the opportunity to inspect and copy corporate records at "a reasonable location specified by the corporation" as an alternative to the corporation's principal office (subsection (1)). Increases the period of prior notice by the member to the corporation required to exercise the member's right to inspect and copy from five (5) to ten (10) business days (subsections (1) and (2)). Deletes reference to a purported section of the FNFPCA that did not exist.

617.1605: Replaces (i) mandatory delivery by the corporation to each member of "a complete financial report of actual receipts and expenditures for the previous 12 months" by accounts and classifications, by (ii) delivery by the corporation only upon a member's written demand of the corporation's latest annual financial statements, which may be consolidated or combined with statements of subsidiaries or affiliates, "as appropriate" (without designating the person responsible for determining appropriateness, perhaps reflecting the draftsmen's oversight), including a balance sheet and statement of operations as of the end of, and for, that year, on the basis of (not "in accordance with," perhaps reflecting the draftsmen's not consulting with accountants in connection with drafting this provision) generally accepted accounting principles if the corporation's financial statements are prepared on that basis.

617.1703: Clarifies that any conflict between the FNFPCA and Florida statutes expressly governing Real Estate and Mobile Home Organizations is to be resolved by those other statutes, respectively. Provides that Sections 617.0605-617.0608, governing transfer or purchase of memberships or resignation, termination, expulsion, or suspension of members (see summary of amendments to those sections), do not apply to Real Estate and Mobile Home Organizations (albeit the definition of "mutual benefit corporation" does not exclude mobile home associations, perhaps reflecting the draftsmen's oversight).

617.1803: Recites the legal consequences of domestication of a foreign not for profit corporation, including a not for profit incorporated organization (subsection (8)).

617.1806: Restricts application of the provisions of this section to petitions for conversion to a not for profit Florida corporation from a for profit corporation incorporated under a Florida statute, engaged solely in carrying out the purposes and objects that not for profit corporations are authorized under Florida law to carry out, pursuant to Section 617.1805.

617.1907: Extends the effect of a repeal of a statute by the FNFPCA to an amendment of a statute by the FNFPCA, and clarifies that any proceeding, reorganization or dissolution commenced before such a repeal or amendment, regardless whether it was commenced under the repealed or amended statute, may be completed as if it had not been repealed or amended and not solely in accordance with the repealed or amended statute. (For example, see this writer's commentary in the summary of amendment to Section 617.0809.)

617.2103: Repealed, but clauses (1) and (2) are replaced, with respect to an exemption from Section 617.0808 applicable to a corporation described in IRC Section 501(c), by the provisions of clause (2) added to Section 617.0808. The effect of this repeal, therefore, is that such a corporation is now subject to the provisions of Sections 617.1601-.1605 regarding corporate records and reports and Section 617.2102 regarding fines and penalties against members.