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**FIDUCIARY DUTIES UNDER FLORIDA RUPA**

**§ 620.8103 Effect of partnership agreement; nonwaivable provisions.--**

(1) Except as otherwise provided in subsection (2), relations among partners and between partners and a partnership are governed by the partnership agreement. To the extent the partnership agreement does not otherwise provide, this act governs relations among partners and between partners and a partnership.

(2) The partnership agreement may not:

(a) Vary the rights and duties under s. 620.8105 except to eliminate the duty to provide copies of statements to all of the partners;

(b) Vary the law applicable to a limited liability partnership under s. 620.8106(2);

(c) Unreasonably restrict the right of access to books and records under s. 620.8403(2) or to information under s. 620.8403(3);

(d) Eliminate the duty of loyalty under s. 620.8404(2) or s. 620.8603(2)(c), but:

    1. The partnership agreement may identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable; or

    2. All of the partners or a number or percentage specified in the partnership agreement may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty;

(e) Unreasonably reduce the duty of care under s. 620.8404(3) or s. 620.8603(2)(c);

(f) Eliminate the obligation of good faith and fair dealing under s. 620.8404(4), but the partnership agreement may prescribe the standards by which the performance of the obligation is to be measured if the standards are not manifestly unreasonable;

(g) Vary the power to dissociate as a partner under s. 620.8602(1), except to require the notice under s. 620.8601(1) to be in writing;

(h) Vary the right of a court to expel a partner under the events specified in s. 620.8601(5);

(i) Vary the requirement to wind up the partnership business in cases specified in s.

620.8801(4), (5), or (6); or  
(j) Restrict rights of third parties under this act.

**§ 620.8404 General standards of partner's conduct.--**

(1) The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care, as set forth in subsections (2) and (3).

(2) A partner's duty of loyalty to the partnership and the other partners is limited to the following:

(a) To account to the partnership and hold as trustee for the partnership any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity;

(b) To refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership; and

(c) To refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership.

(3) A partner's duty of care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

(4) A partner shall discharge the duties to the partnership and the other partners under this act or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing.

(5) A partner does not violate a duty or obligation under this act or under a partnership agreement merely because the partner's conduct furthers the partner's own interest.

(6) A partner may lend money to and transact other business with the partnership, and as to each loan or transaction, the rights and obligations of the partner are the same as those of a person who is not a partner, subject to other applicable law.

(7) This section applies to a person winding up the partnership business as the personal or legal representative of the last surviving partner as if the person were a partner.

**RUPA**

**§ 601 EVENTS CAUSING PARTNER'S DISSOCIATION.**

**A partner is dissociated from a partnership upon the occurrence of any of the following events:**

- (1) the **partnership's having notice of the partner's express will to withdraw as a partner** or on a later date specified by the partner;
- (2) an event agreed to in the partnership agreement as causing the partner's dissociation;
- (3) the partner's expulsion pursuant to the partnership agreement;
- (4) the partner's expulsion by the unanimous vote of the other partners if:
  - (i) it is unlawful to carry on the partnership business with that partner;
  - (ii) there has been a transfer of all or substantially all of that partner's transferable interest in the partnership, other than a transfer for security purposes, or a court order charging the partner's interest, which has not been foreclosed....
- (5) on application by the partnership or another partner, the partner's expulsion by judicial determination because:
  - (i) the partner engaged in wrongful conduct that adversely and materially affected the partnership business;
  - (ii) the partner willfully or persistently committed a material breach of the partnership agreement or of a duty owed to the partnership or the other partners under Section 404; or
  - (iii) the partner engaged in conduct relating to the partnership business which makes it not reasonably practicable to carry on the business in partnership with the partner;
- (6) the partner's:
  - (i) becoming a debtor in bankruptcy;
  - (ii) executing an assignment for the benefit of creditors;
  - (iii) seeking, consenting to, or acquiescing in the appointment of a trustee, receiver, or liquidator of that partner or of all or substantially all of that partner's property...
- (7) in the case of a partner who is an individual:
  - (i) the partner's death;
  - (ii) the appointment of a guardian or general conservator for the partner; or
  - (iii) a judicial determination that the partner has otherwise become incapable of performing the partner's duties under the partnership agreement...

**§ 602 PARTNER'S POWER TO DISSOCIATE; WRONGFUL DISSOCIATION.**

- (a) **A partner has the power to dissociate at any time, rightfully or wrongfully, by express will pursuant to Section 601(1).**
- (b) A partner's dissociation is wrongful **only if**:
  - (1) it is in breach of an express provision of the partnership agreement; or
  - (2) in the case of a partnership for a definite term or particular undertaking, before the expiration of the term or the completion of the undertaking:
    - (i) the partner withdraws by express will, unless the withdrawal follows within 90 days after another partner's dissociation by death or otherwise under Section 601(6) through (10) or wrongful dissociation under this subsection;
    - (ii) the partner is expelled by judicial determination under Section 601(5);
    - (iii) the partner is dissociated by becoming a debtor in bankruptcy; or
    - (iv) in the case of a partner who is not an individual, trust other than a business trust, or estate, the partner is expelled or otherwise dissociated because it willfully dissolved or

terminated.

(c) A partner who wrongfully dissociates is liable to the partnership and to the other partners for damages caused by the dissociation. The liability is in addition to any other obligation of the partner to the partnership or to the other partners.

### **§ 603 EFFECT OF PARTNER'S DISSOCIATION.**

(a) If a partner's dissociation results in a dissolution and winding up of the partnership business, [Article] 8 applies; otherwise, [Article] 7 applies.

(b) Upon a partner's dissociation:

(1) the partner's right to participate in the management and conduct of the partnership business terminates, except as otherwise provided in Section 803;

(2) the partner's duty of loyalty under Section 404(b)(3) terminates; and

(3) the partner's duty of loyalty under Section 404(b)(1) and (2) and duty of care under Section 404(c) continue only with regard to matters arising and events occurring before the partner's dissociation, unless the partner participates in winding up the partnership's business pursuant to Section 803.

### **§ 701 PURCHASE OF DISSOCIATED PARTNER'S INTEREST.**

(a) If a partner is dissociated from a partnership without resulting in a dissolution and winding up of the partnership business under Section 801, the partnership shall cause the dissociated partner's interest in the partnership to be purchased for a buyout price determined pursuant to subsection (b).

(b) The buyout price of a dissociated partner's interest is the amount that would have been distributable to the dissociating partner under Section 807(b) if, on the date of dissociation, the assets of the partnership were sold at a price equal to the greater of the liquidation value or the value based on a sale of the entire business as a going concern without the dissociated partner and the partnership were wound up as of that date. Interest must be paid from the date of dissociation to the date of payment.

(c) Damages for wrongful dissociation under Section 602(b), and all other amounts owing, whether or not presently due, from the dissociated partner to the partnership, must be offset against the buyout price. Interest must be paid from the date the amount owed becomes due to the date of payment.

(d) A partnership shall indemnify a dissociated partner whose interest is being purchased against all partnership liabilities, whether incurred before or after the dissociation, except liabilities incurred by an act of the dissociated partner under Section 702.

(e) If no agreement for the purchase of a dissociated partner's interest is reached within 120 days after a written demand for payment, the partnership shall pay, or cause to be paid, in cash to the dissociated partner the amount the partnership estimates to be the buyout price and accrued interest, reduced by any offsets and accrued interest under subsection (c).

(f) If a deferred payment is authorized under subsection (h), the partnership may tender a written offer to pay the amount it estimates to be the buyout price and accrued interest, reduced by any offsets under subsection (c), stating the time of payment, the amount and type of security for payment, and the other terms and conditions of the

obligation.

(g) The payment or tender required by subsection (e) or (f) must be accompanied by the following:

(1) a statement of partnership assets and liabilities as of the date of dissociation;  
(2) the latest available partnership balance sheet and income statement, if any;  
(3) an explanation of how the estimated amount of the payment was calculated; and  
(4) written notice that the payment is in full satisfaction of the obligation to purchase unless, within 120 days after the written notice, the dissociated partner commences an action to determine the buyout price, any offsets under subsection (c), or other terms of the obligation to purchase.

(h) A partner who wrongfully dissociates before the expiration of a definite term or the completion of a particular undertaking is not entitled to payment of any portion of the buyout price until the expiration of the term or completion of the undertaking, unless the partner establishes to the satisfaction of the court that earlier payment will not cause undue hardship to the business of the partnership. A deferred payment must be adequately secured and bear interest.

(i) A dissociated partner may maintain an action against the partnership, pursuant to Section 405(b)(2)(ii), to determine the buyout price of that partner's interest, any offsets under subsection (c), or other terms of the obligation to purchase. The action must be commenced within 120 days after the partnership has tendered payment or an offer to pay or within one year after written demand for payment if no payment or offer to pay is tendered. The court shall determine the buyout price of the dissociated partner's interest, any offset due under subsection (c), and accrued interest, and enter judgment for any additional payment or refund. If deferred payment is authorized under subsection (h), the court shall also determine the security for payment and other terms of the obligation to purchase. The court may assess reasonable attorney's fees and the fees and expenses of appraisers or other experts for a party to the action, in amounts the court finds equitable, against a party that the court finds acted arbitrarily, vexatiously, or not in good faith. The finding may be based on the partnership's failure to tender payment or an offer to pay or to comply with subsection (g).

## **§ 702 DISSOCIATED PARTNER'S POWER TO BIND AND LIABILITY TO PARTNERSHIP.**

(a) For two years after a partner dissociates without resulting in a dissolution and winding up of the partnership business, the partnership... is bound by an act of the dissociated partner which would have bound the partnership under Section 301 before dissociation only if at the time of entering into the transaction the other party:

(1) reasonably believed that the dissociated partner was then a partner;  
(2) did not have notice of the partner's dissociation; and  
(3) is not deemed to have had knowledge under Section 303(e) or notice under Section 704(c).

(b) A dissociated partner is liable to the partnership for any damage caused to the partnership arising from an obligation incurred by the dissociated partner after dissociation for which the partnership is liable under subsection (a).

### **§ 703 DISSOCIATED PARTNER'S LIABILITY TO OTHER PERSONS.**

(a) A partner's dissociation does not of itself discharge the partner's liability for a partnership obligation incurred before dissociation. A dissociated partner is not liable for a partnership obligation incurred after dissociation, except as otherwise provided in subsection (b).

(b) A partner who dissociates without resulting in a dissolution and winding up of the partnership business is liable as a partner to the other party in a transaction entered into by the partnership, or a surviving partnership under [Article] 9, within two years after the partner's dissociation, only if the partner is liable for the obligation under Section 306 and at the time of entering into the transaction the other party:

(1) reasonably believed that the dissociated partner was then a partner;

(2) did not have notice of the partner's dissociation; and

(3) is not deemed to have had knowledge under Section 303(e) or notice under Section 704(c).

(c) By agreement with the partnership creditor and the partners continuing the business, a dissociated partner may be released from liability for a partnership obligation.

(d) A dissociated partner is released from liability for a partnership obligation if a partnership creditor, with notice of the partner's dissociation but without the partner's consent, agrees to a material alteration in the nature or time of payment of a partnership obligation.

### **FLORIDA STATUTES: CLOSE CORPORATIONS**

#### **§ 607.0722 Proxies....**

(5) An appointment of a proxy is revocable by the shareholder unless the appointment form or electronic transmission conspicuously states that it is irrevocable and the appointment is coupled with an interest. Appointments coupled with an interest include the appointment of:

(a) A pledgee;

(b) A person who purchased or agreed to purchase the shares;

(c) A creditor of the corporation who extended credit to the corporation under terms requiring the appointment;

(d) An employee of the corporation whose employment contract requires the appointment; or

(e) A party to a voting agreement created under s. 607.0731.

(6) An appointment made irrevocable under subsection (5) becomes revocable when the interest with which it is coupled is extinguished.

#### **§ 607.0730 Voting trusts.--**

(1) One or more shareholders may create a voting trust, conferring on a trustee the right to vote or otherwise act for him or her or for them, by signing an agreement setting out the provisions of the trust (which may include anything consistent with its purpose) and transferring their shares to the trustee. When a voting trust agreement is signed, the

trustee shall prepare a list of the names and addresses of all owners of beneficial interests in the trust, together with the number and class of shares each transferred to the trust, and deliver copies of the list and agreement to the corporation's principal office. After filing a copy of the list and agreement in the corporation's principal office, such copy shall be open to inspection by any shareholder of the corporation (subject to the requirements of s. 607.1602(3)) or any beneficiary of the trust under the agreement during business hours.

(2) A voting trust becomes effective on the date the first shares subject to the trust are registered in the trustee's name.

**§ 607.0731 Shareholders' agreements.--**

(1) Two or more shareholders may provide for the manner in which they will vote their shares by signing an agreement for that purpose. A shareholders' agreement created under this section is not subject to the provisions of s. 607.0730.

(2) A shareholders' agreement created under this section is specifically enforceable.

(3) A transferee of shares in a corporation the shareholders of which have entered into an agreement authorized by subsection (1) shall be bound by such agreement if the transferee takes shares subject to such agreement with notice thereof. A transferee shall be deemed to have notice of any such agreement or any such renewal if the existence thereof is noted on the face or back of the certificate or certificates representing such shares.

**§ 607.0732 Shareholder agreements.--**

(1) An agreement among the shareholders of a corporation with 100 or fewer shareholders at the time of the agreement, that complies with this section, is effective among the shareholders and the corporation, even though it is inconsistent with one or more other provisions of this chapter, if it:

(a) Eliminates the board of directors or restricts the discretion or powers of the board of directors;

(b) Governs the authorization or making of distributions whether or not in proportion to ownership of shares, subject to the limitations in s. 607.06401;

(c) Establishes who shall be directors or officers of the corporation, or their terms of office or manner of selection or removal;

(d) Governs, in general or in regard to specific matters, the exercise or division of voting power by the shareholders and directors, including use of weighted voting rights or director proxies;

(e) Establishes the terms and conditions of any agreement for the transfer or use of property or the provision of services between the corporation and any shareholder, director, officer, or employee of the corporation;

(f) Transfers to any shareholder or other person any authority to exercise the corporate powers or to manage the business and affairs of the corporation, including the resolution of any issue about which there exists a deadlock among directors or shareholders; or

(g) Requires dissolution of the corporation at the request of one or more of the



shareholders or upon the occurrence of a specified event or contingency.

**(h)** Otherwise governs the exercise of the corporate powers or the management of the business and affairs of the corporation or the relationship between the shareholders, the directors, or the corporation, and is not contrary to public policy. For purposes of this paragraph, agreements contrary to public policy include, but are not limited to, agreements that reduce the duties of care and loyalty to the corporation as required by ss. 607.0830 and 607.0832, exculpate directors from liability that may be imposed under s. 607.0831, adversely affect shareholders' rights to bring derivative actions under s. 607.07401, or abrogate dissenters' rights under ss. 607.1301-607.1320.

**(2)** An agreement authorized by this section shall be:

**(a)1.** Set forth in the articles of incorporation or bylaws and approved by all persons who are shareholders at the time the agreement; or

**2.** Set forth in a written agreement that is signed by all persons who are shareholders at the time of the agreement and such written agreement is made known to the corporation.

**(b)** Subject to termination or amendment only by all persons who are shareholders at the time of the termination or amendment, unless the agreement provides otherwise with respect to termination and with respect to amendments that do not change the designation, rights, preferences, or limitations of any of the shares of a class or series.

**(3)** The existence of an agreement authorized by this section shall be noted conspicuously on the front or back of each certificate for outstanding shares or on the information statement required by s. 607.0626(2). If at the time of the agreement the corporation has shares outstanding which are represented by certificates, the corporation shall recall such certificates and issue substitute certificates that comply with this subsection. The failure to note the existence of the agreement on the certificate or information statement shall not affect the validity of the agreement or any action taken pursuant to it. Any purchaser of shares who, at the time of purchase, did not have knowledge of the existence of the agreement shall be entitled to rescission of the purchase. A purchaser shall be deemed to have knowledge of the existence of the agreement if its existence is noted on the certificate or information statement for the shares in compliance with this subsection and, if the shares are not represented by a certificate, the information statement is delivered to the purchaser at or prior to the time of the purchase of the shares. An action to enforce the right of rescission authorized by this subsection must be commenced within earlier of 90 days after discovery of the existence of the agreement or 2 years after the time of purchase of the shares.

**(4)** An agreement authorized by this section shall cease to be effective when shares of the corporation are listed on a national securities exchange or regularly quoted in a market maintained by one or more members of a national or affiliated securities association. If the agreement ceases to be effective for any reason, the board of directors may, if the agreement is contained or referred to in the corporation's articles of incorporation or bylaws, adopt an amendment to the articles of incorporation or bylaws, without shareholder action, to delete the agreement and any references to it.

**(5)** An agreement authorized by this section that limits the discretion or powers of the board of directors shall relieve the directors of, and impose upon the person or persons

in whom such discretion or powers are vested, liability for acts or omissions imposed by law on directors to the extent that the discretion or powers of the directors are limited by the agreement.

**(6)** The existence or performance of an agreement authorized by this section shall not be a ground for imposing personal liability on any shareholder for the acts or debts of the corporation even if the agreement or its performance treats the corporation as if it were a partnership or results in failure to observe the corporate formalities otherwise applicable to the matters governed by the agreement.

**(7)** Incorporators or subscribers for shares may act as shareholders with respect to an agreement authorized by this section if no shares have been issued when the agreement is made.

**§ 607.1430** Grounds for judicial dissolution.--A circuit court may dissolve a corporation or order such other remedy as provided in s. 607.1434:

**(1)(a)** In a proceeding by the Department of Legal Affairs if it is established that:

- 1.** The corporation obtained its articles of incorporation through fraud; or
- 2.** The corporation has continued to exceed or abuse the authority conferred upon it by law.

**(b)** The enumeration in paragraph (a) of grounds for involuntary dissolution does not exclude actions or special proceedings by the Department of Legal Affairs or any state official for the annulment or dissolution of a corporation for other causes as provided in any other statute of this state;

**(2)** In a proceeding by a shareholder if it is established that:

**(a)** The directors are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock, and irreparable injury to the corporation is threatened or being suffered; or

**(b)** The shareholders are deadlocked in voting power and have failed to elect successors to directors whose terms have expired or would have expired upon qualification of their successors;

**(3)** In a proceeding by a shareholder or group of shareholders in a corporation having 35 or fewer shareholders if it is established that:

**(a)** The corporate assets are being misapplied or wasted, causing material injury to the corporation; or

**(b)** The directors or those in control of the corporation have acted, are acting, or are reasonably expected to act in a manner that is illegal or fraudulent;

**(4)** In a proceeding by a creditor if it is established that:

**(a)** The creditor's claim has been reduced to judgment, the execution on the judgment returned unsatisfied, and the corporation is insolvent; or

**(b)** The corporation has admitted in writing that the creditor's claim is due and owing and the corporation is insolvent; or

**(5)** In a proceeding by the corporation to have its voluntary dissolution continued under court supervision.

**§ 607.1434** Alternative remedies to judicial dissolution.--In an action for dissolution

pursuant to s. 607.1430, the court may, upon a showing of sufficient merit to warrant such remedy:

- (1) Appoint a receiver or custodian pendente lite as provided in s. 607.1432;
  - (2) Appoint a provisional director as provided in s. 607.1435;
  - (3) Order a purchase of the complaining shareholder's shares pursuant to s. 607.1436;
- or
- (4) Upon proof of good cause, make any order or grant any equitable relief other than dissolution or liquidation as in its discretion it may deem appropriate.

## **DGCL SUBCHAPTER XIV: CLOSE CORPORATIONS**

**§ 341 .** Law applicable to close corporation.

(a) This subchapter applies to all close corporations, as defined in § 342 of this title. Unless a corporation elects to become a close corporation under this subchapter in the manner prescribed in this subchapter, it shall be subject in all respects to this chapter, except this subchapter.

(b) This chapter shall be applicable to all close corporations, as defined in § 342 of this title, except insofar as this subchapter otherwise provides.

**§ 342 .** Close corporation defined; contents of certificate of incorporation.

(a) A close corporation is a corporation organized under this chapter whose certificate of incorporation contains the provisions required by § 102 of this title and, in addition, provides that:

(1) All of the corporation's issued stock of all classes, exclusive of treasury shares, shall be represented by certificates and shall be held of record by not more than a specified number of persons, not exceeding 30; and

(2) All of the issued stock of all classes shall be subject to 1 or more of the restrictions on transfer permitted by § 202 of this title; and

(3) The corporation shall make no offering of any of its stock of any class which would constitute a "public offering" within the meaning of the United States Securities Act of 1933 [15 U.S.C. § 77a et seq.] as it may be amended from time to time.

(b) The certificate of incorporation of a close corporation may set forth the qualifications of stockholders, either by specifying classes of persons who shall be entitled to be holders of record of stock of any class, or by specifying classes of persons who shall not be entitled to be holders of stock of any class or both.

(c) For purposes of determining the number of holders of record of the stock of a close corporation, stock which is held in joint or common tenancy or by the entireties shall be treated as held by 1 stockholder.

**§ 344.** Election of existing corporation to become a close corporation.

Any corporation organized under this chapter may become a close corporation under this subchapter by executing, acknowledging and filing, in accordance with § 103 of this title, a certificate of amendment of its certificate of incorporation which shall contain a statement that it elects to become a close corporation, the provisions required by § 342

of this title to appear in the certificate of incorporation of a close corporation, and a heading stating the name of the corporation and that it is a close corporation. Such amendment shall be adopted in accordance with the requirements of § 241 or 242 of this title, except that it must be approved by a vote of the holders of record of at least two thirds of the shares of each class of stock of the corporation which are outstanding.

**§ 350 .** Agreements restricting discretion of directors.

A written agreement among the stockholders of a close corporation holding a majority of the outstanding stock entitled to vote, whether solely among themselves or with a party not a stockholder, is not invalid, as between the parties to the agreement, on the ground that it so relates to the conduct of the business and affairs of the corporation as to restrict or interfere with the discretion or powers of the board of directors. The effect of any such agreement shall be to relieve the directors and impose upon the stockholders who are parties to the agreement the liability for managerial acts or omissions which is imposed on directors to the extent and so long as the discretion or powers of the board in its management of corporate affairs is controlled by such agreement.

**§ 351 .** Management by stockholders.

The certificate of incorporation of a close corporation may provide that the business of the corporation shall be managed by the stockholders of the corporation rather than by a board of directors. So long as this provision continues in effect:

- (1) No meeting of stockholders need be called to elect directors;
- (2) Unless the context clearly requires otherwise, the stockholders of the corporation shall be deemed to be directors for purposes of applying provisions of this chapter; and
- (3) The stockholders of the corporation shall be subject to all liabilities of directors.

Such a provision may be inserted in the certificate of incorporation by amendment if all incorporators and subscribers or all holders of record of all of the outstanding stock, whether or not having voting power, authorize such a provision. An amendment to the certificate of incorporation to delete such a provision shall be adopted by a vote of the holders of a majority of all outstanding stock of the corporation, whether or not otherwise entitled to vote. If the certificate of incorporation contains a provision authorized by this section, the existence of such provision shall be noted conspicuously on the face or back of every stock certificate issued by such corporation.

**§ 352 .** Appointment of custodian for close corporation.

(a) In addition to § 226 of this title respecting the appointment of a custodian for any corporation, the Court of Chancery, upon application of any stockholder, may appoint 1 or more persons to be custodians, and, if the corporation is insolvent, to be receivers, of any close corporation when:

- (1) Pursuant to § 351 of this title the business and affairs of the corporation are managed by the stockholders and they are so divided that the business of the corporation is suffering or is threatened with irreparable injury and any remedy with respect to such deadlock provided in the certificate of incorporation or bylaws or in any written agreement of the stockholders has failed; or

(2) The petitioning stockholder has the right to the dissolution of the corporation under a provision of the certificate of incorporation permitted by § 355 of this title.

(b) In lieu of appointing a custodian for a close corporation under this section or § 226 of this title the Court of Chancery may appoint a provisional director, whose powers and status shall be as provided in § 353 of this title if the Court determines that it would be in the best interest of the corporation. Such appointment shall not preclude any subsequent order of the Court appointing a custodian for such corporation.

**§ 353 . Appointment of a provisional director in certain cases.**

(a) Notwithstanding any contrary provision of the certificate of incorporation or the bylaws or agreement of the stockholders, the Court of Chancery may appoint a provisional director for a close corporation if the directors are so divided respecting the management of the corporation's business and affairs that the votes required for action by the board of directors cannot be obtained with the consequence that the business and affairs of the corporation can no longer be conducted to the advantage of the stockholders generally.

(b) An application for relief under this section must be filed (1) by at least one half of the number of directors then in office, (2) by the holders of at least one third of all stock then entitled to elect directors, or, (3) if there be more than 1 class of stock then entitled to elect 1 or more directors, by the holders of two thirds of the stock of any such class; but the certificate of incorporation of a close corporation may provide that a lesser proportion of the directors or of the stockholders or of a class of stockholders may apply for relief under this section.

(c) A provisional director shall be an impartial person who is neither a stockholder nor a creditor of the corporation or of any subsidiary or affiliate of the corporation, and whose further qualifications, if any, may be determined by the Court of Chancery. A provisional director is not a receiver of the corporation and does not have the title and powers of a custodian or receiver appointed under §§ 226 and 291 of this title. A provisional director shall have all the rights and powers of a duly elected director of the corporation, including the right to notice of and to vote at meetings of directors, until such time as such person shall be removed by order of the Court of Chancery or by the holders of a majority of all shares then entitled to vote to elect directors or by the holders of two thirds of the shares of that class of voting shares which filed the application for appointment of a provisional director. A provisional director's compensation shall be determined by agreement between such person and the corporation subject to approval of the Court of Chancery, which may fix such person's compensation in the absence of agreement or in the event of disagreement between the provisional director and the corporation.

(d) Even though the requirements of subsection (b) of this section relating to the number of directors or stockholders who may petition for appointment of a provisional director are not satisfied, the Court of Chancery may nevertheless appoint a provisional director if permitted by subsection (b) of § 352 of this title.

**§ 354 . Operating corporation as partnership.**

No written agreement among stockholders of a close corporation, nor any provision of

the certificate of incorporation or of the bylaws of the corporation, which agreement or provision relates to any phase of the affairs of such corporation, including but not limited to the management of its business or declaration and payment of dividends or other division of profits or the election of directors or officers or the employment of stockholders by the corporation or the arbitration of disputes, shall be invalid on the ground that it is an attempt by the parties to the agreement or by the stockholders of the corporation to treat the corporation as if it were a partnership or to arrange relations among the stockholders or between the stockholders and the corporation in a manner that would be appropriate only among partners.

**§ 355 .** Stockholders' option to dissolve corporation.

(a) The certificate of incorporation of any close corporation may include a provision granting to any stockholder, or to the holders of any specified number or percentage of shares of any class of stock, an option to have the corporation dissolved at will or upon the occurrence of any specified event or contingency. Whenever any such option to dissolve is exercised, the stockholders exercising such option shall give written notice thereof to all other stockholders. After the expiration of 30 days following the sending of such notice, the dissolution of the corporation shall proceed as if the required number of stockholders having voting power had consented in writing to dissolution of the corporation as provided by § 228 of this title....

**FLORIDA LLC STATUTE**

**§ 608.407 (6)** The articles of organization may also, but need not, identify one or more persons authorized to serve as a manager or managing member and may describe any limitations upon the authority of a manager or managing member, provided a provision in the articles of organization limiting the authority of a manager or managing member to transfer real property held in the name of the limited liability company is not notice of the limitation, to a person who is not a member or manager of the limited liability company, unless the limitation appears in an affidavit, certificate, or other instrument that bears the name of the limited liability company and is recorded in the office for recording transfers of such real property.

**§ 608.701** Application of corporation case law to set aside limited liability.--In any case in which a party seeks to hold the members of a limited liability company personally responsible for the liabilities or alleged improper actions of the limited liability company, the court shall apply the case law which interprets the conditions and circumstances under which the corporate veil of a corporation may be pierced under the law of this state

**§ 608.422** Management of the limited liability company.--

(1) Unless otherwise provided in its articles of organization or the operating agreement, the limited liability company shall be a member-managed company.

(2) In a member-managed company, unless otherwise provided in its articles of organization or operating agreement:

(a) Management shall be vested in its members or elected managing members in proportion to the then-current percentage or other interest of members in the profits of the limited liability company owned by all of the members or elected managing members.

(b) Except as otherwise provided in subsection (3) or in this chapter, the decision of a majority-in-interest of the members or elected managing members shall be controlling.

(3) If the articles of organization or the operating agreement provide for the management of the limited liability company by a manager or managers, the management of the limited liability company shall be vested in a manager or managers and the limited liability company shall be a manager-managed company.

(4) In a manager-managed company, unless otherwise provided in its articles of organization or operating agreement:

(a) Each manager has equal rights in the management and conduct of the limited liability company's business.

(b) Except as otherwise provided in subsection (3) or in this chapter, any matter relating to the business of the limited liability company may be exclusively decided by the manager or, if there is more than one manager, by a majority of the managers.

(c) A manager:

1. Must be designated, appointed, elected, removed, or replaced by a vote, approval, or consent of a majority-in-interest of the members; and

2. Holds office until a successor has been elected and qualified, unless the manager sooner resigns or is removed.

(5) Action requiring the consent of members or managers under this chapter may be taken without a meeting, subject to the limitations of s. 608.4231.

(6) Unless otherwise provided in the articles of organization or operating agreement, a member, managing member, or manager may appoint a proxy to vote or otherwise act for the member, managing member, or manager by signing an appointment instrument, either personally or by the member's, managing member's, or manager's attorney-in-fact.

(7) Unless otherwise provided in the articles of organization or operating agreement, a member, managing member, or manager may also hold the offices and have such other responsibilities accorded to them by the members and set out in the articles of organization or the operating agreement of the limited liability company.

**§ 608.4225** General standards for managers and managing members.--

(1) Subject to ss. 608.4226 and 608.423, each manager and managing member shall owe a duty of loyalty and a duty of care to the limited liability company and all of the members of the limited liability company.

(a) Subject to s. 608.4226, the duty of loyalty is limited to:

1. Accounting to the limited liability company and holding as trustee for the limited liability company any property, profit, or benefit derived by such manager or managing member in the conduct or winding up of the limited liability company business or derived from a use by such manager or managing member of limited liability company

property, including the appropriation of a limited liability company opportunity.

2. Refraining from dealing with the limited liability company in the conduct or winding up of the limited liability company business as or on behalf of a party having an interest adverse to the limited liability company.

3. Refraining from competing with the limited liability company in the conduct of the limited liability company business before the dissolution of the limited liability company.

(b) The duty of care is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

(c) Each manager and managing member shall discharge the duties to the limited liability company and its members under this chapter or under the articles of organization or operating agreement and exercise any rights consistent with the obligation of good faith and fair dealing.

(d) A manager or managing member does not violate a duty or obligation under this chapter or under the articles of organization or operating agreement merely because the manager's or managing member's conduct furthers such manager's or managing member's own interest.

(e) A manager or managing member may lend money to and transact other business with the limited liability company. As to each loan or transaction, the rights and obligations of the manager or managing member are the same as those of a person who is not a member, subject to other applicable law.

(f) This section applies to a person winding up the limited liability company business as the personal or other legal representative of the last surviving member as if such person were a manager or managing member.

(2) In discharging a manager's or managing member's duties, a manager or managing member is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

(a) One or more members or employees of the limited liability company whom the manager or managing member reasonably believes to be reliable and competent in the matters presented;

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

(c) A committee of managers, members, or managing members of which the affected manager or managing member is not a participant if the manager or managing member reasonably believes the committee merits confidence.

(3) In discharging a manager's or managing member's duties, a manager or managing member may consider such factors as the manager or managing member deems relevant, including the long-term prospects and interests of the limited liability company and its members, and the social, economic, legal, or other effects of any action on the employees, suppliers, customers of the limited liability company, the communities and society in which the limited liability company operates, and the economy of the state and the nation.

(4) A member, manager, or managing member is not acting in good faith if the member, manager, or managing member has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (2) unwarranted.



(5) A manager or managing member is not liable for any action taken as a manager or managing member, or any failure to take any action, if the manager or managing member performed the duties of the manager's or managing member's position in compliance with this section.

**§ 608.4226** Conflicts of interest.--

(1) No contract or other transaction between a limited liability company and one or more of its members, managers, or managing members or any other limited liability company, corporation, firm, association, or entity in which one or more of its members, managers, or managing members are managers, managing members, directors, or officers or are financially interested shall be either void or voidable because of such relationship or interest, because such members, managers, or managing members are present at the meeting of the members, managers, or managing members or a committee thereof which authorizes, approves, or ratifies such contract or transaction, or because their votes are counted for such purpose, if:

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

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

(c) The contract or transaction is fair and reasonable as to the limited liability company at the time it is authorized by the managers, managing members, a committee, or the members.

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

(3) For purposes of paragraph (1)(b) only, a conflict of interest transaction is authorized, approved, or ratified if it receives the vote of a majority-in-interest of the members entitled to be counted under this subsection. Membership interests owned by or voted under the control of a manager or managing member who has a relationship or interest in the transaction described in subsection (1) may not be counted in a vote of members

to determine whether to authorize, approve, or ratify a conflict of interest transaction under paragraph (1)(b). The vote of those membership interests, however, is counted in determining whether the transaction is approved under other sections of this act. A majority-in-interest of the members, whether or not present, that are entitled to be counted in a vote on the transaction under this subsection constitutes a quorum for the purpose of taking action under this section.

**§ 608.4227** Liability of members, managing members, and managers.--

(1) Except as provided in this chapter, the members, managers, and managing members of a limited liability company are not liable, solely by reason of being a member or serving as a manager or managing member, under a judgment, decree, or order of a court, or in any other manner, for a debt, obligation, or liability of the limited liability company;

(2) Any such member, managing member, manager, or other person acting under the articles of organization or operating agreement of a limited liability company is not liable to the limited liability company or to any such other member, managing member, or manager for the member's, managing member's, manager's, or other person's good faith reliance on the provisions of the limited liability company's articles of organization or operating agreement; and

(3) The member's, managing member's, manager's, or other person's duties and liabilities may be expanded or restricted by provisions in a limited liability company's articles of organization or operating agreement.

**§ 608.4228** Limitation of liability of managers and managing members.--

(1) A manager or a managing member shall not be personally liable for monetary damages to the limited liability company, its members, or any other person for any statement, vote, decision, or failure to act regarding management or policy decisions by a manager or a managing member, unless:

(a) The manager or managing member breached or failed to perform the duties as a manager or managing member; and

(b) The manager's or managing member's breach of, or failure to perform, those duties constitutes any of the following:

1. A violation of the criminal law, unless the manager or managing member had a reasonable cause to believe his or her conduct was lawful or had no reasonable cause to believe such conduct was unlawful. A judgment or other final adjudication against a manager or managing member in any criminal proceeding for a violation of the criminal law estops that manager or managing member from contesting the fact that such breach, or failure to perform, constitutes a violation of the criminal law, but does not estop the manager or managing member from establishing that he or she had reasonable cause to believe that his or her conduct was lawful or had no reasonable cause to believe that such conduct was unlawful.

2. A transaction from which the manager or managing member derived an improper personal benefit, either directly or indirectly.

3. A distribution in violation of s. 608.426.

4. In a proceeding by or in the right of the limited liability company to procure a judgment in its favor or by or in the right of a member, conscious disregard of the best interest of the limited liability company, or willful misconduct.
5. In a proceeding by or in the right of someone other than the limited liability company or a member, recklessness or an act or omission which was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.
  - (2) For the purposes of this section, the term "recklessness" means acting, or failing to act, in conscious disregard of a risk known, or so obvious that it should have been known, to the manager or managing member, and known to the manager or managing member, or so obvious that it should have been known, to be so great as to make it highly probable that harm would follow from such action or failure to act.
  - (3) A manager or managing member is deemed not to have derived an improper personal benefit from any transaction if the transaction and the nature of any personal benefit derived by the manager or managing member are not prohibited by state or federal law or the articles of organization or operating agreement and, without further limitation, the transaction and the nature of any personal benefit derived by a manager or managing member are disclosed or known to the members, and the transaction was authorized, approved, or ratified by the vote of a majority-in-interest of the members other than the managing member, or the transaction was fair and reasonable to the limited liability company at the time it was authorized by the manager or managing member, notwithstanding that a manager or managing member received a personal benefit.
  - (4) The circumstances set forth in subsection (3) are not exclusive and do not preclude the existence of other circumstances under which a manager will be deemed not to have derived an improper benefit.

**§ 608.4229** Indemnification of members, managers, managing members, officers, employees, and agents.--

- (1) Subject to such standards and restrictions, if any, as are set forth in its articles of organization or operating agreement, a limited liability company may, and shall have the power to, but shall not be required to, indemnify and hold harmless any member or manager or other person from and against any and all claims and demands whatsoever.
- (2) Notwithstanding subsection (1), indemnification or advancement of expenses shall not be made to or on behalf of any member, manager, managing member, officer, employee, or agent if a judgment or other final adjudication establishes that the actions, or omissions to act, of such member, manager, managing member, officer, employee, or agent were material to the cause of action so adjudicated and constitute any of the following:
  - (a) A violation of criminal law, unless the member, manager, managing member, officer, employee, or agent had no reasonable cause to believe such conduct was unlawful.
  - (b) A transaction from which the member, manager, managing member, officer, employee, or agent derived an improper personal benefit.
  - (c) In the case of a manager or managing member, a circumstance under which the

liability provisions of s. 608.426 are applicable.

(d) Willful misconduct or a conscious disregard for the best interests of the limited liability company in a proceeding by or in the right of the limited liability company to procure a judgment in its favor or in a proceeding by or in the right of a member.

**§ 608.423** Limited liability company operating agreement; nonwaivable provisions.--

(1) Except as otherwise provided in subsection (2), all members of a limited liability company may enter into an operating agreement, which need not be in writing, to regulate the affairs of the limited liability company and the conduct of its business, establish duties in addition to those set forth in this chapter, and to govern relations among the members, managers, and company. Any inconsistency between written and oral operating agreements shall be resolved in favor of the written agreement. The members of a limited liability company may enter into an operating agreement before, after, or at the time the articles of organization are filed, and the operating agreement takes effect on the date of the formation of the limited liability company or on any other date provided in the operating agreement. To the extent the operating agreement does not otherwise provide, this chapter governs relations among the members, managers, and limited liability company.

(2) The operating agreement may not:

(a) Unreasonably restrict a right to information or access to records under s. 608.4101;

(b) Eliminate the duty of loyalty under s. 608.4225, but the agreement may:

1. Identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable; and

2. Specify the number or percentage of members or disinterested managers that may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty;

(c) Unreasonably reduce the duty of care under s. 608.4225;

(d) Eliminate the obligation of good faith and fair dealing under s. 608.4225, but the operating agreement may determine the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable;

(e) Vary the requirement to wind up the limited liability company's business in a case specified in this chapter; or

(f) Restrict rights of a person, other than a manager, member, or transferee of a member's distributional interest, under this chapter.

(3) The power to adopt, alter, amend, or repeal the operating agreement of a limited liability company shall be vested in the members of the limited liability company unless vested in the manager or managers of the limited liability company by the articles of organization or operating agreement, provided that any amendment to a written operating agreement shall be in writing. The operating agreement adopted by the members or by the manager or managers may be repealed or altered; a new operating agreement may be adopted by the members; and the members may prescribe in any operating agreement made by them that such operating agreement may not be altered, amended, or repealed by the manager or managers.

(4) Unless the articles of organization or the operating agreement provides otherwise, if the management of the limited liability company is vested in a manager or managers,

the managers may adopt an operating agreement to be effective only in an emergency as defined in subsection (7). The emergency operating agreement, which is subject to amendment or repeal by the members, may make all provisions necessary for managing the limited liability company during an emergency, including procedures for calling a meeting of the managers and designation of additional or substitute managers.

(5) All provisions of the regular operating agreement consistent with the emergency regulations remain effective during the emergency. The emergency operating agreement is not effective after the emergency ends.

(6) Actions taken by the limited liability company in good faith in accordance with the emergency operating agreement have the effect of binding the limited liability company and may not be used to impose liability on a manager, employee, or agent of the limited liability company.

(7) An emergency exists for purposes of this section if the limited liability company's managers cannot readily be assembled because of some catastrophic event.

## **CONFLICTING INTEREST TRANSACTIONS**

### **DGCL § 144 Interested directors; quorum.**

(a) No contract or transaction between a corporation and 1 or more of its directors or officers, or between a corporation and any other corporation, partnership, association, or other organization in which 1 or more of its directors or officers, are directors or officers, or have a financial interest, shall be void or voidable solely for this reason, or solely because the director or officer is present at or participates in the meeting of the board or committee which authorizes the contract or transaction, or solely because any such director's or officer's votes are counted for such purpose, if:

(1) The material facts as to the director's or officer's relationship or interest and as to the contract or transaction are disclosed or are known to the board of directors or the committee, and the board or committee in good faith authorizes the contract or transaction by the affirmative votes of a majority of the disinterested directors, even though the disinterested directors be less than a quorum; or

(2) The material facts as to the director's or officer's relationship or interest and as to the contract or transaction are disclosed or are known to the shareholders entitled to vote thereon, and the contract or transaction is specifically approved in good faith by vote of the shareholders; or

(3) The contract or transaction is fair as to the corporation as of the time it is authorized, approved or ratified, by the board of directors, a committee or the shareholders.

(b) Common or interested directors may be counted in determining the presence of a quorum at a meeting of the board of directors or of a committee which authorizes the contract or transaction.

**Florida statutes §607.0832 Director conflicts of interest.--**

(1) No contract or other transaction between a corporation and one or more of its directors or any other corporation, firm, association, or entity in which one or more of its directors are directors or officers or are financially interested shall be either void or voidable because of such relationship or interest, because such director or directors are present at the meeting of the board of directors or a committee thereof which authorizes, approves, or ratifies such contract or transaction, or because his or her or their votes are counted for such purpose, if:

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

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

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

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

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

be counted in a vote on the transaction under this subsection constitutes a quorum for the purpose of taking action under this section.

**Florida statutes §607.0830 General standards for directors.--**

(1) A director shall discharge his or her duties as a director, including his or her duties as a member of a committee:

(a) In good faith;

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

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

(2) In discharging his or her duties, a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

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

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

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

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

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

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

**Florida statutes §607.0831 Liability of directors.--**

(1) A director is not personally liable for monetary damages to the corporation or any other person for any statement, vote, decision, or failure to act, regarding corporate management or policy, by a director, unless:

(a) The director breached or failed to perform his or her duties as a director; and

(b) The director's breach of, or failure to perform, those duties constitutes:

1. A violation of the criminal law, unless the director had reasonable cause to believe his or her conduct was lawful or had no reasonable cause to believe his or her conduct was unlawful. A judgment or other final adjudication against a director in any criminal proceeding for a violation of the criminal law estops that director from contesting the

fact that his or her breach, or failure to perform, constitutes a violation of the criminal law; but does not estop the director from establishing that he or she had reasonable cause to believe that his or her conduct was lawful or had no reasonable cause to believe that his or her conduct was unlawful;

2. A transaction from which the director derived an improper personal benefit, either directly or indirectly;

3. A circumstance under which the liability provisions of s. 607.0834 are applicable;

4. In a proceeding by or in the right of the corporation to procure a judgment in its favor or by or in the right of a shareholder, conscious disregard for the best interest of the corporation, or willful misconduct; or

5. In a proceeding by or in the right of someone other than the corporation or a shareholder, recklessness or an act or omission which was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

(2) For the purposes of this section, the term "recklessness" means the action, or omission to act, in conscious disregard of a risk:

(a) Known, or so obvious that it should have been known, to the director; and

(b) Known to the director, or so obvious that it should have been known, to be so great as to make it highly probable that harm would follow from such action or omission.

(3) A director is deemed not to have derived an improper personal benefit from any transaction if the transaction and the nature of any personal benefit derived by the director are not prohibited by state or federal law or regulation and, without further limitation:

(a) In an action other than a derivative suit regarding a decision by the director to approve, reject, or otherwise affect the outcome of an offer to purchase the stock of, or to effect a merger of, the corporation, the transaction and the nature of any personal benefits derived by a director are disclosed or known to all directors voting on the matter, and the transaction was authorized, approved, or ratified by at least two directors who comprise a majority of the disinterested directors (whether or not such disinterested directors constitute a quorum);

(b) The transaction and the nature of any personal benefits derived by a director are disclosed or known to the shareholders entitled to vote, and the transaction was authorized, approved, or ratified by the affirmative vote or written consent of such shareholders who hold a majority of the shares, the voting of which is not controlled by directors who derived a personal benefit from or otherwise had a personal interest in the transaction; or

(c) The transaction was fair and reasonable to the corporation at the time it was authorized by the board, a committee, or the shareholders, notwithstanding that a director received a personal benefit.

(4) The circumstances set forth in subsection (3) are not exclusive and do not preclude the existence of other circumstances under which a director will be deemed not to have derived an improper benefit.

## **RMBCA Subchapter F**



§ 8.60 In this subchapter:

(1) “Conflicting interest” with respect to a corporation means the interest a director of the corporation has respecting a transaction effected or proposed to be effected by the corporation (or by a subsidiary of the corporation or any other entity in which the corporation has a controlling interest) if

(i) whether or not the transaction is brought before the board of directors of the corporation for action, the director knows at the time of commitment that he or a related person is a party to the transaction or has a beneficial financial interest in or so closely linked to the transaction and of such financial significance to the director or a related person that the interest would reasonably be expected to exert an influence on the director’s judgment if he were called upon to vote on the transaction; or

(ii) the transaction is brought (or is of such character and significance to the corporation that it would in the normal course be brought) before the board of directors of the corporation for action, and the director knows at the time of commitment that any of the following persons is either a party to the transaction or has a beneficial financial interest in or so closely linked to the transaction and of such financial significance to the person that the interest would reasonably be expected to exert an influence on the director’s judgment if he were called upon to vote on the transaction: (A) an entity (other than the corporation) of which the director is a director, general partner, agent, or employee; (B) a person that controls one or more of the entities specified in subclause (A) or an entity that is controlled by, or is under common control with, one or more of the entities specified in subclause (A); or (C) an individual who is a general partner, principal, or employer of the director.

(2) “Director’s conflicting interest transaction” with respect to a corporation means a transaction effected or proposed to be effected by the corporation (or by a subsidiary of the corporation or any other entity in which the corporation has a controlling interest) respecting which a director of the corporation has a conflicting interest.

**(3) “Related person” of a director means (i) the spouse (or a parent or sibling thereof) of the director, or a child, grandchild, sibling, parent (or spouse of any thereof) of the director, or an individual having the same home as the director, or a trust or estate of which an individual specified in this clause (i) is a substantial beneficiary; or (ii) a trust, estate, incompetent, conservatee, or minor of which the director is a fiduciary.**

(4) “Required disclosure” means disclosure by the director who has a conflicting interest of (i) the existence and nature of his conflicting interest, and (ii) all facts known to him respecting the subject matter of the transaction that an ordinarily prudent person would reasonably believe to be material to a judgment about whether or not to proceed with the transaction.

(5) "Time of commitment" respecting a transaction means the time when the transaction is consummated or, if made pursuant to contract, the time when the corporation (or its subsidiary or the entity in which it has a controlling interest) becomes contractually obligated so that its unilateral withdrawal from the transaction would entail significant loss, liability, or other damage.

#### **§ 8.61. JUDICIAL ACTION**

(a) A transaction effected or proposed to be effected by a corporation (or by a subsidiary of the corporation or any other entity in which the corporation has a controlling interest) that is not a director's conflicting interest transaction may not be enjoined, set aside, or give rise to an award of damages or other sanctions, in a proceeding by a shareholder or by or in the right of the corporation, because a director of the corporation, or any person with whom or which he has a personal, economic, or other association, has an interest in the transaction.

#### **SECURITIES EXCHANGE ACT 1934**

**§ 10** It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange--

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

**Rule 10b-5** It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

1. To employ any device, scheme, or artifice to defraud,
  2. To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
  3. To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
- in connection with the purchase or sale of any security.