



**DELBERT HOSEMANN**  
*Secretary of State*

**2010 Business Reform Study Groups  
Minutes of the Corporation Laws Study Group, Meeting #1  
June 24, 2010**

This meeting of the Corporation Laws Study Group (the "Study Group") was called to order on Thursday, June 24, 2010 at 11:10 A.M. at the Office of the Secretary of State, 700 North Street, Jackson, Mississippi. A list of the persons in attendance is attached as Exhibit A.

**Welcome and Introduction**

Cheryn Baker, Assistant Secretary of State for the Secretary of State's Division of Policy and Research, welcomed the attendees and thanked Chairman Henry Chatham and Vice-Chairman Stephen Burrow for their service. Ms. Baker proceeded to give a brief explanation of the purpose and mission of the Secretary of State's current Business Reform Study Groups.

**Remarks by Chairs**

Chairman Henry Chatham and Vice-Chairman Stephen Burrow introduced themselves and thanked the members for attending the meeting. Mr. Chatham mentioned that one of the Study Group's goals should be following the Model Business Corporation Act whenever possible.

**Business Services Division Update on Status Reports for Nonprofit Corporations**

Tom Riley, Assistant Secretary of State for the Secretary of State's Business Services Division, explained that the Secretary of State's Office for the first time plans to request status reports from all nonprofit corporations operating in Mississippi. By statute, the Secretary of State is allowed to request these reports every five years. Mr. Riley said the status updates will be used to update the Office's records with respect to which corporations are still in existence and which are no longer operating in the state. Nonprofits that fail to file their status reports will eventually be administratively dissolved, however Mr. Riley stated that the Division will do what it can to avoid dissolving nonprofits that are still in existence and operating. He also stated that administratively dissolved nonprofit corporations may be reinstated by completing some paperwork and filing certain fees with the Division.

## Outline of Issues

Next, Ms. Baker outlined the issues which the Study Group will be addressing during the future meetings. She said the group would consider the following amendments to the Model Business Corporation Act which are explained in further detail in the materials from the meeting (attached hereto at Exhibit B):

**Remote participation in shareholder meetings.** Ms. Baker explained that a recent amendment to the Model Business Corporation Act (the “Act”) would give shareholders the ability to attend shareholder meetings via telephone or the internet.

**Bifurcated record dates in response to empty voting issue.** This amendment would permit a corporation to have a separate record date for notice of a shareholders meeting and a separate record date for shareholders entitled to vote at the shareholders meeting. Chairman Chatham further explained that this would prevent a large investor from acquiring a large amount of stock in a corporation in order to be able to vote the shares, but then selling the stock before the shareholder’s meeting.

**Electronic technology amendments.** Ms. Baker explained that recent amendments to the Act add new definitions allowing for electronic transmission of notices and other communications between the corporation and its shareholders and electronic signatures. She noted that the amendments incorporate concepts from the Uniform Electronic Transactions Act and the Electronic Signatures in Global and National Commerce Act. The amendments also address electronic filings with the Secretary of State’s Office and corporate record-keeping in an electronic format.

**Proxy access of shareholders to nominate directors; expense reimbursement.** Ms. Baker explained that this amendment expressly authorizes bylaws that (a) require the corporation to include individuals nominated by shareholders for election as directors in its proxy statement and proxy cards, and (b) require reimbursement by the corporation of expenses incurred by a shareholder in soliciting proxies in an election of directors.

**Force the vote.** Ms. Baker explained that a past study group had previously considered a “force the vote” amendment to the Act, and that since that time several states have recently adopted this provision. She explained that this amendment to the Act would clarify that a corporation can enter into an agreement, such as a merger agreement, containing a force the vote provision. This amendment would apply to several different provisions of the Act that require the directors to approve a matter before recommending that the shareholders vote to approve it. Under the amended § 8.26, directors can agree to submit a matter to the shareholders for approval even if they later determine that they no longer recommend it.

**Director and officer duty amendments.** Ms. Baker explained that the last set of amendments that the group would be addressing would be in Article 8 and would cover the duties of directors and officers of corporations, including certain provisions applicable only to

public corporations. She gave a brief overview of several of the amendments and discussed how each would impact the duties of directors and officers.

**Administrative dissolution.** The recently adopted Revised Mississippi Limited Liability Act includes language dealing with administrative dissolution for domestic LLCs. Ms. Baker noted that the Study Group will be considering whether to adopt similar amendments dealing with administrative dissolution of business corporations.

### **Closing and Reminder of Upcoming Meetings**

Ms. Baker reminded the committee that Herbert Wander and Bryn Vaaler will be featured as speakers in upcoming meetings. Ms. Baker also said that the Study Group will split into subgroups in order to focus on particular areas of interest. The topics of these subgroups will be determined in the near future, Ms. Baker said.

After a reminder of the upcoming meetings scheduled for July 21 and August 11, the meeting was adjourned at 12:25 P.M.

Respectfully submitted,



Cheryn Baker  
Assistant Secretary of State  
Mississippi Secretary of State  
Division of Policy & Research

## EXHIBIT A

### Minutes of the Corporation Laws Study Group, Meeting # 1 July 24, 2010

#### Members in Attendance:

1. Ronald Applewhite
2. Stephen Burrow, Vice Chairman
3. Henry Chatham, Chairman
4. Karen Green
5. Russell Hawkins
6. Daniel Hise
7. Walter Robert Jones
8. Walter Lee
9. Martha Thomas
10. Lisa Usry
11. Blake Wilson

#### Members Attending by Telephone:

1. Andrew Adams
2. Albert Delgadillo
3. Cecile Champion Edwards
4. Kaleel G. Salloum

#### Secretary of State's Staff:

1. Delbert Hosemann, Secretary of State
2. Cory Wilson, Chief of Staff
3. Cheryn Baker, Assistant Secretary of State, Division of Policy & Research
4. Tom Riley, Assistant Secretary of State, Business Services
5. Doug Jennings, Senior Attorney, Division of Policy & Research
6. Justin Fitch, Staff Attorney, Elections
7. Pam Weaver, Communications Director
8. Richard Lee, Legal Intern, Division of Policy & Research
9. Phillips Strickland, Legal Intern, Division of Policy & Research

## EXHIBIT B

### Potential Amendments to the MS Business Corporation Act

1. **Recent Amendments to the Model Business Corporation Act that have not been adopted in MS**
  - A. Remote participation in shareholder meetings – Section 7.09 (Adopted April 2010)-  
Yellow
  - B. Bifurcated record dates in response to empty voting issue - Sections 7.05, 7.07, 7.20, 8.63, 16.02 (Adopted April 2010) – Light Green
  - C. Incorporating electronic technology amendments – 18 code sections throughout the Act (Adopted December 2009)- Light Blue
  - D. Proxy access of shareholders to nominate directors and expense reimbursement (Adopted 2009). Sections 2.06 and 10.20. These amendments are in response to SEC proposals which are on hold for now. – Light Red
  - E. Force the vote Section 8.26 (Adopted 2006) (the study group considered in 2008, but decided to wait on this one). This amendment would allow shareholders to vote on certain transactions even if the board has withdrawn its recommendation of the approval of the transaction. – Light Purple
  - F. 2005 Director and Officer Duty Amendments (Adopted 2005) – Light Orange
    - (1) Requirements for and Functions of Board of Directors. Section 8.01(b) reference (“and subject to oversight”). Wyoming has adopted this amendment.
    - (2) Provision specific to directors of public corporations. What directors of public corporations should look at - Section 8.01(c). This was adopted in response to the Enron scandal, and not something the Committee on Corporate Laws believed was a good idea on its own. Wyoming has also adopted this amendment.
    - (3) Standards of Conduct for Directors Section 8.30(c). This subsection provides that directors must disclose material corporate information to other members of the board. The BLAG passed on this amendment before. Wyoming and Maine have adopted this amendment.
    - (4) Standards of Liability of Directors. Section 8.31(a)(2)(iv) This amendment establishes a bar to holding directors liable for breaches of their oversight duties. This amendment was adopted in Iowa, Maine, South Dakota, West Virginia and Wyoming.

- (5) Standard of Conduct for Officers. Section 8.42(b) sets forth a specific duty to inform superior officers of certain information and events. Wyoming has also adopted this amendment. The BLAG discussed this several years ago and decided against proposing it.

## 2. Other Model Act Changes

A. Check to see which definitions the Model Act has adopted that the MS Act has not adopted and determine which, if any, definitions need to be added or amended.

B. Review Chapter 8 sections to make sure they match the Model Act language and revise them to conform if they don't match in certain areas. Some of these are substantive; others are not. One is an old typo: Section 79-4-8.06 dropped the word "practicable" at the end of the first sentence. The following sections have text changes that need to be picked up:

8.01  
8.05  
8.06  
8.07  
8.09  
8.10  
8.24  
8.31

## 3. Changes to conform the Corporation Act to the new MS LLC Act

During the course of drafting the new Revised LLC Act, new language was added or changed to the various provisions on filing requirements for filed documents. New definitions were added. Also added were provisions borrowed from the Delaware LLC Act to state the effects of administrative dissolution/revocation and reinstatement, and to the section on what constitutes transacting business by a foreign entity. These provisions are listed below.

Staff will provide a comparison chart of these provisions, comparing the current MS Act, the Model Act, the Delaware Corporation law, possibly other state acts and the MS LLC Act.

Research will also be conducted on the case law of the various provisions.

### A. Filing and Filing Fee Provisions

- (1) Establish a limit on the timing of making corrections to filings- in the Corporation Act, this is unlimited. The Revised LLC Act has limited this to 1 year. After one year, the filing must be amended, not corrected. A correction relates back to the date of the original filing, whereas the amendment is effective on the date the amendment is filed. Staff to research whether other states impose a time limit on making corrections.

- (2) Extend number of days that the SOS Office has to refuse a document from 5 days to 10 days (LLC Act is 10 days).
- (3) Consider whether to increase the penalty for signing a false document from \$500 to \$1,000 (which is amount in LLC Act). The Model Act leaves the amount of penalty up to the state to determine. Staff will provide listing of the penalties in other states.
- (4) Add some clarifying and additional language on requirements of a name and reservation of name in Articles 4 and 15. In the LLC Act the name of an LLC must be distinguishable from the names of all business entity types, not just from the names of corporations.
- (5) Add provision to provide for the ability to cancel a reservation of a name in Articles 4 and 15. This is in the LLC Act but not in the Corporation Act.
- (6) Fees Section 1.22. LLC act provides for expedited filings at a reasonable fee. Corp Act has a \$25 cap.

B. Definition Provisions:

- (1) Compare definitions of “entity,” “person” and “individual” from LLC Act to the current MS Act definitions and to the Model Act definitions if different; Do any changes need to be made?

C. Effects of Administrative Dissolution/Revocation and Reinstatement. The language on these effects in the LLC Act was taken from the DE LLC Act and is different from the language in the current MS Act. Staff will research the corresponding provisions from the DE Corporations Law. Is the MS Act sufficient or do we need to adopt the provisions used in LLC Act:

- (1) Section 14.21. The effects of administrative dissolution  
Current Provisions:

- A corporation administratively dissolved continues its corporate existence but may not carry on any business except that necessary to wind up and liquidate its business and affairs under Section 79-4-14.05 and notify claimants under Sections 79-4-14.06 and 79-4-14.07.
- The administrative dissolution of a corporation does not terminate the authority of its registered agent.

Compare to these provisions from LLC Act:

- The administrative dissolution of a corporation does not terminate the authority of its registered agent.
- The administrative dissolution of a corporation shall not impair the validity of any contract, deed, mortgage, security interest, lien or act of such corporation or prevent such corporation from defending any action, suit or proceeding with any court of this state.
- A shareholder, director or officer of a corporation is not liable for the debts, obligations or liabilities of such corporation solely by reason of the administrative dissolution of a corporation.
- A corporation that has been administratively dissolved may not maintain any action, suit or proceeding in any court of this state until such corporation is reinstated. An action, suit or proceeding may not be maintained in any court of this state by any successor or assignee of such corporation on any right, claim or demand arising out the transaction of business by such corporation after the administrative dissolution.

(2) effects of reinstatement of domestic corporation Section 14.22

Current Provision: When the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the corporation resumes carrying on its business as if the administrative dissolution had never occurred.

Compare to LLC Act Provisions:

- When the reinstatement is effective:
  - The reinstatement relates back to and takes effect as of the effective date of the administrative dissolution;
  - Any liability incurred by the corporation, shareholder, director or officer after the administrative dissolution and before the reinstatement shall be determined as if the administrative dissolution had never occurred; and
  - The corporation may resume carrying on its business as if the administrative dissolution had never occurred.

(3) the effect of administrative revocation on a foreign corporation  
Language is similar to subsection (1)

(4) the effect of reinstatement of foreign corporation  
Language is similar to subsection (2)



D. Effect of Failure to obtain Certificate of Authority – Section 15.02

Current language: (e) Notwithstanding subsections (a) and (b), the failure of a foreign corporation to obtain a certificate of authority does not impair the validity of its corporate acts or prevent it from defending any proceeding in this state.

Compare to LLC Act Language: “.....the failure of a foreign corporation to obtain a certificate of authority shall not impair the validity of any contract, deed, mortgage, security interest, lien or act of such foreign corporation or prevent the foreign corporation from defending any action, suit or proceeding with any court of this state.”

E. Other Amendments:

- (1) Action taken without meeting by (less than unanimous) written consent. The Corporation Act authorizes the corporation to permit actions by less than unanimous consent if permitted by the corporation’s Articles of Incorporation. Section 79-4-7.04. The LLC Act provides for this without an amendment to the LLC’s Certificate of Formation. Should the statute be amended to permit this without a charter amendment, similar to the LLC Act?
- (2) § 79-4-15.01. Exempt Activities. Add that a foreign corporation is not transacting business because it is a shareholder in a corporation transacting business in this state, etc. This is in the LLC Act which came from the DC LLC Act. Staff to research whether DE and other state corporation acts have similar provisions. The current language is set forth below:

**§ 79-4-15.01. Activities requiring certificate; exempt activities**

(a) A foreign corporation may not transact business in this state until it obtains a certificate of authority from the Secretary of State.

(b) The following activities, among others, do not constitute transacting business within the meaning of subsection (a):

(1) Maintaining, defending or settling any proceeding;

(2) Holding meetings of the board of directors or shareholders or carrying on other activities concerning internal corporate affairs;

(3) Maintaining bank accounts;

(4) Maintaining offices or agencies for the transfer, exchange and registration of the corporation’s own securities or maintaining trustees or depositories with respect to those securities;

- (5) Selling through independent contractors;
  - (6) Soliciting or obtaining orders, whether by mail or through employees or agents or otherwise, if the orders require acceptance outside this state before they become contracts;
  - (7) Creating or acquiring indebtedness, mortgages and security interests in real or personal property;
  - (8) Securing or collecting debts or enforcing mortgages and security interests in property securing the debts;
  - (9) Owning, without more, real or personal property;
  - (10) Conducting an isolated transaction that is completed within thirty (30) days and that is not one in the course of repeated transactions of a like nature;
  - (11) Transacting business in interstate commerce.
- (c) The list of activities in subsection (b) is not exhaustive.
- (d) A foreign corporation which is a partner or member of any general partnership, limited partnership (other than a limited partner), joint venture, syndicate, pool or other association of any kind, whether or not such foreign corporation shares with or delegates to others control of such entity, which entity is transacting business in this state, is hereby declared to be transacting business in this state.

The LLC Act contains the following additional language:

- A foreign corporation shall not be considered to be transacting business in this state solely because it:
  - Is a shareholder in a corporation or a foreign corporation that transacts business in this state;
  - Is a limited partner of a limited partnership or foreign limited partnership that is transacting business in this state;
  - or
  - Is a member or manager of a limited liability company or foreign limited liability company that is transacting business in this state.
- This section does not apply in determining the contracts or activities that may subject a foreign corporation to service of process or taxation in this state or to regulation under any other law of this state.

#### 4. Conversion and Domestication Statutes



**DELBERT HOSEMANN**  
*Secretary of State*

**Proposed Amendments to the Mississippi Business Corporation Act from certain  
amendments to the Model Business Corporation Act  
June 2010**

A. Remote participation in shareholder meetings – Section 7.09 (Adopted April 2010)

Section 7.09 permits shareholders to participate in annual and special meetings by means of remote communication, such as over the internet or through telephone conference calls, subject to the conditions set forth in Section 7.09(b) and any other guidelines and procedures that the board of directors adopts. The board of directors has sole discretion as to whether shareholders may participate in meetings via remote communication. Thus, a corporation may not be compelled to allow such participation either through amendments to the bylaws, shareholder resolutions, or otherwise.

Section 7.09 requires that the board of directors implement certain procedures when allowing shareholder participation by means of remote communication. First, the board of directors must create reasonable measures for verifying those entitled to vote. Second, the board of directors must institute reasonable measures to ensure that all shareholders and their proxies within the authorized class or series have the opportunity to participate in the meeting, including measures that provide them with an opportunity to communicate with management and other shareholders present at the meeting, and to read or hear the proceedings.

B. Bifurcated record dates in response to empty voting issue - Sections 7.03, 7.05, 7.07, 7.20, 8.63, 16.02 (Adopted April 2010)

A series of amendments to sections 7.03, 7.05, 7.07, 7.20 of the Act were adopted that authorize directors to bifurcate the record date for receipt of notice of a meeting from the record date for determining the shareholders entitled to vote at that meeting. Related changes were also adopted that deal with notice, the list of shareholders entitled to notice of a meeting, the list of shareholders entitled to vote at a meeting, the information rights of a person who becomes a shareholder subsequent to the record date for notice of the meeting, and other matters. The changes provide corporations, if the directors so choose, greater flexibility to align shareholder ownership and voting by setting a record date for voting closer to the meeting.

C. Incorporating electronic technology amendments – 18 code sections throughout the Act: 1.40, 1.41, 5.02, 6.20, 7.03, 7.04, 7.22, 7.42, 8.53, 11.06, 11.08, 13.22, 15.08, 16.01, 16.02, 16.06, 16.20 and 17.05 (Adopted December 2009)

Those amendments incorporate into the Model Act terminology and concepts from the Uniform Electronic Transmissions Act (“UETA”) and the federal Electronic Signatures in Global and National Commerce Act (“E-Sign”). The amendments add new defined terms for “document,” “electronic,” “electronic record,” and “writing” or “written.” The amendments are accompanied by changes to the definitions of “deliver” or “delivery,” “electronic transmission,” and “sign” or “signature.” The objectives of the amendments are to weave UETA and E-Sign concepts into the Model Act, primarily confining changes to Sections 1.40 and 1.41 and thereby avoiding unnecessary revisions throughout the rest of the Model Act.

In addition, the amendments:

- a. Address electronic filing of documents with the Secretary of State’s office.
- b. Authorize delivery of notices, demands and other “communications” (such as proxies?) electronically
- c. Address corporate record keeping in electronic formats
- d. Provide that public corporations can fulfill annual financial statement delivery requirements by complying with SEC’s rules on this

D. Proxy access of shareholders to nominate directors and expense reimbursement -- Sections 2.06(c), 2.06(d) and 10.20 (Adopted 2009)

Section 2.06(c) expressly authorizes bylaws that require the corporation to include individuals nominated by shareholders for election as directors in its proxy statement and proxy cards (or consents) and that require the reimbursement by the corporation of expenses incurred by shareholders in soliciting proxies (or consents) in an election of directors, in each case subject to such procedures or conditions as may be provided in the bylaws.

Section 2.06(d) limits the rule set forth in section 10.20(b)(2) that shareholder-adopted bylaws may limit the authority of directors to amend bylaws, by specifying that such a limit will not apply absolutely to conditions and procedures set forth in access or reimbursement bylaws authorized by section 2.06(c).

E. Force the Vote Section 8.26 (Adopted 2006)

Section 8.26 is intended to clarify that a corporation can enter into an agreement, such as a merger agreement, containing a “force the vote” provision. Section 8.26 is broader than some analogous state corporation law provisions and applies to several different provisions of the Model Act that require the directors to approve a matter before recommending that the shareholders vote to approve it. Under section 8.26, directors can agree to submit a matter to the shareholders for approval even if they later determine that they no longer recommend it. This provision is not intended to relieve the board of directors of its duty to consider carefully the proposed transaction and the interests of the shareholders.

Nine states have adopted force the vote amendments. Delaware, Georgia, Kansas, Minnesota, North Dakota, and Oklahoma provide general authorization of force the vote provisions and are thus substantively similar to section 8.26. The Maryland, Michigan, and Texas statutes apply only to mergers. The Massachusetts merger statute does not specifically require that the board recommend a plan of merger when submitting it to the shareholders.

F. 2005 Director and Officer Amendments -- Sections 8.01(b), 8.01(c), 8.30(c), 8.31(a)(2)(iv), 8.42(b) (Adopted 2005)

Section 8.01(b) states that if a corporation has a board of directors “its business and affairs shall be managed by or under the direction, and subject to the oversight, of its board of directors.” The phrase “by or under the direction, and subject to the direction, of,” encompasses the varying functions of boards of directors of different corporations. In some closely held corporations, the board of directors may be involved in the day-to-day business and affairs and it may be reasonable to describe management as being “by” the board of directors. But in many other corporations, the business and affairs are managed “under the direction, and subject to the oversight, of” the board of directors, since operational management is delegated to executive officers and other professional managers.

For public corporations, Section 8.01(c) provides that the scope of the director’s oversight responsibility includes the matters identified in that subsection. For other corporations, that responsibility may, depending on the circumstances, include some or all of those matters as well. Section 8.30(c) makes explicit a directors duty of disclosure when the director knows information to be material to the oversight or decision-making functions of the board or committee. However, Section 8.30(c) also recognizes that a duty of confidentiality can override a director’s obligation to share with other directors information pertaining to a current corporate matter.

If a claim of liability arising out of a challenged act or omission of a director is not resolved and disposed of under Section 8.31(a)(1), Section 8.31(a)(2) provides the bases for evaluating whether the conduct in question can be challenged. Section 8.31(a)(2)(iv) is one provision which displays when a director can be held liable to a corporation or its shareholders.

Section 8.42 sets for the standard of conduct for officers. A new subsection (b) was added in 2005 to clarify that the duty of an officer includes the obligation to inform superior officers or the board about material affairs of the corporation and actual or probable material violations of the law involving the corporation. This provision was also added in response to the Enron scandal. Wyoming is the only state that has adopted this amendment.

See official comment to this subsection attached.

**OFFICIAL COMMENT**

Section 8.41 recognizes that persons designated as officers have the formal authority set forth for that position (1) by its description in the bylaws, (2) by specific resolution of the board of directors, or (3) by direction of another officer authorized by the board of directors to prescribe the ~~functions~~ ~~duties~~ of other officers.

These methods of investing officers with formal authority do not exhaust the sources of an officer's actual or apparent authority. Many cases state that specific corporate officers, particularly the chief executive officer, may have implied authority merely by virtue of their positions. This authority, which may overlap the express authority granted by the bylaws, generally has been viewed as extending only to ordinary business transactions, though some cases have recognized unusually broad implied authority of the chief executive officer or have created a presumption that corporate officers have broad authority, thereby placing on the corporation the burden of showing lack of authority. Corporate officers may also be vested with apparent (or ostensible) authority by reason of corporate conduct on which third persons reasonably rely.

In addition to express, implied, or apparent authority, a corporation is normally bound by unauthorized acts of officers if they are ratified by the board of directors. Generally, ratification extends only to acts that could have been authorized as an original matter. Ratification may itself be express or implied and may in some cases serve as the basis of apparent (or ostensible) authority.

**§ 8.42. STANDARDS OF CONDUCT FOR OFFICERS**

- (a) An officer, when performing in such capacity, ~~has the duty to shall~~ act:
- (1) in good faith;
  - (2) with the care that a person in a like position would reasonably exercise under similar circumstances; and
  - (3) in a manner the officer reasonably believes to be in the best interests of the corporation.
- (b) *The duty of an officer includes the obligation:*
- (1) to inform the superior officer to whom, or the board of directors or the committee thereof to which, the officer reports of information about the affairs of the corporation known to the officer, within the scope of the officer's functions, and known to the officer to be material to such superior officer, board or committee; and
  - (2) to inform his or her superior officer, or another appropriate person within the corporation, or the board of directors, or a committee thereof, of any actual or probable material violation of law involving the corporation or material breach of duty to the corporation by an officer, employee, or agent of the corporation, that the officer believes has occurred or is about to occur.
- (cb) In discharging his or her ~~those~~ duties, an officer who does not have knowledge that makes reliance unwarranted, is entitled to rely on:

- (1) the performance of properly delegated responsibilities by one or more employees of the corporation whom the officer reasonably believes to be reliable and competent in performing the responsibilities delegated; or
  - (2) information, opinions, reports or statements, including financial statements and other financial data, prepared or presented by one or more employees of the corporation whom the officer reasonably believes to be reliable and competent in the matters presented or by legal counsel, public accountants, or other persons retained by the corporation as to matters involving skills or expertise the officer reasonably believes are matters (i) within the particular person's professional or expert competence or (ii) as to which the particular person merits confidence.
- (de) An officer shall not be liable to the corporation or its shareholders for any decision to take or not to take action, or any failure to take any action, as an officer, if the duties of the office are performed in compliance with this section. Whether an officer who does not comply with this section shall have liability will depend in such instance on applicable law, including those principles of section 8.31 that have relevance.

#### OFFICIAL COMMENT

*Subsection (a)* ~~This section~~ provides that an officer, when performing in such officer's official capacity, shall meet standards of conduct generally similar to those expected of directors under section 8.30. Consistent with the principles of agency, which generally govern the conduct of corporate employees, an officer is expected to observe the duties of obedience and loyalty and to act with the care that a person in a like position would reasonably exercise under similar circumstances. See RESTATEMENT (SECOND) OF AGENCY §379(1) (1958) ("Unless otherwise agreed, a paid agent is subject to a duty to the principal to act with standard care and with the skill which is standard in the locality for the kind of work which he is employed to perform and, in addition, to exercise any special skill that he has"). *This section is not intended to modify, diminish or qualify the duties or standards of conduct that may be imposed upon specific officers by other law or regulation.*

*The common law, including the law of agency, has recognized a duty on the part of officers and key employees to disclose to their superiors material information relevant to the affairs of the agency entrusted to them. See (SECOND) OF AGENCY §381; A. Gilchrist Sparks, III & Lawrence A. Hamermesh, Common Law Duties of Non-Director Corporate Officers, 48 BUS. LAW. 215, 226—29 (1992). This duty is implicit in, and embraced under, the broader standard of subsection (a). New subsection (b) sets forth explicitly this disclosure obligation by confirming that the officer's duty includes the obligation (i) to keep superior corporate authorities informed of material information within the officer's sphere of functional responsibilities, and (ii) to inform the relevant superior authority, or other appropriate person within the corporation, of violations of law or breaches of duty that the officer believes have occurred or are about to occur (i.e., more likely than not to occur) and are or would be material to the corporation. Subsection (b)(1) specifies that business information shall be transmitted through the*

communication with the officer's subordinates to fulfill his or her supervisory responsibilities. The definition of "employee" in section 1.40(8) includes an officer; accordingly, section 8.42 contemplates the delegation of responsibilities to other officers as well as to non-officer employees.

It is made clear, in subsection (de), that performance meeting the section's standards of conduct will eliminate an officer's exposure to any liability to the corporation or its shareholders. In contrast, an officer failing to meet its standards will not automatically face liability. Deficient performance of duties by an officer, depending upon the facts and circumstances, will normally be dealt with through intracorporate disciplinary procedures, such as reprimand, compensation adjustment, delayed promotion, demotion or discharge. ~~Such a procedure would be subject to any employment agreement between the corporation and the officer.~~ *These procedures may be subject to (and limited by) the terms of an officer's employment agreement. See section 8.443.*

In some cases, failure to observe relevant standards of conduct can give rise to an officer's liability to the corporation or its shareholders. A court review of challenged conduct will involve an evaluation of the particular facts and circumstances in light of applicable law. In this connection, subsection (de) recognizes that relevant principles of section 8.31, such as duties to deal fairly with the corporation and its shareholders and the challenger's burden of establishing proximately caused harm, should be taken into account. In addition, the business judgment rule will normally apply to decisions within an officer's discretionary authority. Liability to others can also arise from an officer's own acts or omissions (e.g., violations of law or tort claims) and, in some cases, an officer with supervisory responsibilities can have risk exposure in connection with the acts or omissions of others.

The Official Comment to section 8.30 supplements this Official Comment to the extent that it can be appropriately viewed as generally applicable to officers as well as directors.