



DELBERT HOSEMANN
Secretary of State

**Mississippi Secretary of State
2010 Business Reform Committees
Minutes of Corporations Laws Study Group, Meeting #3
September 8, 2010**

The third meeting of the Corporation Laws Study Group was called to order on Wednesday, September 8, 2010 at 11:10 A.M. at the Office of the Secretary of State, 700 North Street, Jackson, Mississippi. A list of the persons who were present in person or by telephone is attached as Exhibit A.

Introduction

Cheryn Baker, Assistant Secretary of State for the Secretary of State's Policy and Research Division, welcomed the members to the meeting and called roll to verify everyone who was present.

Approval of Minutes

The members unanimously approved the minutes of the July 21, 2010 meeting.

Business Services Update

Tom Riley, Assistant Secretary of State for the Secretary of State's Business Services Division, gave a brief update to inform the committee members that corporations who failed to file an annual report this year would be receiving a letter from the Secretary of State in about two weeks. This letter would inform the corporation that it must file a current annual report or face the possibility of administrative dissolution.

Subgroup Reports

A. Expired Charter Subgroup

This subgroup reported that its members had prepared a proposed amendment to Section 79-1-1 of the Mississippi Code (See subgroup report as Exhibit B). This amendment addresses existing business corporations and nonprofit corporations whose charters have expired (or are going to expire) by operation of statutes which imposed a limited period of duration. The amendment will change their period of duration from a limited period of duration to a perpetual duration.

B. Article 7 (of the Model Business Corporation Act) Subgroup

This subgroup reported its recommendation to adopt a new Section 79-4-7.09 of the Mississippi Code. This proposed new section (See subgroup report attached as Exhibit C) would provide shareholders with the ability to participate in shareholder meetings via remote communication methods, provided the Board of Directors of the corporation authorizes this. The subgroup also recommended that recent amendments to the Model Business Corporation Act dealing with bifurcation of record dates and proxy access to certain shareholder groups not be adopted at this time.

C. Article 8 (of the Model Business Corporation Act) Subgroup

This subgroup reported that it recommends the adoption of several proposed amendments to the Mississippi Business Corporation Act. These amendments include a “force the vote” provision, and changes to the duties and liability of directors. See Subgroup report attached as Exhibit D.

D. Reviewing Conforming Amendments to LLC Act Subgroup

The subgroup reported that it has reviewed and considered several proposed amendments to the Corporation Act that would conform Mississippi’s Business Corporations Act to track recent amendments to Mississippi’s Revised Limited Liability Company Act. Several of the members had questions and comments regarding certain amendments concerning administrative dissolution and reinstatement, and the effect of administrative revocation. See Subgroup report attached as Exhibit E.

Other Business

Cheryn Baker reminded the group that the Definitions/Electronic Technology Amendments Subgroup would present its report at the next meeting. She also reminded the members that the group would be voting on these amendments at the next meeting. There being no further business, the meeting was adjourned at 12:27 P.M.

Respectfully Submitted,



Cheryn Baker
Assistant Secretary of State
Division of Policy & Research

Exhibit A

**Minutes of the Corporation Laws Study Group, Meeting # 3
September 8, 2010**

In Attendance:

1. Jill Beneke
2. Bill Brown
3. Tammra Cascio
4. Henry Chatham
5. Cecile Edwards
6. Joyce Hall
7. Rusty Hawkins
8. Dan Hise
9. Cliff Hodge (guest)
10. Mark Hosemann
11. Gina Jacobs
12. Robert Jones
13. Robert Lee
14. Bill Mendenhall
15. Caryn Quilter (guest)
16. Tommy Shephard
17. Martha Thomas
18. Scott Waller attending for Blake Wilson

By Telephone:

19. Stephen Burrow
20. Mike Bush
21. John Byrne III
22. Robert Jones
23. Jamie Planck Martin
24. Paul Newton
25. Ben Roberson
26. Teal Salloum
27. Lisa Usry

Secretary of State Staff:

Delbert Hosemann, Secretary of State
Cory Wilson, Chief of Staff
Cheryn Baker, Assistant Secretary of State, Policy & Research
Tom Riley, Assistant Secretary of State, Business Services
Richard Lee, Intern, Policy and Research

Exhibit B

**Corporation Laws Study Group
Workgroup Reviewing Expired Charter Issue
Report and Recommendation to the Full Study Group
September 8, 2010**

This workgroup consists of members of the Corporations Law Study Group, Nonprofit Corporations law Study Group, the Legislature, the staff of the Secretary of State's Office and the Drafting Attorney for the Mississippi Senate. The workgroup has met and considered proposed legislation to address the expired charter issue discussed at previous Corporations and Nonprofit Corporations Study Group meetings. After review and discussion, this workgroup hereby recommends the adoption of the attached proposed revision to Section 79-1-1.

1 AN ACT TO AMEND SECTION 79-1-1, MISSISSIPPI CODE OF 1972,
2 TO PROVIDE FOR THE STATUTORY AUTOMATIC EXTENSION OF CORPORATE
3 CHARTER FOR CERTAIN CORPORATIONS UNDER CERTAIN CIRCUMSTANCES;
4 AND FOR RELATED PURPOSES.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF
6 MISSISSIPPI:

7 SECTION 1. Section 79-1-1, Mississippi Code of 1972, is
8 amended as follows:

9 79-1-1. (1) (a) If a business corporation was created
10 (i) for a limited period of existence, and (ii) before April 18,
11 1988, the life of the business corporation shall be perpetual if
12 the business corporation continues to do business for thirty
13 (30) days after the effective date of this act.

14 (b) If a nonprofit corporation was created (i) for a
15 limited period of existence, and (ii) before January 1, 1988,
16 the life of the nonprofit corporation shall be perpetual if the
17 nonprofit corporation continues to do business for thirty (30)
18 days after the effective date of this act.

19 (2) If * * * a business or nonprofit corporation * * * (a)
20 has a limited period of existence that expired before the
21 effective date of this act, and (b) the business or nonprofit

22 corporation * * * continues to do business for thirty (30) days
23 after the effective date of this act, * * * the * * * life of
24 that corporation * * * shall be perpetual. The corporation's
25 charter and articles of incorporation shall be deemed to have
26 been automatically amended before the end of the limited period
27 of existence to state that the corporation's life shall be
28 perpetual. No further action on the part of the corporation is
29 necessary to execute the provisions of this subsection. * * *

30 * * *

31 (3) Any corporation may, after the effective date of this
32 act, amend its articles of incorporation to provide for a
33 limited period of existence.

34 **SECTION 2.** This act shall take effect and be in force from
35 and after its passage.

Exhibit C

Corporation Laws Study Group Subgroup Reviewing Model Corporation Act to Article 7 Report and Recommendation to the Full Study Group September 8, 2010

This subgroup has met and considered several proposed amendments to the corporation act that would conform it to recent amendments to the Model Business Corporation Act. After review and discussion:

1. The subgroup hereby recommends the following amendment:

§ 79-4-7.09. Remote participation in annual and special meetings (new)

- (a) Shareholders of any class or series may participate in any meeting of shareholders by means of remote communication to the extent the board of directors authorizes such participation for such class or series. Participation by means of remote communication shall be subject to such guidelines and procedures as the board of directors adopts, and shall be in conformity with subsection (b) of this section.
- (b) Shareholders participating in a shareholders' meeting by means of remote communication shall be deemed present and may vote at such a meeting if the corporation has implemented reasonable measures:
 - (1) To verify that each person participating remotely is a shareholder, and
 - (2) To provide such shareholders a reasonable opportunity to participate in the meeting and to vote on matters submitted to the shareholders, including an opportunity to communicate, and to read or hear the proceedings of the meeting, substantially concurrently with such proceeding.

2. The subgroup also reviewed the Model Act Amendments establishing bifurcated record dates for shareholder meetings and to establish access to the proxy process to shareholder groups. The subgroup recommends that these model act amendments not be adopted in Mississippi at this time.

Exhibit D

Corporation Laws Study Group Subgroup Reviewing Model Act Amendments to Article 8 Report and Recommendation to the Full Study Group September 8, 2010

This subgroup has met and considered several proposed amendments to Article 8 of the Mississippi corporation act that would conform it to the Model Business Corporation Act (the "MBCA"). After review and discussion, the subgroup hereby recommends the amendments attached hereto and discussed below:

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 MBCA 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.

2005 Director Amendments -- Sections 8.01(b) and 8.31(a)(2)(iv) (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.

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 basis for evaluating whether the conduct in question can be challenged.

Other Clean Up Amendments to Article 8

The Subgroup also recommends a number of amendments to conform the Mississippi Act to the MBCA. These amendments are technical non-substantive amendments and are included in the attachment.

Members of this subgroup:

Henry Chatham, Robert Jones, Cecile Edwards and Cliff Hodge

**Attachment
to
Article 8 Report – Exhibit D**

Article 8. Directors and Officers

- § 79-4-8.01. Board required; role
- § 79-4-8.02. Qualifications
- § 79-4-8.03. Size and election
- § 79-4-8.04. Election by classes
- § 79-4-8.05. Terms
- § 79-4-8.06. Staggered terms
- § 79-4-8.07. Resignation
- § 79-4-8.08. Removal
- § 79-4-8.09. Removal by or through court
- § 79-4-8.10. Vacancies
- § 79-4-8.11. Compensation
- § 79-4-8.20. Regular and special meetings
- § 79-4-8.21. Action taken without meeting
- § 79-4-8.22. Notice before meeting
- § 79-4-8.23. Waiver of notice
- § 79-4-8.24. Quorum; assent to action presumed
- § 79-4-8.25. Committees
- § 79-4-8.26. Submission of matters for shareholder vote
- § 79-4-8.30. General principles
- § 79-4-8.31. Liability of director; burden of proof
- § 79-4-8.33. Unlawful distributions
- § 79-4-8.40. Generally
- § 79-4-8.41. Authority and duties
- § 79-4-8.42. Standard of conduct
- § 79-4-8.43. Resignation and removal
- § 79-4-8.44. Contract rights
- § 79-4-8.50. Definitions
- § 79-4-8.51. Prerequisites
- § 79-4-8.52. When required
- § 79-4-8.53. Litigation expenses
- § 79-4-8.54. Order by court
- § 79-4-8.55. Process of determining to indemnify
- § 79-4-8.56. Officers, indemnification
- § 79-4-8.57. Purchasing and maintaining insurance
- § 79-4-8.58. Effect of articles or by-laws
- § 79-4-8.59. Importance of subarticle
- § 79-4-8.60. Definitions
- § 79-4-8.61. Exempt transactions
- § 79-4-8.62. Majority; disclosure; qualified directors
- § 79-4-8.63. Shareholders' action, prerequisites
- § 79-4-8.70. Business opportunities

§ 79-4-8.01. Board required; role

(a) Except as provided in Section 79-4-7.32, each corporation must have a board of directors.

(b) All corporate powers shall be exercised by or under the authority of **the board of directors of the corporation**, and the business and affairs of the corporation **shall be** managed by or under the direction **and subject to the oversight of** ~~of~~ its board of directors, subject to any limitation set forth in the articles of incorporation or in an agreement authorized under Section 79-4-7.32.

§ 79-4-8.02. Qualifications

The articles of incorporation or bylaws may prescribe qualifications for directors. A director need not be a resident of this state or a shareholder of the corporation unless the articles of incorporation or bylaws so prescribe.

§ 79-4-8.03. Size and election

- (a) A board of directors must consist of one or more individuals, with the number specified in or fixed in accordance with the articles of incorporation or bylaws.
- (b) The number of directors may be increased or decreased, from time to time, by amendment to, or in the manner provided in, the articles of incorporation or the bylaws.
- (c) Directors are elected at the first annual shareholders' meeting and at each annual meeting thereafter unless their terms are staggered under Section 79-4-8.06.

§ 79-4-8.04. Election by classes

If the articles of incorporation authorize dividing the shares into classes, the articles may also authorize the election of all or a specified number of directors by the holders of one or more authorized classes of shares. Each class (or classes) of shares entitled to elect one or more directors is a separate voting group for purposes of the election of directors.

§ 79-4-8.05. Terms

- (a) The terms of the initial directors of a corporation expire at the first shareholders' meeting at which directors are elected.
- (b) The terms of all other directors expire at the next, ~~or if their terms are staggered in accordance with Section 79-4-8.06, at the applicable second or third,~~ annual shareholders' meeting following their election ~~unless their terms are staggered under Section 79-4-8.06.~~
- (c) A decrease in the number of directors does not shorten an incumbent director's term.
- (d) The term of a director elected to fill a vacancy expires at the next shareholders' meeting at which directors are elected.
- (e) Despite the expiration of a director's term, he continues to serve until his successor is elected and qualifies or until there is a decrease in the number of directors.

§ 79-4-8.06. Staggered terms

The articles of incorporation may provide for staggering the terms of directors by dividing the total number of directors into two (2) or three (3) groups, with each group containing one-half (1/2) or one-third (1/3) of the total, as near as may be **practicable**. In that event, the terms of directors in the first group expire at the first annual shareholders' meeting after their election, the terms of the second group expire at the second annual shareholders' meeting after their election, and the terms of the third group, if any, expire at the third annual shareholders' meeting after their election. At each annual shareholders' meeting held thereafter, directors shall be chosen for a term of two (2) years or three (3) years, as the case may be, to succeed those whose terms expire.

§ 79-4-8.07. Resignation

- (a) A director may resign at any time by delivering written notice to the board of directors, ~~or its chairman, or to the secretary of the corporation.~~
- (b) A resignation is effective when the notice is delivered unless the notice specifies a later effective date.

§ 79-4-8.08. Removal

- (a) The shareholders may remove one or more directors with or without cause unless the articles of incorporation provide that directors may be removed only for cause.
- (b) If a director is elected by a voting group of shareholders, only the shareholders of that voting group may participate in the vote to remove him.
- (c) If cumulative voting is authorized, a director may not be removed if the number of votes sufficient to elect him under cumulative voting is voted against his removal. If cumulative voting is not authorized, a director may be removed only if the number of votes cast to remove him exceeds the number of votes cast not to remove him.

(d) A director may be removed by the shareholders only at a meeting called for the purpose of removing him and the meeting notice must state that the purpose, or one (1) of the purposes, of the meeting is removal of the director.

§ 79-4-8.09. Removal by or through court

- (a) The chancery court of the county where a corporation's principal office (or, if none in this state, its registered office) is located may remove a director of the corporation from office in a proceeding commenced either by the corporation or by its shareholders holding at least ten percent (10%) of the outstanding shares of any class if the court finds that (1) the director engaged in fraudulent or dishonest conduct, or gross abuse of authority or discretion, with respect to the corporation and (2) removal is in the best interest of the corporation.
- (b) The court that removes a director may bar the director from reelection for a period prescribed by the court.
- (c) If shareholders commence a proceeding under subsection (a), they shall make the corporation a party defendant.

§ 79-4-8.10. Vacancies

(a) Unless the articles of incorporation provide otherwise, if a vacancy occurs on a board of directors, including a vacancy resulting from an increase in the number of directors:

- (1) The shareholders may fill the vacancy;
- (2) The board of directors may fill the vacancy; or
- (3) If the directors remaining in office constitute fewer than a quorum of the board, they may fill the vacancy by the affirmative vote of a majority of all the directors remaining in office.

(b) If the vacant office was held by a director elected by a voting group of shareholders, only the holders of shares of that voting group are entitled to fill the vacancy if it is filled by the shareholders and only the directors elected by that voting group are entitled to fill the vacancy if it is filled by the directors.

(c) A vacancy that will occur at a specific later date (by reason of a resignation effective at a later date under Section 79-4-8.07(b) or otherwise) may be filled before the vacancy occurs but the new director may not take office until the vacancy occurs.

§ 79-4-8.11. Compensation

Unless the articles of incorporation or bylaws provide otherwise, the board of directors may fix the compensation of directors.

§ 79-4-8.20. Regular and special meetings

- (a) The board of directors may hold regular or special meetings in or out of this state.
- (b) Unless the articles of incorporation or bylaws provide otherwise, the board of directors may permit any or all directors to participate in a regular or special meeting by, or conduct the meeting through the use of, any means of communication by which all directors participating may simultaneously hear each other during the meeting. A director participating in a meeting by this means is deemed to be present in person at the meeting.

§ 79-4-8.21. Action taken without meeting

- (a) Action required or permitted by Section 79-4-1.01 et seq. to be taken by the board of directors may be taken without a meeting if each director signs a consent describing the action taken and delivers it to the corporation.
- (b) Action taken under this section is the act of the board of directors when one or more consents signed by all the directors are delivered to the corporation. The consent may specify the time at which the action taken thereunder is to be effective. A consent may be withdrawn by a revocation signed by the director and received by the corporation prior to receipt by the corporation of unrevoked written consents signed by all the directors.
- (c) A consent signed under this section has the effect of action taken at a meeting of the board of directors and may be described as such in any document.

§ 79-4-8.22. Notice before meeting

- (a) Unless the articles of incorporation or bylaws provide otherwise, regular meetings of the board of directors may be held without notice of the date, time, place or purpose of the meeting.
- (b) Unless the articles of incorporation or bylaws provide for a longer or shorter period, special meetings of the board of directors must be preceded by at least two (2) days' notice of the date, time and place of the meeting. The notice need not describe the purpose of the special meeting unless required by the articles of incorporation or bylaws.

§ 79-4-8.23. Waiver of notice

- (a) A director may waive any notice required by Sections 79-4-1.01 et seq., the articles of incorporation or bylaws before or after the date and time stated in the notice. Except as provided by subsection (b), the waiver must be in writing, signed by the director entitled to the notice, and filed with the minutes or corporate records.
- (b) A director's attendance at or participation in a meeting waives any required notice to him of the meeting unless the director at the beginning of the meeting (or promptly upon his arrival) objects to holding the meeting or transacting business at the meeting and does not thereafter vote for or assent to action taken at the meeting.

§ 79-4-8.24. Quorum; assent to action presumed

- (a) Unless the articles of incorporation or bylaws require a greater number or unless otherwise specifically provided in this chapter, a quorum of a board of directors consists of:
- (1) A majority of the fixed number of directors if the corporation has a fixed board size; or
 - (2) A majority of the number of directors prescribed, or if no number is prescribed, the number in office immediately before the meeting begins, if the corporation has a variable-range size board.
- (b) The articles of incorporation or bylaws may authorize a quorum of a board of directors to consist of no fewer than one-third ($1/3$) of the fixed or prescribed number of directors determined under subsection (a).
- (c) If a quorum is present when a vote is taken, the affirmative vote of a majority of directors present is the act of the board of directors unless the articles of incorporation or bylaws require the vote of a greater number of directors.
- (d) A director who is present at a meeting of the board of directors or a committee of the board of directors when corporate action is taken is deemed to have assented to the action taken unless: (1) **the director he** objects at the beginning of the meeting (or promptly upon his arrival) to holding it or transacting business at the meeting; (2) **his** dissent or abstention from the action taken is entered in the minutes of the meeting; or (3) **the director's** delivers written notice of **the director's** dissent or abstention to the presiding officer of the meeting before its adjournment or to the corporation immediately after adjournment of the meeting. The right of dissent or abstention is not available to a director who votes in favor of the action taken.

§ 79-4-8.25. Committees

- (a) Unless this chapter, the articles of incorporation or the bylaws provide otherwise, a board of directors may create one or more committees and appoint one or more members of the board of directors to serve on any such committee.
- (b) Unless this chapter otherwise provides, the creation of a committee and appointment of members to it must be approved by the greater of (1) a majority of all the directors in office when the action is taken or (2) the number of directors required by the articles of incorporation or bylaws to take action under Section 79-4-8.24.
- (c) Sections 79-4-8.20 through 79-4-8.24 apply both to committees of the board and their members.
- (d) To the extent specified by the board of directors or in the articles of incorporation or bylaws, each committee may exercise the powers of the board of directors under Section 79-4-8.01.
- (e) A committee may not, however:
- (1) Authorize or approve distributions, except according to a formula or method or within limits prescribed by the board of directors;

- (2) Approve or propose to shareholders action that Section 79-4-1.01 et seq. requires to be approved by shareholders;
- (3) Fill vacancies on the board of directors, or subject to subsection (g), on any of its committees; or
- (4) Adopt, amend or repeal bylaws.

(f) The creation of, delegation of authority to, or action by a committee does not alone constitute compliance by a director with the standards of conduct described in Section 79-4-8.30.

(g) The board of directors may appoint one or more directors as alternate members of any committee to replace any absent or disqualified member during the member's absence or disqualification. Unless the articles of incorporation or the bylaws or the resolution creating the committee provide otherwise, in the event of the absence or disqualification of a member of a committee, the member or members present at any meeting and not disqualified from voting, unanimously, may appoint another director to act in place of the absent or disqualified member.

§ 79-4-8.26. Submission of matters for shareholder vote

A corporation may agree to submit a matter to a vote of its shareholders even if, after approving the matter, the board of directors determines it no longer recommends the matter.

§ 79-4-8.30. General principles

(a) Each member of the board of directors, when discharging the duties of a director, shall act:

- (1) In good faith, and
- (2) In a manner the director reasonably believes to be in the best interests of the corporation.

(b) The members of the board of directors or a committee of the board, when becoming informed in connection with their decision-making function or devoting attention to their oversight function, shall discharge their duties with the care that a person in a like position would reasonably believe appropriate under similar circumstances.

(c) In discharging board or committee duties a director, who does not have knowledge that makes reliance unwarranted, is entitled to rely on the performance by any of the persons specified in subsection to whom the board may have delegated, formally or informally by course of conduct, the authority or duty to perform one or more of the board's functions that are delegable under applicable law,

(d) In discharging board or committee duties a director, who does not have knowledge that makes reliance unwarranted, is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, prepared or presented by any of the persons specified in subsection (e).

(e) A director is entitled to rely, in accordance with subsection (c), or (d) , on:

- (1) One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the functions performed or the information, opinions, reports or statements provided;
- (2) Legal counsel, public accountants, or other persons retained by the corporation as to matters involving skills or expertise the director reasonably believes are matters (i) within the particular person's professional or expert competence or (ii) as to which the particular person merits confidence; or
- (3) A committee of the board of directors of which the director is not a member if the director reasonably believes the committee merits confidence.

(f) For purposes of this section, a director, in determining what he reasonably believes to be in the best interests of the corporation, shall consider the interests of the corporation's shareholders and, in his discretion, may consider any of the following:

- (1) The interests of the corporation's employees, suppliers, creditors and customers;

(2) The economy of the state and nation;

(3) Community and societal considerations;

(4) The long-term as well as short-term interests of the corporation and its shareholders, including the possibility that these interests may be best served by the continued independence of the corporation.

§ 79-4-8.31. Liability of director; burden of proof

(a) A director 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 a director, unless the party asserting liability in a proceeding establishes that:

~~(1) No defense by the director based on (i) any provision in the articles of incorporation authorized by Section 79-4-2.02(b)(4) or, the protection afforded by Section 79-4-8.61 for action taken in compliance with Section 79-4-8.62 or 79-4-8.63, if interposed as a bar to the proceeding by the director, does not preclude liability; (ii) the protection afforded by Section 79-4-8.70, precludes liability; and~~

(2) The challenged conduct consisted or was the result of:

(i) Action not in good faith; or

(ii) A decision

(A) Which the director did not reasonably believe to be in the best interests of the corporation, or

(B) As to which the director was not informed to an extent the director reasonably believed appropriate in the circumstances; or

(iii) A lack of objectivity due to the director's familial, financial or business relationship with, or a lack of independence due to the director's domination or control by, another person having a material interest in the challenged conduct

(A) Which relationship or which domination or control could reasonably be expected to have affected the director's judgment respecting the challenged conduct in a manner adverse to the corporation, and

(B) After a reasonable expectation to such effect has been established, the director shall not have established that the challenged conduct was reasonably believed by the director to be in the best interests of the corporation; or

~~(iv) A sustained failure of the director to devote attention to ongoing oversight of the business and affairs of the corporation, or a failure to devote timely attention, by making (or causing to be made) appropriate inquiry, when particular facts and circumstances of significant concern materialize that would alert a reasonably attentive director to the need therefore; or other material failure of the director to discharge the oversight function; or~~

(v) Receipt of a financial benefit to which the director was not entitled or any other breach of the director's duties to deal fairly with the corporation and its shareholders that is actionable under applicable law.

(b) The party seeking to hold the director liable:

(1) For money damages, shall also have the burden of establishing that:

(i) Harm to the corporation or its shareholders has been suffered, and

(ii) The harm suffered was proximately caused by the director's challenged conduct; or

(2) For other money payment under a legal remedy, such as compensation for the unauthorized use of corporate assets, shall also have whatever persuasion burden may be called for to establish that the payment sought is appropriate in the circumstances; or

(3) For other money payment under an equitable remedy, such as profit recovery by or disgorgement to the corporation, shall also have whatever persuasion burden may be called for to establish that the equitable remedy sought is appropriate in the circumstances.

(c) Nothing contained in this section shall (1) in any instance where fairness is at issue, such as consideration of the fairness of a transaction to the corporation under Section 79-4-8.61(b)(3), alter the burden of proving the fact or lack of fairness otherwise applicable, (2) alter the fact or lack of liability of a director under another section of this act, such as the provisions governing the consequences of an unlawful distribution under Section 79-4-8.33 or a transactional interest under Section 79-4-8.61, or (3) affect any rights to which the corporation or a shareholder may be entitled under another statute of this state or the United States.

§ 79-4-8.33. Unlawful distributions

(a) A director who votes for or assents to a distribution in excess of what may be authorized and made pursuant to Section 79-4-6.40(a) or 79-4-14.09(a) is personally liable to the corporation for the amount of the distribution that exceeds what could have been distributed without violating Section 79-4-6.40(a) or 79-4-14.09(a) if the party asserting liability establishes that when taking the action the director did not comply with Section 79-4-8.30.

(b) A director held liable under subsection (a) for an unlawful distribution is entitled to:

- (1) Contribution from every other director who could be held liable under subsection (a) for the unlawful distribution; and
- (2) Recoupment from each shareholder of the pro rata portion of the amount of the unlawful distribution the shareholder accepted, knowing the distribution was made in violation of Section 79-4-6.40(a) or 79-4-14.09(a).

(c) A proceeding to enforce:

- (1) The liability of a director under subsection (a) is barred unless it is commenced within two (2) years after the date (i) on which the effect of the distribution was measured under Section 79-4-6.40(e) or (g); (ii) as of which the violation of Section 79-4-6.40(a) occurred as the consequence of disregard of a restriction in the articles of incorporation; or (iii) on which the distribution of assets to shareholders under Section 79-4-14.09(a) was made; or
- (2) Contribution or recoupment under subsection (b) is barred unless it is commenced within one (1) year after the liability of the claimant has been finally adjudicated under subsection (a).

§ 79-4-8.40. Generally

- (a) A corporation has the offices described in its bylaws or designated by the board of directors in accordance with the bylaws.
- (b) The board of directors may elect individuals to fill one or more offices of the corporation. A duly authorized officer may appoint one or more officers if authorized by the bylaws or the board of directors.
- (c) The bylaws or the board of directors shall delegate to one (1) of the officers responsibility for preparing minutes of the directors' and shareholders' meetings and for maintaining and authenticating records of the corporation.
- (d) The same individual may simultaneously hold more than one (1) office in a corporation.

§ 79-4-8.41. Authority and duties

Each officer has the authority and shall perform the duties set forth in the bylaws or, to the extent consistent with the bylaws, the duties prescribed by the board of directors or by direction of an officer authorized by the board of directors to prescribe the duties of other officers.

§ 79-4-8.42. Standard of conduct

(a) An officer, when performing in such capacity, 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) In discharging 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.

(c) 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 79-4-8.31 that have relevance.

§ 79-4-8.43. Resignation and removal

(a) An officer may resign at any time by delivering notice to the corporation. A resignation is effective when the notice is delivered unless the notice specifies a later effective time. If a resignation is made effective at a later time and the board or the appointing officer accepts the future effective time, the board or the appointing officer may fill the pending vacancy before the effective time if the board or the appointing officer provides that the successor does not take office until the effective time.

(b) An officer may be removed at any time with or without cause by: (i) the board of directors; (ii) the officer who appointed such officer, unless the bylaws or the board of directors provide otherwise; or (iii) any other officer if authorized by the bylaws or the board of directors.

(c) In this section, "appointing officer" means the officer (including any successor to that officer) who appointed the officer resigning or being removed.

§ 79-4-8.44. Contract rights

(a) The appointment of an officer does not itself create contract rights.

(b) An officer's removal does not affect the officer's contract rights, if any, with the corporation. An officer's resignation does not affect the corporation's contract rights, if any, with the officer.

§ 79-4-8.50. Definitions

In this subchapter subarticle:

(1) "Corporation" includes any domestic or foreign predecessor entity of a corporation in a merger.

(2) "Director" or "officer" means an individual who is or was a director or officer, respectively, of a corporation or who, while a director or officer of the corporation, is or was serving at the corporation's request as a director, officer, partner, trustee, employee or agent of another domestic or foreign corporation, partnership, joint venture, trust, employee benefit plan or other entity. A director or officer is considered to be serving an employee benefit plan at the corporation's request if the individual's duties to the corporation also impose duties on, or otherwise involve services by, the individual to the plan or to participants in or beneficiaries of the plan. "Director" or "officer" includes, unless the context requires otherwise, the estate or personal representative of a director or officer.

(3) "Expenses" includes counsel fees.

(4) "Liability" means the obligation to pay a judgment, settlement, penalty, fine (including an excise tax assessed with respect to an employee benefit plan), or reasonable expenses incurred with respect to a proceeding.

(5) "Official capacity" means: (i) when used with respect to a director, the office of director in a corporation; and (ii) when used with respect to an officer, as contemplated in Section 79-4-8.56, the office in a corporation held by the officer. "Official capacity" does not include service for any other domestic or foreign corporation or any partnership, joint venture, trust, employee benefit plan or other entity.

(6) "Party" means an individual who was, is, or is threatened to be made a defendant or respondent in a proceeding.

(7) "Proceeding" means any threatened, pending, or completed action, suit or proceeding, whether civil, criminal, administrative, arbitral or investigative and whether formal or informal.

§ 79-4-8.51. Prerequisites

(a) Except as otherwise provided in subsection (d) of this section, a corporation may indemnify an individual who is a party to a proceeding because he is a director against liability incurred in the proceeding if:

(1)(i) He conducted himself in good faith; and

(ii) He reasonably believed:

(A) In the case of conduct in his official capacity, that his conduct was in the best interests of the corporation; and

(B) In all other cases, that his conduct was at least not opposed to the best interests of the corporation; and

(iii) In the case of any criminal proceeding, he had no reasonable cause to believe his conduct was unlawful; or

(2) He engaged in conduct which broader indemnification has been made permissible or obligatory under a provision of the articles of incorporation as authorized by Section 79-4-2.02(b)(5).

(b) A director's conduct with respect to an employee benefit plan for a purpose he reasonably believed to be in the interest of the participants in and beneficiaries of the plan is conduct that satisfies the requirement of subsection (a)(1)(ii)(B).

(c) The termination of a proceeding by judgment, order, settlement, conviction or upon a plea of nolo contendere or its equivalent is not, of itself, determinative that the director did not meet the relevant standard of conduct described in this section.

(d) Unless ordered by a court under Section 79-4-8.54(a)(3), a corporation may not indemnify a director under this section:

(1) In connection with a proceeding by or in the right of the corporation, except for reasonable expenses incurred in connection with the proceeding if it is determined that the director has met the relevant standard of conduct under subsection (a); or

(2) In connection with any proceeding with respect to conduct for which he was adjudged liable on the basis that he received a financial benefit to which he was not entitled, whether or not involving action in his official capacity.

§ 79-4-8.52. When required

A corporation shall indemnify a director who was wholly successful, on the merits or otherwise, in the defense of any proceeding to which he was a party because he was a director of the corporation against reasonable expenses incurred by him in connection with the proceeding.

§ 79-4-8.53. Litigation expenses

(a) A corporation may, before final disposition of a proceeding, advance funds to pay for or reimburse the reasonable expenses incurred in connection with the proceeding by an individual who is a party to the proceeding because that individual is a member of the board of directors if the director delivers to the corporation:

(1) A signed written affirmation of the director's good faith belief that the relevant standard of conduct described in Section 79-4-8.51 has been met by the director or that the proceeding involves conduct for which liability has been eliminated under a provision of the articles of incorporation as authorized by Section 79-4-2.02(b)(4); and

(2) A signed written undertaking of the director to repay any funds advanced if the director is not entitled to mandatory indemnification under Section 79-4-8.52 and it is ultimately determined under Section 79-4-8.54 or Section 79-4-8.55 that the director has not met the relevant standard of conduct described in Section 79-4-8.51.

(b) The undertaking required by subsection (a)(2) must be an unlimited general obligation of the director but need not be secured and may be accepted without reference to the financial ability of the director to make repayment.

(c) Authorizations under this section shall be made:

(1) By the board of directors:

(i) If there are two (2) or more qualified directors, by a majority vote of all the qualified directors (a majority of whom shall for such purpose constitute a quorum) or by a majority of the members of a committee of two (2) or more qualified directors appointed by such a vote; or

(ii) If there are fewer than two (2) qualified directors, by the vote necessary for action by the board in accordance with Section 79-4-8.24(c), in which authorization directors who are not qualified directors may participate; or

(2) By the shareholders, but shares owned by or voted under the control of a director who at the time is not a qualified director may not be voted on the authorization.

§ 79-4-8.54. Order by court

(a) A director who is a party to a proceeding because he is a director may apply for indemnification or an advance for expenses to the court conducting the proceeding or to another court of competent jurisdiction. After receipt of an application, and after giving any notice it considers necessary, the court shall:

(1) Order indemnification if the court determines that the director is entitled to mandatory indemnification under Section 79-4-8.52;

(2) Order indemnification or advance for expenses if the court determines that the director is entitled to indemnification or advance for expenses pursuant to a provision authorized by Section 79-4-8.58(a); or

(3) Order indemnification or advance for expenses if the court determines, in view of all the relevant circumstances, that it is fair and reasonable:

(i) To indemnify the director; or

(ii) To advance expenses to the director, even if he has not met the relevant standard of conduct set forth in Section 79-4-8.51(a), failed to comply with Section 79-4-8.53 or was adjudged liable in a proceeding referred to in subsection 79-4-8.51(d)(1) or (d)(2), but if he was adjudged so liable his indemnification shall be limited to reasonable expenses incurred in connection with the proceeding.

(b) If the court determines that the director is entitled to indemnification under subsection (a)(1) or to indemnification or advance for expenses under subsection (a)(2), it shall also order the corporation to pay the director's reasonable expenses incurred in connection with obtaining court-ordered indemnification or advance for expenses. If the court determines that the director is entitled to indemnification or advance for expenses under subsection (a)(3), it may also order the corporation to pay the director's reasonable expenses to obtain court-ordered indemnification or advance for expenses.

§ 79-4-8.55. Process of determining to indemnify

(a) A corporation may not indemnify a director under Section 79-4-8.51 unless authorized for a specific proceeding after a determination has been made that indemnification is permissible because the director has met the relevant standard of conduct set forth in Section 79-4-8.51.

(b) The determination shall be made:

(1) If there are two (2) or more qualified directors, by the board of directors by a majority vote of all the qualified directors (a majority of whom shall for such purpose constitute a quorum), or by a majority of the members of a committee of two (2) or more qualified directors appointed by such a vote;

(2) By special legal counsel:

(i) Selected in the manner prescribed in subdivision (1); or

(ii) If there are fewer than two (2) qualified directors, selected by the board of directors (in which selection directors who are not qualified directors may participate); or

(3) By the shareholders, but shares owned by or voted under the control of a director who at the time is not a qualified director may not be voted on the determination.

(c) Authorization of indemnification shall be made in the same manner as the determination that indemnification is permissible, except that if there are fewer than two (2) qualified directors, or if the determination is made by special legal counsel, authorization of indemnification shall be made by those entitled to select special legal counsel under subsection (b)(2)(ii).

§ 79-4-8.56. Officers, indemnification

(a) A corporation may indemnify and advance expenses under this subarticle to an officer of the corporation who is a party to a proceeding because he is an officer of the corporation:

(1) To the same extent as to a director; and

(2) If he is an officer but not a director, to such further extent as may be provided by the articles of incorporation, the bylaws, a resolution of the board of directors or contract except for (A) liability in connection with a proceeding by or in the right of the corporation other than for reasonable expenses incurred in connection with the proceeding or (B) liability arising out of conduct that constitutes (i) receipt by him of a financial benefit to which he is not entitled, (ii) an intentional infliction of harm on the corporation or the shareholders, or (iii) an intentional violation of criminal law.

(b) The provisions of subsection (a)(2) shall apply to an officer who is also a director if the basis on which he is made a party to the proceeding is an act or omission solely as an officer.

(c) An officer of a corporation who is not a director is entitled to mandatory indemnification under Section 79-4-8.52, and may apply to a court under Section 79-4-8.54 for indemnification or an advance for expenses, in each case to the same extent to which a director may be entitled to indemnification or advance for expenses under those provisions.

§ 79-4-8.57. Purchasing and maintaining insurance

A corporation may purchase and maintain insurance on behalf of an individual who is a director or officer of the corporation, or who, while a director or officer of the corporation, serves at the corporation's request as a director, officer, partner, trustee, employee or agent of another domestic or foreign corporation, partnership, joint venture, trust, employee benefit plan or other entity, against liability asserted against or incurred by him in that capacity or arising from his status as a director or officer, whether or not the corporation would have power to indemnify or advance expenses to him against the same liability under this subarticle.

§ 79-4-8.58. Effect of articles or bylaws

(a) A corporation may, by a provision in its articles of incorporation or bylaws or in a resolution adopted or a contract approved by its board of directors or shareholders, obligate itself in advance of the act or omission giving rise to a proceeding to provide indemnification in accordance with Section 79-4-8.51 or advance funds to pay for or reimburse expenses in accordance with Section 79-4-8.53. Any such provision that obligates the corporation to provide indemnification to the fullest extent permitted by law shall be deemed to obligate the corporation to advance funds to pay for or reimburse expenses in accordance with Section 79-4-8.53 to the fullest extent permitted by law, unless the provision specifically provides otherwise.

(b) Any provision pursuant to subsection (a) shall not obligate the corporation to indemnify or advance expenses to a director of a predecessor of the corporation, pertaining to conduct with respect to the predecessor, unless otherwise specifically provided. Any provision for indemnification or advance for expenses in the articles of incorporation, bylaws, or a resolution of the board of directors or shareholders of a predecessor of the corporation in a merger or in a contract to which the predecessor is a party, existing at the time the merger takes effect, shall be governed by Section 79-4-11.06(a)(3).

(c) A corporation may, by a provision in its articles of incorporation, limit any of the rights to indemnification or advance for expenses created by or pursuant to this subarticle.

(d) This subarticle does not limit a corporation's power to pay or reimburse expenses incurred by a director or an officer in connection with his appearance as a witness in a proceeding at a time when he is not a party.

(e) This subarticle does not limit a corporation's power to indemnify, advance expenses to or provide or maintain insurance on behalf of an employee or agent.

§ 79-4-8.59. Importance of subarticle

A corporation may provide indemnification or advance expenses to a director or an officer only as permitted by this subarticle.

§ 79-4-8.60. Definitions

In Sections 79-4-8.60 through 79-4-8.63 and Section 79-4-8.70:

(1) "Director's conflicting interest transaction" means a transaction effected or proposed to be effected by the corporation (or by an entity controlled by the corporation):

(i) To which, at the relevant time, the director is a party; or

(ii) Respecting which, at the relevant time, the director had knowledge and a material financial interest known to the director; or

(iii) Respecting which, at the relevant time, the director knew that a related person was a party or had a material financial interest.

(2) "Control" (including the term "controlled by") means (i) having the power, directly or indirectly, to elect or remove a majority of the members of the board of directors or other governing body of an entity, whether through the ownership of voting shares or interests, by contract, or otherwise, or (ii) being subject to a majority of the risk of loss from the entity's activities or entitled to receive a majority of the entity's residual returns.

(3) "Relevant time" means (i) the time at which directors' actions respecting the transaction is taken in compliance with Section 79-4-8.62, or (ii) if the transaction is not brought before the board of directors of the corporation (or its committee) for action under Section 79-4-8.62, at the time the corporation (or an entity controlled by the corporation) becomes legally obligated to consummate the transaction.

(4) "Material financial interest" means a financial interest in a transaction that would reasonably be expected to impair the objectivity of the director's judgment when participating in action on the authorization of the transaction.

(5) "Related person" means:

(i) The director's spouse;

(ii) A child, stepchild, grandchild, parent, stepparent, grandparent, sibling, (or spouse of any thereof) of the director or of the director's spouse;

(iii) An individual living in the same home as the director;

(iv) An entity (other than the corporation or an entity controlled by the corporation) controlled by the director or any person specified in this paragraph (5);

(v) A domestic or foreign (A) business or nonprofit corporation (other than the corporation or an entity controlled by the corporation) of which the director is a director, (B) unincorporated entity of which the director is a general partner or a member of the governing body, or (C) individual, trust or estate for whom or of which the director is a trustee, guardian, personal representative or like fiduciary; or

(vi) A person that is, or an entity that is controlled by, an employer of the director.

(6) "Fair to the corporation" means, for purposes of Section 79-4-8.61(b)(3), that the transaction as a whole was beneficial to the corporation, taking into appropriate account whether it was (i) fair in terms of the director's dealings with the corporation, and (ii) comparable to what might have been obtainable in an arms' length transaction, given the consideration paid or received by the corporation.

(7) "Required disclosure" means disclosure of (i) the existence and nature of the director's conflicting interest, and (ii) all facts known to the director respecting the subject matter of the transaction that a director free of such conflicting interest would reasonably believe to be material in deciding whether to proceed with the transaction.

§ 79-4-8.61. Exempt transactions

(a) A transaction effected or proposed to be effected by the corporation or by an entity controlled by the corporation may not be the subject of equitable relief, or give rise to an award of damages or other sanctions against a director of the corporation, in a proceeding by a shareholder or by or in the right of the corporation, on the ground that the director has an interest respecting the transaction, if it is not a director's conflicting interest transaction.

(b) A director's conflicting interest transaction may not be the subject of equitable relief, or give rise to an award of damages or other sanctions against a director of the corporation, in a proceeding by a shareholder or by or in the right of the corporation on the ground that the director has an interest respecting the transaction, if:

- (1) Directors' action respecting the transaction was taken in compliance with Section 79-4-8.62 at any time; or
- (2) Shareholders' action respecting the transaction was taken in compliance with Section 79-4-8.63 at any time; or
- (3) The transaction, judged according to the circumstances at the relevant time, is established to have been fair to the corporation.

§ 79-4-8.62. Majority; disclosure; qualified directors

(a) Directors' action respecting a director's conflicting interest transaction is effective for purposes of Section 79-4-8.61(b)(1) if the transaction has been authorized by the affirmative vote of a majority (but no fewer than two (2)) of the qualified directors who voted on the transaction, after required disclosure by the conflicted director of information not already known by such qualified directors or after modified disclosure in compliance with subsection (b), provided that:

- (1) The qualified directors have deliberated and voted outside the presence of and without the participation by any other director; and
- (2) Where the action has been taken by a committee, all members of the committee were qualified directors, and either (i) the committee was composed of all the qualified directors on the board of directors, or (ii) the members of the committee were appointed by the affirmative vote of a majority of the qualified directors on the board.

(b) Notwithstanding subsection (a), when a transaction is a director's conflicting interest transaction only because a related person described in Section 79-4-8.60(5)(v) or (vi) is a party to or has material financial interest in the transaction, the conflicted director is not obligated to make required disclosure to the extent that the director reasonably believes that doing so would violate a duty imposed under law, a legally enforceable obligation of confidentiality, or a professional ethics rule, provided that the conflicted director discloses to the qualified directors voting on the transaction:

- (1) All information required to be disclosed that is not so violative;
- (2) The existence and nature of the director's conflicting interest; and
- (3) The nature of the conflicted director's duty not to disclose the confidential information.

(c) A majority (but no fewer than two (2)) of all the qualified directors on the board of directors, or on the committee, constitutes a quorum for purposes of action that complies with this section.

(d) Where directors' action under this section does not satisfy a quorum or voting requirement applicable to the authorization of the transaction by reason of the articles of incorporation, the bylaws, or provision of law, independent action to satisfy those authorization requirements must be taken by the board of directors or a committee, in which action directors who are not qualified directors may participate.

§ 79-4-8.63. Shareholders' action, prerequisites

(a) Shareholders' action respecting a director's conflicting interest transaction is effective for purposes of Section 79-4-8.61(b)(2) if a majority of the votes cast by the holders of all qualified shares are in favor of the transaction after (1) notice to shareholders describing the action to be taken respecting the transaction, (2) provision to the corporation of the information referred to in subsection (b), and (3) communication to the shareholders entitled to vote on the transaction of the information that is the subject of required disclosure, to the extent the information is not known by them.

(b) A director who has a conflicting interest respecting the transaction shall, before the shareholders' vote, inform the secretary or other officer or agent of the corporation authorized to tabulate votes, in writing, of the number of shares that the director knows are not qualified shares under subsection (c), and the identity of the holders of those shares.

(c) For purposes of this section, (1) "holder" means, and "held by" refers to shares held by, both a record shareholder (as defined in Section 79-4-13.01(7)) and a beneficial shareholder (as defined in Section 79-4-13.01(2)); and (2) "qualified shares" means all shares entitled to be voted with respect to the transaction except for shares that the secretary (or other officer or agent of the corporation authorized to tabulate votes) either knows, or under subsection (b) is notified, are held by (A) a director who has a conflicting interest respecting the transaction, or (B) a related person of the director (excluding a person described in Section 79-4-8.60(5)(vi)).

(d) A majority of the votes entitled to be cast by the holders of all qualified shares constitutes a quorum for purposes of compliance with this section. Subject to the provisions of subsection (e), shareholders' action that otherwise complies with this section is not affected by the presence of holders, or by the voting, of shares that are not qualified shares.

(e) If a shareholders' vote does not comply with subsection (a) solely because of a director's failure to comply with subsection (b), and if the director establishes that the failure was not intended to influence and did not in fact determine the outcome of the vote, the court may take such action respecting the transaction and the director, and may give such effect, if any, to the shareholders' vote, as the court considers appropriate in the circumstances.

(f) Where shareholders' action under this section does not satisfy a quorum or voting requirement applicable to the authorization of the transaction by reason of the articles of incorporation, the bylaws or a provision of law, independent action to satisfy those authorization requirements must be taken by the shareholders, in which action shares that are not qualified shares may participate.

§ 79-4-8.70. Business opportunities

Business opportunities. (a) A director's taking advantage, directly or indirectly, of a business opportunity may not be the subject of equitable relief, or give rise to an award of damages or other sanctions against the director, in a proceeding by or in the right of the corporation on the ground that such opportunity should have first been offered to the corporation, if before becoming legally obligated respecting the opportunity the director brings it to the attention of the corporation and:

(1) Action by qualified directors disclaiming the corporation's interest in the opportunity is taken in compliance with the procedures set forth in Section 79-4-8.62, as if the decision being made concerned a director's conflicting interest transaction; or

(2) Shareholders' action disclaiming the corporation's interest in the opportunity is taken in compliance with the procedures set forth in Section 79-4-8.63, as if the decision being made concerned a director's conflicting interest transaction; except that, rather than making "required disclosure" as defined in Section 79-4-8.60, in each case the director shall have made prior disclosure to those acting on behalf of the corporation of all material facts concerning the business opportunity that are then known to the director.

(b) In any proceeding seeking equitable relief or other remedies based upon an alleged improper taking advantage of a business opportunity by a director, the fact that the director did not employ the procedure described in subsection (a) before taking advantage of the opportunity shall not create an inference that the opportunity should have been first presented to the corporation or alter the burden of proof otherwise applicable to establish that the director breached a duty to the corporation in the circumstances.

Exhibit E

Corporation Laws Study Group Subgroup Reviewing Conforming Amendments to LLC Act Report and Recommendation to the Full Study Group September 8, 2010

This subgroup has met and considered several proposed amendments to the corporation act that would conform it to the new Mississippi Limited Liability Act. After review and discussion, the subgroup hereby recommends the following fifteen amendments:

Article 1 General Provisions

- 1.22 Fees- remove cap on expedited filing fee Section 1.22(e)(2)
- 1.24 Correction of document – limit corrections to 1 year
- 1.25 Role of Secretary of State – increase time for Secretary to refuse a filing to 10 days
- 1.29 Knowingly signing false document – increase maximum penalty to \$1,000.00

Article 4 Name

- 4.01 Requirement – corporate name must be distinguishable from names of all other entities, not just corporations
- 4.02 Reservation – provide for cancellation of name reservation

Article 5 Office and Agent

- 5.01 Registered Office and Agent required – allow registered agent to be an LLC

Article 14 Dissolution

- 14.21 Notice & Certificate: effects – conform effect of administrative dissolution to LLC Act (See Attachment)
- 14.22 Reinstatement – conform effect of reinstatement to LLC Act (See Attachment)

Article 15 Foreign corporations

- 15.01 Activities requiring certificate; exempt activities – conform to LLC Act (See Attachment)
- 15.02 Transacting business without authority – conform subsection (e) to LLC Act (See Attachment)
- 15.05 Corporate name – same change as in Section 4.01 above
- 15.07 Registered office and agent – same change as in Section 5.01 above
- 15.31 Procedure and effect (of administrative revocation) – conform effect of administrative revocation to LLC Act (See Attachment)
- 15.32 Appeal and reinstatement - conform effect of reinstatement to LLC Act (See Attachment)

**Attachment
to
Subgroup Report Reviewing
Conforming Amendments to LLC Act–
Exhibit E**

The Secretary of State may commence a proceeding under Section 79-4-14.21 to administratively dissolve a corporation if:

- (1) The corporation does not pay within sixty (60) days after they are due any franchise taxes or penalties imposed by Sections 79-4-1.01 et seq. or other law;
- (2) The corporation does not deliver its annual report to the Secretary of State within sixty (60) days after it is due;
- (3) The corporation is without registered agent or registered office in this state for sixty (60) days or more;
- (4) The corporation does not notify the Secretary of State within sixty (60) days that its registered agent or registered office has been changed, that its registered agent has resigned, or that its registered office has been discontinued; or
- (5) The corporation's period of duration stated in its articles of incorporation expires

§ 79-4-14.21. Notice and certificate; effects

(a) If the Secretary of State determines that one or more grounds exist under Section 79-4-14.20 for dissolving a corporation, he shall serve the corporation with written notice of his determination under Section 79-4-5.04, except that such determination may be served by first class mail.

(b) If the corporation does not correct each ground for dissolution or demonstrate to the reasonable satisfaction of the Secretary of State that each ground determined by the Secretary of State does not exist within sixty (60) days after service of the notice is perfected under Section 79-4-5.04, the Secretary of State shall administratively dissolve the corporation by signing a certificate of dissolution that recites the ground or grounds for dissolution and its effective date. The Secretary of State shall file the original of the certificate and serve a copy on the corporation under Section 79-4-5.04, except that such certificate may be served by first class mail.

~~(c) 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. Reserved.~~

(d) The administrative dissolution of a corporation does not terminate the authority of its registered agent.

~~(e) 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.~~

~~(f) A director, officer or shareholder 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.~~

~~(g) 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.~~

§ 79-4-14.22. Reinstatement

(a) A corporation administratively dissolved under Section 79-4-14.21 may apply to the Secretary of State for reinstatement at any time after the effective date of dissolution. The applicant must:

- (1) Recite the name of the corporation and the effective date of its administrative dissolution;
- (2) State that the ground or grounds for dissolution either did not exist or have been eliminated
- (3) State that the corporation's name satisfies the requirements of Section 79-4-4.01; and
- (4) Contain a certificate from the Mississippi State Tax Commission reciting that all taxes owed by the corporation have been paid.

(b) If the Secretary of State determines that the application contains the information required by subsection (a) and that the information is correct, he shall cancel the certificate of dissolution and prepare a certificate of reinstatement that recites his

determination and the effective date of reinstatement, file the original of the certificate and serve a copy on the corporation under Section 79-4-5.04.

(c) When the reinstatement is effective:

(1) The reinstatement relates back to and takes effect as of the effective date of the administrative dissolution;

(2) Any liability incurred by the corporation, director, officer -or a shareholder after the administrative dissolution and before the reinstatement shall be determined as if the administrative dissolution had never occurred; and

(3) The corporation may resume carrying on its business as if the administrative dissolution had never occurred.

~~**(e) 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.**~~

§ 79-4-14.23. Denial of reinstatement; review

(a) If the Secretary of State denies a corporation's application for reinstatement following administrative dissolution, he shall serve the corporation under Section 79-4-5.04 with a written notice that explains the reason or reasons for denial.

(b) The corporation may appeal the denial of reinstatement to the Chancery Court of the First Judicial District of Hinds County, Mississippi, or the chancery court of the county where the corporation is domiciled within thirty (30) days after service of the notice of denial is perfected. The corporation appeals by petitioning the court to set aside the dissolution and attaching to the petition copies of the Secretary of State's certificate of dissolution, the corporation's application for reinstatement and the Secretary of State's notice of denial.

(c) The court may summarily order the Secretary of State to reinstate the dissolved corporation or may take other action the court considers appropriate.

(d) The court's final decision may be appealed as in other civil proceedings.

§ 79-4-14.30. Grounds; application

(a) The chancery court may dissolve a corporation:

(1) In a proceeding by the Attorney General if it is established that:

(i) The corporation obtained its articles of incorporation through fraud; or

(ii) The corporation has continued to exceed or abuse the authority conferred upon it by law;

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

(i) 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 the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally, because of the deadlock;

(ii) The directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive or fraudulent;

(iii) The shareholders are deadlocked in voting power and have failed, for a period that includes at least two (2) consecutive annual meeting dates, to elect successors to directors whose terms have expired; or

(iv) The corporate assets are being misapplied or wasted;

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

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

- (ii) The corporation has admitted in writing that the creditor's claim is due and owing and the corporation is insolvent; or
- (4) In a proceeding by the corporation to have its voluntary dissolution continued under court supervision; or
- (5) In a proceeding by a shareholder if the corporation has abandoned its business and has failed within a reasonable time to liquidate and distribute its assets and dissolve.

(b) Section 79-4-14.30(a)(2) shall not apply in the case of a corporation that, on the date of the filing of the proceeding, has shares that are: (i) listed on the New York Stock Exchange, the American Stock Exchange, or any exchange owned or operated by the NASDAQ Stock Market, LLC, or listed or quoted on a system owned or operated by the National Association of Securities Dealers, Inc.; or (ii) not so listed or quoted, but are held by at least three hundred (300) shareholders and the shares outstanding have a market value of at least Twenty Million Dollars (\$20,000,000.00) (exclusive of the value of such shares held by the corporation's subsidiaries, senior executives, directors and beneficial shareholders owning more than ten percent (10%) of such shares).

(c) In this section "beneficial shareholder" has the meaning specified in Section 79-4-13.01(2).

§ 79-4-14.31. Venue; parties; court powers; notice

(a) Venue for a proceeding brought by any party named in Section 79-4-14.30 lies in the county where a corporation's principal office (or, if none in this state, its registered office) is or was last located.

(b) It is not necessary to make shareholders parties to a proceeding to dissolve a corporation unless relief is sought against them individually.

(c) A court in a proceeding brought to dissolve a corporation may issue injunctions, appoint a receiver or custodian pendente lite with all powers and duties the court directs, take other action required to preserve the corporate assets wherever located, and carry on the business of the corporation until a full hearing can be held.

(d) Within ten (10) days of the commencement of a proceeding under Section 79-4-14.30(2) to dissolve a corporation that is not a public corporation, the corporation shall send to all shareholders, other than the petitioner, a notice stating that the shareholders are entitled to avoid the dissolution of the corporation by electing to purchase the petitioner's shares under Section 79-4-14.34 and accompanied by a copy of Section 79-4-14.34.

§ 79-4-14.32. Receivers and custodians

(a) Unless an election to purchase has been filed under Section 79-4-14.34, a court in a judicial proceeding brought to dissolve a corporation may appoint one or more receivers to wind up and liquidate, or one or more custodians to manage, the business and affairs of the corporation. The court shall hold a hearing, after notifying all parties to the proceeding and any interested persons designated by the court, before appointing a receiver or custodian. The court appointing a receiver or custodian has jurisdiction over the corporation and all its property wherever located.

(b) The court may appoint an individual or a domestic or foreign corporation (authorized to transact business in this state) as a receiver or custodian. The court may require the receiver or custodian to post bond, with or without sureties, in an amount the court directs.

(c) The court shall describe the powers and duties of the receiver or custodian in its appointing order, which may be amended from time to time. Among other powers:

(1) The receiver (i) may dispose of all or any part of the assets of the corporation wherever located, at a public or private sale, if authorized by the court; and (ii) may sue and defend in his own name as receiver of the corporation in all courts of this state;

(2) The custodian may exercise all the powers of the corporation, through or in place of its board of directors or officers, to the extent necessary to manage the affairs of the corporation in the best interests of its shareholders and creditors.

(d) The court during a receivership may redesignate the receiver a custodian, and during a custodianship may redesignate the custodian a receiver, if doing so is in the best interests of the corporation, its shareholders and creditors.

(e) The court from time to time during the receivership or custodianship may order compensation paid and expenses paid or reimbursed to the receiver or custodian from the assets of the corporation or proceeds from the sale of the assets.

Article 15. Foreign Corporations

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§ 79-4-15.32. Appeal and reinstatement

§ 79-4-15.33. Denial of reinstatement; further review

§ 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 partner of any general or limited 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.

(e) A foreign corporation shall not be considered to be transacting business in this state solely because it:

(1) Is a shareholder in a corporation or a foreign corporation that transacts business in this state;

(2) Is a limited partner of a limited partnership or foreign limited partnership that is transacting business in this state; or

(3) Is a member or manager of a limited liability company or foreign limited liability company that is transacting business in this state.

(f) 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.

§ 79-4-15.02. Transacting business without authority, effects

(a) A foreign corporation transacting business in this state without a certificate of authority may not maintain a proceeding in any court in this state until it obtains a certificate of authority.

(b) The successor to a foreign corporation that transacted business in this state without a certificate of authority and the assignee of a cause of action arising out of that business may not maintain a proceeding based on that cause of action in any court in this state until the foreign corporation or its successor obtains a certificate of authority.

(c) A court may stay a proceeding commenced by a foreign corporation, its successor or assignee until it determines whether the foreign corporation or its successor requires a certificate of authority. If it so determines, the court may further stay the proceeding until the foreign corporation or its successor obtains the certificate.

(d) A foreign corporation is liable for a civil penalty of Ten Dollars (\$10.00) for each day, but not to exceed a total of One Thousand Dollars (\$1,000.00) for each year, it transacts business in this state without a certificate of authority. The Attorney General may collect all penalties due under this subsection.

(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.~~

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.

§ 79-4-15.03. Application for certificate

(a) A foreign corporation may apply for a certificate of authority to transact business in this state by delivering an application to the Secretary of State for filing. The application must set forth:

(1) The name of the foreign corporation or, if its name is unavailable for use in this state, a corporate name that satisfies the requirements of Section 79-4-15.06;

(2) The name of the state or country under whose law it is incorporated;

(3) Its date of incorporation and period of duration;

(4) The street address of its principal office;

(5) The address of its registered office in this state and the name of its registered agent at that office; and

(6) The names and usual business addresses of its current directors and officers.

- (4) A mailing address to which the Secretary of State may mail a copy of any process served on him under subdivision (3); and
- (5) A commitment to notify the Secretary of State in the future of any change in its mailing address.

(c) After the withdrawal of the corporation is effective, service of process on the Secretary of State under this section is service on the foreign corporation. Upon receipt of process, the Secretary of State shall mail a copy of the process to the foreign corporation at the mailing address set forth in its application for withdrawal.

§ 79-4-15.30. Grounds

The Secretary of State may commence a proceeding under Section 79-4-15.31 to revoke the certificate of authority of a foreign corporation authorized to transact business in this state if:

- (1) The foreign corporation does not deliver its annual report to the Secretary of State within sixty (60) days after it is due;
- (2) The foreign corporation does not pay within sixty (60) days after they are due any franchise taxes or penalties imposed by Sections 79-4-1.01 et seq. or other law;
- (3) The foreign corporation is without a registered agent or registered office in this state for sixty (60) days or more;
- (4) The foreign corporation does not inform the Secretary of State under Section 79-4-15.08 or 79-4-15.09 that its registered agent or registered office has changed, that its registered agent has resigned, or that its registered office has been discontinued within sixty (60) days of the change, resignation or discontinuance;
- (5) An incorporator, director, officer or agent of the foreign corporation signed a document he knew was false in any material respect with intent that the document be delivered to the Secretary of State for filing;
- (6) The Secretary of State receives a duly authenticated certificate from the Secretary of State or other official having custody of corporate records in the state or country under whose law the foreign corporation is incorporated stating that it has been dissolved or disappeared as the result of a merger.

§ 79-4-15.31. Procedure and effect

- (a) If the Secretary of State determines that one or more grounds exist under Section 79-4-15.30 for revocation of a certificate of authority, he shall serve the foreign corporation with written notice of his determination under Section 79-4-15.10, except that such determination may be served by first class mail.
- (b) If the foreign corporation does not correct each ground for revocation or demonstrate to the reasonable satisfaction of the Secretary of State that each ground determined by the Secretary of State does not exist within sixty (60) days after service of the notice is perfected under Section 79-4-15.10, the Secretary of State may revoke the foreign corporation's certificate of authority by signing a certificate of revocation that recites the ground or grounds for revocation and its effective date. The Secretary of State shall file the original of the certificate and serve a copy on the foreign corporation under Section 79-4-15.10, except that such certificate may be served by first class mail.
- (c) The authority of a foreign corporation to transact business in this state ceases on the date shown on the certificate revoking its certificate of authority.
- (d) The Secretary of State's revocation of a foreign corporation's certificate of authority appoints the Secretary of State the foreign corporation's agent for service of process in any proceeding based on a cause of action which arose during the time the foreign corporation was authorized to transact business in this state. Service of process on the Secretary of State under this subsection is service on the foreign corporation. Upon receipt of process, the Secretary of State shall mail a copy of the process to the secretary of the foreign corporation at its principal office shown in its most recent annual report or in any subsequent communication received from the corporation stating the current mailing address of its principal office, or, if none are on file, in its application for a certificate of authority.

(e) Revocation of a foreign corporation's certificate of authority does not terminate the authority of the registered agent of the corporation.

(f) The administrative revocation of a foreign corporation's 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.

(g) An officer, or director or shareholder of a foreign corporation is not liable for the debts, obligations, or liabilities of such foreign corporation solely by reason of the administrative revocation of the certificate of authority of a foreign corporation.

(h) A foreign corporation whose registration has been administratively revoked may not maintain any action, suit or proceeding in any court of this state until such foreign corporation's certificate of authority has been reinstated. An action, suit or proceeding may not be maintained in any court of this state by any successor or assignee of such foreign corporation on any right, claim or demand arising out of the transaction of business by a foreign corporation after the administrative revocation.

§ 79-4-15.32. Appeal and reinstatement

(a) A foreign corporation whose certificate of authority is administratively revoked under Section 79-4-15.31 may apply to the Secretary of State for reinstatement at any time after the effective date of such revocation. The application must:

- (1) Recite the name of the corporation and the effective date of the administrative revocation;
- (2) State that the ground or grounds for revocation either did not exist or have been eliminated;
- (3) State that the corporation's name satisfies the requirements of Section 79-4-4.01; and
- (4) Contain a certificate from the Mississippi State Tax Commission reciting that the corporation has properly filed all reports and paid all taxes and penalties required by revenue laws of this state.

(b) If the Secretary of State determines that the application contains the information required by subsection (a) and that the information is correct, he shall reinstate the certificate of authority, prepare a certificate that recites his determination and the effective date of reinstatement, file the original of the certificate, and serve a copy on the corporation under Section 79-4-5.04.

(c) When the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative revocation, any liability incurred by the foreign corporation or a director, officer or shareholder after the administrative revocation and before the reinstatement shall be determined as if the administrative revocation had never occurred; and the corporation resumes carrying on its business as if the administrative revocation had never occurred.

§ 79-4-15.33. Denial of reinstatement; further review

(a) If the Secretary of State denies a foreign corporation's application for reinstatement following administrative revocation, he shall serve the corporation under Section 79-4-5.04, Mississippi Code of 1972, with a written communication that explains the reason or reasons for denial.

(b) The corporation may appeal the denial of reinstatement to the Chancery Court of the First Judicial District of Hinds County or the chancery court of the county where the corporation is domiciled within thirty (30) days after service of the communication of denial is perfected. The corporation appeals by petitioning the court to set aside the revocation and attaching to the petition copies of the Secretary of State's communication of denial.

(c) The court may summarily order the Secretary of State to reinstate the revoked corporation or may take other action the court considers appropriate.

(d) The court's final decision may be appealed as in other civil proceedings.