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2008 BUSINESS REFORM COMMITTEES
SECOND MEETING OF THE CORPORATIONS LAW STUDY GROUP

JULY 30, 2008
11:00 A.M.

Secretary of State's Office
700 North Street
Jackson, Mississippi

AGENDA

1. Welcome – Tommy Shepherd

2. Roll Call – Cheryn Baker

3. Introductory Remarks – Committee Co-Chairs

4. Business Services Division Update – Tom Riley, Assistant Secretary of State, Business Services

5. Subcommittee Assignments:

    a. Model Registered Agent Act

    b. Conversion and Junction Box Statutes

    c. Mississippi Business Corporation Act Changes

        1) Duties and Protection Provisions
            a) Director Disclosure of Material Issues
            b) Board and Officer Exculpation
        2) Remote Shareholder Meetings/Meetings by Teleconference
        3) Electronic Transmissions

    d. Forms/Filings

        1) Expedited and Online Filings
        2) Payment Methods
        3) Online Good Standing Certificates

4) Annual Reports
5) Filing Fees
6) Reinstatement Process

6. Format of Upcoming Meetings

7. Other Business

8. Adjourn

Upcoming Meeting Dates

August 13

August 27

September 8 – No meeting; Recommendations Due

Materials included in the Packet for Today's Meeting:

1. MoRAA Joint Committee Roster
2. Proposed Model B.C.A. Amendments –
    a. Electronic Transmissions
    b. Model B.C.A. Director and Officer Duties to Disclose Material Issues
    c. Director Exculpation Provisions
    d. Officer Exculpation Provisions

1. Remote or Teleconference Meetings of Shareholders.

At least four states have amended their corporation law to permit holding remote shareholder meetings by teleconference or virtual meeting. Copies of the statutes from Arizona, Hawaii, Minnesota, and North Dakota are included in Exhibit A.

2. Exculpation of Officers.

At least six states extend exculpation to officers as well as directors. Copies of the statutes from Louisiana, Maryland, New Hampshire, Nevada, New Jersey, and Virginia are included in Exhibit B. In Nevada, exculpation is self-executing by statute for both officers and directors.

3. Self-executing Exculpation of Directors.

Concerning statutory exculpation of directors, Utah and Louisiana allow corporations to grant it by charter provision, but also provide a statutory provision if the corporation neglects to limit director liability in its articles of incorporation. Copies of the Louisiana and Utah statutes are included in Exhibit C. Nevada provides a good example of a self-executing limit. Virginia allows the complete elimination of director liability by charter provision, but if the charter provision is neglected, the statute provides a monetary limit on director liability. Copies of the Virginia and Nevada statutes are included in Exhibit C.

4. Duties of Disclosure of Directors and Officers

The Model Act and Mississippi Act no longer match exactly as it regards the duties of Officers and Directors. Post-Enron, the MBCA has added provisions requiring disclosure of material information possessed by officers and directors. The changes are found in MBCA §§ 8.30(c) and 8.42(b)(1),(2). A copy of Mississippi Business Corporations Act §§ 8.30 and 8.42 and MBCA §§ 8.30 and 8.42 are included in Exhibit D to illustrate the difference between the two statutes.

Exhibit A
Remote or Teleconference Meetings of Shareholders
Selected State Statutes

Arizona

ARIZONA REVISED STATUTES ANNOTATED
TITLE 10. CORPORATIONS AND ASSOCIATIONS
CHAPTER 7. SHAREHOLDERS
ARTICLE 1. MEETINGS

>> s 10-708. Participation in shareholders' meeting

Unless the articles of incorporation or bylaws provide otherwise, the board of directors may permit any or all shareholders to participate in an annual or special shareholders' meeting by or conduct the meeting through use of any means of communication by which all shareholders participating may simultaneously hear each other during the meeting. If the board of directors in its sole discretion elects to permit participation by such means of communication, the notice of the meeting shall specify how a shareholder may participate in the meeting by such means of communication. The participation may be limited by the board of directors in its sole discretion to specified locations or means of communications. A shareholder participating in a meeting by this means is deemed to be present in person at the meeting.

Current through legislation effective July 7, 2008

Hawaii

HAWAI'I REVISED STATUTES ANNOTATED
DIVISION 2. BUSINESS
TITLE 23. CORPORATIONS AND PARTNERSHIPS
CHAPTER 414. HAWAII BUSINESS CORPORATION ACT
PART VIII. SHAREHOLDERS
A. MEETINGS
➡§ 414-125. Notice of meeting

(a) A corporation shall notify shareholders of the date, time, and place, if any, of each annual and special shareholders' meeting no fewer than ten nor more than sixty days before the meeting date. If means of remote communication are authorized for use in a meeting, regardless of whether the meeting is held at a designated place or solely by means of remote communication, the notice shall also inform shareholders of the means of remote communication by which shareholders may be deemed to be present in person and allowed to vote. Unless this chapter or the articles of incorporation require otherwise,

the corporation is required to give notice only to shareholders entitled to vote at the meeting.

(b) Unless this chapter or the articles of incorporation require otherwise, notice of an annual meeting need not include a description of the purpose or purposes for which the meeting is called.

(c) Notice of a special meeting must include a description of the purpose or purposes for which the meeting is called.

(d) If not otherwise fixed under section 414-123 or 414-127, the record date for determining shareholders entitled to notice of and to vote at an annual or special shareholders' meeting is the day before the first notice is delivered to shareholders.

(e) Unless the bylaws require otherwise, if an annual or special shareholders' meeting is adjourned to a different date, time, or place, notice need not be given of the new date, time, or place if the new date, time, or place is announced at the meeting before adjournment. In addition, if the annual or special **shareholders' meeting** was held solely by means of **remote communication**, and the adjourned meeting will be held by a means of **remote communication** by which shareholders may be deemed to be present in person and vote, notice need not be given of the new means of **remote communication** if the new means of **remote communication** is announced at the meeting before adjournment. If a new record date for the adjourned meeting is or must be fixed under section 414- 127, however, notice of the adjourned meeting shall be given under this section to shareholders who are entitled to notice of the new record date.

Current through the 2007 third special session of the Hawaii Legislature.

Minnesota

Minnesota Statutes Annotated Currentness
Corporations (Ch. 300-319B)
Chapter 302A. Business Corporations (Refs & Annos)
Shares; Shareholders

➡**302A.436. Remote communications** for **shareholder meetings**

Subdivision 1. Construction and application. This section shall be construed and applied to:

(1) facilitate remote communication consistent with other applicable law; and

(2) be consistent with reasonable practices concerning remote communication and with the continued expansion of those practices.

Subd. 2. Shareholder meetings held solely by means of **remote communication**. To the extent authorized in the articles or bylaws and determined by the board, a regular or special meeting of shareholders may be held solely by any combination of means of remote communication through which the shareholders may participate in the meeting, if notice of the meeting is given to every holder of shares entitled to vote required by this chapter for a meeting, and if the number of shares held by the shareholders participating in the meeting would be sufficient to constitute a quorum at a meeting. Participation by a shareholder by that means constitutes presence at the meeting in person or by proxy if all the other requirements of section 302A.449 are met.

Subd. 3. Participation in shareholder meetings by means of **remote communication**. To the extent authorized in the articles or bylaws and determined by the board, a shareholder not physically present in person or by proxy at a regular or special meeting of shareholders may, by means of remote communication, participate in a meeting of shareholders held at a designated place. Participation by a shareholder by that means constitutes presence at the meeting in person or by proxy if all the other requirements of section 302A.449 are met.

Subd. 4. Requirements for meetings held solely by means of remote communication and for participation by means of remote communication. In any meeting of shareholders held solely by means of remote communication under subdivision 2 or in any meeting of shareholders held at a designated place in which one or more shareholders participate by means of remote communication under subdivision 3:

(1) the corporation shall implement reasonable measures to verify that each person deemed present and entitled to vote at the meeting by means of remote communication is a shareholder; and

(2) the corporation shall implement reasonable measures to provide each shareholder participating by means of remote communication with a reasonable opportunity to participate in the meeting, including an opportunity to:

(i) read or hear the proceedings of the meeting substantially concurrently with those proceedings;

(ii) if allowed by the procedures governing the meeting, have the shareholder's remarks heard or read by other participants in the meeting substantially concurrently with the making of those remarks; and

(iii) if otherwise entitled, vote on matters submitted to the shareholders.

Subd. 5. Notice to shareholders. (a) Any notice to shareholders given by the corporation under any provision of this chapter, the articles, or the bylaws by a form of electronic communication consented to by the shareholder to whom the notice is given is effective when given. The notice is deemed given:

(1) if by facsimile communication, when directed to a telephone number at which the shareholder has consented to receive notice;

(2) if by electronic mail, when directed to an electronic mail address at which the shareholder has consented to receive notice;

(3) if by a posting on an electronic network on which the shareholder has consented to receive notice, together with separate notice to the shareholder of the specific posting, upon the later of:

(i) the posting; and

(ii) the giving of the separate notice; and

(4) if by any other form of electronic communication by which the shareholder has consented to receive notice, when directed to the shareholder.

An affidavit of the secretary, other authorized officer, or authorized agent of the corporation, that the notice has been given by a form of electronic communication is, in the absence of fraud, prima facie evidence of the facts stated in the affidavit.

(b) Consent by a shareholder to notice given by electronic communication may be given in writing or by authenticated electronic communication. The corporation is entitled to rely on any consent so given until revoked by the shareholder, provided that no revocation affects the validity of any notice given before receipt by the corporation of revocation of the consent.

Subd. 6. Revocation. Any ballot, vote, authorization, or consent submitted by electronic communication under this chapter may be revoked by the shareholder submitting the ballot, vote, authorization, or consent so long as the revocation is received by an officer of the corporation at or before the meeting or before an action without a meeting is effective according to section 302A.441.

Subd. 7. Waiver. Waiver of notice by a shareholder of a meeting by means of authenticated electronic communication may be given in the manner provided in section 302A.435, subdivision 4. Participation in a meeting by means of remote communication described in subdivisions 2 and 3 is a waiver of notice of that meeting, except where the shareholder objects at the beginning of the meeting to the transaction of business because the meeting is not lawfully called or convened, or objects before a vote on an item of business because the item may not lawfully be considered at the meeting and does not participate in the consideration of the item at that meeting.

Current with laws of the 2008 Regular Session, Chapters 151 through 211,
except Statutes Chapters 119 through 143, which are current through
all laws of the 2008 Regular Session.

North Dakota

North Dakota Business Corporation Act--General Provisions

➡§ 10-19.1-75.2. Remote communications for shareholder meetings

1. This section shall be construed and applied to:

a. Facilitate remote communication consistent with other applicable law; and

b. Be consistent with reasonable practices concerning remote communication and with the continued expansion of those practices.

2. To the extent authorized in the articles or the bylaws and determined by the board:

a. A meeting of the shareholders may be held solely by any combination of means of remote communication through which the participants may participate in the meeting:

(1) If notice of the meeting is given to every holder of shares entitled to vote as would be required by this chapter for a meeting; and

(2) If the number of shares held by the shareholders participating in the meeting would be sufficient to constitute a quorum at a meeting.

b. A shareholder not physically present in person or by proxy at a regular or special meeting of shareholders may participate by means of remote communication participate in a meeting of shareholders held at a designated place.

3. In any meeting of shareholders held solely by means of remote communication under subdivision a of subsection 2 or in any meeting of shareholders held at a designated place in which one or more shareholders participate by means of remote communication under subdivision b of subsection 2:

a. The corporation shall implement reasonable measures to:

(1) Verify that each person deemed present and entitled to vote at the meeting by means of remote communication is a shareholder; and

(2) Provide each shareholder participating by means of remote communication with a reasonable opportunity to participate in the meeting, including an opportunity to:

(a) Read or hear the proceedings of the meeting substantially concurrently with those proceedings;

(b) If allowed by the procedures governing the meeting, have the shareholder's remarks heard or read by other participants in the meeting substantially concurrently with the making of those remarks; and

(c) If otherwise entitled, vote on matters submitted to the shareholders.

b. Participation in a meeting by this means constitutes presence at the meeting in person or by proxy if all of the requirements of section 10-19.1-76.2 are met.

4. With respect to notice to shareholders:

a. Any notice to shareholders given by the corporation under any provision of this chapter, the articles, or the bylaws by a form of electronic communication consented to by the shareholder to whom the notice is given is effective when given. The notice is deemed given:

(1) If by facsimile communication, when directed to a telephone number at which the shareholder has consented to receive notice;

(2) If by electronic mail, when directed to an electronic mail address at which the shareholder has consented to receive notice;

(3) If by a posting on an electronic network on which the shareholder has consented to receive notice, together with separate notice to the shareholder of the specific posting, upon the later of:

(a) The posting; or

(b) The giving of the separate notice; or

(4) If by any other form of electronic communication by which the shareholder has consented to receive notice, when directed to the shareholder.

b. An affidavit of the secretary, other authorized officer, or authorized agent of the corporation, that the notice has been given by a form of electronic communication is, in the absence of fraud, prima facie evidence of the facts stated in the affidavit.

c. Consent by a shareholder to notice given by electronic communication may be given in writing or by authenticated electronic communication. The corporation is entitled to rely on any consent so given until revoked by the shareholder. However, no revocation affects the validity of any notice given before receipt by the corporation of revocation of the consent.

5. Any ballot, vote, authorization, or consent submitted by electronic communication under this chapter may be revoked by the shareholder submitting the ballot, vote, authorization, or consent so long as the revocation is received by an officer of the

corporation at or before the meeting or before an action without a meeting is effective according to section 10-19.1-75.

6. Waiver of notice by a shareholder of a meeting by means of authenticated electronic communication may be given in the manner provided in subsection 4 of section 10-19.1-73. Participation in a meeting by means of remote communication described in subdivisions a and b of subsection 2 is a waiver of notice of that meeting, except when the shareholder objects:

a. At the beginning of the meeting to the transaction of business because the meeting is not lawfully called or convened; or

b. Before a vote on an item of business because the item may not lawfully be considered at the meeting and does not participate in the consideration of the item at that meeting.

Current through the 2007 Regular Session of the 60th Legislative Assembly.

Exhibit B
Exculpation of Officers
Selected State Statutes

Louisiana

Louisiana Revised Statutes
Title 12. Corporations and Associations (Refs & Annos)
Chapter 1. Business Corporation Law (Refs & Annos)
Part II. Incorporation

➡§ 24. Articles of incorporation

A. The articles shall be written in the English language, and shall be signed by each incorporator, or by an agent of each incorporator duly authorized by a document attached to the articles. The articles shall be acknowledged by one of the persons who signed the articles, or may instead be executed by authentic act.

B. The articles shall set forth:

(1) The name of the corporation.

(2) In general terms, the purpose or purposes for which the corporation is to be formed, or that its purpose is to engage in any lawful activity for which corporations may be formed under this Chapter.

(3) The duration of the corporation, if other than perpetual.

(4) The aggregate number of shares which the corporation shall have authority to issue.

(5) If the shares are to consist of one class only, the par value of each share or a statement that all of the shares are without par value.

(6)(a) If the shares are to be divided into classes, the number of shares of each class; the par value of the shares of each class or a statement that such shares are without par value; the designation of each class and, insofar as fixed in the articles, each series of each preferred or special class; a statement of the preferences, limitations and relative rights of the shares of each class and the variations in relative rights and preferences as between series, insofar as the same are fixed in the articles; and a statement of any authority vested in the board of directors to amend the articles to fix the preferences, limitations and relative rights of the shares of any class, and to establish, and fix variations in relative rights as between, series of any preferred or special class.

(b) Any of the designations, preferences, limitations and relative rights of the shares of any class and of the variations in relative rights and preferences as between series may be made dependent upon facts ascertainable outside the articles or any amendment thereto,

provided that the manner in which such facts shall operate upon the designations, preferences, limitations, relative rights, or variations in relative rights and preferences is clearly and expressly set forth in the articles or amendment thereto. The term "facts", as used in this Paragraph, includes but is not limited to the occurrence of any event, including a determination or action by any person or body, including the corporation.

(7) The full name and post office address of each incorporator.

(8) The taxpayer identification number of the corporation. The failure to include the taxpayer identification number of the corporation shall not invalidate nor cause the secretary of state to reject the articles.

C. The articles may also contain the following:

(1) A provision granting to the shareholders or any class of shareholders the preemptive right to subscribe to any or all additional issues of stock, or securities convertible into stock, of the corporation of any or all classes. A provision that "Shareholders shall have preemptive rights" shall have the meaning stated in R.S. 12:72, and this provision shall be deemed to be included in the articles of every corporation heretofore formed unless the articles contain a specific provision enlarging, limiting or denying preemptive rights.

(2) Any provision concerning the powers or rights of the corporation, the directors or the shareholders, or any class or classes of shareholders.

(3) A provision that cash, property or share dividends, shares issuable to shareholders in connection with a reclassification of stock, and the redemption price of redeemed shares, which are not claimed by the shareholders entitled thereto within a reasonable time (not less than one year in any event) after the dividend or redemption price became payable or the shares became issuable, despite reasonable efforts by the corporation to pay the dividend or redemption price or deliver the certificates for the shares to such shareholders within such time, shall, at the expiration of such time, revert in full ownership to the corporation, and the corporation's obligation to pay such dividend or redemption price or issue such shares, as the case may be, shall thereupon cease; provided that the board of directors may, at any time, for any reason satisfactory to it, but need not, authorize (a) payment of the amount of any cash or property dividend or redemption price or (b) issuance of any shares, ownership of which has reverted to the corporation pursuant to a provision of the articles authorized by this section, to the entity who or which would be entitled thereto had such reversion not occurred.

(4) A provision eliminating or limiting the personal liability of a director or officer to the corporation or its shareholders for monetary damages for breach of fiduciary duty as a director or officer, provided that such provision shall not eliminate or limit the liability of a director or officer:

(a) For any breach of the director's or officer's duty of loyalty to the corporation or its shareholders;

(b) For acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law;

(c) For liability under R.S. 12:92(D); or

(d) For any transaction from which the director or officer derived an improper personal benefit.

No such provision shall eliminate or limit the liability of a director or officer for any act or omission occurring prior to the date when such provision becomes effective.

(5) Any other provisions for the regulation of the business and the conduct of the affairs of the corporation not prohibited by this Chapter or other laws of this state, including, without limitation of the generality of the foregoing phrase, any provisions restricting the transfer of shares or for the optional or compulsory sale and purchase of shares among the shareholders and the corporation or any of them.

LSA-R.S. 12:24, LA R.S. 12:24

Current through the 2008 Second Extraordinary Session.

Maryland

CORPORATIONS AND ASSOCIATIONS
TITLE 2. CORPORATIONS IN GENERAL--FORMATION, ORGANIZATION, AND OPERATION
SUBTITLE 1--FORMATION AND POWERS
➡§ 2-104. Provisions of articles of incorporation

(a) The articles of incorporation shall include:

(1) The name and address of each incorporator and a statement that each incorporator is:

(i) 18 years old or older; and

(ii) Forming a corporation under the general laws of the State of Maryland;

(2) The name of the corporation;

(3) The purposes for which the corporation is formed or a statement that the corporation may engage in any lawful business or other activity;

(4) The address of the principal office of the corporation;

(5) The name and address of the resident agent of the corporation;

(6)(i) The total number of shares of stock of all classes which the corporation has authority to issue;

(ii) The number of shares of stock of each class;

(iii) The par value of the shares of stock of each class or a statement that the shares are without par value; and

(iv) If there are any shares of stock with par value, the aggregate par value of all the shares of all classes;

(7) If the stock is divided into classes as permitted by § 2-105 of this subtitle, a description of each class including any preferences, conversion and other rights, voting powers, restrictions, limitations as to dividends, qualifications, and terms and conditions of redemption; and

(8) The number of directors and the names of those individuals who will serve as directors until their successors are elected and qualify.

(b) The articles of incorporation may include:

(1) Any provision not inconsistent with law that defines, limits, or regulates the powers of the corporation, its directors and stockholders, any class of its stockholders, or the holders of any bonds, notes, or other securities that it may issue;

(2) Any restriction not inconsistent with law on the transferability of stock of any class;

(3) Any provision authorized by this article to be included in the bylaws;

(4) Any provision that requires for any purpose the concurrence of a greater proportion of the votes of all classes or of any class of stock than the proportion required by this article for that purpose;

(5) A provision that requires for any purpose a lesser proportion of the votes of all classes or of any class of stock than the proportion required by this article for that purpose, but this proportion may not be less than a majority of all the votes entitled to be cast on the matter;

(6) A provision that divides its directors into classes and specifies the term of office of each class;

(7) A provision for minority representation through cumulative voting in the election of directors and the terms on which cumulative voting rights may be exercised;

(8) A provision that varies in accordance with § 2-405.2 of this title the standards for

liability of the directors and officers of a corporation for money damages; and

(9) A provision that allows the board of directors, in considering a potential acquisition of control of the corporation, to consider the effect of the potential acquisition of control on:

(i) Stockholders, employees, suppliers, customers, and creditors of the corporation; and

(ii) Communities in which offices or other establishments of the corporation are located.

(c) The inclusion or omission of a provision in the charter that allows the board of directors to consider the effect of a potential acquisition of control on persons specified in subsection (b)(9) of this section does not create an inference concerning factors that may be considered by the board of directors regarding a potential acquisition of control.

➡§ 2-405.2. Limitation or expansion of director liability

The charter of the corporation may include any provision expanding or limiting the liability of its directors and officers to the corporation or its stockholders as described under § 5-418 of the Courts and Judicial Proceedings Article.

Current through all chapters of the 2008 Regular Session of the General Assembly, effective through July 1, 2008.

New Hampshire

TITLE XXVII. CORPORATIONS, ASSOCIATIONS, AND PROPRIETORS OF COMMON LANDS
CHAPTER 293-A. NEW HAMPSHIRE BUSINESS CORPORATION ACT
INCORPORATION
➡293-A:2.02 Articles of Incorporation.

(a) The articles of incorporation shall set forth:

(1) A corporate name for the corporation that satisfies the requirements of RSA 293-A:4.01.

(2) The number of shares the corporation is authorized to issue.

(3) The street address of the corporation's initial registered office and the name of its initial registered agent at that office.

(4) The name and address of each incorporator.

(b) The articles of incorporation may set forth:

(1) The names and addresses of the individuals who are to serve as the initial directors.

(2) Provisions not inconsistent with law regarding:

(i) The purposes for which the corporation is organized.

(ii) Managing the business and regulating the powers of the corporation, its board of directors, and shareholders.

(iii) Defining, limiting, and regulating the powers of the corporation, its board of directors, and shareholders.

(iv) A par value for authorized shares or classes of shares.

(v) The imposition of personal liability on shareholders for the debts of the corporation to a specified extent and upon specified conditions.

(3) Any provision that under this chapter is required or permitted to be set forth in the bylaws.

(4) A provision eliminating or limiting the liability of a director, an officer, or both, to the corporation or its shareholders for money damages for any action taken, or any failure to take any action, as a director or an officer, except liability for:

(i) The amount of a financial benefit received by a director or an officer to which he is not entitled;

(ii) An intentional infliction of harm on the corporation or the shareholders;

(iii) A violation of RSA 293-A:8.33; or

(iv) An intentional violation of criminal law.

(c) The articles of incorporation need not set forth any of the corporate powers enumerated in this chapter.

Updated with laws currently effective June 30, 2008 through Chapter 211
of the 2008 Reg. Sess., not including changes and corrections made
by the State of New Hampshire, Office of Legislative Services.

New Jersey

Title 14A. Corporations, General (Refs & Annos)
Chapter 2. Formation (Refs & Annos)
➡ 14A:2-7. Certificate of incorporation

(1) The certificate of incorporation shall set forth:

(a) The name of the corporation;

(b) The purpose or purposes for which the corporation is organized. It shall be a sufficient compliance with this paragraph to state, alone or with specifically enumerated purposes, that the corporation may engage in any activity within the purposes for which corporations may be organized under this act, and all such activities shall by such statement be deemed within the purposes of the corporation, subject to express limitations, if any;

(c) The aggregate number of shares which the corporation shall have authority to issue;

(d) If the shares are, or are to be, divided into classes, or into classes and series, the designation of each class and series, the number of shares in each class and series, and a statement of the relative rights, preferences and limitations of the shares of each class and series, to the extent that such designations, numbers, relative rights, preferences and limitations have been determined;

(e) If the shares are, or are to be, divided into classes, or into classes and series, a statement of any authority vested in the board to divide the shares into classes or series or both, and to determine or change for any class or series its designation, number of shares, relative rights, preferences and limitations;

(f) Any provision not inconsistent with this act or any other statute of this State, which the incorporators elect to set forth for the management of the business and the conduct of the affairs of the corporation, or creating, defining, limiting or regulating the powers of the corporation, its directors and shareholders or any class of shareholders, including any provision which under this act is required or permitted to be set forth in the bylaws;

(g) The address of the corporation's initial registered office, and the name of the corporation's initial registered agent at such address. On or after the effective date of this 1989 amendatory and supplementary act, the address of the registered office as shown on the certificate of incorporation shall be a complete address, including the number and street location of the registered office and, if applicable, the post office box number;

(h) The number of directors constituting the first board and the names and addresses of the persons who are to serve as such directors;

(i) The names and addresses of the incorporators;

(j) The duration of the corporation if other than perpetual; and

(k) If, pursuant to subsection 14A:2-7(2), the certificate of incorporation is to be effective on a date subsequent to the date of filing, the effective date of the certificate.

(2) The certificate of incorporation shall be filed in the office of the Secretary of State. The corporate existence shall begin upon the effective date of the certificate, which shall be the date of the filing or such later time, not to exceed 90 days from the date of filing, as may be set forth in the certificate. Such filing shall be conclusive evidence that all conditions precedent required to be performed by the incorporators have been complied with and, after the corporate existence has begun, that the corporation has been incorporated under this act, except as against this State in a proceeding to cancel or revoke the certificate of incorporation or for involuntary dissolution of the corporation.

(3) The certificate of incorporation may provide that a director or officer shall not be personally liable, or shall be liable only to the extent therein provided, to the corporation or its shareholders for damages for breach of any duty owed to the corporation or its shareholders, except that such provision shall not relieve a director or officer from liability for any breach of duty based upon an act or omission (a) in breach of such person's duty of loyalty to the corporation or its shareholders, (b) not in good faith or involving a knowing violation of law or (c) resulting in receipt by such person of an improper personal benefit. As used in this subsection, an act or omission in breach of a person's duty of loyalty means an act or omission which that person knows or believes to be contrary to the best interests of the corporation or its shareholders in connection with a matter in which he has a material conflict of interest.

Current with laws eff. through L.2008, c. 39 andJ.R. No. 3.

Nevada

Title 7. Business Associations; Securities; Commodities
Chapter 78. Private Corporations (Refs & Annos)
Formation (Refs & Annos)

➡78.037. Articles of incorporation: Optional provisions

The articles of incorporation may also contain any provision, not contrary to the laws of this state:

1. For the management of the business and for the conduct of the affairs of the corporation;

2. Creating, defining, limiting or regulating the powers of the corporation or the rights, powers or duties of the directors, the officers or the stockholders, or any class of the stockholders, or the holders of bonds or other obligations of the corporation; or

3. Governing the distribution or division of the profits of the corporation.

Added by Laws 1987, p. 80. Amended by Laws 1991, p. 1210; Laws 1993, p. 945; Laws 2001, c. 601, § 2, eff. June 15, 2001. N. R. S. 78.037, NV ST 78.037

➡78.138. Directors and officers: Exercise of powers; performance of duties; presumptions and considerations; liability to corporation and stockholders

1. Directors and officers shall exercise their powers in good faith and with a view to the interests of the corporation.

2. In performing their respective duties, directors and officers are entitled to rely on information, opinions, reports, books of account or statements, including financial statements and other financial data, that are prepared or presented by:

(a) One or more directors, officers or employees of the corporation reasonably believed to be reliable and competent in the matters prepared or presented;

(b) Counsel, public accountants, financial advisers, valuation advisers, investment bankers or other persons as to matters reasonably believed to be within the preparer's or presenter's professional or expert competence; or

(c) A committee on which the director or officer relying thereon does not serve, established in accordance with NRS 78.125, as to matters within the committee's designated authority and matters on which the committee is reasonably believed to merit confidence, but a director or officer is not entitled to rely on such information, opinions, reports, books of account or statements if he has knowledge concerning the matter in question that would cause reliance thereon to be unwarranted.

3. Directors and officers, in deciding upon matters of business, are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation.

4. Directors and officers, in exercising their respective powers with a view to the interests of the corporation, may consider:

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

(b) The economy of the State and Nation;

(c) The interests of the community and of society; and

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

5. Directors and officers are not required to consider the effect of a proposed corporate action upon any particular group having an interest in the corporation as a dominant factor.

6. The provisions of subsections 4 and 5 do not create or authorize any causes of action against the corporation or its directors or officers.

7. Except as otherwise provided in NRS 35.230, 90.660, 91.250, 452.200, 452.270, 668.045 and 694A.030, or unless the articles of incorporation or an amendment thereto, in each case filed on or after October 1, 2003, provide for greater individual liability, a director or officer is not individually liable to the corporation or its stockholders or creditors for any damages as a result of any act or failure to act in his capacity as a director or officer unless it is proven that:

(a) His act or failure to act constituted a breach of his fiduciary duties as a director or officer; and

(b) His breach of those duties involved intentional misconduct, fraud or a knowing violation of law.

Added by Laws 1991, p. 1184. Amended by Laws 1993, p. 951; Laws 1999, p. 1580; Laws 2001, c. 601, § 3, eff. June 15, 2001; Laws 2003, c. 485, § 23, eff. Oct. 1, 2003.

Current through the 2007 74th Regular Session and the 23rd Special Session of the Nevada Legislature and technical corrections received from the Legislative Counsel Bureau (2007).

Virginia

TITLE 13.1. CORPORATIONS
CHAPTER 9. VIRGINIA STOCK CORPORATION ACT
ARTICLE 9. DIRECTORS AND OFFICERS
➡§ 13.1-692.1. Limitation on liability of officers and directors; exception

A. In any proceeding brought by or in the right of a corporation or brought by or on behalf of shareholders of the corporation, the damages assessed against an officer or director arising out of a single transaction, occurrence or course of conduct shall not exceed the lesser of:

1. The monetary amount, including the elimination of liability, specified in the articles of incorporation or, if approved by the shareholders, in the bylaws as a limitation on or elimination of the liability of the officer or director; or

2. The greater of (i) $100,000 or (ii) the amount of cash compensation received by the officer or director from the corporation during the twelve months immediately preceding the act or omission for which liability was imposed.

B. The liability of an officer or director shall not be limited as provided in this section if the officer or director engaged in willful misconduct or a knowing violation of the criminal law or of any federal or state securities law, including, without limitation, any claim of unlawful insider trading or manipulation of the market for any security.

C. No limitation on or elimination of liability adopted pursuant to this section may be affected by any amendment of the articles of incorporation or bylaws with respect to any act or omission occurring before such amendment.

Current through End of 2008 Special Session I.

Exhibit C
Self-executing Exculpation of Directors
Selected State Statutes

Louisiana

Louisiana Revised Statutes
Title 12. Corporations and Associations (Refs & Annos)
Chapter 1. Business Corporation Law (Refs & Annos)
Part II. Incorporation

➡§ 24. Articles of incorporation

A. The articles shall be written in the English language, and shall be signed by each incorporator, or by an agent of each incorporator duly authorized by a document attached to the articles. The articles shall be acknowledged by one of the persons who signed the articles, or may instead be executed by authentic act.

B. The articles shall set forth:

(1) The name of the corporation.

(2) In general terms, the purpose or purposes for which the corporation is to be formed, or that its purpose is to engage in any lawful activity for which corporations may be formed under this Chapter.

(3) The duration of the corporation, if other than perpetual.

(4) The aggregate number of shares which the corporation shall have authority to issue.

(5) If the shares are to consist of one class only, the par value of each share or a statement that all of the shares are without par value.

(6)(a) If the shares are to be divided into classes, the number of shares of each class; the par value of the shares of each class or a statement that such shares are without par value; the designation of each class and, insofar as fixed in the articles, each series of each preferred or special class; a statement of the preferences, limitations and relative rights of the shares of each class and the variations in relative rights and preferences as between series, insofar as the same are fixed in the articles; and a statement of any authority vested in the board of directors to amend the articles to fix the preferences, limitations and relative rights of the shares of any class, and to establish, and fix variations in relative rights as between, series of any preferred or special class.

(b) Any of the designations, preferences, limitations and relative rights of the shares of any class and of the variations in relative rights and preferences as between series may be

made dependent upon facts ascertainable outside the articles or any amendment thereto, provided that the manner in which such facts shall operate upon the designations, preferences, limitations, relative rights, or variations in relative rights and preferences is clearly and expressly set forth in the articles or amendment thereto. The term "facts", as used in this Paragraph, includes but is not limited to the occurrence of any event, including a determination or action by any person or body, including the corporation.

(7) The full name and post office address of each incorporator.

(8) The taxpayer identification number of the corporation. The failure to include the taxpayer identification number of the corporation shall not invalidate nor cause the secretary of state to reject the articles.

C. The articles may also contain the following:

(1) A provision granting to the shareholders or any class of shareholders the preemptive right to subscribe to any or all additional issues of stock, or securities convertible into stock, of the corporation of any or all classes. A provision that "Shareholders shall have preemptive rights" shall have the meaning stated in R.S. 12:72, and this provision shall be deemed to be included in the articles of every corporation heretofore formed unless the articles contain a specific provision enlarging, limiting or denying preemptive rights.

(2) Any provision concerning the powers or rights of the corporation, the directors or the shareholders, or any class or classes of shareholders.

(3) A provision that cash, property or share dividends, shares issuable to shareholders in connection with a reclassification of stock, and the redemption price of redeemed shares, which are not claimed by the shareholders entitled thereto within a reasonable time (not less than one year in any event) after the dividend or redemption price became payable or the shares became issuable, despite reasonable efforts by the corporation to pay the dividend or redemption price or deliver the certificates for the shares to such shareholders within such time, shall, at the expiration of such time, revert in full ownership to the corporation, and the corporation's obligation to pay such dividend or redemption price or issue such shares, as the case may be, shall thereupon cease; provided that the board of directors may, at any time, for any reason satisfactory to it, but need not, authorize (a) payment of the amount of any cash or property dividend or redemption price or (b) issuance of any shares, ownership of which has reverted to the corporation pursuant to a provision of the articles authorized by this section, to the entity who or which would be entitled thereto had such reversion not occurred.

(4) A provision eliminating or limiting the personal liability of a director or officer to the corporation or its shareholders for monetary damages for breach of fiduciary duty as a director or officer, provided that such provision shall not eliminate or limit the liability of a director or officer:

(a) For any breach of the director's or officer's duty of loyalty to the corporation or its shareholders;

(b) For acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law;

(c) For liability under R.S. 12:92(D); or

(d) For any transaction from which the director or officer derived an improper personal benefit.

No such provision shall eliminate or limit the liability of a director or officer for any act or omission occurring prior to the date when such provision becomes effective.

(5) Any other provisions for the regulation of the business and the conduct of the affairs of the corporation not prohibited by this Chapter or other laws of this state, including, without limitation of the generality of the foregoing phrase, any provisions restricting the transfer of shares or for the optional or compulsory sale and purchase of shares among the shareholders and the corporation or any of them.

➞§ 91. Relation of directors and officers to corporation and shareholders

A. Officers and directors shall be deemed to stand in a fiduciary relation to the corporation and its shareholders, and shall discharge the duties of their respective positions in good faith, and with that diligence, care, judgment, and skill which ordinary prudent men would exercise under similar circumstances in like positions; however, a director or officer shall not be held personally liable to the corporation or the shareholders thereof for monetary damages unless the director or officer acted in a grossly negligent manner as defined in Subsection B of this Section, or engaged in conduct which demonstrates a greater disregard of the duty of care than gross negligence, including but not limited to intentional tortious conduct or intentional breach of his duty of loyalty. Nothing herein contained shall derogate from any indemnification authorized by R.S. 12:83.

B. As used in this Section, "gross negligence" shall be defined as a reckless disregard of or a carelessness amounting to indifference to the best interests of the corporation or the shareholders thereof.

C. A director or officer who makes a business judgment in good faith fulfills the duty of diligence, care, judgment, and skill under Subsection A of this Section if the director or officer:

(1) Does not have a conflict of interest with respect to the subject of the business judgment.

(2) Is informed with respect to the subject of the business judgment to the extent the

director or officer reasonably believes to be appropriate under the circumstances.

(3) Rationally believes that the business judgment is in the best interests of the corporation and its shareholders.

D. In fulfilling his duties under this Section, a director or officer is entitled to rely upon records and other materials and persons as specified in R.S. 12:92(E).

E. A person alleging a breach of the duty of diligence, care, judgment, and skill owed by an officer or director under Subsection A shall have the burden of proving the alleged breach of duty, including the inapplicability of the provisions as to the fulfillment of the duty under Subsections C and D and, in a damage action, the burden of proving that the breach was the legal cause of damage suffered by the corporation.

F. The provisions of this Section shall apply to all business organizations, whether incorporated or unincorporated, formed under Louisiana law.

Current through the 2008 Second Extraordinary Session.

Utah

TITLE 16. CORPORATIONS
CHAPTER 10A. UTAH REVISED BUSINESS CORPORATION ACT
PART 8. DIRECTORS AND OFFICERS
➞§ 16-10a-840. General standards of conduct for directors and officers

(1) Each director shall discharge his duties as a director, including duties as a member of a committee, and each officer with discretionary authority shall discharge his duties under that authority:

(a) in good faith;

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

(c) in a manner the director or officer reasonably believes to be in the best interests of the corporation.

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

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

(b) legal counsel, public accountants, or other persons as to matters the director or officer

reasonably believes are within the person's professional or expert competence; or

(c) in the case of a director, a committee of the board of directors of which he is not a member, if the director reasonably believes the committee merits confidence.

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

(4) A director or officer is not liable to the corporation, its shareholders, or any conservator or receiver, or any assignee or successor-in-interest thereof, for any action taken, or any failure to take any action, as an officer or director, as the case may be, unless:

(a) the director or officer has breached or failed to perform the duties of the office in compliance with this section; and

(b) the breach or failure to perform constitutes gross negligence, willful misconduct, or intentional infliction of harm on the corporation or the shareholders.

➡§ 16-10a-841. Limitation of liability of directors

(1) Without limiting the generality of Subsection 16-10a-840(4), if so provided in the articles of incorporation or in the bylaws or a resolution to the extent permitted in Subsection (3), a corporation may eliminate or limit the liability of a director to the corporation or to its shareholders for monetary damages for any action taken or any failure to take any action as a director, except liability for:

(a) the amount of a financial benefit received by a director to which he is not entitled;

(b) an intentional infliction of harm on the corporation or the shareholders;

(c) a violation of Section 16-10a-842; or

(d) an intentional violation of criminal law.

(2) No provision authorized under this section may eliminate or limit the liability of a director for any act or omission occurring prior to the date when the provision becomes effective.

(3) Any provision authorized under this section to be included in the articles of incorporation may also be adopted in the bylaws or by resolution, but only if the provision is approved by the same percentage of shareholders of each voting group as would be required to approve an amendment to the articles of incorporation including the provision.

(4) Any foreign corporation authorized to transact business in this state, including any federally chartered depository institution authorized under federal law to transact business in this state, may adopt any provision authorized under this section.

(5) With respect to a corporation that is a depository institution regulated by the Department of Financial Institutions or by an agency of the federal government, any provision authorized under this section may include the elimination or limitation of the personal liability of a director or officer to the corporation's members or depositors.

Current through 2008 General Session.

Nevada

Title 7. Business Associations; Securities; Commodities
Chapter 78. Private Corporations (Refs & Annos)

➡78.138. Directors and officers: Exercise of powers; performance of duties; presumptions and considerations; liability to corporation and stockholders

1. Directors and officers shall exercise their powers in good faith and with a view to the interests of the corporation.

2. In performing their respective duties, directors and officers are entitled to rely on information, opinions, reports, books of account or statements, including financial statements and other financial data, that are prepared or presented by:

(a) One or more directors, officers or employees of the corporation reasonably believed to be reliable and competent in the matters prepared or presented;

(b) Counsel, public accountants, financial advisers, valuation advisers, investment bankers or other persons as to matters reasonably believed to be within the preparer's or presenter's professional or expert competence; or

(c) A committee on which the director or officer relying thereon does not serve, established in accordance with NRS 78.125, as to matters within the committee's designated authority and matters on which the committee is reasonably believed to merit confidence, but a director or officer is not entitled to rely on such information, opinions, reports, books of account or statements if he has knowledge concerning the matter in question that would cause reliance thereon to be unwarranted.

3. Directors and officers, in deciding upon matters of business, are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation.

4. Directors and officers, in exercising their respective powers with a view to the interests of the corporation, may consider:

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

(b) The economy of the State and Nation;

(c) The interests of the community and of society; and

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

5. Directors and officers are not required to consider the effect of a proposed corporate action upon any particular group having an interest in the corporation as a dominant factor.

6. The provisions of subsections 4 and 5 do not create or authorize any causes of action against the corporation or its directors or officers.

7. Except as otherwise provided in NRS 35.230, 90.660, 91.250, 452.200, 452.270, 668.045 and 694A.030, or unless the articles of incorporation or an amendment thereto, in each case filed on or after October 1, 2003, provide for greater individual liability, a director or officer is not individually liable to the corporation or its stockholders or creditors for any damages as a result of any act or failure to act in his capacity as a director or officer unless it is proven that:

(a) His act or failure to act constituted a breach of his fiduciary duties as a director or officer; and

(b) His breach of those duties involved intentional misconduct, fraud or a knowing violation of law.

Added by Laws 1991, p. 1184. Amended by Laws 1993, p. 951; Laws 1999, p. 1580; Laws 2001, c. 601, § 3, eff. June 15, 2001; Laws 2003, c. 485, § 23, eff. Oct. 1, 2003.

Current through the 2007 74th Regular Session and the 23rd Special Session of the Nevada Legislature and technical corrections received from the Legislative Counsel Bureau (2007).

Virginia

Title 13.1. Corporations (Refs & Annos)
Chapter 9. Virginia Stock Corporation Act (Refs & Annos)
Article 9. Directors and Officers (Refs & Annos)

➞§ 13.1-692.1. Limitation on liability of officers and directors; exception

A. In any proceeding brought by or in the right of a corporation or brought by or on

behalf of shareholders of the corporation, the damages assessed against an officer or director arising out of a single transaction, occurrence or course of conduct shall not exceed the lesser of:

1. The monetary amount, including the elimination of liability, specified in the articles of incorporation or, if approved by the shareholders, in the bylaws as a limitation on or elimination of the liability of the officer or director; or

2. The greater of (i) $100,000 or (ii) the amount of cash compensation received by the officer or director from the corporation during the twelve months immediately preceding the act or omission for which liability was imposed.

B. The liability of an officer or director shall not be limited as provided in this section if the officer or director engaged in willful misconduct or a knowing violation of the criminal law or of any federal or state securities law, including, without limitation, any claim of unlawful insider trading or manipulation of the market for any security.

C. No limitation on or elimination of liability adopted pursuant to this section may be affected by any amendment of the articles of incorporation or bylaws with respect to any act or omission occurring before such amendment.

Va. Code Ann. § 13.1-692.1, VA ST § 13.1-692.1

Current through End of 2008 Special Session I.

Exhibit D

Mississippi: Duties of Directors

WEST'S ANNOTATED MISSISSIPPI CODE
TITLE 79. CORPORATIONS, ASSOCIATIONS, AND PARTNERSHIPS
CHAPTER 4. MISSISSIPPI BUSINESS CORPORATION ACT
ARTICLE 8. DIRECTORS AND OFFICERS
SUBARTICLE C. STANDARDS OF CONDUCT
➡§ 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 (e)(1) or subsection (e)(3) 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.

Current through all 2007 Sessions and Chs. 302, 309, 312, 330, 344 to 347, 349 to 351, 356, 368, 371, 373, 376, 381, 388, 398, 433, 436, 464, 470, 490, 510, 531 and 543, of the 2008 Reg. Sess.

MBCA: Duties of Directors

Subchapter C. DIRECTORS
§ 8.30. STANDARDS OF CONDUCT FOR DIRECTORS

(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 shall disclose, or cause to be disclosed, to the other board or committee members information not already known by them but known by the director to be material to the discharge of their decision-making or oversight functions, except that disclosure is not required 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.

(d) 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 (f)(1) or subsection (f)(3) 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.

(e) 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
(f). A director is entitled to rely, in accordance with subsection

(d) or (e), 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.

Mississippi: Duties of Officers

TITLE 79. CORPORATIONS, ASSOCIATIONS, AND PARTNERSHIPS
CHAPTER 4. MISSISSIPPI BUSINESS CORPORATION ACT
ARTICLE 8. DIRECTORS AND OFFICERS
SUBARTICLE D. 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.

Current through all 2007 Sessions and Chs. 302, 309, 312, 330, 344 to 347, 349 to 351, 356, 368, 371, 373, 376, 381, 388, 398, 433, 436, 464, 470, 490, 510, 531 and 543, of the 2008 Reg. Sess.

MBCA: Duties of Officers

§ 8.42. STANDARDS OF CONDUCT FOR OFFICERS

(a) An officer, when performing in such capacity, has the duty to act:

(I) 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 likely to occur.

(c) In discharging his or her duties, an officer who does not have knowledge that makes reliance unwarranted is entitled to rely on:

(I) 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 fmancial 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.

(d) 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.

To: **General Review Task Force**
From: **Jim Zimpritch**
Re: **Official Comment to Proposed Sections 1.40 and 1.41**
Date: **June 5, 2008**

See attached revised black letter and Official Comments for Sections 1.40 and 1.41, clean and redlined. (There are no changes in the black letter from Dallas, although they appear as redlined now that we're folding them into the existing Model Act.)

Given the complexity of the topic, and the interrelationship with UETA and E-Sign, I elected to add a "Note" at the beginning of the OC for section 1.41. We have used this kind of technique in other parts of the Model Act. See, e.g.:

- Note on the Business Judgment Rule [8.31],
- Note on Directors' Liability [8.31],
- Subchapter E, Introductory Comment [indemnification and advance],
- Subchapter F, Introductory Comment [DCITs],
- Note on Directors' Compensation [8.61(b)],
- Ch. 9[Entity Conversion], Introductory Comment, etc.,

It seemed the right approach here. It also enabled me to keep the specific Comments to sections 1.41 and 1.42 simpler, and it will provide a repository for how we got to where we are.

Subchapter D.
DEFINITIONS

§ 1.40. ACT DEFINITIONS

In this Act:

(1) "Articles of incorporation" means the original articles of incorporation, all amendments thereof, and any other documents permitted or required to be filed by a domestic business corporation with the secretary of state under any provision of this Act except section 16.21. If an amendment of the articles or any other document filed under this Act restates the articles in their entirety, thenceforth the "articles" shall not include any prior documents.

(2) "Authorized shares" means the shares of all classes a domestic or foreign corporation is authorized to issue.

(3) "Conspicuous" means so written that a reasonable person against whom the writing is to operate should have noticed it. For example, printing in italics or boldface or contrasting color, or typing in capitals or underlined, is conspicuous.

(4) "Corporation," "domestic corporation" or "domestic business corporation" means a corporation for profit, which is not a foreign corporation, incorporated under or subject to the provisions of this Act.

(5) "Deliver" or "delivery" means any method of delivery used in conventional commercial practice, including delivery by hand, mail, commercial delivery~~,~~ and, if authorized in accordance with section 1.41, by electronic transmission.

(6) "Distribution" means a direct or indirect transfer of money or other property (except its own shares) or incurrence of indebtedness by a corporation to or for the benefit of its shareholders in respect of any of its shares. A distribution may be in the form of a declaration or payment of a dividend; a purchase, redemption, or other acquisition of shares; a distribution of indebtedness; or otherwise.

(6A) "Document" means (i) any tangible medium on which information is inscribed, and includes any writing or written instrument, or (ii) an electronic record.

(6B) ~~(6A)~~ "Domestic unincorporated entity" means an unincorporated entity whose internal affairs are governed by the laws of this state.

(7) "Effective date of notice" is defined in section 1.41.

(7A) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(7B) "Electronic record" means information that is stored in an electronic or other medium and is retrievable in paper form through an automated process, unless otherwise authorized in accordance with section 1.41(j).

(7C) "Electronic transmission" or "electronically transmitted" means any form or process of communication, not directly involving the physical transfer of paper ~~that~~or another tangible medium, which (a) is suitable for the retention, retrieval, and reproduction of information by the recipient, and (b) is retrievable in paper form by the recipient through an automated process, unless otherwise authorized in accordance with section 1.41(j).

(7D) ~~(7B)~~ "Eligible entity" means a domestic or foreign unincorporated entity or a domestic or foreign nonprofit corporation.

(7E) ~~(7C)~~ "Eligible interests" means interests or memberships.

(8) "Employee" includes an officer but not a director. A director may accept duties that make the director also an employee.

(9) "Entity" includes domestic and foreign business corporation; domestic and foreign nonprofit corporation; estate; trust; domestic and foreign unincorporated entity; and state, United States, and foreign government.

(9A) The phrase "facts objectively ascertainable" outside of a filed document or plan is defined in section 1.20(k).

(9AA) "Expenses" means reasonable expenses of any kind that are incurred in connection with a matter.

(9B) "Filing entity" means an unincorporated entity that is of a type that is created by filing a public organic document.

(10) "Foreign corporation" means a corporation incorporated under a law other than the law of this state; which would be a business corporation if incorporated under the laws of this state.

(10A) "Foreign nonprofit corporation" means a corporation incorporated under a law other than the law of this state, which would be a nonprofit corporation if incorporated under the laws of this state.

(10B) "Foreign unincorporated entity" means an unincorporated entity whose internal affairs are governed by an organic law of a jurisdiction other than this state.

(11) "Governmental subdivision" includes authority, county, district, and municipality.

(12) "Includes" denotes a partial definition.

(13) "Individual" means a natural person.

(13A) "Interest" means either or both of the following rights under the organic law of an unincorporated entity:

(i) the right to receive distributions from the entity either in the ordinary course or upon liquidation; or

(ii) the right to receive notice or vote on issues involving its internal affairs, other than as an agent, assignee, proxy or person responsible for managing its business and affairs.

(13B) "Interest holder" means a person who holds of record an interest.

(14) "Means" denotes an exhaustive definition.

(14A) "Membership" means the rights of a member in a domestic or foreign nonprofit corporation.

(14B) "Nonfiling entity" means an unincorporated entity that is of a type that is not created by filing a public organic document.

(14C) "Nonprofit corporation" or "domestic nonprofit corporation" means a corporation incorporated under the laws of this state and subject to the provisions of the [Model Nonprofit Corporation Act].

(15) "Notice" is defined in section 1.41.

(15A) "Organic document" means a public organic document or a private organic document.

(15B) "Organic law "means the statute governing the internal affairs of a domestic or foreign business or nonprofit corporation or unincorporated entity.

(15C) "Owner liability" means personal liability for a debt, obligation or liability of a domestic or foreign business or nonprofit corporation or unincorporated entity that is imposed on a person:

(i) solely by reason of the person's status as a shareholder, member or interest holder; or

(ii) by the articles of incorporation, bylaws or an organic document under a provision of the organic law of an entity authorizing the articles of incorporation, bylaws or an organic document to make one or more specified shareholders, members or interest holders liable in their capacity

as shareholders, members or interest holders for all or specified debts, obligations or liabilities of the entity.

(16) "Person" includes an individual and an entity.

(17) "Principal office" means the office (in or out of this state) so designated in the annual report where the principal executive offices of a domestic or foreign corporation are located.

(17A) "Private organic document" means any document (other than the public organic document, if any) that determines the internal governance of an unincorporated entity. Where a private organic document has been amended or restated, the term means the private organic document as last amended or restated.

(17B) "Public organic document" means the document, if any, that is filed of public record to create an unincorporated entity. Where a public organic document has been amended or restated, the term means the public organic document as last amended or restated.

(18) "Proceeding" includes civil suit and criminal, administrative, and investigatory action.

(18A) "Public corporation" means a corporation that has shares listed on a national securities exchange or regularly traded in a market maintained by one or more members of a national securities association.

(18B) "Qualified director" is defined in section 1.43.

(19) "Record date" means the date established under chapter 6 or 7 on which a corporation determines the identity of its shareholders and their shareholdings for purposes of this Act. The determinations shall be made as of the close of business on the record date unless another time for doing so is specified when the record date is fixed.

(20) "Secretary" means the corporate officer to whom the board of directors has delegated responsibility under section 8.40(c) for custody of the minutes of the meetings of the board of directors and of the shareholders and for authenticating records of the corporation.

(21) "Shareholder" means the person in whose name shares are registered in the records of a corporation or the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with a corporation.

(22) "Shares" means the units into which the proprietary interests in a corporation are divided.

(23) "Sign" or "signature" means, with present intent to authenticate or adopt a document:

~~(22A) "Sign" or "signature"~~(i) to execute or adopt a tangible symbol to a document, and includes any manual, facsimile, or conformed ~~or electronic signature.~~signature; or

(ii) to attach to or logically associate with an electronic transmission an electronic sound, symbol or process, and includes an electronic signature in an electronic transmission.

(24) ~~(23)~~ "State," when referring to a part of the United States, includes a state and commonwealth (and their agencies and governmental subdivisions) and a territory and insular possession (and their agencies and governmental subdivisions) of the United States.

(25) ~~(24)~~ "Subscriber" means a person who subscribes for shares in a corporation, whether before or after incorporation.

(25A) ~~(24A)~~ "Unincorporated entity" means an organization or artificial legal person that either has a separate legal existence or has the power to acquire an estate in real property in its own name and that is not any of the following: a domestic or foreign business or nonprofit corporation, an estate, a trust, a state, the United States, or a foreign government. The term includes a general partnership, limited liability company, limited partnership, business trust, joint stock association and unincorporated nonprofit association.

(26) ~~(25)~~ "United States" includes district, authority, bureau, commission, department, and any other agency of the United States.

(27) ~~(26)~~ "Voting group" means all shares of one or more classes or series that under the articles of incorporation or this Act are entitled to vote and be counted together collectively on a matter at a meeting of shareholders. All shares entitled by the articles of incorporation or this Act to vote generally on the matter are for that purpose a single voting group.

(28) ~~(27)~~ "Voting power" means the current power to vote in the election of directors.

(29) "Writing" or "written" means any information in the form of a document.

CROSS-REFERENCES

Annual report, see § 16.21.
Nominee certificate, see § 7.23.
Notice, see § 1.41.
Special definitions:
"affiliate," see § 13.01.
"beneficial shareholder," see § 13.01.
"claim," see § 14.06.

"conflicted director," see § 8.60.
"control," see § 8.60.
"corporation," see §§ 8.50 & 13.01.
"derivative proceeding," see § 7.40.
"director's conflicting interest transaction," see § 8.60.
"fair to the corporation," see § 8.60
"fair value," see § 13.01.
"interest," see § 13.01.
"interested transactions," see § 13.01.
"interests," see § 11.01.
"liability," see § 8.50.
"material financial interest," see § 8.60.
"merger," see § 11.01.
"officer," see § 8.50.
"official capacity," see § 8.50.
"organic documents," see § 11.01.
"other entity," see § 11.01.
"outstanding shares," see § 6.03.
"party," see § 8.50.
"party to a merger," or "party to a share exchange," see § 11.01.
"preferred shares," see § 13.01.
"proceeding," see § 8.50.'
record shareholder," see § 13.01.
"related person," see § 8.60.
"relevant time," see § 8.60.
"required disclosure," see § 8.60.
"senior executive," see § 13.01.
"share exchange," see § 11.01.
"shares," see §§ 6.27 & 6.30.
"shareholder," see ~~§ §~~§§ 7.40 & 13.01.
"survivor," see § 11.01.

OFFICIAL COMMENT

Section 1.40 collects in a single section definitions of terms used throughout the Model Act. Subchapters and sections of the Act in a few instances contain specialized definitions applicable only to those subchapters or sections.

Most of the definitions of section 1.40 are drawn directly from earlier versions of the Model Act and are reasonably self-explanatory. A number of definitions: however: are new or deserve further explanation.

*1. **Conspicuous***

"Conspicuous" is defined in section 1.40(3) basically as defined in section 1-201(10) of the Uniform Commercial Code. Even though the definition indicates some of the methods by

which a provision may be made attention-calling, the test is whether attention can reasonably be expected to be called to it.

2. Corporation, Domestic Corporation, Domestic Business Corporation, and Foreign Corporation

"Corporation," "domestic corporation," "domestic business corporation," and "foreign corporation" are defined in sections 1.40(4) and (10). The word "corporation," when used alone, refers only to domestic corporations. In a few instances, the phrase "domestic corporation" has been used in order to contrast it with a foreign corporation. The phrase "domestic business corporation" has been used on occasion to contrast it with a domestic nonprofit corporation.

2.1. Document

The term "document" includes writings or written instruments, as well as electronic records.

3. Distribution

The term "distribution" defined in section 1.40(6) is a fundamental element of the financial provisions of the Model Act as amended in 1980. Section 6.40 sets forth a single, unitary test for the validity of any "distribution." Section 1.40(6) in turn defines "distribution" to include all transfers of money or other property made by a corporation to any shareholder in respect of the corporation's shares, except mere changes in the unit of interest such as share dividends and share splits. Thus, a "distribution" includes the declaration or payment of a dividend, a purchase by a corporation of its own shares, a distribution of evidences of indebtedness or promissory notes of the corporation, and a distribution in voluntary or involuntary liquidation. If a corporation incurs indebtedness in connection with a distribution (as in the case of a distribution of a debt instrument or an installment purchase of shares), the creation, incurrence, or distribution of the indebtedness is the event which constitutes the distribution rather than the subsequent payment of the debt by the incorporation.

The term "indirect" in the definition of "distribution" is intended to include transactions like the repurchase of parent company shares by a subsidiary whose actions are controlled by the parent. It also is intended to include any other transaction in which the substance is clearly the same as a typical dividend or share repurchase, no matter how structured or labeled.

4. Electronic, Electronic Record, and Electronic Transmission

~~"Electronic~~The terms "electronic" and "electronic record," and the amended terms "electronic transmission" or "electronically transmitted" ~~includes both communication~~are part of a suite of electronic technology changes adopted in 2008 to incorporate into the Model Act terminology from the Uniform Electronic Transmissions Act (UETA) and the federal Electronic Signatures in global and National Commerce Act (E-Sign). See Official Comment to section 1.41, Note on the Relationship between Model Act Provisions on Electronic Technology and UETA and E-Sign. The 2008 changes to the Model Act were accompanied by changes to the definitions of "deliver" or "delivery" and "sign" or "signature", and by the addition of definitions of "document" and "writing" or "written." The objectives of the 2008 changes were to weave

UETA and E-Sign concepts into the Model Act in as minimalist a way as possible, primarily confining changes to sections 1.40 and 1.41 and hence avoiding unnecessary revisions throughout the rest of the Model Act.

Specifically, the term "electronic" is identical to the defined term in section 2(5) of UETA, and in section 106(a)(2) of E-Sign. The term "electronic record" includes information stored in an electronic medium, but must be retrievable in paper form through an automated process unless otherwise specifically authorized in accordance with section 1.41(j). "Electronic transmission" or "electronically transmitted" includes communications using systems which in the normal course produce paper, such as facsimiles, as well as ~~communication~~those using systems which transmit and permit the retention of data which is ~~then subject to~~capable of subsequent retrieval ~~and reproduction in written form~~in paper form by the recipient through an automated process, unless otherwise authorized in accordance with section 1.41(j). Electronic transmission is intended to be broadly construed and include the evolving methods of electronic delivery, including electronic transmissions via the Internet, as well as data stored and delivered on computer diskettes. A typical form of electronic transmission is an email, which the recipient can print out. The phrase is not intended to include voice mail, text messaging and communications using other similar systems which do not automatically provide for the retrieval of data in printed or typewritten form, unless specifically authorized in accordance with section 1.41(j).

5. Entity

The term "entity," defined in section 1.40(9), appears in the definition of "person" in section 1.40(16) and is included to cover all types of artificial persons. Estates and trusts and general partnerships are included even though they may not, in some jurisdictions, be considered artificial persons. "Trust," by itself, means a ~~nonbusiness~~non-business trust, such as a traditional testamentary or inter vivos trust.

The term "entity" is broader than the term "unincorporated entity" which is defined in section 1.40(24A). See also the definitions of "governmental subdivision" in section 1.40(11), "state" in section 1.40(23), and "United States" in section 1.40(25).

A form of co-ownership of property or sharing of returns from property that is not a partnership under the Uniform Partnership Act (1997) will not be an "unincorporated entity." In that connection, section 202(c) of the Uniform Partnership Act (1997) provides, among other things, that:

In determining whether a partnership is formed, the following rules apply:

(1) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not by itself establish a partnership, even if the co-owners share profits made by the use of the property.

(2) The sharing of gross returns does not by itself establish a partnership, even if the persons sharing them have a joint or common right or interest in property from which the returns are derived.

5.1. EXPENSES

The Act provides in a number of contexts that expenses relating to a proceeding incurred by a person shall or may be paid by another, through indemnification or by court order in specific contexts. See sections 7.46, 7.48, 8.50(3), 8.53(a), 13.31(b) and (c), 14.32 (e), 16.04(c) and 16.05(c). In all cases, the expenses must be reasonable in the circumstances. The type or character of the expenses is not otherwise limited. Examples include such usual things as fees and disbursements of counsel, experts of all kinds, and jury and similar litigation consultants; travel, lodging, transcription, reproduction, photographic, video recording, communication, and delivery costs, whether included in the disbursements of counsel, experts, or consultants, or directly incurred; court costs; and premiums for posting required bonds.

Historically, before the inclusion in section 1.40 of the Act of the definition of "expenses," a number of the affected sections explicitly contained the phrase "including counsel fees," or similar words, after "expenses." The exclusion of other elements of expenses was not intended in these sections (see the definition of "includes" in subsection (12)). With the current universal definition, singling out this one example of expenses in the statutory text was deemed unnecessary and stylistically inconsistent. The current formulation, referring to expenses "of any kind" and eliminating the example of counsel fees, also more clearly avoids any possible incorrect negative inference that other elements of expenses, not specified, might be excluded if one example were specified.

5.2. MEMBERSHIP

"Membership" is defined in section 1.40(14A) for purposes of this Act to refer only to the rights of a member in a nonprofit corporation. Although the owners of a limited liability company are generally referred to as "members," for purposes of this Act they are referred to as "interest holders" and what they own in the limited liability company is referred to in this Act as an "interest."

5.3. ORGANIC DOCUMENTS, PUBLIC ORGANIC DOCUMENTS AND PRIVATE ORGANIC DOCUMENTS

The term "organic documents" in section 1.40(15A) includes both public organic documents and private organic documents. The term "public organic document" includes such documents as the certificate of limited partnership of a limited partnership, the articles of organization or certificate of formation of a limited liability company, the deed of trust of a business trust and comparable documents, however denominated, that are publicly filed to create other types of unincorporated entities. An election of limited liability partnership status is not of itself a public organic document because it does not create the underlying general or limited partnership filing the election, although the election may be made part of the public organic document of the partnership by its organic law. The term "private organic document" includes such documents as a partnership agreement of a general or limited partnership, an operating agreement of a limited liability company and comparable documents, however denominated, of unincorporated types of other entities.

5.4. OWNER LIABILITY

The term "owner liability" is used in the context of provisions in Chapters 9 and 11 that preserve the personal liability of shareholders, members and interest holders when the entity in which they hold shares, memberships or interests is the subject of a transaction under those chapters. The term includes only liabilities that are imposed pursuant to statute on shareholders, members or interest holders. Liabilities that a shareholder, member or interest holder incurs by contract are not included. Thus, for example, if a state's business corporation law were to make shareholders personally liable for unpaid wages, that liability would be an "owner liability." If, on the other hand, a shareholder were to guarantee payment of an obligation of a corporation, that liability would not be an "owner liability." The reason for excluding contractual liabilities from the definition of "owner liability" is because those liabilities are constitutionally protected from impairment and thus do not need to be separately protected in Chapters 9 and 11.

5.5. UNINCORPORATED ENTITY

The term "unincorporated entity" is a subset of the broader term "entity."

There is some question as to whether a partnership subject to the Uniform Partnership Act (1914) is an entity or merely an aggregation of its partners. That question has been resolved by section 201 of the Uniform Partnership Act (1997), which makes clear that a general partnership is an entity with its own separate legal existence. Section 8 of the Uniform Partnership Act (1914) gives partnerships subject to it the power to acquire estates in real property and thus such a partnership will be an "unincorporated entity." As a result, all general partnerships will be "unincorporated entities" regardless of whether the state in which they are organized has adopted the new Uniform Partnership Act (1997).

The term "unincorporated entity" includes limited liability partnerships and limited liability limited partnerships because those entities are forms of general partnerships and limited partnerships, respectively, that have made the additional required election claiming that status.

Section 4 of the Uniform Unincorporated Nonprofit Association Act gives an unincorporated nonprofit association the power to acquire an estate in real property and thus an unincorporated nonprofit association organized in a state that has adopted that act will be an "unincorporated entity." At common law, an unincorporated nonprofit association was not a legal entity and did not have the power to acquire real property. Most states that have not adopted the Uniform Act have nonetheless modified the common law rule, but states that have not adopted the Uniform Act should analyze whether they should modify the definition of "unincorporated entity" to add an express reference to unincorporated nonprofit associations.

"Business trust" includes any trust carrying on a business, such as a Massachusetts trust, real estate investment trust, or other common law or statutory business trust. The term "unincorporated entity" expressly excludes estates and trusts (i.e., trusts that are not business trusts), whether or not they would be considered artificial persons under the governing jurisdiction's law, to make it clear that they are not eligible to participate in a conversion under subchapter E of chapter 9 or a merger or share exchange under chapter 11.

6. Principal Office

Section 1.40(17) defines the principal office of a corporation to be the office within or without the state, where the principal executive office of the corporation is located. Many corporations maintain numerous offices, but there is usually one office, sometimes colloquially referred to as the home office, headquarters, or executive suite, where the principal corporate officers are located. The corporation must designate its principal office address in the annual report required by section 16.21. In case of doubt as to which corporate office is the principal office, the designation by the corporation in its annual report should be accepted as establishing the principal office of the corporation.

6.1. PUBLIC CORPORATION

The term "public corporation" defined in section 1.40(18A) is used in sections 7.29, 7.32, 8.01, and 10.22 to distinguish publicly held corporations from other corporations. The definition establishes the distinction by reference to the existence of an organized trading market in the corporation's shares as an indication of broad share ownership. The reference to markets comes from the securities law governing regulation of securities trading markets.

7. Shareholder

The definition of "shareholder" in section 1.40(21) includes a beneficial owner of shares named in a nominee certificate under section 7.23, but only to the extent of the rights granted the beneficial owner in the certificate—for example, the right to receive notice of, and vote at, shareholders' meetings. Various substantive sections of the Model Act also permit holders of voting trust certificates or beneficial owners of shares (not subject to a nominee certificate under section 7.23) to exercise some of the rights of a "shareholder." See, for example, section 7.40 (derivative proceedings).

8. Secretary

The term "secretary" is defined in section 1.40(20) since the Model Act does not require the corporation to maintain any specific or titled officers. See section 8.40. However, some corporate officer, however titled, must perform the functions described in this definition, and that officer is referred to as the "secretary" in various sections of the Act that impose such a duty.

9. Sign or Signature

The definition of "sign" or "signature" ~~includes~~incorporates into the Model Act concepts and terminology from the Uniform Electronic Transmissions Act (UETA) and the federal E-Sign. Thus, the terms "sign" and "signature" include not only traditional forms of signing such as manual, facsimile, conformed ~~or~~signatures, but also electronic signatures in electronic transmissions. In this regard, it is intended that any manifestation of an intention to sign or authenticate a document will be accepted~~. Electronic signatures are expected to encompass any methodology approved by the secretary of state for purposes of verification of the authenticity of the document.~~, so long as electronic transmissions having electronic signatures comply with the requirements in the definition of "electronic transmission," including their ability to be retrieved

in paper form by the recipient through an automated process unless otherwise authorized in accordance with section 1.41(j).

~~This could include a typewritten conformed signature or other electronic entry in the form of a computer data compilation of any characters or series of characters comprising a name intended to evidence authorization and signing of a document.~~

10. Person

The term "person" is defined in section 1.40(16) to include an individual or an entity. In the case of an individual the Model Act assumes that the person is competent to act in the matter under general state law independent of the corporation statute.

11. Voting Group

Section 1.40(26) defines "voting group" for purposes of the Act as a matter of convenient reference. A "voting group" consists of all shares of one or more classes or series that under the articles of incorporation or the revised Model Act are entitled to vote and be counted together collectively on a matter. Shares entitled to vote "generally" on a matter under the articles of incorporation or this Act are for that purpose a single voting group. The word "generally" signifies all shares entitled to vote on the matter by the articles of incorporation or this Act that do not expressly have the right to be counted or tabulated separately. "Voting groups" are thus the basic units of collective voting at a shareholders' meeting, and voting by voting groups may provide essential protection to one or more classes or series of shares against actions that are detrimental to the rights or interests of that class or series.

The determination of which shares form part of a single voting group must be made from the provisions of the articles of incorporation and of this Act. In a few instances under the Model Act, the board of directors may establish the right to vote by voting groups. On most matters coming before shareholders' meetings, only a single voting group, consisting of a class of voting or common shares, will be involved, and action on such a matter is effective when approved by that voting group pursuant to section 7.25. See section 7.26(a). If a second class of shares is also entitled to vote on the matter, then a further determination must be made as to whether that class is to vote as a separate voting group or whether it is to vote along with the other voting shares as part of a single voting group.

Members of the board of directors are usually elected by the single voting group of shares entitled to vote generally; in some circumstances, however, some members of the board may be selected by one voting group and other members by one or more different voting groups. See section 8.03.

The definition of a voting group permits the establishment by statute of quorum and voting requirements for a variety of matters considered at shareholders' meetings in corporations with multiple classes of shares. See sections 7.25 and 7.26. Depending on the circumstances, two classes or series of shares may vote together collectively on a matter as a single voting group, they may be entitled to vote on the matter separately as two voting groups, or one or both of them may not be entitled to vote on the matter at all.

12. Voting Power

Under section 1.40(27) the term "voting power" means the current power to vote in the election of directors. Application of this definition turns on whether the relevant shares carry the power to vote in the election of directors as of the time for voting on the relevant transaction. If shares carry the power to vote in the election of directors only under a certain contingency, as is often the case with preferred stock, the shares would not carry voting power within the meaning of section 1.40(27) unless the contingency has occurred, and only during the period when the voting rights are in effect. Shares that carry the power to vote for any directors as of the time to vote on the relevant transaction have the current power to vote in the election of directors within the meaning of section 1.40(27) even if the shares do not carry the power to vote for all directors.

~~**§ 1.41. NOTICE**~~

13. Writing or Written

"Writing" or "written" means information in the form of a "document," which in turn means any tangible medium on which information is inscribed, such as a paper instrument, as well as an electronic record. Thus, under the Model Act a written consent, e.g., a unanimous written consent of shareholders under section 7.04(a), may be in the form of paper or an electronic record.

§ 1.41. NOTICES AND OTHER COMMUNICATIONS

(a) Notice under this Act must be in writing unless oral notice is reasonable under the circumstances. ~~Notice by electronic transmission is written notice.~~

(b) ~~Notice~~Unless otherwise agreed between the sender and the recipient, words in a notice or other communication under this Act must be in English. A notice or other communication may be communicated ~~in person; by mail or other~~any method of delivery~~; or by telephone, voice mail or other~~, except that electronic ~~means~~transmissions must be in accordance with this section. If these ~~forms of personal notice~~methods of communication are impracticable, a notice or other communication may be communicated by a newspaper of general circulation in the area where published, or by radio, television, or other form of public broadcast communication.

~~(c) Written notice by a domestic or foreign corporation to its shareholders, if in a comprehensible form, is effective (i) upon deposit in the United States mail, if mailed postpaid and correctly addressed to the shareholder's address shown in the corporation's current record of shareholders, or (ii) when electronically transmitted to the shareholder in a manner authorized by the shareholder.~~

(c) ~~(d) Written notice to a domestic or foreign corporation (~~Notice or other communication to a domestic or foreign corporation authorized to transact business in this state~~)~~ may be addressed to its registered agent at its registered office or to the secretary of the corporation at its principal office shown in its most recent annual report or, in the case of

a foreign corporation that has not yet delivered an annual report, in its application for a certificate of authority.

(d) Notice or other communications may be delivered by electronic transmission if consented to by the recipient.

(e) Any consent by a shareholder or director to the corporation under subsection (d) is revocable by written or electronic notice to the corporation. Any such consent is deemed revoked if (1) the corporation is unable to deliver 2 consecutive electronic transmissions given by the corporation in accordance with such consent and (2) such inability becomes known to the secretary or an assistant secretary of the corporation or to the transfer agent, or other person responsible for the giving of notice or other communications; provided, however, the inadvertent failure to treat such inability as a revocation shall not invalidate any meeting or other action.

(f) Unless otherwise agreed between sender and recipient, an electronic transmission is received when:

(1) it enters an information processing system that the recipient has designated or uses for the purposes of receiving electronic transmissions or information of the type sent, and from which the recipient is able to retrieve the electronic transmission; and

(2) it is in a form capable of being processed by that system.

(g) Receipt of an electronic acknowledgement from an information processing system described in subsection (f)(1) establishes that an electronic transmission was received but, by itself, does not establish that the content sent corresponds to the content received.

(h) An electronic transmission is received under this section even if no individual is aware of its receipt.

~~(e) Except as provided in subsection (c), written notice~~(i) Notice or other communication, if in a comprehensible form or manner, is effective when the recipient has actual notice of it, or at the earliest of the following:
~~(1) when received;~~

(1) if in physical form, when it is delivered to:

(A) a shareholder's address shown on the corporation's record of shareholders maintained by the corporation under section 16.01(c);

(B) a director's residence or usual place of business; or

(C) the corporation's principal place of business;

~~(2) five days after its deposit in the United States mail,~~ (2) if mailed ~~postpaid~~postage prepaid and correctly addressed~~;~~ (i) to a shareholder, upon deposit in the United States Mail, and (ii) to a recipient other than a shareholder, five days after it is so deposited in the United States Mail;

~~(3) on the date shown on the return receipt,~~ (3) if sent by registered or certified mail, return receipt requested, and the receipt is signed by or on behalf of the addressee, on the date shown on the return receipt;

(4) if an electronic transmission, when it is received as provided in subsection (f); and

(5) if oral, when communicated.

~~(f) Oral notice is effective when communicated, if communicated in a comprehensible manner.~~

(j) A notice or other communication may be in the form of an electronic transmission that cannot be directly reproduced in paper form by the recipient through an automated process only if (i) the electronic transmission is otherwise retrievable in perceivable form, and (ii) the sender and the recipient have consented in writing to the validity of such an electronic transmission or, in the case of notices to directors, the articles of incorporation or the bylaws so provide.

~~(g)~~ (k) If this Act prescribes ~~notice~~ requirements for notices or other communications for particular circumstances, those requirements govern. If articles of incorporation or bylaws prescribe ~~notice~~ requirements~~;~~ for notices or other communications not inconsistent with this section or other provisions of this Act, those requirements govern.

CROSS-REFERENCES

Annual report, see § 16.21.
Application for certificate of authority, see § 15.03.
"Deliver," see § 1.40.
"Electronic transmission," see § 1.40.
"Householding," see § 1.44
"Principal office:"
  defined, see § 1.40.
  designated in annual report, see § 16.21.
Record of shareholders, see § 16.01.
Special notice requirements:
  derivative proceedings, see § 7.40.
  resignation of registered agent, see §§ 5.03 & 15.09.
  service on corporation, see §§ 5.04 & 15.10.

OFFICIAL COMMENT

Section 1.41 establishes rules for determining how ~~notice~~notices and other communications may be given and when ~~notice is~~they are effective for a variety of purposes under the Model Act.

~~***1. Notice by a Corporation to Its Shareholders***~~

~~Section 1.41(c) provides that notice by a corporation to its shareholders is effective when mailed if correctly addressed with sufficient postage. The correct address for this purpose is the address shown in the corporation's shareholder records. Written notice includes notice by electronic transmission, but notice may be provided through electronic transmission only if specifically authorized by the shareholder. This allows corporations to provide notices by electronic means, but only when, and in the manner, authorized by the shareholder. Absent such authorization, notice must be provided to the shareholder in the traditional manner consistent with the other provisions of section 1.41.~~

~~Written notice to shareholders by persons other than the corporation is effective as provided in section 1.41(e). Notice by the corporation to its shareholders that is not addressed to the record address of the shareholder is effective when received under section 1.41(e).~~

* * * * *

Note on the Relationship between Model Act Provisions on Electronic Technology and UETA and E-Sign.

In 2008 the Committee on Corporate Laws adopted a suite of changes in the Model Act relating to electronic records, electronic transmissions, and related matters. These changes are found principally in the definitions in section 1.40; their principal applications are in section 1.41. The 2008 Model Act changes were adopted against the backdrop of the 1999 promulgation of the Uniform Electronic Transmissions Act (UETA) and the 2000 passage of the federal Electronic Signatures in Global and National Commerce Act (E-Sign). A brief description of certain aspects of UETA and E-Sign is necessary in order to understand the Model Act electronic technology provisions.

UETA adopted definitions for the terms electronic, electronic records, electronic signatures, records, transactions and the like, as well as provisions governing the use of those terms. UETA applies to "transactions," which are defined to mean actions between two or more persons "*relating to* the conduct of business [or] commercial…affairs." UETA §§2(16) and 3(a). The reach of the term "transactions" in the context of a comprehensive business corporation act is unclear. For example, while obtaining a proxy from a shareholder that is voting on a cash-out merger would likely constitute a "transaction," in contrast the unilateral act by a corporation of sending the notice of an annual meeting at which no significant action is proposed might not.

If UETA applies, it establishes certain statutory norms for the validity of electronic signatures, electronic records, etc. However, UETA also provides that it applies only to transactions between parties each of which has *agreed* to conduct transactions by electronic

means, and that such agreement is determined from the context and surrounding circumstances, including the parties' conduct. *Id.* §5(b).

E-Sign, codified at 15 USC §§7001 *et seq.*, in turn adopted the substance of UETA's principal definitions, including electronic, electronic signature, record and transaction, as well as many of the operative provisions of UETA. The applicability of E-Sign, like UETA, turns on whether a "transaction" is involved. *Id.* §7001(a). And, like UETA, E-Sign's applicability also depends upon the parties *consenting* to transact business by electronic means. *Id.* §7001(b)(2) ("This title…does not… require any person to agree to use or accept electronic records or electronic signatures….").

Importantly, E-Sign contains a federal pre-emption provision that itself excepts certain state adoptions of UETA. Thus, in general terms, section 7002(a) of E-Sign allows a state statute to modify, limit or supercede the provisions of E-Sign section 7001 only if [A] it is a state enactment of the version of UETA approved in 1999, and [B] the state's enactment of UETA does not contain any state exceptions, or "carve outs," other that those contained in the 1999 version of UETA section 3(b)(4). If, for example, a state enactment of UETA carved out that state's general business corporation law from the applicability of UETA, a carve out that is not contained in the 1999 version of UETA section 3(b)(4), and that business corporation law was deemed to be inconsistent with E-Sign, the offending provisions of the business corporation law would be preempted. *Id.* §7002(a)(1).

Note one aspect of the definition of "record" in both UETA and E-Sign: they both provide that information that is stored in an electronic medium must simply be "retrievable in perceivable form." This is in contrast to states which require not only that an electronic transmission may be retained, retrieved and reviewed but also require that it "may be directly reproduced in paper form by [the] recipient through an automated process." The former would include, *e.g.*, a voicemail, a text message and an electronic page, while the latter would not.

Against that backdrop, the Committee on Corporate Laws updated the Model Act's electronic technology provisions to bring them into alignment, in all material respects, with the more modern terminology and concepts reflected in UETA and E-Sign. However, the Committee did not adopt wholesale the vocabulary and concepts of UETA and E-Sign, for the following reasons:

1. Such wholesale changes would have involved amendments to the black letter in over fifty sections of the Model Act. Given that more than half the states in the United States have state corporation laws based in large measure on the Model Act, the Committee was reluctant to adopt an approach to electronic technology that would require so many statutory changes in each state.

2. The vocabulary of UETA and E-Sign, particularly the definition of "record" and "sign," while technically precise, are not written in the same style as the Model Act, do not use its terminology, and are less understandable to the ordinary reader. And if engrafted directly into the full body of the Model Act, the result would have been a major change from well-understood, obvious and traditional terminology (*e.g.*, a "unanimous written consent") to a comparatively awkward and less intuitively obvious terminology (*e.g.*, a "consent in the form of a record").

3. The Committee did not embrace the concept that a voicemail or a text message should, as a default matter, have the same status as a paper document. In so doing, the Committee implicitly acknowledged the corruptibility and/or inaccessibility of electronic data over the long term, issues with which universities, archives, libraries and other repositories of information continue to struggle.

The Committee instead adopted a more minimalist approach that involved incorporating into the definitions in Model Act section 1.40 the principal electronic technology vocabulary and concepts of UETA and E-Sign, in ways that did not require substantial changes throughout the Model Act.

Thus, the 2008 electronic technology amendments:

- Add new definitions of "document" and "writing" or "written," which include electronic records.
- Revise the definition of "deliver" or "delivery" to include electronic transmissions if properly authorized.
- Add new definitions of "electronic" and "electronic record" that borrow heavily from UETA and E-Sign.
- Revise the definition of "electronic transmission" or "electronically transmitted" to incorporate UETA and E-Sign vocabulary and concepts.
- Require that electronic records and electronic transmissions be retrievable in paper form through an automated process, unless specifically authorized in accordance with section 1.41(j), thereby establishing the default rule that voicemails and text messages are not generally recognized as valid, absent a specific consent.
- Revise the definitions of "sign" or "signature" to incorporate technical E-Sign and UETA terminology, while retaining common terminology such as "any manual, facsimile, or conformed signature."

This minimalist approach is pragmatic, addresses the vast majority of recurring questions involving electronic transmissions and records, and yet enables parties who wish to do so to specifically consent to use electronic records or transmissions that are merely "retrievable in perceivable form."

As for the preemption issue under E-Sign, the Model Act electronic technology provisions are consistent in all material respects with E-Sign and UETA. While the Model Act's basic provision has the additional requirement that electronic records or transmissions be retrievable in paper form through an automated process, section 1.41(j) permits parties to agree to the broader "retrievable in perceivable form" formulation found in E-Sign and UETA, and accordingly the Model act provisions are consistent with those laws.

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1. General

Under section 1.41(a) and (b), notices and other communications must be in English unless otherwise agreed between sender and recipient, and must normally be in writing.

2. Rules Governing Use of Electronic Transmissions

Electronic records and transmissions are effective under the Model Act if in accordance with section 1.41. The definition of writing in section 1.40(29) includes a document, which is defined in section 1.40(6A) to include an electronic record. Section 1.40(5) then defines the terms "deliver" or "delivery" to include delivery by hand, mail, commercial delivery, or by electronic transmission *if authorized in accordance with section 1.41*. Authorization of notices or other communications delivered by electronic transmission is governed by section 1.41(d), which requires the *consent* of the recipient. Thus, electronic notices or communications are valid under the Model Act, but only with the consent of the recipient.

Assuming consent, section 1.41 then establishes a number of rules with respect to electronic transmissions and records. Subsection (e) provides that any consent by a shareholder or director to the use of electronic transmissions may be revoked at any time. Subsection (e) also establishes a default rule in cases of failed electronic deliveries that parallels the rule in section 16.06(a) of the Model Act: a consent under section 1.41(d) is deemed revoked if the corporation is unable to deliver 2 consecutive electronic transmissions and the inability becomes known to specified corporate officers or agents. Subsection (f), based on UETA § 15(b), establishes basic rules, which can be varied by the sender and recipient, for when an electronic transmission is "received." An electronic transmission is received, even if the recipient's electronic filters, firewalls or other similar systems effectively block the transmission, because a recipient who consents to the use of electronic transmissions is responsible for any such filters or firewalls that block access to them. Subsection (g), based on UETA, § 15(f), provides legal certainty regarding an electronic acknowledgment, but only addresses the fact of receipt, not the quality of the content or whether it was "opened" or read. Subsection (h), based on UETA § 15(h), establishes that an electronic transmission is received even if the recipient or individual is unaware of its receipt, just as a written notice physically delivered to a person's correct address is duly delivered even if the addressee is not aware of its delivery or declines to open the envelope.

Subsection (j) requires specific consent to the use of the electronic transmissions that are only "retrievable in perceivable form" and that cannot be directly reproduced in paper form through an automated process. Such a consent between the sender and recipient must be in writing, except with respect to notices to directors, which may be in the articles of incorporation or bylaws.

3. When Notices or Other Communications Effective

Section 1.41(i) reorganizes in one place the rules governing when notices and other communications are effective. An overarching principle embedded in subsection (i) is that notices and communications are effective when the recipient has actual notice. Subsection (i) then establishes rules governing when notices or communications are deemed to be legally

effective, serially addressing delivery in physical form, regular mail sent to shareholders and to other recipients, registered or certified mail, electronic transmissions and oral communications.

~~2.~~ 4. *Notice to the Corporation*

Section 1.41(~~d~~c) provides that a notice or other communication to a corporation may be ~~addressed~~delivered to the registered agent of the corporation at its registered office or to the corporation or its secretary of the corporation at the principal office of the corporation as shown in its most recent public filing. An officer, director, or shareholder of a corporation will normally give written notice to the corporation by delivering ~~or mailing~~ a copy of that notice to the corporation or to the secretary of the corporation at its principal office. Such ~~a notice is effective when it is received. Such~~ notice may be given for a variety of purposes under this Act, e.g., giving notice of intent to dissent (section 13.21), notice of a demand to inspect books and records (section 16.02), and notices of resignation (sections 8.07 and 8.43). ~~This method of giving notice to the corporation, however, is not exclusive, and an officer, director, or shareholder may give notice in other ways as well.~~

Persons who have no prior relationship with the corporation may give notice either to the registered agent of the corporation, or, if they wish, to the corporation or to the corporation's secretary at its principal office.

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~~3.~~ 5. *Miscellaneous Provisions*

Section 1.41 also contains a variety of general provisions dealing with notice. It recognizes, for example, that notice on some occasions may be given orally if that is reasonable under the circumstances~~, which would include oral notice through voice mail or other similar means~~. It also deals with situations where notice may be sought to be given to persons for whom no current address is available, or where personal notice is impractical. Notice delivered to the person's last known address is effective as described in section 1.41(e~~i~~) even though never actually received by the person. Section 1.41(b) also authorizes notice by publication in some circumstances, including radio, television, or other form of public wire or wireless communication.

Section 1.41(~~g~~k) recognizes that other sections of the Act prescribe specific notice requirements for particular situations—e.g., service of process on a corporation's registered agent under section 5.04—and that these specific requirements, rather than the general requirements of section 1.41, control. Finally, the second sentence of subsection 1.41(~~g~~k) permits a corporation's articles of incorporation or bylaws to prescribe the corporation's own notice requirements, if they are not inconsistent with the general requirements of this section or specific requirements of other sections of the Act.

The rules set forth in section 1.41 permit many other sections of the Model Act to be phrased simply in terms of giving or delivering notice without repeating details with respect to how notice should be given and when it is effective in various circumstances.