Regular Session, 2014

HOUSE BILL NO. 319

BY REPRESENTATIVE FOIL

(On Recommendation of the Louisiana State Law Institute)

CORPORATIONS: Provides for revisions to business corporation law

AN ACT

To amend and reenact R.S. 12:1501, 1502(A), 1601 through 1604, and 1701, R.S. 44:4.1(B)(5), R.S. 49:222(B)(1) and (6), and Code of Civil Procedure Article 611, to enact R.S. 12:1-101 through 1-1704, and 1702 through 1704, and to repeal R.S. 12:1 through 178 and 1605 through 1607, relative to corporations; to provide for general provisions; to provide for incorporation; to provide for the purposes and powers of corporations; to provide for names; to provide for offices and agents; to provide for shares and distributions; to provide with respect to shareholders; to provide with respect to directors and officers; to provide for domestication and conversion; to provide for the amendment of articles of incorporation and bylaws; to provide for mergers and share exchanges; to provide for the disposition of assets; to provide for appraisal rights; to provide for dissolution; to provide for foreign corporations; to provide for records and reports; to provide for transition provisions; to provide for the applicability of Chapter 24 of Title 12 of the Louisiana Revised Statutes of 1950; to provide for the conversion of business organizations; to provide for fees; to provide for derivative actions; to provide for the continuous revision of Title 12 of the Louisiana Revised Statutes of 1950; to provide an effective date; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. R.S. 12:1501, 1502(A), 1601 through 1604, and 1701 are hereby amended and reenacted and R.S. 12:1-101 through 1-1704, and 1702 through 1704 are hereby enacted to read as follows:

PART 1. GENERAL PROVISIONS

SUBPART A. SHORT TITLE AND RESERVATION OF POWER

§1-101. Short title

This Chapter shall be known and may be cited as the "Business Corporation Act". References in this Chapter and elsewhere in the Revised Statutes to the Business Corporation Act or the Business Corporation Law shall be deemed to be references to this Chapter.

Source: MBCA §1.01.

Comment - 2014 Revision

The former Chapter was known as the "Business Corporation Law". The distinct name for this Chapter will make it consistent with that of the Model Business Corporation Act, on which it is based, and provide a convenient means of distinguishing the earlier statute from the current one.

§1-102. Reservation of power to amend or repeal

The legislature has power to amend or repeal all or part of this Chapter at any time and all domestic and foreign corporations subject to this Chapter are governed by the amendment or repeal.

Source: MBCA §1.02.

SUBPART B. FILING DOCUMENTS

§1-120. Requirements for documents; extrinsic facts

A. A document must satisfy the requirements of this Section, and of any other provision of this Chapter that adds to or varies these requirements, to be entitled to filing by the secretary of state.

B. The filing of the document in the office of the secretary of state must be required or permitted by this Chapter.

C. The document must contain the information required by this Chapter. It may contain other information as well.

D. The document must be typewritten or printed or, if electronically transmitted, it must be in a format that can be retrieved or reproduced in typewritten or printed form. The inclusion of handwritten notations or entries on a typewritten or printed document does not affect the eligibility of the document for filing.

E. The document must be in the English language. A corporate name need not be in English if written in English letters or Arabic or Roman numerals, and the certificate of existence required of foreign corporations need not be in English if accompanied by a reasonably authenticated English translation.

F. The document must be signed by one of the following:

(1) By the chairman of the board of directors of a domestic or foreign corporation, by its president, or by another of its officers.

(2) If directors have not been selected or the corporation has not been formed, by an incorporator.

(3) If the corporation is in the hands of a receiver, liquidator, trustee, or other court-appointed fiduciary, by that fiduciary.

G. The person executing the document shall sign it and state, beneath or opposite the person's signature, the person's name and the capacity in which the document is signed. The document may but need not contain a corporate seal.

H. Except as provided in R.S. 12:1701, the following documents shall be acknowledged by one of the persons who signs the document or instead shall be executed by authentic act:

(1) Articles of incorporation.

(2) Written consent to appointment by a registered agent.

(3) Articles of correction.

(4) Articles of amendment.

(5) Articles of merger.

(6) Articles of share exchange.

(7) Articles of domestication.

(8) Articles of nonprofit conversion.

(9) Articles of nonprofit domestication and conversion.

(10) Articles of entity conversion.

(11) Articles of dissolution.

(12) Articles of revocation of dissolution.

(13) Articles of termination.

(14) Articles of reinstatement.

(15) Contract acknowledgment statement by a corporation that contracts with the state.

I. If the secretary of state has prescribed a mandatory form for the document pursuant to R.S. 12:1-121, the document must be in or on the prescribed form.

J. The document must be delivered to the office of the secretary of state for filing. Delivery may be made by electronic transmission if and to the extent permitted by the secretary of state. If it is filed in typewritten or printed form and not transmitted electronically, the secretary of state may require one exact or conformed copy to be delivered with the document, except as provided in R.S. 12:1-503.

K. When the document is delivered to the office of the secretary of state for filing, the correct filing fee and any tax, fee, or penalty required to be paid therewith by this Chapter or other provision of law must be paid or provision for payment made in a manner permitted by the secretary of state.

L. Whenever a provision of this Chapter permits any of the terms of a plan or a filed document to be dependent on facts objectively ascertainable outside the plan or filed document, the following provisions apply:

(1) The manner in which the facts will operate upon the terms of the plan or filed document shall be set forth in the plan or filed document.

(2) The facts may include any of the following but are not limited to:

(a) Any of the following that is available in a nationally recognized news or information medium either in print or electronically: statistical or market indices,

market prices of any security or group of securities, interest rates, currency exchange rates, or similar economic or financial data.

(b) A determination or action by any person or body, including the corporation or any other party to a plan or filed document.

(c) The terms of, or actions taken under, an agreement to which the corporation is a party or any other agreement or document.

(3) As used in this Subsection:

(a) "Filed document" means a document filed with the secretary of state under any provision of this Chapter except R.S. 12:1-1621.

(b) "Plan" means a plan of domestication, nonprofit conversion, entity conversion, merger, or share exchange.

(4) The following provisions of a plan or filed document may not be made dependent on facts outside the plan or filed document:

(a) The name and address of any person required in a filed document.

(b) The registered office of any entity required in a filed document.

(c) The registered agent of any entity required in a filed document.

(d) The number of authorized shares and designation of each class or series of shares.

(e) The effective date of a filed document.

(f) Any required statement in a filed document of the date on which the underlying transaction was approved or the manner in which that approval was given.

(5) If a provision of a filed document is made dependent on a fact ascertainable outside of the filed document, and that fact is not ascertainable by reference to a source described in Subparagraph (K)(2)(a) of this Section or a document that is a matter of public record, or the affected shareholders have not received notice of the fact from the corporation, then the corporation shall file with the secretary of state articles of amendment setting forth the fact promptly after the time when the fact referred to is first ascertainable or thereafter changes. Articles of

amendment under this Paragraph are deemed to be authorized by the authorization of the original filed document or plan to which they relate and may be filed by the corporation without further action by the board of directors or the shareholders.

Source: MBCA §1.20.

Comments - 2014 Revision

(a) The Model Act language in Subsection (b) provided that "[t]his Act must require or permit filing the document in the office of the secretary of state." The Model Act language was modified in this Chapter to make it clear that the terms of Subsection B of this Section operated as one of the conditions to be satisfied to make a document eligible for filing under this Chapter, and not as a free-standing requirement that was to be imposed on the Chapter itself.

(b) The second sentence of Subsection D of this Section was added to preserve the eligibility for filing of typewritten or printed documents that contain handwritten entries or notations, which are commonly used to complete blank spaces or to modify printed provisions in form documents.

(c) A new Subsection H of this Section was added, and the existing Model Act subsections (h) through (k) were redesignated as Subsections I through L of this Section, to retain the rule in prior law that required documents of the kind listed in Subsection H of this Section to be acknowledged or executed by authentic act. As in prior law, this rule is subject to exceptions provided elsewhere in the law, currently in R.S. 12:1701. If the requirements of those exceptions are satisfied, they permit documents that are signed and filed electronically, or in person at the secretary of state's office, to be filed without the acknowledgment or authentic act that would otherwise be required.

(d) Subsection K of this Section requires the payment of the correct filing fee for a document. Those fees are set forth in R.S. 49:222.

§1-121. Forms

A.(1) The secretary of state may prescribe and furnish on request forms for any of the following:

(a) An application for a certificate of existence and standing.

(b) A foreign corporation's application for a certificate of authority to do business in this state.

(c) A foreign corporation's application for a certificate of withdrawal.

(d) The annual report.

(2) If the secretary of state so requires, use of these forms is mandatory.

B. The secretary of state may prescribe and furnish on request forms for other documents required or permitted to be filed by this Chapter but their use is not mandatory.

Source: MBCA §1.21.

Comment - 2014 Version

The title of the "certificate of existence" in the Model Act was modified to add the phrase "and standing" to reflect the added content in the "certificate of existence and standing" as provided in R.S. 12:1-128.

§1-122. Filing, service, and copying fees

The secretary of state shall collect the fee authorized in R.S. 49:222 when a document described in this Chapter is delivered to the secretary of state for filing.

Source: MBCA §1.22.

§1-123. Effective time and date of document

A. Except as provided in Subsections B and C of this Section and in R.S. 12:1-124(C), a document accepted for filing is effective at one of the following:

(1) The date and time of its receipt for filing, as evidenced by such means as the secretary of state may use for the purpose of recording the date and time of receipt.

(2) A later time, on the date of receipt, specified in the document as its effective time.

B. Except as provided in Subsection C of this Section, a corporation's original articles of incorporation become effective when signed as provided in R.S. 12:1-120 if all of the following conditions are met:

(1) The articles are received for filing by the secretary of state within five days, exclusive of legal holidays, after the date that the articles are signed.

(2) The articles are accepted for filing.

C. A document may specify a delayed effective time and date, and if it does so the document becomes effective at the time and date specified. If a delayed effective date but no time is specified, the document is effective at the close of business on that date. A delayed effective date for a document may not be earlier than the first date and time that the document otherwise would have become effective under this Section or later than the ninetieth day after the date the document is received for filing by the secretary of state.

D. A document is accepted for filing when the secretary of state files the document as provided in R.S. 12:1-125(B).

Source: MBCA §1.23.

Comments - 2014 Revision

(a) The Model Act provision was modified to add a new Subsection B of this Section, and to redesignate Model Act Subsection (b) as Subsection C of this Section. The new Subsection B of this Section retains the five-day grace period provided under former Louisiana law for the filing of a corporation's original articles of incorporation, making them effective when signed if they are delivered for filing within five days, exclusive of holidays. Prior law had applied the five-day grace period to several other documents, such as articles of amendment and articles of merger, but this Section drops those documents from the coverage of the five-day rule to avoid unfair surprise to those who may rely upon documents already on file in the secretary of state's office. The grace period for a corporation's original articles of incorporation does not pose that kind of risk but rather supports the reasonable expectations of those dealing with or on behalf of the new corporation.

The term "original articles of incorporation" is used in this provision to distinguish a corporation's initial articles of incorporation from other, later-filed documents that would be considered part of a corporation's "articles of incorporation" as that term is defined in R.S. 12:1-140(1). As used in the definition and in this Section, the term "original" is not related to the distinction between a manually-signed document and a copy.

In some cases incorporators may not wish for the five-day grace period to apply. For example, articles may be signed near the end of a calendar or tax year, but be intended to take effect on the first day of the next year. In that case, the parties may specify a delayed effective date as provided in Subsection C of this Section.

(b) A phrase was added to Model Act Subsection (c), concerning delayed effective dates, to take account of the fact that a corporation's original articles of incorporation may take effect under Subsection B up to five business days before they are delivered for filing to the secretary of state. As modified, Subsection C of this Section permits the effective date of the articles to fall on any date between the date that they are signed, provided that the conditions of the five-day grace period are satisfied, and the ninetieth day after the articles are received by the secretary of state. For example, original articles that were signed on day one, but stated that they were to become effective on day three would become effective on day three as long as they were delivered for filing by day five and were accepted for filing by the secretary of state. If the same articles stated that they were to become effective on the first day of the month after the month in which they were filed, they would take effect on that date.

(c) A new Subsection D of this Section was added to the Model Act to make it clear that a document is "accepted for filing" within the meaning of this Subsection only if the secretary of state "files" the document as provided in R.S. 12:1-125(B).

(d) The Model Act language in Paragraph (A)(2) of this Section was modified to make it clear that the effective time of a document must be a time that occurs on the date of filing, and not, as the original language may have suggested, any time on any chosen date, as long as that time was specified in the filed document on the date that the document was filed.

§1-124. Correcting filed document

A. A domestic or foreign corporation may correct a document filed with the secretary of state if any of the following apply:

(1) The document contains an inaccuracy.

(2) The document was defectively signed, attested, sealed, verified, or acknowledged.

(3) The electronic transmission was defective.

B. A document is corrected by doing all of the following:

(1) Preparing articles of correction that perform all of the following:

(a) Describe the document, including its filing date, or attach a copy of it to the articles.

(b) Specify the inaccuracy or defect to be corrected.

(c) Correct the inaccuracy or defect.

(2) By delivering the articles to the secretary of state for filing.

C. Articles of correction are effective on the effective date of the document they correct except as to persons relying on the uncorrected document and adversely affected by the correction. As to those persons, articles of correction are effective when filed.

Source: MBCA §1.24.

§1-125. Filing duty of secretary of state

A. If a document delivered to the office of the secretary of state for filing satisfies the requirements of R.S. 12:1-120, the secretary of state shall file it.

B. The secretary of state files a document by recording it as filed on the date and time of receipt. After filing a document, except as provided in R.S. 12:1-503, the secretary of state shall deliver to the domestic or foreign corporation or its representative a copy of the document with an acknowledgment of the date of filing.

C. If the secretary of state refuses to file a document, it shall be returned to the domestic or foreign corporation or its representative within five days after the

document was delivered, together with a brief, written explanation of the reason for the refusal.

D. The secretary of state's duty to file documents under this Section is ministerial. The secretary's filing or refusing to file a document does not do any of the following:

(1) Affect the validity or invalidity of the document in whole or part.

(2) Relate to the correctness or incorrectness of information contained in the document.

(3) Create a presumption that the document is valid or invalid or that information contained in the document is correct or incorrect.

Source: MBCA § 1.25

§1-126. Appeal from secretary of state's refusal to file document

[Reserved.]

Comment - 2014 Revision

Section 1.26 of the Model Act, concerning the procedure for appealing a refusal by the secretary of state to file a document, was omitted from this Chapter to avoid any redundancy or conflict with the provisions of the Code of Civil Procedure concerning writs of mandamus. Under Article 3863 of the Code of Civil Procedure, a writ of mandamus may be directed to a public officer to compel the performance of a ministerial duty required by law. R.S. 12:1-125(A) imposes on the secretary of state a legal duty to file documents that satisfy the requirements of R.S. 12:1-120, and R.S. 12:1-125(D) states that this filing duty is ministerial. Hence, a writ of mandamus is available to compel the secretary of state to file a document that is submitted in compliance with this Chapter.

§1-127. Evidentiary effect of copy of filed document

[Reserved.]

Comment - 2014 Revision

Section 1.27 of the Model Act, concerning the evidentiary effects of a certificate of filing from the secretary of state, was omitted from this Chapter to avoid any redundancy or conflict with the provisions of the Code of Evidence. See C.E. Arts. 902 and 904.

§1-128. Certificate of existence and standing

A. Anyone may apply to the secretary of state to furnish a certificate of existence and standing for a domestic corporation or a certificate of authorization and standing for a foreign corporation.

B. A certificate of existence, or authorization, and standing sets forth all of the following:

(1) The domestic corporation's corporate name or the foreign corporation's corporate name used in this state.

(2) That either of the following apply:

(a) The domestic corporation is duly incorporated under the law of this state, along with the date of its incorporation and the period of its duration if less than perpetual.

(b) The foreign corporation is authorized to do business in this state.

(3) [Reserved.]

(4) That its most recent annual report required by R.S. 12:1-1621 or R.S. 12:309 has been filed with the secretary of state and that the corporation is in good standing, or that its most recent annual report has not been filed as required by law.

(5) That the corporation is not dissolved or terminated.

C. Subject to any qualification stated in the certificate, a certificate of existence, or authorization, and standing issued by the secretary of state may be relied upon as conclusive evidence that the domestic corporation is in existence or the foreign corporation is authorized to transact business in this state, and, if the certificate so states, that the corporation is in good standing.

Source: MBCA §1.28.

Comments - 2014 Revision

(a) Paragraph (b)(3) of the Model Act, concerning the secretary of state's records on the payment of taxes and fees that could affect a corporation's existence, was omitted from this Chapter because the secretary of state does not maintain records of taxes or fees owed by a corporation to the state, other than the filing fees for documents filed in the secretary of state's office. A corporation's existence or authority to do business in this state could be affected by its failure to file annual reports as required by R.S. 12:1-1621 or R.S. 12:309, but compliance with the annual report filing requirement is covered by a separate Paragraph (b)(4), which was retained in this Chapter in a modified form.

(b) Paragraph (b)(4) of the Model Act was modified to require the certificate of existence and standing to state either that the most recent annual report required by R.S. 12:1-1621 or R.S. 12:309 had been filed, and that the corporation was in good standing, or that the most recent annual report had not been filed. The change was made to allow the secretary of state to utilize a single certificate in the place of the multiple certificates used under prior law, including a certificate of incorporation,

a certificate of existence and a certificate of good standing. Although most applicants for certificates concerning domestic corporations will wish to obtain a certificate that affirms all three items are true, experience suggests that some certificate applicants may be satisfied with a certificate of existence even in the absence of a certificate of good standing. A statement of good standing is redundant of the statement that a corporation has filed its annual report as required, but the traditional terminology was added to the Model Act language to harmonize it with that commonly used in corporate transactional work.

(c) The rule in Model Act Subsection (c) concerning the conclusive effect of a certificate of existence, or authorization, and good standing was retained as a rule of substantive law similar to former R.S. 12:25(B) on the conclusive effects of a certificate of incorporation. The certificate of existence, or authorization, and good standing supplants the formerly separate certificates of incorporation or authorization, of existence, and of good standing.

(d) A reference to R.S. 12:309 was added to Paragraph (B)(4)of this Section to reflect the retention of existing Chapter 3 of Title 12, in place of Model Act Chapter 15, to govern the qualification of foreign corporations to do business in Louisiana.

(e) Model Act Subsection (b)(5) was modified to reflect the distinction drawn in this Chapter between a dissolution and termination. See R.S. 12:1-1440 through 1-1445 and related comments.

§1-129. Penalty for signing false document

[Reserved.]

Comment - 2014 Version

Section 1.29 of the Model Act, concerning the imposition of a criminal penalty for signing a false document, was omitted to avoid any redundancy or conflict with the state's general criminal law.

SUBPART C. SECRETARY OF STATE

§1-130. Powers

[Reserved.]

Comment - 2014 Version

Section 1.30 of the Model Act, concerning the power of the secretary of state to do the things necessary to fulfill the duties of the secretary under this Chapter, was omitted to avoid redundancy or conflict with existing constitutional and statutory provisions concerning the powers of the secretary of state.

SUBPART D. DEFINITIONS

§1-140. Definitions

In this Chapter:

(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 Chapter except R.S. 12:1-1621. If an amendment of the articles or any other document filed under this Chapter 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.

(2A) "Beneficial shareholder" means a person who owns the beneficial interest in shares, including a record shareholder or a person on whose behalf shares are registered in the name of an intermediary or nominee.

(3) "Conspicuous" means so written, displayed, or presented that a reasonable person against whom the writing is to operate should have noticed it. For example, text in italics, boldface, contrasting color, 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 Chapter.

(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 R.S. 12:1-141, 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 any of the following forms:

(a) A declaration or payment of a dividend.

(b) A purchase, redemption, or other acquisition of shares.

(c) A distribution of indebtedness.

(d) Any other form.

(6A) "Document" means either of the following:

(a) Any tangible medium on which information is inscribed, and includes any writing or written instrument.

(b) An electronic record.

(6B) "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 R.S. 12:1-141.

(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 used in conventional commercial practice, unless otherwise authorized in accordance with R.S. 12:1-141(J).

(7C) "Electronic transmission" or "electronically transmitted" means any form or process of communication, not directly involving the physical transfer of paper or another tangible medium, which is both of the following:

(a) Suitable for the retention, retrieval, and reproduction of information by the recipient.

(b) Retrievable in paper form by the recipient through an automated process used in conventional commercial practice, unless otherwise authorized in accordance with R.S. 12: 1-141(J).

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

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

(8) [Reserved.]

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

(9A) The phrase "facts objectively ascertainable" outside of a filed document or plan is defined in R.S. 12:1-120(K).

(9B) "Expenses" means reasonable expenses of any kind, including attorney's fees and other litigation-related expenses, that are incurred in connection with a matter.

(9C) "Filing entity" means an unincorporated entity that is required by law to file a public organic document for any of the purposes stated in the definition of that term.

(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 parish, authority, county, district, municipality, and any other state or local political subdivision.

(12) "Includes" denotes a partial definition.

(13) "Individual" means a natural person.

(13A) "Intangible property" means a thing that is classified as incorporeal, as distinguished from corporeal, or property that is classified as intangible, as distinguished from tangible, by the law of the jurisdiction that governs its ownership.

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

(a) The right to receive distributions from the entity either in the ordinary course or upon liquidation, other than as an assignee or other similar role.

(b) 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.

(13C) "Interest holder" means a person who owns an interest.

(13D) "Knowledge" means actual knowledge. "Know" has a corresponding meaning.

(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 not a filing entity.

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

(15) "Notice" is defined in R.S. 12:1-141.

(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 by either of the following:

(a) Solely by reason of the person's status as a shareholder, partner, member, or interest holder.

(b) 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, partners, members, or interest holders liable in their capacity as shareholders, partners, members, or interest holders for all or specified debts, obligations, or liabilities of the entity.

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

(16A) "Personal property" means a thing that is classified as movable, as distinguished from immovable, or property that is classified as personal, as distinguished from real, by the law of the jurisdiction that governs its ownership.

(17) "Principal office" means the office, in or out of this state, so designated in the most recent annual report or, until an annual report is filed, in the articles of incorporation, 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, to allow it to own immovable property as to third persons, or to protect its shareholders, partners, members, or interest holders against owner liability. 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 civil, 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 R.S. 12:1-143.

(18C) "Real property" means a thing that is classified as immovable, as distinguished from movable, or property that is classified as real, as distinguished from personal, by the law of the jurisdiction that governs its ownership.

(19) "Record date" means the date established under Part 6 or 7 of this Chapter on which a corporation determines the identity of its shareholders and their shareholdings for purposes of this Chapter. 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.

(19A) "Record shareholder" means either of the following:

(a) The person in whose name shares are registered in the records of the corporation.

(b) The person identified as the beneficial owner of shares in a beneficial ownership certificate pursuant to R.S. 12:1-723 on file with the corporation to the extent of the rights granted by such certificate.

(20) "Secretary" means the corporate officer responsible 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, unless varied for purposes of a specific provision of this Chapter, a record shareholder.

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

(22A) "Sign" or "signature" means, with present intent to authenticate or adopt a document, either of the following:

(a) To execute or adopt a tangible symbol in a document, and includes any manual, facsimile, or conformed signature.

(b) 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.

(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.

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

(24A) "Tangible property" means a thing that is classified as corporeal, as distinguished from incorporeal, or property that is classified as tangible as distinguished from intangible, by the law of the jurisdiction that governs its ownership.

(24B) "Unincorporated entity" means an organization or juridical person that has a separate juridical personality 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, a foreign government, or any agency or subdivision of a foreign government. In addition, the term includes a general partnership, limited liability company, limited partnership, partnership in commendam, registered limited liability partnership, business trust, joint stock association, and unincorporated nonprofit association, regardless of whether any of those included forms of organization is treated as a juridical person under the relevant organic law.

(25) "Unanimous governance agreement" is defined in R.S. 12:1-732.

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

(26) "Voting group" means all shares of one or more classes or series that under the articles of incorporation or this Chapter 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 Chapter to vote generally on the matter are for that purpose a single voting group.

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

(27A) "Voting trust beneficial owner" means an owner of a beneficial interest in shares of the corporation held in a voting trust established pursuant to R.S. 12:1-730(A). "Unrestricted voting trust beneficial owner" means, with respect to any shareholder rights, a voting trust beneficial owner whose entitlement to exercise the shareholder right in question is not inconsistent with the voting trust agreement.

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

Source: MBCA §1.40.

Comments - 2014 Revision

(a) This Section deletes the Model Act definition of "employee" in Paragraph (8) of this Section because the definition is not relevant to the meaning of any provision in the Chapter, other than R.S. 12: 1-858(E), where the definition actually would work against the intended meaning of the provision. The deletion of the definition also prevents it from being used for unintended purposes, such as determining whether an officer is an employee for purposes of workers' compensation law or the imposition of vicarious tort liability on an employer.

(b) The definition of "expenses" in Paragraph (9B) of this Section has been modified to include an express reference to attorney's fees and other litigation-related expenses. This modification does not change the intended meaning of the Model Act definition; the Official Comments to the relevant provision say that reasonable fees and disbursements of counsel are to be considered expenses. The phrase added by this Section simply puts the comment's position on that issue into the language of the statute itself.

(c) This Act modifies the definition of three terms to make them apply as intended to partnerships governed by Louisiana law. The three affected terms are "filing entity" (9C), "nonfiling entity" (14B), and "public organic document" (17B). The three terms are used strictly in connection with entity conversions under Part 9 of this Chapter, and operate there to require the filing of appropriate public documents by an entity that survives a conversion if the "creation" of that form of entity would require the filing of a public organic document. The terms are designed to apply mainly to limited partnerships and limited liability partnerships that are "formed" or "created" under the laws of most states by the filing of articles or a certificate of partnership.

Under Louisiana law, however, the filing of this kind of document does not necessarily "form" or "create" either a partnership in commendam or a registered limited liability partnership. An existing general partnership can obtain the form of limited liability that is available in a limited liability partnership or partnership in commendam by, among other things, filing the appropriate document with the secretary of state. The filing of that document does not affect the filing partnership's already-existing juridical personality. Moreover, Louisiana law does not limit its filing obligations to limited liability forms of partnership; it requires even general partnerships to file a document with the secretary of state to acquire the legal capacity to own immovable property as to third persons. C.C. Art. 2806; R.S. 9:3401-3410. Still, in neither context - limited liability nor ownership of immovable property- is the filing required to create the partnership as a separate juridical person.

Nevertheless, the purpose of the relevant Model Act rules on "filing entities" - that they be required to file the appropriate public documents in connection with an entity conversion - should apply to Louisiana partnerships in the same way they would apply to a limited partnership or a limited liability partnership formed under the laws of another state. To achieve that end, this Section broadens the definition of a "public organic document" to include not only a document filed to "create" an entity, but also one that must be filed for the entity to own immovable property as to third persons or to protect the entity's owners against liability. The definitions of "filing entity" and "nonfiling entity" are then made to depend on this broader definition of the term "public organic document."

In one type of transaction, this approach could theoretically require the filing of a public document where it would otherwise not be required: in the conversion of a corporation or other form of entity into a general partnership. Louisiana law does not require a general partnership to file an organic document with the secretary of state unless the partnership wishes to own immovable property. As a practical matter, however, few owners of a general partnership would really wish to relinquish their partnership's capacity to own immovable property merely to save a small filing fee. Accordingly, this Section includes a general partnership within the meaning of a "filing entity" so that a conversion of another form of business into a general partnership will trigger the filing that preserves the capacity of the converted business entity to own immovable property.

(d) Following the example set in Louisiana's adoption of the Uniform Commercial Code, this Section adds definitions to the Model Act to deal with differences in common law and civil law terminology in the area of what the common law calls property and the civil law calls things. The four new property-related definitions cover the terms "real property" (18C), "personal property" (16A), "tangible property" (24A), and "intangible property" (13A). Each definition includes both the common law and civil law terminology, and applies them based on the law that governs the ownership of the thing or property in question. So, for example, a Louisiana corporation that owned land both in Louisiana and in Texas would own "real property" in both states within the meaning of that term in this Section, because the land would be classified as an immovable thing under Louisiana law and as real property under Texas law.

(e) The Model Act defines an "interest holder" as a person who "holds of record" an interest. This Section substitutes the term "owner" for the "holds of record" phrase. The Model Act's implicit assumption that the organic law governing all forms of unincorporated entities will provide a corporation-like record holder rule, and that the unincorporated entities will maintain those records as required, may not be correct. In an informally-operated partnership or limited liability company, it is possible, even likely, that no partner or member will hold an interest "of record" in the usual sense of those words. Because the term "interest holder" is used in this Section to identify the persons whose approval is required to carry out a merger or entity conversion, limiting those persons to holders of record could mean that no one within an informally-operated partnership or limited liability company would have the power to approve those types of transactions. The "holds of record" phrase is omitted to avoid that problem. However, the deletion of those words is not intended to deprive a record ownership rule, if one exists, of its normal effects. If the organic law governing an unincorporated entity does contain a record ownership rule, that rule should operate by itself to permit the unincorporated entity to determine the persons entitled to vote on a merger or entity conversion in accordance with the record ownership rule.

(f) This Section adds a definition of "know" or "knowledge" in Paragraph (13D) of this Section that is identical to that in the Uniform Commercial Code, R.S. 10:1-202 (b). Although the notice rules in the two statutes differ, the definition of "knowledge" provided in Paragraph (13D) of this Section is intended to draw the same distinction between knowledge and notice that is drawn by the UCC, and to express the same concept of actual knowledge.

(g) This Section adds "partner" to the list of persons who may bear "owner liability" under Paragraph (15C) of this Section to avoid any question whether a partner is among the types of owners who may bear that form of liability. This Section rejects the Model Act rule that would have permitted the articles of incorporation of a corporation governed by this Chapter to contain a provision imposing owner liability on the shareholders of the corporation. See R.S. 12:1-202, Comment (b). Nevertheless, that feature of the definition of owner liability was

retained in Paragraph (15C) of this Section because it may be relevant to a transaction with a foreign corporation or unincorporated entity. For example, if a plan of merger proposed the merger of a Louisiana corporation into a foreign corporation whose articles contained a provision imposing owner liability on the corporation's shareholders, R.S. 12:1-1104(H) would require the plan of merger to be approved by each shareholder who would bear owner liability as a result of the merger. The full definition of "owner liability" in Paragraph (15C) of this Section is retained to deal with that kind of transaction.

(h) This Section modifies the definition of "principal office" in Paragraph (17) of this Section to reflect the requirement in R.S. 12:1-202 that the address of an initial principal office, if different from the registered office, be included in a corporation's initial articles of incorporation.

(i) The Model Act definition of "secretary" in Paragraph (20) of this Section has been modified in this Section to reflect the requirement imposed by this Chapter that a corporation elect an officer called a "secretary." The Model Act requires the election of someone with the responsibilities traditionally associated with a corporate secretary, but does not require that person to be called "secretary." Thus, in the Model Act, a definition of "secretary" is required to describe the person to whom the Model Act is referring when it uses that term. The definition is retained in this Section to describe the minimum, statutorily-designated responsibilities of the person elected to the office of secretary.

(j) This Section modifies the Model Act definition of "unincorporated entity" in Paragraph (24B) of this Section in two ways. First, it replaces the Model Act references to an "artificial legal person" and to a "separate legal entity" with the equivalent Louisiana terminology, "juridical person" and "separate juridical personality." See C.C. Art. 24. And, second, it deletes the Model Act reference to an organization that has the capacity to "own an estate in real property." That phrase, which is foreign to Louisiana law, appeared to be included in the model definition primarily to deal with partnerships and unincorporated nonprofit associations that are governed by the law of a state that has yet make the transition from an aggregate to entity theory for those forms of organization. The same purpose is served in this Section by retaining the Model Act's listing of those organizations by name in the definition, along with the names of the analogous Louisiana organizations, and then by stating that the inclusive listing controls regardless of whether the listed entities are treated as juridical persons in their states of organization.

This list-by-name approach, when combined with the general juridical personality rule, provides a clear, simple rule for all of the currently-realistic possibilities for an entity conversion transaction, while also allowing for expansion of the covered entities to include any new form of organization that is given the juridical personality that modern law nearly always confers on new forms of business organization. Of course, this approach does exclude the possibility that a corporation could engage in an entity conversion transaction under Louisiana law with some newly-discovered or newly-invented form of business organization that lacked juridical personality, yet still possessed the capacity to own immovable property. But this Section chooses deliberately to leave for future consideration the rules that should apply in that type of transaction.

§1-141. Notices and other communications

A. Except as provided in R.S. 12:1-303, notice under this Chapter must be in writing. Unless otherwise agreed between the sender and the recipient, a notice or other communication under this Chapter must be in English.

B. A notice or other communication may be given or sent by any method of delivery, except that electronic transmissions must be in accordance with this Section. If these methods of delivery are impracticable, a notice or other communication may be communicated by a newspaper of general circulation in the area where published.

C. Notice or other communication to a domestic or foreign corporation authorized to transact business in this state may be delivered to its registered agent 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 or if authorized by Subsection J of this Section.

E. Any consent under Subsection D of this Section may be revoked by the person who consented by written or electronic notice to the person to whom the consent was delivered. Any such consent is deemed revoked if both of the following conditions are met:

(1) The corporation is unable to deliver two consecutive electronic transmissions given by the corporation in accordance with such consent.

(2) The 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 the sender and the recipient, an electronic transmission is received when all of the following occurs:

(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.

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

G. Receipt of an electronic acknowledgment from an information processing system described in Paragraph (F)(1) of this Section 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.

I. Notice or other communication, if in a comprehensible form or manner, is effective at the earliest of the following:

(1) If in physical form, the earliest of when it is actually received, or when it is left at a place apparently designated for the receipt of mail or other similar communication at any of the following:

(a) A shareholder's address shown on the corporation's record of shareholders maintained by the corporation under R.S. 12:1-1601(C).

(b) A director's residence or usual place of business.

(c) The corporation's principal place of business.

(2) If mailed postage prepaid and correctly addressed to a shareholder, upon deposit in the United States mail.

(3) If mailed by United States mail postage prepaid and correctly addressed to a recipient other than a shareholder, the earliest of when it is actually received, or either of the following:

(a) If sent by registered or certified mail, return receipt requested, the date shown on the return receipt signed by or on behalf of the addressee.

(b) Five days after it is deposited in the United States mail.

(4) If an electronic transmission, when it is received as provided in Subsection F of this Section.

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 used in conventional commercial practice only if both of the following conditions are met:

(1) The electronic transmission is otherwise retrievable in perceivable form.

(2) The sender and the recipient have consented in writing to the use of such form of electronic transmission.

K. If this Chapter prescribes requirements for notices or other communications in particular circumstances, those requirements govern. If articles of incorporation or bylaws prescribe requirements for notices or other communications, not inconsistent with this Section or other provisions of this Chapter, those requirements govern. The articles of incorporation or bylaws may authorize or require delivery of notices of meetings of directors by electronic transmission.

Source: MBCA §1.41.

Comment - 2014 Revision

This Section omits the phrase in Model Act Subsection (a) that would have permitted oral notice if "reasonable in the circumstances" and the rule in Model Act Paragraph (i)(5) concerning the time at which an oral notice becomes effective. When this Chapter requires a notice, the notice must be in writing, as defined. However, the rejection of an oral statement as an acceptable form notice does not affect any inference of knowledge that may be drawn from evidence that an oral statement was made to an individual.

§1-142. Number of shareholders

A. For purposes of this Chapter, the following identified as a shareholder in a corporation's current record of shareholders constitutes one shareholder:

(1) Co-owners.

(2) A corporation, partnership or other entity.

(3) A trust or estate or the trustees, guardians, custodians, succession representatives, or other fiduciaries of a single trust, estate, succession, or account.

B. For purposes of this Chapter, shareholdings registered in substantially similar names constitute one shareholder if it is reasonable to believe that the names represent the same person.

Source: MBCA §1.42.

Comments - 2014 Revision

(a) Under Louisiana law, the heirs or legatees of a decedent succeed immediately to ownership of the decedent's assets. See C.C. Arts. 871, 934, and 935. If specific shares owned by the decedent are not bequeathed to particular successors, the shares are co-owned by the decedent's successors. See C.C. Arts. 872, 935, and 1292. To achieve the result intended by the Model Act's treating an estate as one owner, this Section treats co-owners by succession, either of the shares or of the estate in which the shares are included, as one owner under Paragraph (A)(1) of this Section.

(b) The Model Act counts co-owners as a single shareholder only when the shares involved are owned by three or fewer co-owners. This Section counts all co-owners of the same shares as a single shareholder, regardless of the number of co-owners, so that direct co-ownership is treated for counting purposes in the same way as the various forms of indirect co-ownership that are counted as a single shareholder for counting purposes under Paragraph (A)(2) of this Section. The removal of the numerical limitation on the operation of the co-ownership rule also allows the rule on co-ownership by succession to operate as intended, regardless of the number of heirs or legatees involved.

(c) The Model Act includes a trust or estate in the list of entities treated as a single shareholder under Paragraph (a)(2). Because Louisiana law does not treat a trust or estate as an entity, and because the entity status of an estate or trust is not relevant to the operation of the counting rule stated by Subsection A of this Section, this Section covers estates and trusts in Paragraph (A)(3) of this Section instead of (A)(2).

(d) As used in Paragraph (A)(3) of this Section, the term "estate" was retained as a means of applying the Model Act rule to estates existing under the laws of another state. The rule applicable under Louisiana law to shares held by the heirs or legatees of a deceased shareholder is not provided by the rule in Paragraph (A)(3) of this Section concerning estates, but rather by the rule in Paragraph (A)(1) of this Section concerning co-owners by succession. The rule is the same in both places, of course, but the co-ownership by succession phrase in Paragraph (A)(1) of this Section is the more technically accurate source of the rule in the context of Louisiana succession law.

(e) This Section adds a reference to succession representatives of a succession in Paragraph (A)(3) of this Section, to supply the Louisiana analogue to the estate fiduciaries included in the Model Act.

(f) Under the Model Act, the rules in this Section are relevant only for purposes of two provisions, Model Act Section 13.02(b)(2), concerning the availability of appraisal rights, and Model Act Section 14.30(a)(2), concerning the availability of dissolution of the corporation on grounds of oppression. Under this Chapter, the rules are relevant only for the first purpose. This Chapter does not require a counting of shareholders to determine whether the remedies it provides on grounds of oppression are available to a shareholder. See R.S. 12:1-1435(J).

§1-143. Qualified director

A. A "qualified director" is a director who meets the following criteria:

(1) At the time action is to be taken under R.S. 12:1-744, does not have either of the following:

(a) A material interest in the outcome of the proceeding.

(b) A material relationship with a person who has such an interest.

(2) At the time action is to be taken under R.S. 12:1-853 or 1-855, does not have a material relationship with a director described in either Subparagraph (a) or (b) of this Paragraph and is not either of the following:

(a) A party to the proceeding.

(b) A director as to whom a transaction is a director's conflicting interest transaction or who sought a disclaimer of the corporation's interest in a business opportunity under R.S. 12:1-870, which transaction or disclaimer is challenged in the proceeding.

(3) At the time action is to be taken under R.S. 12:1-862, is not either of the following:

(a) A director who has a material relationship with another director as to whom the transaction is a director's conflicting interest transaction.

(4) At the time action is to be taken under R.S. 12: 1-870, would be a qualified director under Paragraph (A)(3) of this Section if the business opportunity were a director's conflicting interest transaction.

B. For purposes of this Section and R.S. 12:1-860:

(1) "Material relationship" means a familial, financial, professional, employment or other relationship that would reasonably be expected to impair the objectivity of the director's judgment when participating in the action to be taken.

(2) "Material interest" means an actual or potential benefit or detriment, other than one which would devolve on the corporation or the shareholders generally, that would reasonably be expected to impair the objectivity of the director's judgment when participating in the action to be taken.

C. The presence of one or more of the following circumstances shall not automatically prevent a director from being a qualified director:

(1) Nomination or election of the director to the current board by any director who is not a qualified director with respect to the matter, or by any person that has a material relationship with that director, acting alone or participating with others.

(2) Service as a director of another corporation of which a director who is not a qualified director with respect to the matter, or any individual who has a material relationship with that director, is or was also a director.

(3) With respect to action to be taken under R.S. 12:1-744, status as a named defendant, as a director against whom action is demanded, or as a director who approved the conduct being challenged.

Source: MBCA §1.43.

Comment - 2014 Revision

This Section makes the definitions in Subsection B of this Section applicable not only for purposes of this Section, as provided in the Model Act, but also for purposes of R.S. 12:1-860. As explained in the comments to that Section, this Section utilizes the definition of "material relationship" to broaden the definition of a director's conflicting interest transaction.

§1-144. Householding

A. A corporation has delivered written notice or any other report or statement under this Chapter, the articles of incorporation, or the bylaws to all shareholders who share a common address if all of the following conditions are met:

(1) The corporation delivers one copy of the notice, report, or statement to the common address.

(2) The corporation addresses the notice, report, or statement to those shareholders either as a group or to each of those shareholders individually or to the shareholders in a form to which each of those shareholders has consented.

(3) Each of those shareholders consents to delivery of a single copy of such notice, report or statement to the shareholders' common address. Any such consent shall be revocable by any of the shareholders who deliver written notice of

revocation to the corporation. If the written notice of revocation is delivered, the corporation shall begin providing individual notices, reports, or other statements to the revoking shareholder no later than thirty days after delivery of the written notice of revocation.

B. Any shareholder who fails to object by written notice to the corporation, within sixty days of written notice by the corporation of its intention to send single copies of notices, reports or statements to shareholders who share a common address as permitted by Subsection A of this Section, shall be deemed to have consented to receiving such single copy at the common address.

Source: MBCA §1.44.

PART 2. INCORPORATION

§1-201. Incorporators

One or more persons capable of contracting may act as the incorporator or incorporators of a corporation by delivering to the secretary of state for filing articles of incorporation and the written consent of the registered agent required by R.S. 12:1-202(E).

Source: MBCA §2.01

Comments - 2014 Revision

(a) Under former R.S. 12:21, one or more "natural or artificial" persons "capable of contracting" were permitted to act as incorporators. The "natural or artificial" phrase was eliminated as unnecessary due to the definition of "person" in R.S. 12:1-140. The "capable of contracting" phrase from the former provision was added to the Model Act provision as a means of requiring incorporators to possess contractual capacity, thus disqualifying unemancipated minors and others lacking the required capacity from acting as incorporators. The added language is not meant to suggest that an incorporator, in filing the contemplated corporate documents, is becoming a party to a contract.

(b) This Section modifies the Model Act language to retain the substance of the requirement in the former law that a notarized affidavit of acceptance from the corporation's registered agent be filed as part of the incorporation process. The document is now described as a written consent, not an affidavit, but the document still must be acknowledged or executed by authentic act as provided in R.S. 12:1-120(H), unless it satisfies one of the exceptions in R.S. 12:1701.

§1-202. Articles of incorporation and signed consent by agent to appointment

A. The articles of incorporation must set forth all of the following:

(1) A corporate name for the corporation that satisfies the requirements of R.S. 12:1-401.

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

(3) The street address, not a post office box only, of the corporation's initial registered office, and, if different, the street address, not a post office box only, of the corporation's initial principal office.

(4) The name and street address, not a post office box only, of its initial registered agent.

(5) Whether the corporation accepts, rejects, or limits, with a statement of the limitations, the protection against liability of directors and officers that is provided by R.S. 12:1-832.

(6) The name and address of each incorporator.

B. The articles of incorporation may set forth any of the following:

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

(2) Provisions not inconsistent with law regarding any of the following:

(a) The purpose or purposes for which the corporation is organized.

(b) Managing the business and regulating the affairs of the corporation.

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

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

(3) Any provision that the provisions of this Chapter requires or permits to be set forth in the bylaws.

(4) A provision that limits, reduces, qualifies, or conditions the protection against liability of directors and officers provided by R.S. 12:1-832.

(5) A provision permitting or making obligatory indemnification of a director for liability, as defined in R.S. 12:1-850(3), to any person for any action

taken, or any failure to take any action, as a director, except liability for any of the following:

(a) A breach of the duty of loyalty owed by the director or officer to the corporation or its shareholders.

(b) An intentional infliction of harm on the corporation or its shareholders.

(c) A violation of R.S. 12:1-833.

(d) An intentional violation of criminal law.

(6) 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, that 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 either of the following:

(a) Payment of the amount of any cash or property dividend or redemption price.

(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 person that would be entitled thereto had such reversion not occurred.

C. The articles of incorporation need not set forth any of the corporate powers enumerated in this Act.

D. Provisions of the articles of incorporation may be made dependent upon facts objectively ascertainable outside the articles of incorporation in accordance with R.S. 12:1-120(K).

E. A written consent to appointment, signed by the initial registered agent, shall be attached or appended to the articles of incorporation.

Source: MBCA §2.02; R.S. 12:24.

Comments - 2014 Revision

(a) The Model Act unifies the address of a corporation's registered agent with that of its registered office. That approach was rejected in this Section in favor of the traditional Louisiana approach of permitting the two addresses to be handled independently of one another. The registered office of a Louisiana corporation may be relevant for purposes other than service of process on the registered agent. Venue, for example, is proper in the parish in which a corporation's registered office is located. See C.C.P. Art. 42(2). A corporation may wish to appoint a registered agent in a given parish without submitting itself to the treatment of that parish as a parish of proper venue. The Model Act language was modified to permit that kind of choice. The Model Act was also modified to add a requirement that the address of the corporation's initial principal office, if different from its initial registered office, be included in the articles of incorporation.

(b) Model Act Subparagraph 2.02(b)(2)(v), which would have permitted the articles of incorporation to impose personal liability on shareholders for corporate debts, was deleted from this Section because of the risks that it posed of subjecting shareholders to personal liability without their knowledge. The deletion of the Model Act provision does not affect the ability of shareholders to undertake personal liability through their own personal guarantees.

(c) The Model Act permits the inclusion of a provision in the articles of incorporation that exculpates corporate directors from personal liability for monetary damages arising from a breach of fiduciary duty, subject to four exceptions for serious forms of misconduct that are considered beyond the reach of private agreements. Experience suggests that most parties who receive legal advice do include the permitted exculpatory provision in their articles of incorporation, usually "to the fullest extent allowed by law." Reflecting this strong preference for the statutory form of exculpation, this Section makes the inclusion of statutory exculpation the default rule. But because of the importance of the issue both to shareholders and to management, the Section does not merely permit shareholders to opt out of the statutory exculpation rules, it requires that an explicit choice be made on the subject in the corporation's articles of incorporation. Paragraph (A)(5) of this Section requires that the articles include a statement that selects one of three choices: to accept, to limit, with a statement of the limitations, or to reject the default exculpation rules.

(d) Paragraph (A)(5) of this Section contemplates that most parties will make the simple choice between accepting and rejecting the statutory exculpation rules in full. If the parties wish to engage in the more difficult task of devising their own customized exculpatory rules, the particular limitations they wish to place on the default statutory rules must be stated in the articles of incorporation. Under R.S. 12:1-832, if the articles choose the "accept with limitations" option, but fail to include the limitations in the articles, the default statutory rules will apply in full. Conversely, if statements of limitation are indeed included in the articles, but an inconsistent choice is made under Paragraph (A)(5), the statement of limitations will control over the inconsistent Paragraph (A)(5) selection.

(e) Model Act Paragraph (b)(5) was modified to harmonize the limitations on indemnity provisions with the limits of exculpation permitted under R.S. 12:1-832.

(f) Former R.S. 12:24(C)(3), concerning the reversion to the corporation of dividends and other similar distributions that remained unclaimed after a year, was retained and added to this Part as R.S. 12:1-202(B)(6).

(g) A new Subsection E of this Section was added to the Model Act provision to retain the substance of the requirement in prior law that a notarized affidavit of acceptance from the corporation's initial registered agent be filed as part of the incorporation process. The document is now described as a written consent, not an affidavit, but the document still must be acknowledged or executed by authentic act as provided in R.S. 12:1-120(H), unless it satisfies one of the exceptions in R.S. 12:1701.

§1-203. Incorporation

A. Except as provided in Subsection C of this Section, the corporate existence begins, and the corporation is duly incorporated, when the articles of incorporation become effective under R.S. 12:1-123.

B. The secretary of state's filing of the articles of incorporation is conclusive proof that the incorporators satisfied all conditions precedent to incorporation and that the corporation is duly incorporated, except in a proceeding by the state to cancel or revoke the incorporation or involuntarily dissolve the corporation.

C. When immovable property is acquired by one or more persons acting in any capacity for and in the name of any corporation that is not duly incorporated, and the corporation is subsequently duly incorporated, the corporate existence shall be retroactive to the date of acquisition of an interest in the immovable property, but such retroactive existence shall be without prejudice to rights validly acquired by third persons in the interim between the date of acquisition and the date that the corporation is duly incorporated.

Source: MBCA §2.03, R.S. 12:25.1.

Comments - 2014 Revision

(a) Model Act Subsection (a) was modified to accommodate the grace periods provided by R.S. 12:1-123(B) for the delivery of original articles of incorporation to the secretary of state.

(b) The reference to a delayed effective date in Section 2.03 of the Model Act was deleted as redundant of the rules in R.S. 12:1-123(C) concerning delayed effective dates.

(c) Former R.S. 12:25.1 was retained and added as Subsection C of this Section, to retain the retroactivity effects provided by prior law in connection with acquisitions of immovable property. An introductory reference to the rule in Subsection C of this Section was added to Subsection A of this Section.

(d) A phrase was added to Subsections A and B of this Section to make the filing of articles of incorporation conclusive evidence that a corporation has been "duly incorporated," effective on the date established by R.S. 12:1-123. The phrase was added to harmonize Subsections A and B of this Section with the "duly incorporated" language added in Subsection C of this Section from former R.S. 12:25.1, and to support the traditional form of legal opinion that is commonly required in connection with a corporate transaction, to the effect that one or more of the corporations involved in the transaction is "duly incorporated."

§1-204. Liability for preincorporation transactions

[Reserved.]

Comment - 2014 Revision

Section 9 of Louisiana's 1928 business corporation act imposed personal liability on non-dissenting directors and participating officers for all debts and liabilities of a corporation that arose from the transaction of corporate business before the corporation's articles of incorporation were properly filed. 1928 La. Acts No. 250, §9. That rule was deliberately omitted from the 1968 statute "to permit full application of the de facto-corporation and estoppel-to-deny-corporate existence rules." Model Act Section 2.04 would have reinserted a modified version of the older rule, imposing liability only if the participants in pre-incorporation transactions acted while "knowing" that the corporation had not yet been formed. Like the 1968 statute, this Section rejects a mechanical liability rule, even the improved version offered by the Model Act, in favor of the broader, more factually-sensitive approach taken in de-facto-corporation and estoppel-to-deny-corporate-existence cases. See §§9.03-.04 Glenn G. Morris and Wendell H. Holmes, Louisiana Business Organizations, Vols. 7 & 8, Louisiana Civil Law Treatise Series (West Group 1999); Fred S. McChesney, Doctrinal Analysis and Statistical Modeling in Law: The Case of Defective Incorporation, 71 Wash. U.L.Q. 493 (1993).

§1-205. Organization of corporation

A. After incorporation, the following shall apply:

(1) If initial directors are named in the articles of incorporation, the initial directors shall hold an organizational meeting, at the call of a majority of the directors, to complete the organization of the corporation by appointing officers and carrying on any other business brought before the meeting.

(2) If initial directors are not named in the articles, the incorporator or incorporators shall hold an organizational meeting at the call of a majority of the incorporators to elect a board of directors who shall complete the organization of the corporation.

B. The election by the incorporators of a board of directors may be conducted without a meeting by means of one or more written consents signed by each incorporator.

C. An organizational meeting may be held in or out of this state.

Source: MBCA §2.05.

Comment - 2014 Revision

The Model Act allows incorporators to engage in the post-incorporation acts that are typically carried out to complete the organization of a corporation, such as electing officers and issuing stock. This Section retains the approach taken under prior Louisiana law. It limits the role of incorporators to the signing and delivery of articles of incorporation for filing, and to the election of the corporation's first directors. Unless initial directors are named in the articles of incorporation, directors must be elected by the incorporators to complete the organization of the corporation.

§1-206. Bylaws

A. The board of directors of a corporation may adopt bylaws for the corporation.

B. The bylaws of a corporation may contain any provision for managing the business and regulating the affairs of the corporation that is not inconsistent with law or the articles of incorporation.

C. The bylaws may contain one or both of the following provisions:

(1) A requirement that if the corporation solicits proxies or consents with respect to an election of directors, the corporation include in its proxy statement and any form of its proxy or consent, to the extent and subject to such procedures or conditions as are provided in the bylaws, one or more individuals nominated by a shareholder in addition to individuals nominated by the board of directors.

(2) A requirement that the corporation reimburse the expenses incurred by a shareholder in soliciting proxies or consents in connection with an election of directors, to the extent and subject to such procedures or conditions as are provided in the bylaws, provided that no bylaw so adopted shall apply to elections for which any record date precedes its adoption.

D. Notwithstanding R.S. 12:1-1020(B)(2), the shareholders in amending, repealing, or adopting a bylaw described in Subsection C of this Section may not limit the authority of the board of directors to amend or repeal any condition or procedure set forth in or to add any procedure or condition to such a bylaw in order to provide for a reasonable, practicable, and orderly process.

Source: MBCA §2.06

Comment - 2014 Revision

Model Act Section 2.06 was modified in this Section: (1) to make the adoption of bylaws permissive rather than mandatory, and (2) not to grant authority to incorporators to adopt bylaws. Both changes were made to retain the existing Louisiana law on the subject.

§1-207. Emergency bylaws

A. Unless the articles of incorporation provide otherwise, the board of directors of a corporation may adopt bylaws to be effective only in an emergency defined in Subsection D of this Section. The emergency bylaws, which are subject to amendment or repeal by the shareholders, may make all provisions necessary for managing the corporation during the emergency, including any of the following:

(1) Procedures for calling a meeting of the board of directors.

(2) Quorum requirements for the meeting.

(3) Designation of additional or substitute directors.

B. All provisions of the regular bylaws consistent with the emergency bylaws remain effective during the emergency. The emergency bylaws are effective only during the emergency.

C. Corporate action taken in good faith in accordance with the emergency bylaws binds the corporation and may not be used to impose liability on a corporate director, officer, employee, or agent.

D. An emergency exists for purposes of this Section if a catastrophic event makes it impracticable to attain a quorum of the corporation's directors when and as necessary to carry out the functions of the board of directors.

Source: MBCA §2.07.

Comment - 2014 Revision

The definition of emergency in R.S. 12:1-207(D) has been modified to harmonize it with the Louisiana-modified definition of the same term in R.S. 12:1-303(D), for the reasons explained in the Comments to that section.

PART 3. PURPOSES AND POWERS

§1-301. Purposes

A. Every corporation incorporated under this Chapter has the purpose of engaging in any lawful business or activity unless a more limited purpose is set forth in the articles of incorporation.

B. A corporation engaging in a business that is subject to regulation under another statute of this state may incorporate under this Chapter only if permitted by, and subject to all limitations of, the other statute.

Source: MBCA §3.01.

Comment - 2014 Revision

The phrase "or activity" was added to Subsection A of this Section to make it consistent with former law, which had permitted a business corporation to engage in "any lawful activity", and to make it clear that business corporations may used for purposes other than the operation of a business in the usual sense of the term. This Section also allows business corporations to be used, for example, to hold assets, to facilitate financial transactions, and to provide services to affiliated operating companies.

§1-302. General powers

Unless its articles of incorporation provide otherwise, every corporation has perpetual duration and has the power to do all things necessary or convenient to carry out its business and affairs, including without limitation power to perform any of the following actions:

(1) Sue and be sued, complain and defend in its corporate name.

(2) Have a corporate seal, which may be altered at will, and to use it, or a facsimile of it, by impressing or affixing it or in any other manner reproducing it.

(3) Make and amend bylaws, not inconsistent with its articles of incorporation or with the laws of this state, for managing the business and regulating the affairs of the corporation.

(4) Purchase, receive, lease, or otherwise acquire and own, hold, improve, use, and otherwise deal with real or personal property, or any interest in property, wherever located.

(5) Sell, convey, mortgage, pledge, lease, exchange, and otherwise dispose of all or any part of its property.

(6) Purchase, receive, subscribe for, or otherwise acquire, own, hold, vote, use, sell, mortgage, lend, pledge, or otherwise dispose of, and deal in and with shares or other interests in, or obligations of, any other entity.

(7) Make contracts and guarantees, incur liabilities, borrow money, issue its notes, bonds, and other obligations, which may be convertible into or include the option to purchase other securities of the corporation, and secure any obligation by mortgage, pledge, or security interests of any kind in any of its property, franchises, or income.

(8) Lend money, invest and reinvest its funds, and receive and hold real and personal property as security for repayment.

(9) Be a promoter, partner, member, associate, or manager of any limited liability company, partnership, joint venture, trust, or other entity.

(10) Conduct its business, locate offices, and exercise the powers granted by this Chapter within or without this state.

(11) Elect directors and appoint officers, employees, and agents of the corporation, define their duties, fix their compensation, and lend them money and credit.

(12) Pay pensions and establish pension plans, pension trusts, profit sharing plans, share bonus plans, share option plans, and benefit or incentive plans for any or all of the current or former directors, officers, employees, and agents of the corporation and its affiliated entities, and the dependents and families of those individuals.

(13) Make donations for the public welfare or for charitable, scientific, or educational purposes.

(14) Transact any lawful business that will aid governmental policy.

(15) Make payments or donations, or do any other act, not inconsistent with law, that furthers the business and affairs of the corporation.

Source: MBCA §3.02.

Comments - 2014 Revision

(a) The introductory sentence of the Section was modified to eliminate the Model Act statement that corporations hold powers coextensive with those of an individual. While this Section does provide broad powers to business corporations, corporations still may not do such uniquely human things as adopt children, vote, or hold political office.

(b) The Model Act refers to "real or personal" property in Model Act Paragraphs (4) and (8), and to "legal or equitable" interests in Model Act Paragraph (4). This Chapter defines the terms "real property" and "personal property" in Section 1-140 in a way that encompasses both the common law meaning of the terms and the analogous civil law concepts of "immovable" and "movable" things. That approach supports consistency between the language in this Chapter and in the Model Act, and also allows the references to those forms of property to apply as intended with respect to real and personal property owned by Louisiana corporations in other states. However, the Model Act terms "legal" and "equitable" interests in property, which appear only in this Section, were omitted because they could not be reconciled with any classification scheme under Louisiana law, and because they were not necessary to make the intended point of the provision: that corporations have the power to deal with all forms of interest in property. The Model Act makes the point by including the only two forms of interest that are recognized in other states, while this Section makes the same point by removing any words of limitation or qualification concerning the property interests that are covered by the provision.

(c) The phrase "or security interests of any kind" was added to Paragraph (7) of the Model Act to avoid any implication that the Subsection covered only the two particular types of security interests, mortgages and pledges, that it listed. Paragraph (7) was also modified to permit the corporation to provide security for "any obligation" and not merely "its" obligations as provided in the Model Act.

(d) The phrase "limited liability company" was added to Paragraph (9) of the Model Act to include explicit coverage for that widely-used form of business organization.

(e) The coverage of Model Act Paragraph (12) was broadened to include the power to provide pension and similar benefits for the families of the listed corporate workers and to provide those benefits to the workers and worker families of affiliated entities such as subsidiaries.

(f) Former law had included among a corporation's listed powers the power to provide inter-corporate guarantees among a parent corporation and its wholly-owned subsidiaries. See former R.S. 12:41(C). That provision was omitted from this Chapter because it could have carried with it the unintended negative implication that similar guarantees might be ultra vires among affiliates without a common 100% parent. The issue of a corporation's power to issue inter-corporate guarantees is covered fully by Paragraph (7) of this Section. Subject only to contrary provisions in a corporation's articles, Paragraph (7) of this Section states without qualification that a corporation has the power to issue guarantees. Paragraph (7) of this Section does not attempt to address all of the situations in which such guarantees may or may not be appropriate. Like other transactions in which a corporation has the power to engage, the power to issue guarantees may be exercised in many

different factual contexts, either in accordance with or in violation of the legal duties owed to and by the corporation. If the guarantee power is exercised lawfully and properly, the resulting guarantee is enforceable in the usual way, without any ultra vires obstacle, while if the guarantee violates some legal duty owed to or by the corporation, the normal remedies for a breach of the relevant duty are available. The fact that the inter-corporate beneficiary of a guarantee is a 100% parent or affiliate may be relevant in evaluating whether the legal duties owed in connection with the guarantee have been satisfied. See, e.g., Trenwick America Litigation Trust v. Billet, 931 A.2d 438 (Del.2007) (en banc), affirming and adopting the rationale of Trenwick American Litigation Trust v. Ernst & Young, L.L.P., 906 A.2d 168 (Del. Ch. 2006). But the propriety of such guarantees must be determined on the basis of those legal duties, not as an issue of corporate power. As a matter strictly of corporate power, a corporation formed under this Chapter may issue guarantees without limitation.

§1-303. Emergency powers

A. In anticipation of or during an emergency defined in Subsection D of this Section, the board of directors of a corporation may do either of the following:

(1) Modify lines of succession to accommodate the incapacity of any director, officer, employee, or agent.

(2) Relocate the principal office, designate alternative principal offices or regional offices, or authorize the officers to do so.

B. During an emergency defined in Subsection D of this Section, unless emergency bylaws provide otherwise, all of the following provisions shall apply:

(1) Notice of a meeting of the board of directors need be given only to those directors whom it is practicable to reach and may be given in any practicable manner, including by publication and radio.

(2) Any or all directors may participate in a regular or special meeting of the board by, and the meeting may be conducted through the use of, any means of communication by which all directors participating may simultaneously hear each other during the meeting.

(3) A director participating in a meeting by the means authorized in Paragraph (2) of this Subsection is deemed to be present in person at the meeting.

(4) Unless the application of Paragraphs (2) and (3) of this Subsection is sufficient to attain a quorum of directors, a quorum of directors consists of the number of directors who participate in a meeting if both of the following conditions are met:

(a) Reasonable efforts have been made to provide actual knowledge of the meeting to all directors.

(b) All of the directors who have actual knowledge of the meeting, and who could participate in the meeting lawfully and without undue hardship or risk of injury, do participate in the meeting.

(5) If business is conducted at a meeting of directors at which a quorum would be present only by application of the rule in Paragraph (4) of this Subsection, a quorum of directors under Paragraph (4) of this Subsection is presumed to be present.

C. Corporate action taken in good faith during an emergency under this Section to further the ordinary business affairs of the corporation binds the corporation and may not be used to impose liability on a corporate director, officer, employee, or agent.

D. An emergency exists for purposes of this Section if a catastrophic event makes it impracticable, without applying the rules pursuant to Subsection B of this Section, to attain a quorum of the corporation's directors when and as necessary to carry out the functions of the board of directors.

Source: MBCA §3.03.

Comments - 2014 Revision

(a) The definition of emergency in Subsection (d) of the Model Act was modified in this Act to tie more closely together the extraordinary powers provided by this Section and the necessities that would justify the exercise of those powers. If the board is capable of achieving a quorum under its normal rules, without application of the rules in Subsection B of this Section, then no emergency exists as that term is defined in Subsection D of this Section.

(b) The functions of the board are described in R.S. 12:1-801. To the extent that no action of the board was required during or in the aftermath of a catastrophic event, no emergency would exist under this Section. A major hurricane, for example, might make it impossible to convene a quorum of directors for a period of several days. But that catastrophic event would not justify the exercise of corporate powers under this Section if no need existed for board action during the period in which a quorum could not be attained. If the required decisions fell within the normal authority of the corporation's officers, for example, or if the decisions could be delayed without significant harm to the corporation's interests for the few days needed to attain the needed quorum, emergency actions under this Section would not be authorized.

(c) R.S. 12:1-820(B) provides authority to a board of directors to permit participation in board meetings by communication devices that permit all participants in the meeting to hear each other simultaneously. Paragraphs (B)(2) and (B)(3) of this Section provide rules identical to those in R.S. 12:1-820(B), except that the rules in this Section are self-operative; they apply in the case of an emergency without regard to whether the board has taken action to approve of that form of participation. In many cases, the board will have taken action before a catastrophic event to permit this type of telephonic or other similar form of participation in a meeting. If so, the corporation may be able to attain a quorum of directors under its normal rules. In that event, the special quorum and participation rules of this Section would not be needed, so no "emergency" would exist within the meaning of Subsection D.

(d) During an emergency, Model Act Section 3.03(b)(2) allows officers to be substituted for absent directors as needed to achieve a quorum of the directors. This Section does not permit that form of substitution. Instead, it deals with the emergency by relaxing the quorum requirement itself.

(e) If a normal quorum can be achieved under the corporation's normal rules, then no emergency exists, by definition, under Subsection D. If a quorum could be achieved by allowing telephonic or other similar forms of participation in the meeting, and the board has yet to exercise its power to permit those forms of participation under R.S. 12:1-820(B), then Paragraphs (B)(2) and (B)(3) of this Section will operate to permit telephonic or similar participation during the emergency. If application of those two Subsections is enough by itself to resolve the quorum problem, then the number of directors required to attain a quorum is not affected by Paragraph (B)(4) of this Section. The special rule in Paragraph (B)(4) of this Section does not apply in those circumstances because the rule is designed to decrease, not increase, the number of directors required to establish a quorum, and the number of directors able to participate in a meeting under Paragraph (B)(4) may actually exceed the number normally required for a quorum. In that case, the normal number would control. In a typical corporation, in which a majority of directors would constitute a quorum, the effect of the rule in Paragraph (B)(4) of this Section would be to set a quorum at a majority of directors (the normal rule) or a smaller number equal to those who were able to participate in the meeting lawfully and without undue hardship or risk of injury.

(f) The participation of a director in a meeting is excused, and does not count in determining the quorum under Paragraph (B)(4) of this Section, if two conditions are satisfied: (1) the corporation has made reasonable efforts to give actual knowledge of the meeting to all of its directors, and (2) all directors who know about the meeting, and could participate in it lawfully and without undue hardship or risk of injury, do participate. The reference to lawful participation in Paragraph (B)(4) of this Section is designed to excuse participation that is made impracticable by reason of some rule, order or instruction by a governmental agency, official or other actor who is exercising lawful authority during the emergency. For example, if emergency road closures or restrictions prevented a director from reaching the board meeting site, and downed telephone lines and cellular towers prevented telephonic participation, that director would not be able to participate in the meeting lawfully, i.e., without violating the road closure or restriction orders. Under those circumstances, that director's participation in the meeting would be excused, and would not count toward the number needed to achieve a quorum, regardless of whether the closed roads were passable enough to allow the director to reach the meeting.

(g) Paragraph (B)(5) of this Section creates a presumption that an emergency quorum under Paragraph (B)(4) of this Section is present at any meeting at which the board conducts business during an emergency. The presumption is designed to give

the benefit of doubt to directors who are doing their best to deal with emergency conditions, perhaps without full documentation of the efforts they are making to notify all directors and to arrange for their participation in the meeting. The presumption may be rebutted by a preponderance of evidence to the contrary. But in the absence of such evidence, the interests of the corporation are best served by attaching a presumption of regularity, not usurpation, to the steps taken by directors during the emergency.

§1-304. Ultra vires

A. Except as provided in Subsection B of this Section, the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.

B. A corporation's power to act may be challenged in any of the following:

(1) A proceeding by a shareholder against the corporation to enjoin the act.

(2) A proceeding by the corporation, directly, derivatively, or through a receiver, trustee, or other legal representative, against a current or former director, officer, employee, or agent of the corporation.

(3) A proceeding by the attorney general under R.S. 12:1-1430.

C. In a shareholder's proceeding under Paragraph (B)(1) of this Section to enjoin an unauthorized corporate act, the court may enjoin or set aside the act if equitable, and may award damages for loss, other than anticipated profits, suffered by the corporation or another party to the proceeding because of enjoining the unauthorized act. If an act to be enjoined in the proceeding is the performance of a duty owed by the corporation under the terms of a contract to which the corporation is a party, the court may enjoin the act only if the other parties to the contract are joined in the proceeding.

Source: MBCA §3.04.

Comments - 2014 Revision

The Model Act requires the joinder of "all affected persons" to a proceeding to enjoin an ultra vires act. Because of concern about the potential breadth and uncertainty of that requirement, this Section replaces it with the joinder requirement that was imposed under the former Louisiana law. As modified, Subsection (C) of this Section requires the joinder of a third person in an ultra vires proceeding only if the proceeding is brought to enjoin the performance of a duty owed by the corporation under a contract to which that person is a party.

PART 4. NAME

§1-401. Corporate name

A.(1) A corporate name may include words in any language but must be written in English letters or characters.

(2) A corporate name must contain the word "corporation", "incorporated", "company", or "limited," or the abbreviation, with or without punctuation, "corp.", "inc.", "co.", or "ltd.".

(3) A corporate name may not contain any of the following:

(a) Any language stating or implying that the corporation is organized for a purpose other than that permitted by R.S. 12:1-301 and its articles of incorporation.

(b) The phrase "doing business as" or any abbreviation of that phrase, such as "d/b/a".

(c) Any words that deceptively or falsely suggest a charitable or nonprofit nature or that imply that the corporation is an administrative agency of this state or any of its political subdivisions or of the United States.

(d) Except as indicated, any of the following quoted words or phrases in any form:

(i) "Casualty," "redevelopment corporation", or "electrical cooperative".

(ii) Except for a bank holding company, "bank", "banker", "banking", "savings", "safe deposit", "trust", "trustee", "building and loan", "homestead", or "credit union".

(iii) Except for an independent insurance agency or brokerage corporation, "insurance".

(4) A court having jurisdiction may, upon application of the state or of any interested or affected person, enjoin a corporation from doing business under a name that violates any part of R.S. 12:1-401(A)(3)(c) or (d).

B. Except as authorized by Subsections C and D of this Section, a corporate name must be distinguishable from all of the following:

(1) The corporate name of a corporation or nonprofit corporation incorporated in this state.

(2) A corporate name reserved or registered under R.S. 12:1-402 or 1-403.

(3) The name of a foreign corporation or foreign nonprofit corporation, as stated in the certificate of authority to do business in this state issued to that corporation under Chapter 3 of this Title.

(4) The name of a domestic limited liability company or the name of a foreign limited liability company used in the foreign limited liability company's certificate of authority to do business in this state.

(5) The name of a partnership whose contract for partnership is filed for registry with the secretary of state or the name of a duly registered foreign partnership.

(6) A trade name registered with the secretary of state.

C. A corporation may apply to the secretary of state for authorization to use a name in its filings with the secretary of state that is not distinguishable from one or more of the names described in Subsection B of this Section. The secretary of state shall authorize the use of the name applied for if either of the following occur:

(1) The other registrant consents to the use in writing and submits an undertaking in a form satisfactory to the secretary of state to change its name to a name that is distinguishable from the name of the applying corporation.

(2) The applicant delivers to the secretary of state a certified copy of the final judgment of a court of competent jurisdiction establishing the applicant's right to use the name applied for in this state.

D. A corporation may use in its filings with the secretary of state a name that is not distinguishable from one or more of the names described in Subsection B of this Section if the registrant of the name is incorporated, organized, or authorized to transact business in this state and the proposed user corporation performed any of the following actions:

(1) Merged with the other registrant.

(2) Been formed by reorganization of the other registrant.

(3) Acquired all or substantially all of the assets, including the name, of the other registrant.

E. This Act does not control the use of fictitious, assumed, or trade names.

F. If the secretary of state receives for filing articles of incorporation that include in the corporate name the word "bank", "banker", "banking", "savings", "safe deposit", "trust", "trustee", "building and loan", "homestead", "credit union", or any other word of similar import, the secretary of state shall not file the articles of incorporation until the secretary of state receives satisfactory evidence that written notice of the proposed use of that name was delivered to the office of financial institutions at least ten days earlier.

G. If the secretary of state receives for filing articles of incorporation that include in the corporate name the word "engineer", "engineering", "surveyor", or "surveying," the secretary of state shall not file the articles of incorporation until the secretary of state receives either of the following:

(1) Satisfactory evidence that written notice of the proposed use of that name was delivered to the Louisiana Professional Engineering and Land Surveying Board at least ten days earlier.

(2) A written waiver of the ten-day notice requirement, signed by the executive secretary or any officer of the Louisiana Professional Engineering and Land Surveying Board.

H. If the secretary of state receives for filing articles of incorporation that include in the corporate name the word "architect", "architectural", or "architecture", the secretary of state shall not file the articles of incorporation until the secretary of state receives either of the following:

(1) Satisfactory evidence that written notice of the proposed use of that name was delivered to the State Board of Architectural Examiners at least ten days earlier.

(2) A written waiver of the ten-day notice requirement, signed by the executive director or any member of the State Board of Architectural Examiners.

I. The assumption or use of a name in violation of this Section does not affect or vitiate the corporate existence.

Source: MBCA §4.01, R.S. 12:23.

Comments - 2014 Revision

(a) The Model Act includes periods as punctuations after the abbreviations listed in Paragraph (A)(2) of this Section. This Section adds the phrase "with or without punctuation" to permit the abbreviations to be used with or without periods.

(b) Model Act Subsection (a) was modified to retain the substance of the rules in former R.S. 12:23 that prohibited the use of certain words or phrases in corporate names (see Subparagraphs (A)(3)(b)-(d) of this Section) and that required the corporate name to be expressed in English letters or characters (see Paragraph (A)(1) of this Section).

(c) The Model Act language in Paragraph (a)(2) would have permitted the required designations of corporate status, such as "corporation" or "corp", to be expressed in "words or abbreviations of like import in any language". That language was omitted to require the use of the listed English words and abbreviations.

(d) Model Act Paragraph (b)(3) was modified in this Section to take account of the retention of existing Chapter 3 of Title 12 (in place of Model Act Chapter 15) to govern the qualification of foreign corporations to do business in this state.

(e) The Model Act standard for distinguishing corporate and other related names, i.e. "distinguishable upon the records of the secretary of state", was modified in this Section to retain the standard in prior law that the names be "distinguishable", without any reference to the records of the secretary of state. That standard falls between the early standard of "deceptive similarity", which both the Model Act and this Section reject, and the purely linguistic, on-the-records standard used in the Model Act. Except for a brief return to the deceptive similarity standard between 1993 and 1997, distinguishability has been the name-difference standard in Louisiana since 1988.

(f) Under the distinguishability standard, the secretary of state's office has required that names be distinguishable not only in writing, upon the secretary's records, but also in pronunciation. The name "B C Corporation", for example, would not be treated as distinguishable from "Bee See Corporation". This Section retains the distinguishability standard to allow the secretary of state to leave the distinguishable pronunciation requirement in place. The required difference in the pronunciation of names serves two functions: it helps the secretary of state's office avoid confusion during telephone inquiries concerning corporate records, and it lets the secretary of state withhold any form of perceived official sanction for the use of a name so similar in sound that it is more likely than most to lead to name-use disputes. Still, nothing in this Section precludes a person from doing business lawfully under an assumed or trade name, even if that name has been declined for filing purposes because it was considered insufficiently distinguishable from some other name already on file. Similarly, nothing in this Section confers any form of presumption that a name accepted for filing by the secretary of state may be used in business operations, free of any competing claims by others who may hold superior rights to the name. Rights in trade names are governed by trade name and unfair competition law, not by this Chapter or by the filing decisions of the secretary of state under this Chapter. See Subsection E of this Section; Gulf Coast Bank v. Gulf Coast Bank & Trust Company, 652 So.2d 1306 (La. 1995) (explaining sources and requirements of trade name protection). This Section rejects the rule in some

reported cases that the filing decisions of the secretary of state with respect to corporate names are entitled to "some weight" or "great weight" in trade name disputes; they are entitled to no weight at all.

(g) The phrase "in its filings with the secretary of state" was added to Subsections C and D of this Section to make it clear that the "use" of a corporation name under those Subsections meant strictly the use of a name in a corporation's filings with the secretary of state, and not the more general use of a corporate or fictitious name in the corporation's business operations.

(h) Former R.S. 12:23(F) provided that the assumption of an improper name did not affect a corporation's legal existence, but could be the basis of an injunction against continued use of the improper name. The former provision was divided and placed into two different Subsections in this Section. The rule that protected a corporation's legal existence, despite an improper name, was retained as a general rule, in Subsection I, applicable to all of the naming rules set forth in this Section. But the injunctive relief rule was included as Paragraph (A)(4) of this Section, and made to apply only to those items in Paragraph (A)(3)of this Section that prohibit the use of words or language in a corporate name that would imply a corporation was something other than an ordinary business corporation, such as a charity or governmental agency. The injunctive relief rule was made inapplicable to the Section's provisions concerning the distinguishability of corporate names because the distinguishability requirements were designed to serve principally a recordkeeping function, not to provide grounds for remedies in trade name or unfair competition disputes.

(i) Subsections F through H of this Section were added to the Model Act provision to retain the rules in former R.S. 12:23(E) that required advance notice to the listed regulatory or licensing agencies if certain words, such as "bank", "engineer", or "architect" were included in a corporation's proposed corporate name. Changes were made in the terminology and style of the former rules to harmonize them with those of the Model Act.

§1-402. Reserved name

A. A person may reserve the exclusive use of a corporate name in its filings with the secretary of state, including a fictitious name for a foreign corporation whose corporate name is not available, by delivering an application to the secretary of state for filing. The application must set forth the name and address of the applicant and the name proposed to be reserved. If the secretary of state finds that the corporate name applied for is available, the secretary of state shall reserve the name for the applicant's exclusive use for a nonrenewable period of one hundred and twenty days.

B. The owner of a reserved corporate name may transfer the reservation to another person by delivering to the secretary of state a signed notice of the transfer that states the name and address of the transferee.

C. A terminated corporation's name is reserved by operation of law for three years after the effective date of the corporation's termination.

Source: MBCA §4.02.

Comments - 2014 Revision

(a) The phrase "in its filings with the secretary of state" was added to the first sentence of Subsection A of this Section to make it clear that the reservation of the name related strictly to a corporation's filings with the secretary of state, and not to the right to use the reserved name in business operations.

(b) The qualification of foreign corporations is governed by Title 12, Chapter 3. Nevertheless, the Model Act reference to a foreign corporation was retained in this Section to allow a foreign corporation to reserve a name under which it intends to do business in this state.

(c) This Section adds a new Subsection C to the Model Act. The new subsection automatically reserves the name of a terminated corporation for a period of three years after the effective date of the corporation's termination. This reservation causes the terminated corporation's name to be included among the names from which a new corporate name must be distinguishable under R.S. 12:1-401(B)(2), and so protects the name from adoption by another company during the period in which R.S. 12:1-1444 allows the terminated corporation to be reinstated.

§1-403. Registered name

A. A foreign corporation may register its corporate name, or its corporate name with any addition authorized by R.S. 12:303(A)(3), if the name is distinguishable upon the records of the secretary of state from the corporate names that are not available under R.S. 12:1-401(B).

B. A foreign corporation registers its corporate name, or its corporate name with any addition authorized by R.S. 12:303(A)(3), by delivering to the secretary of state for filing an application which does both of the following:

(1) Sets forth its corporate name, or its corporate name with any addition authorized by R.S. 12:303(A)(3), the state or country and date of its incorporation, and a brief description of the nature of the business in which it is engaged.

(2) Is accompanied by a certificate of existence, or a document of similar import, from the state or country of incorporation.

C. The name is registered for the applicant's exclusive use upon the effective date of the application.

D. A foreign corporation whose registration is effective may renew it for successive years by delivering to the secretary of state for filing a renewal application, which complies with the requirements of Subsection B of this Section, between October first and December thirty-first of the preceding year. The renewal application when filed renews the registration for the following calendar year.

E. A foreign corporation whose registration is effective may thereafter qualify as a foreign corporation under the registered name or consent in writing to the use of that name by a corporation thereafter incorporated under this Chapter or by another foreign corporation thereafter authorized to transact business in this state. The registration terminates when the domestic corporation is incorporated or the foreign corporation qualifies or consents to the qualification of another foreign corporation under the registered name.

Source: MBCA §4.03.

Comment - 2014 Revision

References in this Section to Model Act Section 15.06 were replaced by references to the analogous provision in Title 12, Chapter 3, which was retained in place of Model Act Chapter 15 to govern the qualification of foreign corporations to do business in this state.

PART 5. OFFICE AND AGENT

§1-501. Registered office and registered agent

Each corporation must continuously maintain in this state both of the following:

(1) A registered office that may be, but need not be, the same as any of its places of business.

(2) A registered agent, who may be either of the following:

(a) An individual who resides in this state.

(b) A domestic or foreign corporation or other eligible entity that continuously maintains an office in this state and, in the case of a foreign corporation or foreign eligible entity, is authorized to transact business in this state.

Source: MBCA §5.01.

Comment - 2014 Revision

The Model Act requires a corporation's registered office to be located at the street address of its registered agent. This Section permits a corporation to specify a street address for its registered office different from that of its registered agent. See Comment (a) to R.S. 12:1-202. This Section was modified to accommodate the possible distinction between those two addresses.

§1-502. Change of registered office or registered agent

A. A corporation may change its registered office or the identity or address of its registered agent by delivering to the secretary of state for filing a statement of change that sets forth all of the following information:

(1) The name of the corporation.

(2) The street address of its current registered office.

(3) If the current registered office is to be changed, the street address of the new registered office.

(4) The name and street address of its current registered agent.

(5) If the identity of the current registered agent is to be changed, the name of the new registered agent and the new agent's signed written consent, either on the statement or attached to it, to the appointment.

(6) If the street address of the registered agent is to be changed, the new street address of the registered agent.

B. A registered agent may change its street address on the records of the secretary of state for all corporations for which it serves as registered agent by delivering to the secretary of state a statement of change that sets forth all of the following information:

(1) The name of the registered agent.

(2) Its current street address to be changed.

(3) Its new street address.

(4) A certification that the registered agent has notified all of the corporations for which it serves as registered agent of the change in its address to the new street address specified in the statement of change.

Source: MBCA §5.02.

Comments - 2014 Revision

(a) The Model Act requires a corporation's registered office to be located at the street address of its registered agent. This Section permits a corporation to specify a street address for its registered office different from that of its registered agent. See Comment (a) to R.S. 12:1-202. This Section was modified to accommodate the possible distinction between those two addresses, and to delete the requirement in Model Act Subsection (b) that the two addresses be the same.

(b) This Section replaces Model Act Subsection (b) with a new provision that allows a registered agent to notify the secretary of state of a change in address by utilizing a single statement for all of the corporations for which the agent is serving.

§1-503. Resignation of registered agent

A. A registered agent may resign the agent's appointment by signing and delivering to the secretary of state for filing the signed original and two exact or conformed copies of a statement of resignation. If the office of the registered agent is also the registered office of the corporation, the statement may include a statement that the registered office is also discontinued.

B. After filing the statement the secretary of state shall mail one copy to the registered office, if not discontinued, and the other copy to the corporation at its principal office.

C. The agency appointment is terminated, and the registered office discontinued if so provided, on the thirty-first day after the date on which the statement was filed.

Source: MBCA §5.03.

Comment - 2014 Revision

The Model Act requires a corporation's registered office to be located at the street address of its registered agent. This Section permits a corporation to specify a street address for its registered office different from that of its registered agent. See Comment (a) to R.S. 12:1-202. Subsection A of this Section was modified to limit the statement about the discontinuation of a registered office upon resignation of the registered agent to those situations in which the addresses of the registered office and registered agent are the same.

§1-504. Service on corporation

A. A corporation's registered agent is the corporation's agent for service of process, notice, or demand required or permitted by law to be served on the corporation.

B. If a corporation has no registered agent, or the agent cannot with reasonable diligence be served, the corporation may be served by registered or certified mail, return receipt requested, addressed to the secretary of the corporation at its principal office. Service is perfected under this Subsection at the earliest of the following:

(1) The date the corporation receives the mail.

(2) The date shown on the return receipt, if signed on behalf of the corporation.

(3) Five days after its deposit in the United States Mail, as evidenced by the postmark, if mailed postpaid and correctly addressed.

C. This Section does not prescribe the only means, or necessarily the required means of serving a corporation.

Source: MBCA §5.04.

Comment - 2014 Revision

A corporation's principal office will ordinarily be stated in the corporation's most recent annual report. See R.S. 12:1-1621(A)(4). If a corporation has not yet filed an annual report, the initial principal office, if different from the registered office, will be stated in the corporation's articles of incorporation. If no principal office is identified in a corporation's annual report or articles of incorporation, the corporation's principal office will be the same as its registered office. See R.S. 12:1-140(17) and 1-202(A)(3).

PART 6. SHARES AND DISTRIBUTIONS

SUBPART A. SHARES

§1-601. Authorized shares

A. The articles of incorporation must set forth any classes of shares and series of shares within a class, and the number of shares of each class and series, that the corporation is authorized to issue. If more than one class or series of shares is authorized, the articles of incorporation must prescribe a distinguishing designation for each class or series and must describe, prior to the issuance of shares of a class or series, the terms, including the preferences, rights, and limitations, of that class or series. Except to the extent varied as permitted by this Section, all shares of a

class or series must have terms, including preferences, rights, and limitations that are identical with those of other shares of the same class or series.

B. The articles of incorporation must authorize both of the following:

(1) One or more classes or series of shares that together have unlimited voting rights.

(2) One or more classes or series of shares, which may be the same class or classes as those with voting rights, that together are entitled to receive the net assets of the corporation upon dissolution.

C. The articles of incorporation may authorize one or more classes or series of shares that meet any of the following criteria:

(1) Have special, conditional, or limited voting rights, or no right to vote, except to the extent otherwise provided by this Chapter.

(2) Are redeemable or convertible as specified in the articles of incorporation, at the option of the corporation, the shareholder, or another person or upon the occurrence of a specified event, for cash, indebtedness, securities, or other property at prices and in amounts specified or determined in accordance with a formula.

(3) Entitle the holders to distributions calculated in any manner, including dividends that may be cumulative, noncumulative, or partially cumulative.

(4) Have preference over any other class or series of shares with respect to distributions, including distributions upon the dissolution of the corporation.

D. Terms of shares may be made dependent upon facts objectively ascertainable outside the articles of incorporation in accordance with R.S. 12:1-120(K).

E. Any of the terms of shares may vary among holders of the same class or series so long as such variations are expressly set forth in the articles of incorporation.

F. The description of the preferences, rights, and limitations of classes or series of shares in Subsection C of this Section is not exhaustive.

Source: MBCA §6.01.

§1-602. Terms of class or series determined by board of directors

A. If the articles of incorporation so provide, the board of directors is authorized, without shareholder approval, to do any of the following:

(1) Classify any unissued shares into one or more classes or into one or more series within a class.

(2) Reclassify any unissued shares of any class into one or more classes or into one or more series within one or more classes.

(3) Reclassify any unissued shares of any series of any class into one or more classes or into one or more series within a class.

B. If the board of directors acts pursuant to Subsection A of this Section, it must determine the terms, including the preferences, rights, and limitations, to the same extent permitted under R.S. 12:1-601, of the following:

(1) Any class of shares before the issuance of any shares of that class.

(2) Any series within a class before the issuance of any shares of that series.

C. Before issuing any shares of a class or series created under this Section, the corporation must deliver to the secretary of state for filing articles of amendment setting forth the terms determined under Subsection A of this Section.

Source: MBCA §6.02.

§1-603. Issued and outstanding shares

A. A corporation may issue the number of shares of each class or series authorized by the articles of incorporation. Shares that are issued are outstanding shares until they are reacquired, redeemed, converted, or cancelled.

B. The reacquisition, redemption, or conversion of outstanding shares is subject to the limitations of Subsection C of this Section and to R.S. 12:1-640.

C. At all times that shares of the corporation are outstanding, one or more shares that together have unlimited voting rights and one or more shares that together

are entitled to receive the net assets of the corporation upon dissolution must be outstanding.

Source: MBCA §6.03.

§1-604. Fractional shares

A. A corporation may do any of the following:

(1) Issue fractions of a share or pay in money the value of fractions of a share.

(2) Arrange for disposition of fractional shares by the shareholders.

(3) Issue scrip in registered or bearer form entitling the holder to receive a full share upon surrendering enough scrip to equal a full share.

B. Each certificate representing scrip must be conspicuously labeled "scrip" and must contain the information required by R.S. 12:1-625(B).

C. The holder of a fractional share is entitled to exercise the rights of a shareholder, including the right to vote, to receive dividends, and to participate in the assets of the corporation upon liquidation. The holder of scrip is not entitled to any of these rights unless the scrip provides for them.

D. The board of directors may authorize the issuance of scrip subject to any condition considered desirable, including either of the following:

(1) That the scrip will become void if not exchanged for full shares before a specified date.

(2) That the shares for which the scrip is exchangeable may be sold and the proceeds paid to the scripholders.

Source: MBCA §6.04.

SUBPART B. ISSUANCE OF SHARES

§1-620. Subscription for shares before incorporation

A. A subscription for shares entered into before incorporation is irrevocable for six months unless the subscription agreement provides a longer or shorter period or all the subscribers agree to revocation.

B. The board of directors may determine the payment terms of subscription for shares that were entered into before incorporation, unless the subscription agreement specifies them. A call for payment by the board of directors must be uniform so far as practicable as to all shares of the same class or series, unless the subscription agreement specifies otherwise.

C. Shares issued pursuant to subscriptions entered into before incorporation are fully paid and nonassessable when the corporation receives the consideration specified in the subscription agreement.

D. If a subscriber defaults in payment of money or property under a subscription agreement entered into before incorporation, the corporation may collect the amount owed as any other debt. Alternatively, unless the subscription agreement provides otherwise, the corporation may rescind the agreement and may sell the shares if the debt remains unpaid for more than twenty days after the corporation sends written demand for payment to the subscriber.

E. A subscription agreement entered into after incorporation is a contract between the subscriber and the corporation subject to R.S. 12:1-621.

Source: MBCA §6.20.

§1-621. Issuance of shares

A. The powers granted in this Section to the board of directors may be reserved to the shareholders by the articles of incorporation.

B. The board of directors may authorize shares to be issued for consideration consisting of any tangible or intangible property or benefit to the corporation, including cash, promissory notes, services performed, contracts for services to be performed, or other securities of the corporation.

C. Before the corporation issues shares, the board of directors must determine that the consideration received or to be received for shares to be issued is adequate. That determination by the board of directors is conclusive insofar as the adequacy of consideration for the issuance of shares relates to whether the shares are validly issued, fully paid, and nonassessable.

D. When the corporation receives the consideration for which the board of directors authorized the issuance of shares, the shares issued therefor are fully paid and nonassessable.

E. The corporation may place in escrow shares issued for a contract for future services or benefits or a promissory note, or make other arrangements to restrict the transfer of the shares, and may credit distributions in respect of the shares against their purchase price, until the services are performed, the note is paid, or the benefits received. If the services are not performed, the note is not paid, or the benefits are not received, the shares escrowed or restricted and the distributions credited may be cancelled in whole or part.

F.(1) An issuance of shares or other securities convertible into or rights exercisable for shares, in a transaction or a series of integrated transactions, requires approval of the shareholders, at a meeting at which a quorum consisting of at least a majority of the votes entitled to be cast on the matter exists, if both of the following conditions are satisfied:

(a) The shares, other securities, or rights are issued for consideration other than cash or cash equivalents.

(b) The voting power of shares that are issued and issuable as a result of the transaction or series of integrated transactions will comprise more than twenty percent of the voting power of the shares of the corporation that were outstanding immediately before the transaction.

(2) In this Subsection, both of the following shall apply:

(a) For purposes of determining the voting power of shares issued and issuable as a result of a transaction or series of integrated transactions, the voting power of shares shall be the greater of either of the following:

(i) The voting power of the shares to be issued.

(ii) The voting power of the shares that would be outstanding after giving effect to the conversion of convertible shares and other securities and the exercise of rights to be issued.

(b) A series of transactions is integrated if consummation of one transaction is made contingent on consummation of one or more of the other transactions.

Source: MBCA §6.21.

Comment - 2014 Revision

Subsection (b) of the Model Act authorizes the issuance of shares for, among other things, "tangible or intangible" property. R.S. 12:1-140 defines "tangible property" to include "corporeal property" and "intangible property" to include "incorporeal property" as those terms are understood under Louisiana law.

§1-622. Liability of shareholders

A. A purchaser from a corporation of its own shares is not liable to the corporation or its creditors with respect to the shares except to pay the consideration for which the shares were authorized to be issued pursuant to R.S. 12:1-621 or specified in the subscription agreement pursuant to R.S. 12:1-620.

B. A shareholder of a corporation is not personally liable for the acts or debts of the corporation.

C. A shareholder who receives a distribution in excess of what may be authorized and made pursuant to R.S. 12:1-640(A) shall be personally liable to the corporation, or to creditors of the corporation, or both, for an amount not exceeding, in the aggregate, the excess amount received by that shareholder.

D. A proceeding to enforce the liability of a shareholder under Subsection C of this Section is subject to a peremption of two years measured from the relevant date of either of the following:

(1) The date on which the effect of the distribution was to be measured under R.S. 12:1-640(E) or (G), to the extent that the distribution is alleged to have been unlawful under R.S. 12:1-640(C).

(2) The date as of which the distribution first violated a restriction in the articles of incorporation, to the extent that the distribution is alleged to have been unlawful because it violated a restriction in the articles of incorporation.

Source: MBCA §6.22.

Comments - 2014 Revision

(a) Subsection (b) of the Model Act was modified by deleting the phrase, "Unless otherwise provided in the articles of incorporation," at the beginning of the sentence and the phrase, "except that he may become personally liable by reason of his own acts or conduct," at the end of the sentence.

(b) The first phrase was included in the Model Act to make the provision consistent with Model Act Section 2.02(b)(2)(v), which allowed provisions in the articles of incorporation to impose personal liability on shareholders for the debts of a corporation. That provision of the Model Act was deleted from this Section to avoid the risk that such a provision might result in a shareholder's incurring personal liability inadvertently. See Comment (b) to R.S. 12:1-202. The related phrase in Subsection B of this Section was deleted because the underlying authority to include such a provision in the articles had itself been deleted.

(c) The second phrase, concerning an exception for personal liability arising out of personal conduct, was deleted from this Section because it could have been interpreted to provide an independent basis for personal liability based simply on a corporate actor's having engaged in some kind of personal conduct in connection with the corporation's operations. It is true that liability may attach to a corporate actor's personal conduct if, for example, the conduct is tortious or amounts to an undertaking of personal contractual duties. But the grounds for such liability are determined by other bodies of law, not corporation law, and they do not impose liability on a corporate actor merely because the actor has engaged in personal conduct on behalf of a corporation. If a corporate actor does bear personal liability based on his personal acts or conduct in connection with the operation of the corporation, the actor is being held liable for his own acts or debts, not those of the corporation, so no need exists to state the exception contained in the Model Act.

(d) The Model Act does not impose liability on a shareholder for a wrongful distribution, except indirectly in an action under Section 8.33(b)(2) for recoupment by a director held liable for the unlawful distribution. This Section adds a new Subsection C to retain the existing Louisiana rule that a shareholder is liable to return to the corporation any unlawful distributions received by that shareholder. The liability imposed by Subsection C of this Section does not depend upon proof of any culpable conduct by the receiving shareholder, but merely on proof that the shareholder received a distribution that was unlawful. However, Subsection C of this Section imposes liability on a shareholder to return only the unlawful portion of any distribution received by that shareholder. The shareholder does not bear liability under Subsection C for any part of the distribution made to other shareholders or for any part of the distribution to him that was made lawfully.

(e) Subsection D of this Section was added to retain the prior law's two-year time limit on actions to enforce a shareholder's liability for the receipt of an unlawful distribution. However, unlike the earlier law, Subsection D of this Section explicitly makes the two-year period peremptive rather than prescriptive. The two-year peremptive period begins on the date on which lawfulness of the distribution would have been measured for purposes of R.S. 12:1-640(C), to the extent that a violation of R.S. 12:1-640(C) is alleged as the basis of recovery, or on the date on which the distribution first violated a restriction in the articles of incorporation, to the extent that a violation of the articles is alleged as the basis of recovery.

§1-623. Share dividends

A. Unless the articles of incorporation provide otherwise, shares may be issued pro rata and without consideration to the corporation's shareholders or to the

shareholders of one or more classes or series. An issuance of shares under this Subsection is a share dividend.

B. Shares of one class or series may not be issued as a share dividend in respect of shares of another class or series unless one of the following conditions are satisfied:

(1) The articles of incorporation so authorize.

(2) A majority of the votes entitled to be cast by the class or series to be issued approve the issue.

(3) There are no outstanding shares of the class or series to be issued.

C. If the board of directors does not fix the record date for determining shareholders entitled to a share dividend, it is the date the board of directors authorizes the share dividend.

Source: MBCA §6.23.

§1-624. Share options

A. A corporation may issue rights, options, or warrants for the purchase of shares or other securities of the corporation. The board of directors shall determine the terms upon which the rights, options, or warrants are issued and the terms, including the consideration, for which the shares or other securities are to be issued. The authorization by the board of directors for the corporation to issue such rights, options, or warrants constitutes authorization of the issuance of the shares or other securities for which the rights, options, or warrants are exercisable.

B. The terms and conditions of such rights, options or warrants, including those outstanding on the effective date of this Section, may include, without limitation, restrictions or conditions that do either of the following:

(1) Preclude or limit the exercise, transfer or receipt of such rights, options, or warrants by any person or persons owning or offering to acquire a specified number or percentage of the outstanding shares or other securities of the corporation or by any transferee or transferees of any such person or persons.

(2) Invalidate or void such rights, options, or warrants held by any such person or persons or any such transferee or transferees.

C. The board of directors may authorize one or more officers to designate the recipients of rights, options, warrants, or other equity compensation awards that involve the issuance of shares and to determine, within an amount and subject to any other limitations established by the board and, if applicable, the stockholders, the number of such rights, options, warrants, or other equity compensation awards and the terms thereof to be received by the recipients, provided that an officer may not use such authority to designate himself or herself or any other persons the board of directors may specify as a recipient of such rights, options, warrants, or other equity compensation awards.

Source: MBCA §6.24.

§1-625. Form and content of certificates

A. Shares shall be represented by share certificates unless the issuing corporation is a participant in the Direct Registration System of the Depository Trust & Clearing Corporation or of a similar book-entry system used in the trading of shares of public corporations. If the issuing corporation is a participant in the Direct Registration System or a similar book-entry system, shares may but need not be represented by certificates. Unless this Chapter or another statute expressly provides otherwise, the rights and obligations of shareholders are identical whether or not their shares are represented by certificates.

B. At a minimum each share certificate must state on its face all of the following:

(1) The name of the issuing corporation and that it is organized under the law of this state.

(2) The name of the person to whom issued.

(3) The number and class of shares and the designation of the series, if any, the certificate represents.

C. If the issuing corporation is authorized to issue different classes of shares or different series within a class, the designations, relative rights, preferences, and limitations applicable to each class and the variations in rights, preferences, and limitations determined for each series, and the authority of the board of directors to determine variations for future series, must be summarized on the front or back of each certificate. Alternatively, each certificate may state conspicuously on its front or back that the corporation will furnish the shareholder this information on request in writing and without charge.

D. Each share certificate must be signed, either manually or in facsimile, by the president and secretary or by two officers designated in the bylaws or by the board of directors and may bear the corporate seal or its facsimile.

E. If the person who signed, either manually or in facsimile, a share certificate no longer holds office when the certificate is issued, the certificate is nevertheless valid.

Source: MBCA §6.25.

Comments - 2014 Revision

(a) Subsection (a) of the Model Act allows all corporations to issue shares with or without certificates. This Section adds language to Subsection (a) to retain essentially the same limitation contained in prior law concerning the use of uncertificated shares. Uncertificated shares may be issued only by a corporation that is a participant in the Direct Registration System of the Depository Trust & Clearing Corporation or some similar book-entry system for trading shares in public corporations. The reference in this Act to a "similar book-entry system" replaces the prior reference to a "successor" system because the allowance for uncertificated shares should extend to other similar systems regardless of whether they are successors to the current Depository Trust system.

(b) For corporations that do not participate in the Depository Trust & Clearing Corporation Direct Registration System, a system designed to facilitate the efficient execution through brokerage firms of transactions in publicly-traded securities, share certificates provide a convenient and reliable means of perfecting security interests in the underlying shares and of notifying third parties of transfer restrictions.

(c) When applicable, the statutory requirement that shares be issued in certificated form is a duty imposed by law on the corporation, not a defense that may be asserted by the corporation against a person who genuinely owns shares for which the corporation has failed to issue a certificate. A person may own shares without possessing a certificate for the shares, even if the law requires the corporation to issue its shares in certificated form. See, e.g., Mercer v. Mercer, 930 So.2d 348 (La. App. 2d Cir. 2006); Age v. Age, 820 So.2d 1167 (La. App. 4th Cir. 2002); International Stevedores, Inc., v. Hanlon, 499 So.2d 1183 (La. App. 5th Cir. 1986).

(d) Subsection (d) of the Model Act was modified to supply a default rule for the two officers, president and secretary, who are to sign a share certificate in the event that the signing officers are not designated in the corporation's bylaws or by its board of directors.

§1-626. Shares without certificates

A. If a corporation is eligible to issue shares without certificates, the board of directors of the corporation may authorize the issue of some or all of the shares of any or all of its classes or series without certificates, except to the extent that its articles of incorporation or bylaws provide otherwise. The authorization does not affect shares already represented by certificates until they are surrendered to the corporation.

B. Within a reasonable time after the issue or transfer of shares without certificates, the corporation shall send the shareholder a written statement of the information required on certificates by R.S. 12:1-625(B) and (C), and, if applicable, R.S. 12:1-627.

Source: MBCA §6.26.

Comment - 2014 Revision

This Section limits the application of the rule in Subsection A of this Section to those corporations that are eligible to issue uncertificated shares. Under R.S. 12:1-625(A), a corporation is eligible to issue uncertificated shares only if the corporation is a participant in the Direct Registration System of the Depository Trust & Clearing Corporation or some similar system. Most Louisiana corporations are not participants in that kind of system, and so would not be eligible either to issue uncertificated shares or to utilize the rules in this Section.

§1-627. Restriction on transfer of shares and other securities

A. The articles of incorporation, bylaws, an agreement among shareholders, or an agreement between shareholders and the corporation may impose restrictions on the transfer or registration of transfer of shares of the corporation. A restriction

does not affect shares issued before the restriction was adopted unless the holders of the shares are parties to the restriction agreement or voted in favor of the restriction.

B. A restriction on the transfer or registration of transfer of shares is valid and enforceable against the holder or a transferee of the holder if the restriction is authorized by this Section and its existence is noted conspicuously on the front or back of the certificate or is contained in the information statement required by R.S. 12:1-626(B). Unless so noted or contained, a restriction is not enforceable against a person without knowledge of the restriction.

C. A restriction on the transfer or registration of transfer of shares is authorized for any of the following:

(1) To maintain the corporation's status when it is dependent on the number or identity of its shareholders.

(2) To preserve exemptions under federal or state securities law.

(3) For any other reasonable purpose.

D. A restriction on the transfer or registration of transfer of shares may do any of the following:

(1) Obligate the shareholder first to offer the corporation or other persons, separately, consecutively, or simultaneously, an opportunity to acquire the restricted shares.

(2) Obligate the corporation or other persons, separately, consecutively, or simultaneously, to acquire the restricted shares.

(3) Require the corporation, the holders of any class of its shares, or another person to approve the transfer of the restricted shares, if the requirement is not manifestly unreasonable.

(4) Prohibit the transfer of the restricted shares to designated persons or classes of persons, if the prohibition is not manifestly unreasonable.

E. For purposes of this Section, "shares" includes a security convertible into or carrying a right to subscribe for or acquire shares.

Source: MBCA §6.27.

Comment - 2014 Revision

The rule in Subsection B of this Section is consistent with the rule in Article 8 of the Uniform Commercial Code concerning the enforceability of transfer restrictions on investment securities generally. Under both the UCC and this Section, a transfer restriction that is not noted as required on the certificate of a certificated security, or in a required notification statement for an uncertificated security, is unenforceable except against a person with "knowledge" of the restriction. See R.S. 10:8-204. As used in this Section and in the UCC, the term "knowledge" means actual knowledge. The terms "knowledge" and "know" are defined in R.S. 12:1-140 in the same way as in R.S. 10:1-202, Louisiana's enactment of the UCC.

§1-628. Expense of issue

A corporation may pay the expenses of selling or underwriting its shares, and of organizing or reorganizing the corporation, from the consideration received for shares.

Source: MBCA §6.28.

SUBPART C. SUBSEQUENT ACQUISITION OF SHARES BY SHAREHOLDERS AND CORPORATION

§1-630. Shareholders' preemptive rights

A. The shareholders of a corporation do not have a preemptive right to acquire the corporation's unissued shares except to the extent the articles of incorporation so provide. The articles of incorporation of a corporation that was incorporated before January 1, 1969, shall be deemed to contain a statement that "the corporation elects to have preemptive rights," unless the articles of incorporation contain a specific provision enlarging, limiting, or denying preemptive rights.

B. A statement included in the articles of incorporation that "the corporation elects to have preemptive rights", or words of similar import, means that the following principles apply except to the extent the articles of incorporation expressly provide otherwise:

(1) The shareholders of the corporation have a preemptive right, granted on uniform terms and conditions prescribed by the board of directors to provide a fair and reasonable opportunity to exercise the right, to acquire proportional amounts of the corporation's unissued shares upon the decision of the board of directors to issue them. Shareholders have a fair and reasonable opportunity to exercise the right to

acquire shares if they are given at least forty-five days to purchase the shares after notice to them of that right, but shorter periods of time may be fair and reasonable under the circumstances in which the shares are being issued.

(2) A shareholder may waive his preemptive right. A waiver evidenced by a writing is irrevocable even though it is not supported by consideration.

(3) There is no preemptive right with respect to any of the following:

(a) Shares issued as compensation to directors, officers, agents, or employees of the corporation, its subsidiaries, or affiliates.

(b) Shares issued to satisfy conversion or option rights created to provide compensation to directors, officers, agents, or employees of the corporation, its subsidiaries, or affiliates.

(c) Shares authorized in articles of incorporation that are issued within six months from the effective date of incorporation.

(d) Shares sold otherwise than for money.

(4) Holders of shares of any class without general voting rights but with preferential rights to distributions or assets have no preemptive rights with respect to shares of any class.

(5) Holders of shares of any class with general voting rights but without preferential rights to distributions or assets have no preemptive rights with respect to shares of any class with preferential rights to distributions or assets unless the shares with preferential rights are convertible into or carry a right to subscribe for or acquire shares without preferential rights.

(6) Shares subject to preemptive rights that are not acquired by shareholders may be issued to any person for a period of one year after being offered to shareholders at a consideration set by the board of directors that is not lower than the consideration set for the exercise of preemptive rights. An offer at a lower consideration or after the expiration of one year is subject to the shareholders' preemptive rights.

C. For purposes of this Section, "shares" includes a security convertible into or carrying a right to subscribe for or acquire shares.

D. On or after January 1, 2016, no action to enforce a preemptive right of a shareholder shall be brought unless filed in a court of competent jurisdiction and proper venue within one year of the date of the issuance of the share to which the shareholder had the preemptive right, or within one year of the date that the issuance of the share is discovered or should have been discovered. Such an action is perempted three years after the date of the issuance of the share.

Source: MBCA §6.30.

Comments - 2014 Revision

(a) Before January 1, 1969, the effective date of the 1968 business corporation law, Louisiana provided an "opt out" form of preemptive rights; the earlier corporation statute supplied preemptive rights automatically unless a corporation's articles of incorporation provided otherwise. See former R.S. 12:28(B) (1951, superseded). The 1968 statute reversed the rule, and made preemptive rights "opt in;" shareholders did not have preemptive rights unless the articles affirmatively approved them. See former R.S. 12:72(A) (1994, superseded). To prevent the change in the default rule from eliminating preemptive rights in corporations whose articles were silent on the subject, the 1968 statute contained a provision that deemed the articles of pre-1969 corporations to contain a statement approving of preemptive rights, except to the extent that the articles actually enlarged, limited or denied those rights. See former R.S. 12:24(C)(1) (1994, superseded). Because this Section retains the opt-in approach of the 1968 statute, and of the Model Act, some pre-1969 corporations may still need the statutory transition rule that was provided in the 1968 statute. That rule has been added to Subsection A of this Section.

(b) Model Act Paragraph (b)(1) does not specify how much time the shareholders must be given to exercise their preemptive rights, saying only that the corporation must provide a "fair and reasonable opportunity" to exercise them. This Section adds a sentence to Paragraph (b)(1) that establishes a safe harbor of forty-five days for the preemptive period, measured from notice to the shareholders of their opportunity to purchase the shares. (See R.S. 12:1-141 for the effective date of the notice.) Shorter periods may also be fair and reasonable, based on the circumstances of the transactions in question, but the corporation would bear the burden of proving the fairness and reasonableness of a shorter period. Examples of factors that would help justify a shorter period would be the corporation's need for funds before the expiration of the forty-five-day period, advance knowledge and involvement by a complaining shareholder in the decision to issue additional shares, and the ability of a complaining shareholder to raise the required funds without financial hardship.

(c) This Section adds a new time limit for an action to enforce a preemptive right. The new time limits are especially important to pre-1969 corporations, which may inadvertently fail to afford the preemptive rights that their articles, if silent on the point, are deemed to provide.

§1-631. Corporation's acquisition of its own shares

A. A corporation may acquire its own shares, and shares so acquired constitute authorized but unissued shares.

B. If the articles of incorporation prohibit the reissue of the acquired shares, the number of authorized shares is reduced by the number of shares acquired.

Source: MBCA §6.31.

SUBPART D. DISTRIBUTIONS

§1-640. Distributions to shareholders

A. A board of directors may authorize and the corporation may make distributions to its shareholders subject to restriction by the articles of incorporation and the limitation in Subsection C of this Section.

B. If the board of directors does not fix the record date for determining shareholders entitled to a distribution, other than one involving a purchase, redemption, or other acquisition of the corporation's shares, it is the date the board of directors authorizes the distribution.

C. No distribution may be made if, after giving it effect, either of the following conditions would exist:

(1) The corporation would not be able to pay its debts as they become due in the usual course of business.

(2) The corporation's total assets would be less than the sum of its total liabilities plus, unless the articles of incorporation permit otherwise, the amount that would be needed, if the corporation were to be dissolved at the time of the distribution, to satisfy the preferential rights upon dissolution of shareholders whose preferential rights are superior to those receiving the distribution.

D. The board of directors may base a determination that a distribution is not prohibited under Subsection C of this Section either on financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances or on a fair valuation or other method that is reasonable in the circumstances.

E. Except as provided in Subsection G of this Section, the effect of a distribution under Subsection C of this Section is measured by one of the following:

(1) In the case of distribution by purchase, redemption, or other acquisition of the corporation's shares, as of the earlier of the date money or other property is transferred or debt incurred by the corporation or the date the shareholder ceases to be a shareholder with respect to the acquired shares.

(2) In the case of any other distribution of indebtedness, as of the date the indebtedness is distributed.

(3) In all other cases, as of the date the distribution is authorized if the payment occurs within one hundred and twenty days after the date of authorization or the date the payment is made if it occurs more than one hundred and twenty days after the date of authorization.

F. A corporation's indebtedness to a shareholder incurred by reason of a distribution made in accordance with this Section is at parity with the corporation's indebtedness to its general, unsecured creditors except to the extent subordinated by agreement.

G. Indebtedness of a corporation, including indebtedness issued as a distribution, is not considered a liability for purposes of determinations under Subsection C of this Section if its terms provide that payment of principal and interest are made only if and to the extent that payment of a distribution to shareholders could then be made under this Section. If the indebtedness is issued as a distribution, each payment of principal or interest is treated as a distribution, the effect of which is measured on the date the payment is actually made.

H. This Section shall not apply to distributions in liquidation under Part 14 of this Chapter.

Source: MBCA §6.40.

PART 7. SHAREHOLDERS

SUBPART A. MEETINGS

§1-701. Annual meeting

A. Unless directors are elected by written consent in lieu of an annual meeting as permitted by R.S. 12:1-704, a corporation shall hold a meeting of shareholders annually at a time stated in or fixed in accordance with the bylaws or, if not so stated or fixed, as stated or fixed in accordance with a resolution of the board of directors. If a corporation's articles of incorporation authorize shareholders to cumulate their votes when electing directors pursuant to R.S. 12:1-728, directors may not be elected by written consent unless the written consent is unanimous.

B. Annual shareholders' meetings may be held in or out of this state at the place stated in or fixed in accordance with the bylaws or, if not so stated or fixed, as stated or fixed in accordance with a resolution of the board of directors. If no place is stated in or fixed in accordance with the bylaws, annual meetings shall be held at the corporation's principal office.

C. The failure to hold an annual meeting at the time stated in or fixed in accordance with Subsection A of this Section does not affect the validity of any corporate action.

D. If no annual shareholders' meeting is held for a period of eighteen months, and directors are not elected by written consent in lieu of an annual meeting during that period, any shareholder may by notice to the secretary demand that the secretary call such a meeting, to be held at the corporation's principal office or, if none in this state, at its registered office. The secretary shall call the meeting and shall provide notice of the meeting as required by R.S. 12:1-705 within thirty days after the notice to the secretary of the shareholder's demand for the meeting.

Source: MBCA §7.01.

Comments - 2014 Revision

(a) This Section adds language to Subsection A through C of this Section to accommodate the rule, retained from prior law, that makes the adoption of bylaws optional. Under the added language, the time and place of an annual meeting of

shareholders may set by or in accordance with a resolution of the board of directors if the corporation has not adopted a bylaw that controls the matter.

(b) This Section changes the Model Act wording in the second sentence of Subsection A of this Section to make it clear that the effect of cumulative voting on the election of directors under Subsection A is to require the election of directors at a meeting, and not through written consents in lieu of a meeting, unless the written consent is unanimous. The Model Act language could have been interpreted to require directors to be elected by unanimous consent whenever shareholders had the right to vote cumulatively.

(c) This Section adds a new Subsection D to retain a modified version of the provision in prior law that allowed any shareholder to call an annual meeting for the election of directors if no such meeting had been held for a period of eighteen months. As modified, the new Subsection D does not empower the shareholder actually to call the meeting, but rather to demand that the secretary do so. The secretary, unlike the shareholder, has the ability to arrange for the meeting and to provide the notice of the meeting required by R.S. 12:1-705. Subsection D of this Section requires both that the meeting be called and that the required notice be provided within thirty days of the notice to the secretary of the shareholder's demand for a meeting. The secretary has the discretion, acting consistently with the secretary's fiduciary duties, to choose the date of the meeting, provided that the date chosen permits the secretary to provide notice of the meeting no fewer than ten and no more than sixty days before the date of the meeting. The duties of the secretary under Subsection D are subject to enforcement through a writ of mandamus. See C.C.P. Art. 3864.

§1-702. Special meeting

A. A corporation shall hold a special meeting of shareholders upon either of the following:

(1) On call of its board of directors or the person or persons authorized to do so by the articles of incorporation or bylaws.

(2) If the shareholders holding at least ten percent of all the votes entitled to be cast on an issue proposed to be considered at the proposed special meeting sign, date, and deliver to the corporation one or more written demands for the meeting describing the purpose or purposes for which it is to be held, provided that the articles of incorporation may fix a lower percentage or a higher percentage not exceeding twenty-five percent of all the votes entitled to be cast on any issue proposed to be considered. Unless otherwise provided in the articles of incorporation, a written demand for a special meeting may be revoked by a writing to that effect received by the corporation prior to the receipt by the corporation of demands sufficient in number to require the holding of a special meeting.

B. If not otherwise fixed under R.S. 12:1-703 or 1-707, the record date for determining shareholders entitled to demand a special meeting is the date the first shareholder signs the demand.

C. Special shareholders' meetings may be held in or out of this state at the place stated in or fixed in accordance with the bylaws or, if not so stated or fixed, at the place stated in or fixed in accordance with a resolution of the board of directors. If no place is stated or fixed in accordance with the bylaws or a resolution of the board of directors, special meetings shall be held at the corporation's principal office.

D. Only business within the purpose or purposes described in the meeting notice required by R.S. 12:1-705(C) may be conducted at a special shareholders' meeting.

Source: MBCA §7.02.

Comment - 2014 Revision

Subsection C of this Section permits a special shareholders' meeting to be held at any place, whether inside or outside Louisiana, fixed by or in accordance with the corporation's bylaws. The power to choose the place for a shareholders' meeting, like the power to determine other details concerning the meeting, must be exercised in accordance with the fiduciary duties of the directors. The choice of the location of the meeting cannot be designed to interfere with the ability of shareholders to participate in the meeting or to exercise their voting power. Cf., Schnell v. Chris Craft Industries, 285 A.2d 437 (Del. 1971) (management may not utilize its power to fix the date of a shareholders' meeting for purposes of interfering with the right of dissident shareholders to engage in a proxy contest against management); Blasius Industries, Inc. v. Atlas Corp., 564 A.2d 651 (Del. Ch. 1988) (business judgment rule does not apply to board actions taken with the primary purpose of interfering with the shareholders' exercising their voting power, even if the action is taken advisedly and in a good faith effort to thwart a transaction that the directors believe not to be in the best interest of the corporation; such acts are not illegal per se but management bears a heavy burden of demonstrating a compelling justification for them); Aprahamian v. HBO & Co., 531 A.2d 1204, 1206-07 (Del. Ch. 1987) ("In the interests of corporate democracy, those in charge of the election machinery of a corporation must be held to the highest standards in providing for and conducting corporate elections.").

§1-703. Court-ordered meeting

A. The district court of the parish where a corporation's principal office or, if none in this state, its registered office, is located may in a summary proceeding order a meeting to be held at upon either of the following:

(1) On application of any shareholder of the corporation if an annual meeting was not held or action by written consent in lieu thereof did not become effective

within the earlier of six months after the end of the corporation's fiscal year or fifteen months after its last annual meeting.

(2) On application of a shareholder who signed a demand for a special meeting valid under R.S. 12:1-702, if either of the following conditions exist:

(a) Notice of the special meeting was not given within thirty days after the date the demand was delivered to the corporation's secretary.

(b) The special meeting was not held in accordance with the notice.

B. The court may fix the time and place of the meeting, determine the shares entitled to participate in the meeting, specify a record date for determining shareholders entitled to notice of and to vote at the meeting, prescribe the form and content of the meeting notice, fix the quorum required for specific matters to be considered at the meeting or direct that the votes represented at the meeting constitute a quorum for action on those matters, and enter other orders necessary to accomplish the purpose or purposes of the meeting.

C. For purposes of Paragraph (A)(1) of this Section, "shareholder" means a record shareholder, a beneficial shareholder, and an unrestricted voting trust beneficial owner.

Source: MBCA §7.03.

Comment - 2014 Revision

Subsection B of this Section authorizes a court to enter orders as necessary "to accomplish the purpose or purposes of the meeting." As used in that Subsection the phrase "purpose or purposes of the meeting" refers to the deliberation and voting for which a meeting is being called, and not to the subsequent implementation of the votes that may be taken at the meeting. The effects of the votes taken, and the remedies available for their implementation, are issues that are governed by other principles of law, not by this Section.

§1-704. Action without meeting

A. Action required or permitted by this Chapter to be taken at a shareholders' meeting may be taken without a meeting if the action is taken by all the shareholders entitled to vote on the action. The action must be evidenced by one or more written consents bearing the date of signature and describing the action taken, signed by all

the shareholders entitled to vote on the action and delivered to the corporation for inclusion in the minutes or filing with the corporate records.

B. The articles of incorporation may provide that any action required or permitted by this Chapter to be taken at a shareholders' meeting may be taken without a meeting, and without prior notice, if consents in writing setting forth the action so taken are signed by the holders of outstanding shares having not less than the minimum number of votes that would be required to authorize or take the action at a meeting at which all shares entitled to vote on the action were present and voted. The written consent shall bear the date of signature of the shareholder who signs the consent and be delivered to the corporation for inclusion in the minutes or filing with the corporate records.

C. If an earlier date has not been fixed under R.S. 12:1-707 and if prior board action is not required respecting the action to be taken without a meeting, the record date for determining the shareholders entitled to take action without a meeting shall be the first date on which a signed written consent is delivered to the corporation. If not otherwise fixed under R.S. 12:1-707 and if prior board action is required respecting the action to be taken without a meeting, the record date shall be the close of business on the day the resolution of the board taking such prior action is adopted. No written consent shall be effective to take the corporate action referred to therein unless, within sixty days of the earliest date on which a consent delivered to the corporation as required by this Section was signed, written consents signed by sufficient shareholders to take the action have been delivered to the corporation. A written consent may be revoked by a writing to that effect delivered to the corporation before unrevoked written consents sufficient in number to take the corporate action are delivered to the corporation.

D. A consent signed pursuant to the provisions of this Section has the effect of a vote taken at a meeting and may be described as such in any document. Unless the articles of incorporation, bylaws, or a resolution of the board of directors provides for a reasonable delay to permit tabulation of written consents, the action

taken by written consent shall be effective when written consents signed by sufficient shareholders to take the action are delivered to the corporation.

E. If this Chapter requires that notice of a proposed action be given to nonvoting shareholders and the action is to be taken by written consent of the voting shareholders, the corporation must give its nonvoting shareholders written notice of the action not more than ten days after written consents sufficient to take the action have been delivered to the corporation, or such later date that tabulation of consents is completed pursuant to an authorization under Subsection D of this Section. The notice must reasonably describe the action taken and contain or be accompanied by the same material that, under any provision of this Chapter, would have been required to be sent to nonvoting shareholders in a notice of a meeting at which the proposed action would have been submitted to the shareholders for action.

F. If action is taken by less than unanimous written consent of the voting shareholders, the corporation must give its nonconsenting voting shareholders written notice of the action not more than ten days after written consents sufficient to take the action have been delivered to the corporation, or such later date that tabulation of consents is completed pursuant to an authorization under Subsection D of this Section. The notice must reasonably describe the action taken and contain or be accompanied by the same material that, under any provision of this Chapter, would have been required to be sent to voting shareholders in a notice of a meeting at which the action would have been submitted to the shareholders for action.

G. The notice requirements in Subsections E and F of this Section shall not delay the effectiveness of actions taken by written consent, and a failure to comply with such notice requirements shall not invalidate actions taken by written consent, provided that this Subsection shall not be deemed to limit judicial power to fashion any appropriate remedy in favor of a shareholder adversely affected by a failure to give such notice within the required time period.

Source: MBCA §7.04.

Comment - 2014 Revision

Model Act Subsection (c) was modified in this Section to allow a record date established under R.S. 12:1-707 to control over the date fixed by Subsection C of this Section itself only if the R.S. 12:1-707 date is earlier than that established by Subsection C of this Section. Subsection C of this Section fixes the record date as the first date on which a signed shareholder's consent is delivered to the corporation. If the board of directors of the corporation were permitted to select a record date occurring after the Subsection C date, they could invalidate written consents already delivered to the corporation. Under this Section, the persons who are soliciting the shareholder's consents are entitled to rely upon the date fixed in Subsection C unless an earlier record date has been established under R.S. 12:1-707.

§1-705. Notice of meeting

A. A corporation shall notify shareholders of the date, time, and place of each annual and special shareholders' meeting no fewer than ten nor more than sixty days before the meeting date. 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, both of the following shall apply:

(1) Notice of an annual meeting need not include a description of the purpose or purposes for which the meeting is called.

(2) If a notice of an annual meeting does include a description of one or more purposes, the meeting is not limited to those purposes.

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 R.S. 12:1-703 or 1-707, 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 to shareholders is effective.

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. If a new record date for the adjourned meeting is or must be fixed under R.S. 12:1-707, however, notice of the adjourned meeting must

be given under this Section to persons who are shareholders as of the new record date.

Source: MBCA §7.05.

Comments - 2014 Revision

(a) The second sentence of Subsection B of this Section was added in this Section as a corollary to the Model Act rule that no notice is required of the purpose of an annual meeting.

(b) The default rule in Subsection D of this Section on fixing of the record date for the meeting was modified in this Section to refer to the day on which the first notice to shareholders is effective, rather than the day on which the first notice is delivered. The "effective" standard was chosen over that of "delivery" to allow the corporation to rely on the rules in R.S. 12:1-141 concerning the date on which a notice becomes effective.

§1-706. Waiver of notice

A. A shareholder may waive any notice required by this Chapter, the articles of incorporation, or bylaws before or after the date and time stated in the notice. The waiver must be in writing, be signed by the shareholder entitled to the notice, and be delivered to the corporation for inclusion in the minutes or filing with the corporate records.

B. A shareholder's attendance at a meeting does both of the following:

(1) Waives objection to lack of notice or defective notice of the meeting, unless the shareholder at the beginning of the meeting objects to holding the meeting or transacting business at the meeting.

(2) Waives objection to consideration of a particular matter at the meeting that is not within the purpose or purposes described in the meeting notice, unless the shareholder objects to considering the matter when it is presented.

C. A shareholder attends a meeting if the shareholder is present at the meeting in person or by proxy. If a shareholder attends a meeting by proxy, then for purposes of Subsection B of this Section, an objection by the shareholder's proxy has the same effect as an objection by the shareholder.

Source: MBCA §7.06.

Comment - 2014 Revision

A new Subsection C was added in this Section to provide support in the statute itself for the statement in Official Comment 1 of the Model Act that the word "attendance" means the presence of a shareholder in person or by proxy. The same Subsection similarly treats an objection by the proxy as an objection by the shareholder.

§1-707. Record date

A. The bylaws may fix or provide the manner of fixing the record date for one or more voting groups in order to determine the shareholders entitled to notice of a shareholders' meeting, to demand a special meeting, to vote, or to take any other action. If the bylaws do not fix or provide for fixing a record date, the board of directors of the corporation may fix a future date as the record date.

B. A record date fixed under this Section may not be more than seventy days before the meeting or action requiring a determination of shareholders.

C. A determination of shareholders entitled to notice of or to vote at a shareholders' meeting is effective for any adjournment of the meeting unless the board of directors fixes a new record date, which it must do if the meeting is adjourned to a date more than one hundred and twenty days after the date fixed for the original meeting.

D. If a court orders a meeting adjourned to a date more than one hundred and twenty days after the date fixed for the original meeting, it may provide that the original record date continues in effect or it may fix a new record date.

Source: MBCA §7.07.

§1-708. Conduct of the meeting

A. At each meeting of shareholders, a chair shall preside. The chair shall be appointed as provided in the bylaws or, in the absence of such provision, by the board.

B. The chair, unless the articles of incorporation or bylaws provide otherwise, shall determine the order of business and shall have the authority to establish rules for the conduct of the meeting.

C. Any rules adopted for, and the conduct of, the meeting shall be fair to shareholders.

D. The chair of the meeting shall announce at the meeting when the polls close for each matter voted upon. If no announcement is made, the polls shall be deemed to have closed upon the final adjournment of the meeting. After the polls close, no ballots, proxies, or votes nor any revocations or changes thereto may be accepted.

Source: MBCA §7.08.

SUBPART B. VOTING

§1-720. Shareholders' list for meeting

A. After fixing a record date for a meeting, a corporation shall prepare an alphabetical list of the names of all its shareholders who are entitled to notice of a shareholders' meeting. The list must be arranged by voting group, and within each voting group by class or series of shares, and show the address of and number of shares held by each shareholder.

B. The shareholders' list must be available for inspection by any shareholder, beginning two business days after notice of the meeting is given for which the list was prepared and continuing through the meeting, at the corporation's principal office or at a place identified in the meeting notice in the city where the meeting will be held. A shareholder, or the shareholder's agent or attorney, is entitled on written demand to inspect and, subject to the requirements of R.S. 12:1-1602(C) other than the required percentage and duration of ownership of shares, to copy the list, during regular business hours and at the shareholder's expense, during the period it is available for inspection.

C. The corporation shall make the shareholders' list available at the meeting, and any shareholder, or the shareholder's agent or attorney, is entitled to inspect the list at any time during the meeting or any adjournment.

D. If the corporation refuses to allow a shareholder, or the shareholder's agent or attorney, to inspect the shareholders' list before or at the meeting, or copy

the list as permitted by Subsection B of this Section, the district court of the parish where a corporation's principal office or, if none in this state, its registered office, is located, on application of the shareholder, may in a summary proceeding order the inspection or copying at the corporation's expense and may postpone the meeting for which the list was prepared until the inspection or copying is complete.

E. Refusal or failure to prepare or make available the shareholders' list does not affect the validity of action taken at the meeting.

Source: MBCA §7.20.

§1-721. Voting entitlement of shares

A. Except as provided in Subsections B and D of this Section, or unless the articles of incorporation provide otherwise, each outstanding share, regardless of class, is entitled to one vote on each matter voted on at a shareholders' meeting. Only shares are entitled to vote.

B. Absent special circumstances, the shares issued by a corporation are not entitled to vote if they are owned, directly or indirectly, by a subsidiary.

C. Subsection B of this Section does not limit the power of a corporation or subsidiary to vote any shares, including its own shares, held by it in a fiduciary capacity.

D. Redeemable shares are not entitled to vote after notice of redemption is mailed to the holders and a sum sufficient to redeem the shares has been deposited with a bank, trust company, or other financial institution under an irrevocable obligation to pay the holders the redemption price on surrender of the shares.

E. For purposes of Subsections B and C of this Section, the following meanings shall apply:

(1) The term "subsidiary" means a domestic or foreign corporation, limited liability company, partnership, or other juridical person that is subject to at least majority control by the issuer of the shares, but does not include the issuer itself.

(2) "Majority control" means ownership, direct or indirect, of a majority of either of the following:

(a) The shares entitled to vote for the directors of a corporation.

(b) The membership, partnership, or other interests in an unincorporated entity that are entitled either to vote for those who hold the general managerial authority in the unincorporated entity or to exercise that authority directly.

Source: MBCA §7.21.

Comments - 2014 Revision

(a) Model Act Subsection (b) provides an explicit statutory rule against "circular" voting only where the circular voting is occurring through a subsidiary that is organized as a corporation. The Model Act leaves other forms of circular voting to common law principles, as noted in Model Act Comment 3. Because Louisiana law does not include those common law principles, this Section extends the express statutory rule against circular voting to all subsidiaries generally, whether incorporated or unincorporated. Subsection B of this Section provides the rule against the voting of shares held by a "subsidiary," and Subsection E of this Section provides the definition of that term.

(b) The rule in this Section against circular voting prohibits only a subsidiary's voting the shares that it owns in its direct or indirect parent companies, something that might be pictured as "upstream voting." That kind of voting is prohibited because it would allow the management of the parent company to exercise voting control over the parent company itself, through management's directing the votes of the subsidiary-owned shares in the parent. The rule in this Section against circular voting does not affect the formation of holding companies or the exercise of "downstream" voting power by a parent company over the shares that it owns in a subsidiary.

§1-722. Proxies

A. A shareholder may vote the shareholder's shares in person or by proxy.

B. A shareholder, or the shareholder's agent or attorney-in-fact, may appoint a proxy to vote or otherwise act for the shareholder by signing an appointment form, or by an electronic transmission. An electronic transmission must contain or be accompanied by information from which one can determine that the shareholder, the shareholder's agent, or the shareholder's attorney-in-fact authorized the transmission.

C. An appointment of a proxy is effective when a signed appointment form or an electronic transmission of the appointment is received by the inspector of election, the secretary, or other officer or agent of the corporation authorized to tabulate votes. An appointment is valid for eleven months unless a longer period is expressly provided in the appointment form.

D. An appointment of a proxy is revocable unless the appointment form or electronic transmission states that it is irrevocable and the appointment is coupled with an interest. Appointments coupled with an interest include the appointment of:

(1) A pledgee or other person having a security interest in the shares;

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

(3) A creditor of the corporation who extended it credit under terms requiring the appointment;

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

(5) A party to a voting agreement created under Section 1-731.

E. The revocation of a proxy appointment or the death or incapacity of the shareholder appointing a proxy does not affect the right of the corporation to accept the proxy's authority unless notice of the revocation, death or incapacity is received by the secretary or other officer or agent authorized to tabulate votes before the proxy exercises authority under the appointment.

F. An appointment made irrevocable under Subsection D of this Section is revoked when the interest with which it is coupled is extinguished.

G. Unless it otherwise provides, an appointment made irrevocable under Subsection D of this Section continues in effect after a transfer of the shares and a transferee takes subject to the appointment, except that a transferee for value of shares subject to an irrevocable appointment may revoke the appointment if the transferee did not know of its existence when acquiring the shares and the existence of the irrevocable appointment was not noted conspicuously on the certificate representing the shares or on the information statement for shares without certificates.

H. Subject to Section 1-724 and to any express limitation on the proxy's authority stated in the appointment form or electronic transmission, a corporation is entitled to accept the proxy's vote or other action as that of the shareholder making the appointment.

Source: MBCA §7.22.

Comment - 2014 Revision

The authority granted to corporate officials by this Section must be exercised in good faith. See the Comment to R.S. 12:1-702.

§1-723. Shares held by intermediaries and nominees

A. A corporation's board of directors may establish a procedure under which a person on whose behalf shares are registered in the name of an intermediary or nominee may elect to be treated by the corporation as the record shareholder by filing with the corporation a beneficial ownership certificate. The extent, terms, conditions, and limitations of this treatment shall be specified in the procedure. To the extent such person is treated under such procedure as having rights or privileges that the record shareholder otherwise would have, the record shareholder shall not have those rights or privileges.

B. The procedure shall specify all of the following information:

(1) The types of intermediaries or nominees to which it applies.

(2) The rights or privileges that the corporation recognizes in a person with respect to whom a beneficial ownership certificate is filed.

(3) The manner in which the procedure is selected, which shall include that the beneficial ownership certificate be signed or assented to by or on behalf of the record shareholder and the person or persons on whose behalf the shares are held.

(4) The information that must be provided when the procedure is selected.

(5) The period for which selection of the procedure is effective.

(6) Requirements for notice to the corporation with respect to the arrangement.

(7) The form and contents of the beneficial ownership certificate.

C. The procedure may specify any other aspects of the rights and duties created by the filing of a beneficial ownership certificate.

Source: MBCA §7.23.

§1-724. Corporation's acceptance of votes

A. If the name signed on a vote, consent, waiver, or proxy appointment corresponds to the name of a shareholder, the corporation if acting in good faith is entitled to accept the vote, consent, waiver, or proxy appointment and give it effect as the act of the shareholder.

B. If the name signed on a vote, consent, waiver, or proxy appointment does not correspond to the name of its shareholder, the corporation if acting in good faith is nevertheless entitled to accept the vote, consent, waiver, or proxy appointment and give it effect as the act of the shareholder if any of the following conditions are met:

(1) The shareholder is an entity and the name signed purports to be that of an officer or agent of the entity.

(2) The name signed purports to be that of an administrator, executor, guardian, conservator, curator, tutor or judicially authorized representative of the shareholder and, if the corporation requests, evidence of fiduciary status and authority acceptable to the corporation has been presented with respect to the vote, consent, waiver, or proxy appointment.

(3) The name signed purports to be that of a receiver or trustee in bankruptcy of the shareholder and, if the corporation requests, evidence of this status acceptable to the corporation has been presented with respect to the vote, consent, waiver, or proxy appointment.

(4) The name signed purports to be that of a pledgee or other person having a security interest in the shares, a beneficial owner, or an attorney-in-fact or representative through mandate or procuration of the shareholder and, if the corporation requests, evidence acceptable to the corporation of the signatory's authority to sign for the shareholder has been presented with respect to the vote, consent, waiver, or proxy appointment.

(5) Two or more persons are the shareholder as co-owners, co-tenants, or fiduciaries and the name signed purports to be the name of at least one of them and the person signing appears to be acting on behalf of all of them.

C. The corporation is entitled to reject a vote, consent, waiver, or proxy appointment if the secretary or other officer or agent authorized to tabulate votes, acting in good faith, has reasonable basis for doubt about the validity of the signature on it or about the signatory's authority to sign for the shareholder.

D. The corporation and its officer or agent who accepts or rejects a vote, consent, waiver, or proxy appointment in good faith and in accordance with the standards of this Section or R.S. 12:1-722(B) are not liable in damages to the shareholder for the consequences of the acceptance or rejection.

E. The corporation's acceptance or rejection of a vote, consent, waiver, or proxy appointment under this Section is conclusive unless a shareholder objects timely to the acceptance or rejection of the item and, if the corporation rejects the objection, proves in a summary proceeding, commenced within ten days after the corporation's notice to the shareholder that it has rejected the objection, that the corporation's acceptance or rejection of the item was incorrect. A shareholder's objection is timely under this Subsection only if the objection is made before the end of the shareholders' meeting at which the acceptance or rejection of the item is given effect or, if the item is relevant to an action taken by shareholders without a meeting in accordance with R.S. 12:1-704, before the corporation incurs a legal obligation in good faith reliance on its acceptance or rejection of the item.

Source: MBCA §7.24, R.S. 12:75.

Comments - 2014 Revision

(a) The phrase, "curator, tutor or judicially authorized representative" was added to the list of fiduciaries in Paragraph (B)(2) of this Section, and the parenthetical phrase "or representative through mandate or procuration" was added to Paragraph (B)(4) of this Section to reflect the appropriate Louisiana terminology. The phrase, "or another person having a security interest in the shares" was added to Paragraph (B)(4) to reflect the fact that security interests in shares are not limited to those held by a pledgee.

(b) The Official Comment to the Model Act states that the doctrine of laches may bar a challenge to a corporate action that is not brought promptly. But

Louisiana law does not recognize the doctrine of laches. Fishbein v. State ex rel. Louisiana State University Health Sciences Center, 898 So.2d 1260 (La. 2005). Accordingly, Subsection (e) of the Model Act has been modified in this Section to provide a statutory rule similar to laches, and similar to the rule in prior law that a proxy regular on its face was valid unless it was challenged before it was exercised. See former R.S. 12:75(C)(4). Under Subsection E of this Section, a corporation's acceptance or rejection of a vote or other similar item is treated as conclusive unless a shareholder objects to the corporation's treatment of the item before the end of the meeting at which the item is relevant or, if the action is being taken without a meeting, before the corporation incurs a legal obligation in good faith reliance on that treatment. If the shareholder's objection is timely, and the corporation rejects the objection, then the corporation's decision is conclusive unless the shareholder commences a summary proceeding within ten days of the date that the corporation's notice to the shareholder becomes effective under R.S. 12:1-141 and proves in that proceeding that the corporation's decision concerning the validity of the challenged item was incorrect.

§1-725. Quorum and voting requirements for voting groups

A. Shares entitled to vote as a separate voting group may take action on a matter at a meeting only if a quorum of those shares exists with respect to that matter. Unless the articles of incorporation provide otherwise, a majority of the votes entitled to be cast on the matter by the voting group constitutes a quorum of that voting group for action on that matter.

B. Once a share is represented for any purpose at a meeting, it is deemed present for quorum purposes for the remainder of the meeting and for any adjournment of that meeting unless a new record date is or must be set for that adjourned meeting.

C. If a quorum exists, action on a matter, other than the election of directors, by a voting group is approved if the votes cast within the voting group favoring the action exceed the votes cast opposing the action, unless the articles of incorporation require a greater number of affirmative votes.

D. An amendment of articles of incorporation adding, changing, or deleting a quorum or voting requirement for a voting group greater than specified in Subsection A or C of this Section is governed by R.S. 12:1-727.

E. The election of directors is governed by R.S. 12:1-728.

F. Whenever a provision of this Chapter provides for voting of classes or series as separate voting groups, the rules provided in R.S. 12:1-1004(C) for amendments of articles of incorporation apply to that provision.

Source: MBCA §7.25.

§1-726. Action by single and multiple voting groups

A. If the articles of incorporation or this Act provide for voting by a single voting group on a matter, action on that matter is taken when voted upon by that voting group as provided in R.S. 12:1-725.

B. If the articles of incorporation or this Chapter provide for voting by two or more voting groups on a matter, action on that matter is taken only when voted upon by each of those voting groups counted separately as provided in R.S. 12:1-725. Action may be taken by one voting group on a matter even though no action is taken by another voting group entitled to vote on the matter.

Source: MBCA § 7.26.

§1-727. Greater quorum or voting requirements

A. The articles of incorporation may provide for a greater quorum or voting requirement for shareholders, or voting groups of shareholders, than is provided for by this Chapter.

B. An amendment to the articles of incorporation that adds, changes, or deletes a greater quorum or voting requirement must meet the same quorum requirement and be adopted by the same vote and voting groups required to take action under the quorum and voting requirements then in effect or proposed to be adopted, whichever is greater.

Source: MBCA §7.27.

§1-728. Voting for directors; cumulative voting

A. Unless otherwise provided in the articles of incorporation, directors are elected by a plurality of the votes cast by the shares entitled to vote in the election at a meeting at which a quorum is present.

B. Shareholders do not have a right to cumulate their votes for directors unless the articles of incorporation so provide.

C. A statement included in the articles of incorporation that shareholders, or a designated group of shareholders, "are entitled to cumulate their votes for directors", or words of similar import, means that the shareholders designated are entitled to multiply the number of votes they are entitled to cast by the number of directors for whom they are entitled to vote and cast the product for a single candidate or distribute the product among two or more candidates.

Source: MBCA §7.28.

Comments - 2014 Revision

(a) This Section deleted Subsection (d) of the Model Act, and its related comments, which would have conditioned the exercise of cumulative voting rights on prior notice by the corporation, or by the shareholders wishing to exercise the rights, that cumulative voting was to be exercised at a particular shareholders' meeting. Under this Section, the availability of cumulative voting depends only on whether that form of voting is authorized by the articles of incorporation. No separate notice is required for each meeting at which cumulative voting may occur.

(b) If cumulative voting is authorized in the articles of incorporation, a director may not be removed if the votes in opposition to the director's removal would be sufficient under cumulative voting to elect the director. See R.S. 12:1-808(C).

§1-729. Inspectors of election

A. A public corporation shall, and any other corporation may, appoint one or more inspectors to act at a meeting of shareholders and make a written report of the inspectors' determinations. Each inspector shall take and sign an oath faithfully to execute the duties of inspector with strict impartiality and according to the best of the inspector's ability.

B. The inspectors shall do all of the following:

(1) Ascertain the number of shares outstanding and the voting power of each.

(2) Determine the shares represented at a meeting.

(3) Determine the validity of proxies and ballots.

(4) Count all votes.

(5) Determine the result.

C. An inspector may be an officer or employee of the corporation.

Source: MBCA §7.29.

SUBPART C. VOTING TRUSTS AND AGREEMENTS

§1-730. Voting trusts

A. One or more shareholders may create a voting trust, conferring on a trustee the right to vote or otherwise act for them, by signing an agreement setting out the provisions of the trust, which may include anything consistent with its purpose, and transferring their shares to the trustee. When a voting trust agreement is signed, the trustee shall prepare a list of the names and addresses of all voting trust beneficial owners, together with the number and class of shares each transferred to the trust, and deliver copies of the list and agreement to the corporation's principal office.

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

C. Limits, if any, on the duration of a voting trust shall be as set forth in the voting trust. The duration of a voting trust that became effective before January 1, 2015, may not exceed fifteen years, but may stipulate that it may be extended under the same terms and conditions for an additional period not to exceed ten years from the date of the expiration of the initial term. The limitation imposed by this Subsection on the duration of a voting trust that became effective before January 1, 2015, may be modified or eliminated by unanimous agreement of the parties to the voting trust.

Source: MBCA §7.30.

Comment - 2014 Revision

The Model Act version of Subsection C of this Section provided a transitional rule for voting trusts that became effective before the Model Act eliminated its ten-year limitation on the duration of a voting trust. This Chapter provides a similar transition rule for voting trusts that took effect before the effective date of this Chapter, when the law limited the duration of a voting trust to an initial fifteen-year period, followed by one ten-year extension.

§1-731. Voting agreements

A. Two or more shareholders may provide for the manner in which they will vote their shares by signing an agreement for that purpose. A voting agreement created under this Section is not subject to the provisions of R.S. 12:1-730.

B. A voting agreement created under this Section is specifically enforceable.

Source: MBCA §7.31.

§1-732. Unanimous governance agreements

A. The term "unanimous governance agreement" means any written agreement, other than the articles of incorporation or bylaws, that satisfies all of the following criteria:

(1) Is approved in one or more writings signed by all persons who are shareholders at the time of the agreement.

(2) Governs the exercise of the corporate powers or the management of the business and affairs of the corporation or the relationship among the shareholders, the directors, and the corporation, or among any of them.

(3) States that it is a unanimous governance agreement or that it is governed by this Section.

B. A unanimous governance agreement is effective among the shareholders and the corporation, and shall be interpreted and enforced among those persons in accordance with the principle of freedom of contract, subject only to the limitations imposed by public policy. A unanimous governance agreement is enforceable among the shareholders and the corporation even though it is inconsistent with one or more other provisions of this Chapter in that it does any of the following:

(1) Eliminates the board of directors or restricts the discretion or powers of the board of directors.

(2) Governs the authorization or making of distributions whether or not in proportion to ownership of shares, subject to the limitations in R.S. 12:1-640.

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

(4) Governs, in general or in regard to specific matters, the exercise or division of voting power by or between the shareholders and directors or by or among any of them, including use of weighted voting rights or director proxies.

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

(6) Transfers to one or more shareholders or other persons all or part of the authority to exercise the corporate powers or to manage the business and affairs of the corporation, including the resolution of any issue about which there exists a deadlock among directors or shareholders.

(7) Requires dissolution of the corporation at the request of one or more of the shareholders or upon the occurrence of a specified event or contingency.

(8) Otherwise changes, in a manner not contrary to public policy, the result that would be reached under other provisions of this Chapter.

C.(1) The existence of a unanimous governance agreement shall be noted conspicuously on the front or back of each certificate for outstanding shares. If, at the time of the agreement, the corporation has shares outstanding represented by certificates, the corporation shall recall the outstanding certificates and issue substitute certificates that comply with this Subsection. The failure to note the existence of the agreement on the certificate shall not affect the validity of the agreement or any action taken pursuant to it.

(2) Any purchaser of shares who, at the time of purchase, did not have knowledge of the existence of the agreement shall be entitled to rescission of the purchase. A purchaser shall be deemed to have knowledge of the existence of the agreement if its existence is noted on the certificate for the shares in compliance with this Subsection.

(3) An action to enforce the right of rescission authorized by this Subsection must be commenced within the earlier of ninety days after discovery of the existence of the agreement or two years after the time of purchase of the shares.

D. The provisions of a unanimous governance agreement shall cease to be effective when the corporation becomes a public corporation. If the agreement ceases to be effective for any reason, the board of directors may adopt an amendment to the articles of incorporation or bylaws, without shareholder action, to delete any references to it.

E. A unanimous governance agreement that limits the discretion or powers of the board of directors shall relieve the directors of, and impose upon the person or persons in whom such discretion or powers are vested, liability for acts or omissions imposed by law on directors to the extent that the discretion or powers of the directors are limited by the agreement. A person who is subjected to liability by this Subsection may be held liable only to the extent that a director vested with the same discretion or powers could be held liable, and is entitled to indemnity under R.S. 12:1-850 through 1-859, and to protection against liability under R.S. 12:1-832, to the same extent as a director vested with the same discretion or powers.

F. The existence or performance of a unanimous governance agreement shall not be a ground for imposing personal liability on any shareholder for the acts or debts of the corporation even if the agreement or its performance treats the corporation as if it were a partnership or results in failure to observe the corporate formalities otherwise applicable to the matters governed by the agreement.

G. Incorporators or subscribers for shares may act as shareholders with respect to a unanimous governance agreement if no shares have been issued when the agreement is made.

H. If the shareholders have approved more than one unanimous governance agreement, all of the agreements shall, to the extent reasonable, be construed together as one agreement in which all provisions are given effect. To the extent that conflicting provisions cannot be reconciled through that rule of construction, the more recently-approved provision controls.

I. Except as otherwise provided in the agreement, a unanimous governance agreement shall have all of the following characteristics:

(1) Has an initial term of twenty years.

(2) May be renewed during the initial or any subsequent term for an additional term of up to twenty years after the renewal is approved, by means of one or more written consents to the renewal, signed by all persons who are shareholders at the time of the renewal, and delivered to the corporation in accordance with R.S. 12:1-704(C).

(3) May be amended or terminated during its initial or any subsequent term by means of one or more written consents to the amendment or termination, signed by all persons who are shareholders at the time of the termination or amendment, and delivered to the corporation in accordance with R.S. 12:1-704(C).

(4) Continues in effect even after the expiration of its term, as renewed, until one or more written consents to its termination, signed by the shareholders of at least twenty-five percent of the issued shares of any class are delivered to the corporation in accordance with R.S. 12:1-704(C).

J. The corporation shall send notice of any renewal, amendment, or termination of a unanimous governance agreement to all shareholders within ten days after the effective date of the renewal, amendment, or termination, but the renewal, amendment, or termination is effective even if the notice is not sent.

K. This Section does not affect the enforceability of any agreement among shareholders that is not a unanimous governance agreement as defined in Subsection A of this Section.

Source: MBCA §7.32.

Comments - 2014 Revision

(a) Model Act Section 7.32 is revised in this Section in several respects:

(1) A new term, "unanimous governance agreement," with definition, is used in place of the Model Act phrases, "agreement among shareholders that complies with this provision" and "agreement authorized by this Section".

(2) Written consent is required to establish, renew, terminate early, or amend a unanimous governance agreement.

(3) Articles of incorporation or bylaws may not operate as unanimous governance agreements, and an otherwise qualifying written agreement may operate

as a unanimous governance agreement only if the agreement states that it is a unanimous governance agreement or that it is governed by R.S. 12:1-732.

(4) A rule of construction is provided to deal with multiple unanimous written operating agreements, requiring that the multiple agreements be interpreted together as one document to the extent reasonable, and otherwise resolving inconsistencies in provisions by allowing the more recent provision to control.

(5) Unless otherwise provided, the agreement has an initial term of twenty, subject to renewals, and the unanimous governance agreement remains in effect even the after the expiration of its term until shareholders of at least twenty-five percent of the issued shares of any class deliver to the corporation written consents to termination of the agreement.

(6) A new Subsection K is added as a savings provision to preserve the contractual freedom that shareholders had before the enactment of R.S. 12:1-732.

(b) A unanimous governance agreement is not the only mechanism under this Section through which shareholders may modify the governance rules for their corporation. Many of the provisions in this Section concerning corporate governance are subject to modification through appropriate provisions in the articles of incorporation or bylaws, and shareholders may enter into lawful agreements with one another, such as voting agreements, that do not satisfy the requirements of a unanimous governance agreement as defined in Subsection A of this Section. What is distinctive about a unanimous governance agreement is, first, that it may modify what would otherwise be mandatory statutory rules concerning corporation governance, and, second, that it is governed by the special rules in R.S. 12:1-732 concerning its creation, disclosure, renewal, amendment, and termination.

(c) This Section provides three rules to prevent the inadvertent triggering of the special rules in R.S. 12:1-732, two in Subsection A of this Section and the one in Subsection K of this Section. Subsection A excludes the articles and bylaws as forms of unanimous governance agreement, and also requires an otherwise qualifying agreement to state that it is a unanimous governance agreement or that it is governed by R.S. 12:1-732. Subsection K provides that R.S. 12:1-732 has no effect on the enforceability of a shareholders' agreement that does not meet the requirements of Subsection A of this Section. Through a combination of the two Subsections, this Section preserves the freedom that shareholders had before the enactment of R.S. 12:1-732 to modify the governance rules in their corporation by means of customized terms in the articles or bylaws, or through contracts among the shareholders. The enforceability of those non-R.S. 12:1-732 forms of agreement is governed by ordinary principles of corporation and contract law, without regard to the special rules in R.S. 12:1-732.

(d) Provisions concerning corporate governance usually remain in effect indefinitely, until they are changed. Reflecting the usual understanding, and to prevent the automatic and perhaps unexpected termination of governance terms with which shareholders may continue to be satisfied, and on which they may be continuing to rely, this Section provides that a unanimous governance agreement remains in effect indefinitely even after the expiration of its term. Still, because of the extraordinary power of a unanimous governance agreement to override statutory provisions that would otherwise be considered mandatory, this Section does provide a default term for a unanimous governance agreement and does allow the agreement to be terminated by a substantial minority of shares - at least twenty-five percent - after the term expires. The default term is twenty years, a period chosen to correspond roughly with one generation of investors. As a new generation of investors is introduced, they may wish to renegotiate or terminate the unanimous governance agreement.

(e) If the shareholders wish for some of their agreed modifications to be governed by the usual rules, e.g. to be subject to amendment by less than unanimous consent, but to apply indefinitely until amended as required for the amendment of the type of provision involved, but also wish to make some of them subject to the powers and requirements of R.S. 12:1-732, they should place the ordinary modifications in the usual place, in the articles or bylaws, for example, and place the more extraordinary provisions, those that may be unenforceable in the absence of R.S. 12:1-732, into an agreement that meets the definition of a unanimous governance agreement under Subsection A of this Section.

SUBPART D. DERIVATIVE PROCEEDINGS

§1-740. Subpart definitions

In this Subpart, the following meanings shall apply:

(1) "Derivative proceeding" means a civil suit in the right of a domestic corporation or, to the extent provided in R.S. 12:1-747, in the right of a foreign corporation.

(2) "Shareholder" means a record shareholder, a beneficial shareholder, and an unrestricted voting trust beneficial owner.

Source: MBCA §7.40.

§1-741. Standing

A. A shareholder may not commence or maintain a derivative proceeding unless the shareholder satisfies all of the following conditions:

(1) Was a shareholder of the corporation at the time of the act or omission complained of or became a shareholder through transfer by operation of law from one who was a shareholder at that time.

(2) Fairly and adequately represents the interests of the corporation in enforcing the right of the corporation.

B. A shareholder who meets the requirements of R.S. 12:1-741(A) may file a derivative proceeding to enforce a right of the corporation, but only after the shareholder satisfies the requirements of R.S. 12:1-742.

Source: MBCA §7.41.

Comment - 2014 Revision

This Section designated the original Model Act provision as Subsection A of this Section and added a new Subsection B of this Section. The new Subsection B states explicitly what the Model Act provisions imply: that a shareholder may file a derivative proceeding to enforce a right of the corporation if the shareholder

complies with the requirements of R.S. 12:1-741 and 1-742. Prior law had stated a similar rule in Art. 611 of the Code of Civil Procedure, but that article was amended in connection with the adoption of this Section to exempt derivative proceedings governed by this Section from the coverage of the class and derivative action provisions of the Code of Civil Procedure, i.e., Chapter 5 of Book I, Title 2. Subsection B of this Section now provides an authorization of derivative proceedings on behalf of business corporations that replaces the authorization formerly provided by Art. 611.

§1-742. Demand

No shareholder may commence a derivative proceeding until the following conditions are satisfied:

(1) A written demand has been made upon the corporation to take suitable action.

(2) Ninety days have expired from the date the demand was made unless the shareholder has earlier been notified that the demand has been rejected by the corporation or unless irreparable injury to the corporation would result by waiting for the expiration of the ninety-day period.

Source: MBCA §7.42.

Comments - 2014 Revision

This Section, like the Model Act, rejects the approach taken by the Delaware courts to determining whether demand in a derivative action is required or, instead, is excused as futile. The Delaware law on demand futility is expressed through a complicated body of decisions that began in the 1984 decision of the Delaware Supreme Court in Aronson v. Lewis, 473 A.2d 805 (Del. 1984). The Aronson approach has been criticized on grounds that it requires a court to determine hypothetically - at the complaint stage of a case and without any of the evidence that might be produced through discovery - whether the directors of a corporation are facing enough prospect of personal liability in the case to disqualify them from responding disinterestedly if the plaintiff, contrary to fact, were to make a demand on them for corrective action.

This Section, like the Model Act, adopts what is known as a "universal demand" requirement. Under this approach, demand is always required. A court is never required to determine whether a board of directors or other corporate actors could respond appropriately to a hypothetical demand that has not really been made. Instead, because demand always must be made, the court is able to evaluate, in accordance with R.S. 12:1-744, what the board or other appropriate corporate officials have actually done in response to the required demand.

Before the adoption of this Section, Louisiana courts had rejected the Aronson approach to demand, preferring instead the traditional, pre-Aronson rule that allowed demand to be excused as futile in any case in which a majority of the corporation's directors were themselves named as defendants in the suit. Smith v. Wembley Industries, Inc., 490 So.2d 1107 (La. App. 4th Cir. 1986); Robinson v. Snell's Limbs and Braces of New Orleans, Inc., 538 So.2d 1045 (La. App. 4th Cir. 1989). While this traditional rule avoided the problems posed by Aronson, it posed

a serious problem of its own: it gave a plaintiff virtually unfettered power to evade the demand rule, simply by naming a majority of the directors as defendants.

This Section abrogates the demand and demand-futility rules in Smith and Robinson. Demand is always required, and so never is excused as futile. But the making of demand under this Section does not mean that unfettered control over the suit is being turned over to the defendants. Rather, the suit may be dismissed as against the best interests of the corporation only if the persons rejecting the demand, or recommending dismissal of the suit, are sufficiently disinterested to be "qualified" as defined in R.S. 12:1-143, and only if those qualified persons have conducted the inquiry and made their decisions in accordance with the standards of R.S. 12:1-744.

§1-742.1. Petition in derivative proceeding

The petition in a derivative proceeding shall do all of the following:

(1) Allege that the plaintiff meets the standing requirements of R.S. 12:1-741.

(2) Allege either that the plaintiff made demand upon the corporation at least ninety days before the filing of the petition as required by R.S. 12:1-742 or that the plaintiff made the demand and, for reasons alleged in the petition, the filing of the petition before the expiration of the ninety-day period complies with R.S. 12:1-742.

(3) Join as defendants the corporation and the obligor on the obligation sought to be enforced.

(4) Include a prayer for judgment in favor of the corporation and against the obligor on the obligation sought to be enforced.

(5) Be verified by the affidavit of the plaintiff or his counsel.

Source: MBCA §7.42.1.

Comments - 2014 Revision

(a) This Section is not part of the Model Act. It was added to this Part to retain the pleading requirements formerly imposed on derivative actions by Art. 615 of the Code of Civil Procedure, modified as necessary to harmonize them with the Model Act provisions on derivative proceedings.

(b) As applied to derivative proceedings on behalf of business corporations, this Section eliminates the distinction drawn by the Code of Civil Procedure between derivative suits that are treated as class actions and those that require the joinder of all shareholders as parties to the suit. The rules that apply to derivative actions are provided directly by this Section, based on the Model Act, and not by making some of the class action rules apply to some derivative suits.

§1-743. Stay of proceedings

If the corporation commences an inquiry into the allegations made in the demand or petition, the court may stay any derivative proceeding for such period as the court deems appropriate.

Source: MBCA §7.43.

§1-744. Dismissal

A. A derivative proceeding shall be dismissed by the court on motion by the corporation if one of the groups specified in Subsection B or Subsection E of this Section has determined in good faith, after conducting a reasonable inquiry upon which its conclusions are based, that the maintenance of the derivative proceeding is not in the best interests of the corporation.

B. Unless a panel is appointed pursuant to Subsection E of this Section, the determination in Subsection A of this Section shall be made by one of the following:

(1) A majority vote of qualified directors present at a meeting of the board of directors if the qualified directors constitute a quorum.

(2) A majority vote of a committee consisting of two or more qualified directors appointed by majority vote of qualified directors present at a meeting of the board of directors, regardless of whether such qualified directors constitute a quorum.

C. If a derivative proceeding is commenced after a determination has been made rejecting a demand by a shareholder, the petition shall allege with particularity facts establishing either of the following:

(1) That a majority of the board of directors did not consist of qualified directors at the time the determination was made.

(2) That the requirements of Subsection A of this Section have not been met.

D. If a majority of the board of directors consisted of qualified directors at the time the determination was made, the plaintiff shall have the burden of proving that the requirements of Subsection A of this Section have not been met; if not, the

corporation shall have the burden of proving that the requirements of Subsection A of this Section have been met.

E. Upon motion by the corporation, the court may appoint a panel of one or more individuals to make a determination whether the maintenance of the derivative proceeding is in the best interests of the corporation. In such case, the plaintiff shall have the burden of proving that the requirements of Subsection A of this Section have not been met.

Source: MBCA §7.44.

Comment - 2014 Revision

The Official Comments to this section of the Model Act explain that the word "inquiry" is used in Subsection A of this Section, rather than the word "investigation," to make it clear the nature of the procedure used to consider the allegations made in the demand or complaint depend on the nature of those allegations and the knowledge of the persons who conduct the inquiry. In some cases, the Comment suggests, the issues may be simple enough, and the knowledge of those conducting the inquiry so extensive, that little additional effort will be required to satisfy the statutory standard that the inquiry be conducted in good faith. This Section does not disagree with the Model Act or the official comments on that issue. Nevertheless, in the case of serious allegations of misconduct against the management of a corporation, a good faith inquiry ordinarily will require the preparation of a written report, with the assistance of independent legal counsel, in support of a recommendation either to reject demand or to dismiss the suit.

§1-745. Discontinuance or settlement

A. Unless approved unanimously by the shareholders of the corporation, a derivative proceeding may not be discontinued or settled without the court's approval. If the court determines that a proposed discontinuance or settlement will substantially affect the interests of the corporation's shareholders or a class of shareholders, the court shall direct that notice be given to the shareholders affected.

B. This Section does not affect the plaintiff's right under Article 1671 of the Code of Civil Procedure to obtain a judgment of dismissal without prejudice if the application for dismissal is made before any defendant, including the corporation in its capacity as a defendant, makes any appearance of record in the proceeding.

Source: MBCA §7.45.

Comments - 2014 Revision

(a) This Section adds a provision that permits a derivative action to be settled or discontinued without court approval if the settlement or discontinuation is

approved unanimously by the shareholders of the corporation. The rule that requires judicial approval of the settlement of derivative suits is based on the risk that the named plaintiff in the suit may agree to settlement terms that are satisfactory to the parties who are participating in the settlement negotiations - the defendants, the named plaintiff and the named plaintiff's lawyers - but that produce little or no benefit for the other shareholders of the corporation. But if all shareholders actually agree to the settlement, a realistic possibility only in closely-held corporations, each shareholder is able to decide personally whether the settlement is acceptable. Under those circumstances, the parties should be free to settle the case on the terms they consider appropriate.

(b) This Section also adds a sentence to make it clear that this Section does not affect a plaintiff's ability to obtain a judgment of dismissal without prejudice as provided in Art. 1671 of the Code of Civil Procedure. The plaintiff is entitled to that form of judgment only if he pays all costs of the proceeding and if he applies for the dismissal before the defendant makes any appearance of record in the proceeding. Id. Because the corporation in a derivative action participates in the suit both as a plaintiff, represented by the plaintiff shareholder, and as a defendant, represented by management-authorized agents, the last sentence of this Section makes the point that the plaintiff's right to a dismissal without prejudice under Art. 1671 is cut off by the corporation's appearance in the suit only if the corporation is appearing of record in its capacity as a defendant. The requirement in Art. 1671 that the plaintiff pay the costs of the proceeding as a condition to the dismissal applies in the normal way.

§1-746. Payment of expenses

On termination of the derivative proceeding the court may do any of the following:

(1) Order the corporation to pay the plaintiff's expenses incurred in the proceeding if it finds that the proceeding has resulted in a substantial benefit to the corporation.

(2) Order the plaintiff to pay any defendant's expenses incurred in defending the proceeding if it finds that the proceeding was commenced or maintained without reasonable cause or for an improper purpose.

(3) Order a party to pay an opposing party's expenses incurred because of the filing of a pleading, motion, or other paper, if it finds that the pleading, motion, or other paper was not well grounded in fact, after reasonable inquiry, or warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and was interposed for an improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation.

Source: MBCA §7.46.

§1-747. Applicability to foreign corporations

In any derivative proceeding in the right of a foreign corporation, the matters covered by this Subpart shall be governed by the laws of the jurisdiction of incorporation of the foreign corporation except for R.S. 12: 1-743, 1-745, and 1-746.

Source: MBCA §7.47.

SUBPART E. PROCEEDING TO APPOINT RECEIVER

§1-748. Shareholder action to appoint receiver

A. The district court of the parish in which the registered office of the corporation is located may appoint one or more to be receivers, of and for a corporation in a proceeding by a shareholder where it is established that either of the following conditions exist:

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

(2) The directors or those in control of the corporation are acting fraudulently and irreparable injury to the corporation is threatened or being suffered.

B.(1) The court may issue injunctions, appoint a temporary receiver with all the powers and duties the court directs, take other action to preserve the corporate assets wherever located, and carry on the business of the corporation until a full hearing is held.

(2) The court shall hold a full hearing, after notifying all parties to the proceeding and any interested persons designated by the court, before appointing a receiver.

(3) The court has jurisdiction over the corporation and all of its property, wherever located.

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

D. The court shall describe the powers and duties of the receiver in its appointing order, which may be amended from time to time. Among other powers, a receiver may do any of the following:

(1) Exercise all of the powers of the corporation, through or in place of its board of directors, to the extent necessary to manage the business and affairs of the corporation.

(2) Dispose of all or any part of the assets of the corporation wherever located, at a public or private sale, if authorized by the court.

(3) Sue and defend in the receiver's own name as receiver in all courts of this state.

E. [Reserved.]

F. The court from time to time during the receivership may order compensation paid and expense disbursements or reimbursements made to the receiver from the assets of the corporation or proceeds from the sale of its assets.

G. In this Section, "shareholder" means a record shareholder, a beneficial shareholder, and an unrestricted voting trust beneficial owner.

Source: MBCA §7.48.

Comment - 2014 Revision

The Model Act distinction between the appointment of custodians for solvent companies and receivers for insolvent ones is omitted from this Section to retain the prior law that authorized the appointment of receivers for both solvent and insolvent companies. Model Act Subsection (e), which authorized a court to redesignate a custodian as a receiver and a receiver as a custodian, was omitted as irrelevant to the receiver-only scheme adopted in this Section.

PART 8. DIRECTORS AND OFFICERS

SUBPART A. BOARD OF DIRECTORS

§1-801. Requirement for and functions of board of directors

A. Except as provided in R.S. 12:1-732, each corporation must have a board of directors.

B. All corporate powers shall be exercised by or under the authority of the board of directors of the corporation, and the business and affairs of the corporation shall be managed by or under the direction, and subject to the oversight, of its board

of directors, subject to any limitation set forth in the articles of incorporation or in an agreement authorized under R.S. 12:1-732.

C. In the case of a public corporation, the board's oversight responsibilities include attention to all of the following:

(1) Business performance and plans.

(2) Major risks to which the corporation is or may be exposed.

(3) The performance and compensation of senior officers.

(4) Policies and practices to foster the corporation's compliance with law and ethical conduct.

(5) Preparation of the corporation's financial statements.

(6) The effectiveness of the corporation's internal controls.

(7) Arrangements for providing adequate and timely information to directors.

(8) The composition of the board and its committees, taking into account the important role of independent directors.

Source: MBCA §8.01.

§1-802. Qualifications of directors

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

Source: MBCA §8.02.

§1-803. Number and election of directors

A. A board of directors must consist of one or more individuals. The number of directors shall be fixed by or in accordance with the articles of incorporation or, if not so fixed, shall be the number fixed by or in accordance with the bylaws. If not fixed by or in accordance with the articles or the bylaws, the number of directors shall be the number elected from time to time by the shareholders and, if directors have not been elected by the shareholders, the number of directors shall be the number of directors named as initial directors in the articles of incorporation.

B. The number of directors may be increased or decreased from time to time by amendment to, or in the manner provided in, the articles of incorporation or the bylaws.

C. Directors are elected at the first annual shareholders' meeting and at each annual meeting thereafter unless their terms are staggered under R.S. 12:1-806.

Source: MBCA §8.03.

Comments - 2014 Revision

(a) This Section modifies the language of Model Act Subsection (a) to retain the former Louisiana law concerning the determination of the number of directors to be elected.

(b) Former R.S. 12:81(A) provided that an incumbent director's term could not be shortened by means of an amendment to the articles or bylaws that reduced the number of directors. The substance of that rule is retained in R.S. 12:1-805(C).

§1-804. Election of directors by certain classes of shareholders

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

Source: MBCA §8.04.

§1-805. Terms of directors generally

A. The terms of the initial directors of a corporation expire at the first shareholders' meeting at which directors are elected.

B. The terms of all other directors expire at the next, or if their terms are staggered in accordance with R.S. 12:1-806, at the applicable second or third, annual shareholders' meeting following their election, except to the extent provided in R.S. 12:1-1022 if a bylaw electing to be governed by that Section is in effect or a shorter term is specified in the articles of incorporation in the event of a director nominee failing to receive a specified vote for election.

C. A decrease in the number of directors does not shorten an incumbent director's term.

D. The term of a director elected to fill a vacancy expires when the term of that director's predecessor in office would have expired had the vacancy not occurred.

E. Except to the extent otherwise provided in the articles of incorporation or under R.S. 12:1-1022 if a bylaw electing to be governed by that Section is in effect, despite the expiration of a director's term, the director continues to serve until the director's successor is elected and qualifies or there is a decrease in the number of directors.

Source: MBCA §8.05.

Comment - 2014 Revision

Model Act Subsection (d) provides that the term of a director elected to fill a vacancy expires at the next shareholders' meeting at which directors are elected. The Official Comment to that Subsection explains that the rule is to apply even when directors are elected to staggered terms as permitted under Model Act Section 8.06, and acknowledges that this approach may cause the staggered terms not to operate in the normal way. Subsection D of this Section is modified to preserve staggered terms in the event of a vacancy. Under Subsection D, the term of a director who is elected to fill a vacancy expires at the same time that the term of the director's predecessor in office would have expired had the vacancy not occurred.

§1-806. Staggered terms for directors

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

Source: MBCA §8.06.

§1-807. Resignation of directors

A. A director may resign at any time by delivering a written resignation to the board of directors, or its chair, or to the secretary of the corporation.

B. A resignation is effective when the resignation is delivered unless the resignation specifies a later effective date or an effective date determined upon the happening of an event or events. A resignation that is conditioned upon failing to receive a specified vote for election as a director may provide that it is irrevocable.

Source: MBCA §8.07.

§1-808. Removal of directors by shareholders

A. The shareholders may remove one or more directors with or without cause unless the articles of incorporation provide that directors may be removed only for cause.

B. If a director is elected by a voting group of shareholders, only the shareholders of that voting group may participate in the vote to remove that director.

C. If cumulative voting is authorized, a director may not be removed if the number of votes sufficient to elect the director under cumulative voting is voted against removal. If cumulative voting is not authorized, a director may be removed only if the number of votes cast to remove is a majority of the number of votes entitled to be cast in an election of directors.

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

Source: MBCA §8.08.

Comment - 2014 Revision

Subject to exceptions for cumulative voting and for directors elected by particular voting groups, the Model Act permits the removal of a director by a majority of the votes cast on the issue. This Section requires the removal to be approved by a majority of the votes entitled to be cast in an election of directors.

§1-809. [Reserved]

§1-810. Vacancy on board

A. Unless the articles of incorporation or bylaws provide otherwise, if a vacancy occurs on a board of directors, including a vacancy resulting from an increase in the number of directors, the vacancy may be filled by one of the following methods:

(1) The shareholders may fill the vacancy.

(2) The board of directors may fill the vacancy.

(3) If the directors remaining in office constitute fewer than a quorum of the board, they may fill the vacancy by the affirmative vote of a majority of all the directors remaining in office.

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

C. A vacancy that will occur at a specific later date, by reason of a resignation effective at a later date under R.S. 12:1-807(B) or otherwise, may be filled before the vacancy occurs but the new director may not take office until the vacancy occurs.

Source: MBCA §8.10.

Comment - 2014 Revision

This Section adds the phrase "or bylaws" to Model Act Subsection (a).

§1-811. Compensation of directors

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

Source: MBCA §8.11.

§1-812. Director proxies

A. A director may vote by proxy at a meeting of the board of directors or of a committee of the board only if the articles of incorporation so provide.

B. A director may appoint as proxy only another director, and the appointment may be made only by means of a signed writing, that is delivered to the person who is presiding at the meeting at which the proxy seeks to cast the absent director's vote. The writing may contain instructions, general or special, concerning the proxy's authority.

C. Except as otherwise provided in the articles of incorporation, a separate appointment of a proxy is required for each meeting, and the proxy's authority under any appointment terminates at the conclusion of the meeting for which the appointment was made.

D. The proxy shall cast the votes of the absent director consistently with any instructions that the proxy receives from the absent director, but otherwise may cast votes on behalf of the absent director in accordance with the proxy's own discretion.

Comments - 2014 Revision

(a) R.S. 12:1-812 is a new section, which is not part of the Model Act, added to retain the "opt in" rule in prior law concerning proxy voting by directors. This Section governs only those votes cast by a director in the capacity of director. A director who is also a shareholder may vote by proxy as a shareholder in accordance with R.S. 12:1-722, on shareholder proxies.

(b) This Section uses the term "proxy" in the same way it is used in R.S. 12:1-722, to refer to the person who is authorized to exercise the appointing person's voting power. Only another director may be appointed as proxy and the appointment may be made only through a signed writing that is delivered to the person who is presiding at the relevant meeting.

(c) Subsection C of this Section requires a separate proxy appointment for each meeting at which a proxy is to vote for an absent director. The purpose of the limited term is to discourage the routine use of proxies or the use of long-term proxies as a means of granting one director what is effectively the voting power of two or more directors.

(d) Subsection D of this Section gives to a director's proxy the same discretion, and the same obligation to follow the appointing director's voting instructions, as apply in the case of a shareholder's proxy.

SUBPART B. MEETINGS AND ACTION OF THE BOARD

§1-820. Meetings

A. The board of directors may hold regular or special meetings in or out of this state.

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

C. A meeting of the board of directors may be called by the board chair, by the chief executive officer, regardless of the title used by the corporation to designate that officer, or by a majority of the directors.

Source: MBCA §8.20.

Comment - 2014 Revision

This Section adds a new Subsection C to the Model Act to retain the prior law concerning the persons entitled to call a meeting of the board of directors, while updating the titles used in prior law. As used in the new Subsection, the term "chief executive officer" is used descriptively, not as a title, to refer to the highest ranking executive officer in the corporation. In many corporations, that officer will indeed be called the chief executive officer or CEO, but it is the nature of the office, not the title, that is controlling for purposes of Subsection C of this Section. A corporation that used more traditional titles for its officers, for example, might call this person the "president."

§1-821. Action without meeting

A. Except to the extent that the articles of incorporation or bylaws require that action by the board of directors be taken at a meeting, action required or permitted by this Chapter to be taken by the board of directors may be taken without a meeting if each director signs a consent describing the action to be taken and delivers it to the corporation.

B. Action taken under this Section is the act of the board of directors when one or more consents signed by all the directors are delivered to the corporation. The consent may specify the time at which the action taken thereunder is to be effective. A director's consent may be withdrawn by a revocation signed by the director and delivered to the corporation prior to delivery to the corporation of unrevoked written consents signed by all the directors.

C. A consent signed under this Section has the effect of action taken at a meeting of the board of directors and may be described as such in any document.

Source: MBCA §8.21.

§1-822. Notice of meeting

A. Unless the articles of incorporation or bylaws provide otherwise, regular meetings of the board of directors may be held without notice of the date, time, place, or purpose of the meeting.

B. Unless the articles of incorporation or bylaws provide for a longer or shorter period, special meetings of the board of directors must be preceded by at least forty-eight hour notice of the date, time, and place of the meeting. Except as otherwise provided in the articles of incorporation or bylaws, the notice shall describe the purpose or purposes of the special meeting.

Source: MBCA §8.22.

Comments - 2014 Revision

(a) This Sectopm modifies Model Act Subsection (b) to require notice of at least forty-eight hours, rather than two days, for a special meeting, and to change the default rule concerning a statement of purpose in the notice from one that requires no such statement to one that does require a statement of purpose.

(b) This Section rejects the rule in Model Act Section 1.41(a) that a notice required by this Section may be oral if reasonable under the circumstances. Accordingly, it also rejects the statement in the Model Act's Official Comment to this Section that notice of a board meeting may be provided orally; all notices required by this Section must be in "writing," as that term is defined in R.S. 12:1-140. Absent a proper objection, however, a director's attendance at a meeting of the board operates as a waiver of notice by the director under R.S. 12:1-823(B). So, as a practical matter, oral notice that results in actual attendance at a meeting by all directors, something that is fairly easy to accomplish in many closely-held companies, will be effective in satisfying the notice requirement -- not by legally-sufficient notice, but by waiver.

§1-823. Waiver of notice

A. A director may waive any notice required by this Part, the articles of incorporation, or bylaws before or after the date and time stated in the notice. Except as provided by Subsection B of this Section, the waiver must be in writing, signed by the director entitled to the notice, and filed with the minutes or corporate records.

B. A director's attendance at or participation in a meeting waives any required notice to the director of the meeting unless one of the following occurs:

(1) The director at the beginning of the meeting, or promptly upon arrival, objects to holding the meeting or transacting business at the meeting.

(2) The objection is to the consideration of an item of business outside the scope of the purposes stated in the notice of the meeting and the director objects to the consideration of that item promptly after the item is first raised for consideration at the meeting.

C. A director who objects in accordance with Subsection B of this Section, but who then participates in the meeting or votes in favor of one or more actions at the meeting, does not waive the objection except with respect to those actions at the meeting that the director votes to approve.

Source: MBCA §8.23.

Comments - 2014 Revision

(a) This Section modifies Model Act Subsection (b) to take account of the modification made by this Part in Model Act Section 8.22(b). Subject to contrary provisions in the articles of incorporation or bylaws, that Section requires a notice of a special meeting of the board of directors to include a description of the purpose or purposes of the meeting. As a result, a notice that meets the requirements of this Chapter concerning the time and location of the meeting may be deficient in failing to describe the purposes of the meeting. That kind of deficiency may not be evident until after the meeting has begun, when an item falling outside the described purposes is first raised for consideration. To deal with that problem, this Section divides Model Act Subsection (b) into Paragraphs and adds a new Paragraph (B)(2) of this Section to deal with purpose-related objections that may occur after the normal deadline for an objection under Paragraph (B)(1) of this Section has already passed. If an objection is made as provided under Paragraph (B)(1) of this Section, then the objection is preserved without any need to resort to Paragraph (B)(2) of this Section. But if the deadline in Paragraph (B)(1) of this Section is missed, and the objection concerns the purposes described in the notice, Paragraph (B)(2) of this Section provides a second, more liberal deadline for the objection: promptly after the objectionable item is first raised at the meeting for consideration.

(b) Model Act Subsection (b) provides that a director who is present at a meeting waives any objection concerning notice if the director votes for or assents to any action taken at the meeting after the director's initial objection. That approach treats an objection to inadequate notice as an always-universal objection, unrelated to the nature of the particular actions that actually may be causing the director to object. In many cases, a director may be perfectly willing to cooperate with other directors in approving obviously beneficial or appropriate agenda items, even without the required notice, while still wishing to preserve his notice-related objection concerning the items that the director considers more difficult or controversial. The Model Act rule fails to acknowledge the possibility of that kind of legitimate, but limited, objection. Hence, the rule may cause a director who does not know the consequences of cooperating in routine business items to waive a legitimate objection inadvertently, and require a director who does know about the rule to obstruct action even on routine items that no one objects to taking up. To avoid results of that kind, this Section reverses the Model Act rule. Under new

Subsection C of this Section, a director's participation in a meeting after an earlier objection of inadequate notice does not waive the objection except with respect to those actions at the meeting that the director votes to approve.

§1-824. Quorum and voting

A. Unless the articles of incorporation or bylaws require a greater number or unless otherwise specifically provided in this Chapter, a quorum of a board of directors consists of a majority of the number of directors determined in accordance with R.S. 12:1-803.

B. The articles of incorporation or bylaws may authorize a quorum of a board of directors to consist of no fewer than one-third of the number of directors determined in accordance with R.S. 12:1-803.

C.(1) If a quorum is present when a vote is taken, the affirmative vote of the required majority of directors is the act of the board of directors. The required majority of directors is a majority of the directors present, or the number of directors whose votes are required by the articles of incorporation or bylaws for the board to take the relevant action, whichever number is greater.

(2) If a quorum is present when a meeting is convened, but the quorum is lost through the withdrawal from the meeting of one or more directors, the affirmative vote of the required majority of directors is the act of the board of directors provided that the number of affirmative votes is not fewer than the number that would have been required had the quorum not been lost.

D. A director who is present at a meeting of the board of directors or a committee of the board of directors when corporate action is taken is deemed to have assented to the action taken unless one of the following occurs:

(1) The director objects at the beginning of the meeting, or promptly upon arrival, to holding it or transacting business at the meeting.

(2) The dissent or abstention from the action taken is entered in the minutes of the meeting.

(3) The director delivers written notice of the director's dissent or abstention to the presiding officer of the meeting before its adjournment or to the corporation

immediately after adjournment of the meeting. The right of dissent or abstention is not available to a director who votes in favor of the action taken.

Source: MBCA §8.24.

Comments - 2014 Revision

(a) This Section simplifies Model Act Subsection (a) by deleting its references to a variable range size board, and by defining a quorum by reference to the number of directors established under R.S. 12:1-803. A similar change was made in Model Act Subsection (b), linking it to R.S. 12:1-803 rather than to the formerly more complex rules in Subsection (a).

(b) This Section modifies Model Act Subsection (c) by introducing a new defined term, "required majority of directors" to facilitate the statement of the minimum number of affirmative votes required to establish an act of the board of directors. Ordinarily, assuming that the quorum requirement is satisfied, the required majority of directors is a majority of the directors present at the meeting. But that figure may be increased in the articles of incorporation or bylaws, and that greater number controls over the statutory minimum.

(c) Subsection (c) also is modified to retain the rule in prior law that a board of directors may in some cases continue to conduct business at a meeting that has lost its initial quorum. The rule is designed to preclude minority directors from blocking action by the majority through a withdrawal from the meeting that causes the quorum to be lost. But, at the same time, the rule respects the basic purpose of the quorum and majority approval rules; it applies only when a meeting was convened with a quorum, and it recognizes as acts of the board only those acts that are supported by the number of directors that would have been required to approve the action had the quorum not been lost.

(d) As an example of the operation of the anti-quorum-loss rule in Subsection C of this Section, consider a corporation with a nine-member board of directors. Under the default statutory rules, the presence of five of those directors at a meeting would be required to establish a quorum, and the affirmative votes of a majority of the five directors present, three, would required to establish an act of the board. In the absence of the anti-quorum-loss rule in modified Subsection C of this Section, any one director present at a meeting with a quorum of five could block action by the remaining eighty percent of the directors present simply by walking out of the meeting; that would cause the quorum to be lost by reducing the number directors present from five to four. But under the rule in modified Subsection C of this Section, the affirmative votes of at least a majority of the remaining four directors would remain sufficient to constitute an act of the board of directors because a majority of four is three, and the majority vote required at a meeting with a minimal quorum of five, i.e., a meeting at which a quorum had not been lost, would also be three. If, on the other hand, two directors withdrew from the meeting, the affirmative vote of a bare majority of the three directors still present would not constitute an act of the board of directors because two votes is not a majority of the minimal quorum of five. If only three directors remained at the meeting, they could take action only by unanimous vote. If fewer than three remained, no further action could be taken at the meeting.

§1-825. Committees

A. Unless this Chapter, the articles of incorporation or the bylaws provide otherwise, the board of directors may create one or more committees and appoint one

or more members of the board of directors to serve on any such committee. If the board of directors appoints a person who is not a director, that person may serve only in an advisory capacity and shall not be a member of the committee for purposes of any reference by this Chapter to a committee or to one or more members of a committee.

B. Unless this Chapter otherwise provides, the creation of a committee and appointment of members to it must be approved by the greater of the following:

(1) A majority of all the directors in office when the action is taken.

(2) The number of directors required by the articles of incorporation or bylaws to take action under R.S. 12:1-824.

C. R.S. 12:1-820 through 1-824 apply both to committees of the board and to their members.

D. To the extent specified by the board of directors or in the articles of incorporation or bylaws, each committee may exercise the powers of the board of directors under R.S. 12:1-801.

E. A committee may not, however do any of the following:

(1) Authorize or approve distributions, except according to a formula or method, or within limits, prescribed by the board of directors.

(2) Approve or propose to shareholders action that this Chapter requires be approved by shareholders.

(3) Fill vacancies on the board of directors or, subject to Subsection G of this Section, on any of its committees.

(4) Adopt, amend, or repeal bylaws.

F. The creation of, delegation of authority to, or action by a committee does not alone constitute compliance by a director with the standards of conduct described in R.S. 12:1-830.

G. The board of directors may appoint one or more directors as alternate members of any committee to replace any absent or disqualified member during the member's absence or disqualification. Unless the articles of incorporation or the

bylaws or the resolution creating the committee provide otherwise, in the event of the absence or disqualification of a member of a committee, the member or members present at any meeting and not disqualified from voting, unanimously, may appoint another director to act in place of the absent or disqualified member.

Source: MBCA §8.25.

Comment - 2014 Revision

This Section adds a second sentence to Model Act Subsection (a) to address the question whether the membership of a committee of the board of directors may include persons who are not members of the board itself. In some cases, the board of directors may wish to appoint one or more non-director staff members who have knowledge or experience that would be helpful to the committee's work. The added sentence recognizes that possibility, but permits the non-director appointees to the committee to act only in an advisory capacity. Appointees of that kind are not considered members of the committee for purposes of any of the statutory rules concerning committees or members of committees. So, for example, the rules concerning the required quorum and vote for committee action would apply only with respect to the directors who were members of the committee. If a committee consisted of three directors and five non-director staff members, a quorum of the committee could be established only if a majority of the three directors were present at a meeting, and only the vote of a majority of the directors present at the committee meeting would constitute the act of the committee.

§1-826. Submission of matters for shareholder vote

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

Source: MBCA §8.26.

SUBPART C. DIRECTORS

§1-830. Standards of conduct for directors

A. Each member of the board of directors, when discharging the duties of a director, shall act in good faith and 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 Paragraph (F)(1) or Paragraph (F)(3) of this Section 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 of this Section.

F. A director is entitled to rely, in accordance with Subsection D or E of this Section, on any of the following:

(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 within the particular person's professional or expert competence or as to which the particular person merits confidence.

(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.

Source: MBCA §8.30.

§1-831. Standards of liability for directors

A. A director shall not be liable to the corporation or its shareholders for any decision to take or not to take action, or any failure to take any action, as a director, unless the party asserting liability in a proceeding establishes both of the following:

(1) No defense interposed by the director based on R.S. 12:1-832 or the protection afforded by R.S. 12:1-861, for action taken in compliance with R.S. 12:1-862 or R.S. 12:1-863, or the protection afforded by R.S. 12:1-870, precludes liability.

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

(a) Action not in good faith.

(b) A decision which the director did not reasonably believe to be in the best interests of the corporation, or as to which the director was not informed to an extent the director reasonably believed appropriate in the circumstances.

(c) A lack of objectivity due to the director's familial, financial, or business relationship with, or a lack of independence due to the director's domination or control by, another person having a material interest in the challenged conduct, which relationship or which domination or control could reasonably be expected to have affected the director's judgment respecting the challenged conduct in a manner adverse to the corporation, and after a reasonable expectation to such effect has been established, the director shall not have established that the challenged conduct was reasonably believed by the director to be in the best interests of the corporation.

(d) A sustained failure of the director to devote attention to ongoing oversight of the business and affairs of the corporation, or a failure to devote timely attention, by making, or causing to be made, appropriate inquiry, when particular

facts and circumstances of significant concern materialize that would alert a reasonably attentive director to the need therefore.

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

B.(1) The party seeking to hold the director liable for money damages, shall also have the burden of establishing both of the following:

(a) Harm to the corporation or its shareholders has been suffered.

(b) The harm suffered was proximately caused by the director's challenged conduct.

(2) The party seeking to hold the director liable for other money payment under a legal remedy, such as compensation for the unauthorized use of corporate assets, shall also have whatever persuasion burden may be called for to establish that the payment sought is appropriate in the circumstances.

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

C. Nothing contained in this Section shall be construed to do any of the following:

(1) In any instance where fairness is at issue, such as consideration of the fairness of a transaction to the corporation under R.S. 12:1-861(B)(3), alter the burden of proving the fact or lack of fairness otherwise applicable.

(2) Alter the fact or lack of liability of a director under another provision of this Chapter, such as the provisions governing the consequences of an unlawful distribution under R.S.12:1-833 or a transactional interest under R.S. 12:1-861.

(3) Affect any rights to which the corporation or a shareholder may be entitled under another statute of this state or the United States.

Source: MBCA §8.31.

Comments - 2014 Revision

(a) The Model Act language in Subparagraph (A)(1)(a) was modified to substitute the default exculpation provision, R.S. 12:1-832, for the reference to the Model Act's optional exculpation provision. Under the Model Act, exculpation is an opt-in provision that may be placed in the articles of incorporation. Under this Section, exculpation is provided by statute except to the extent that it is rejected or limited by the articles of incorporation.

(b) If R.S. 12:1-832 protects a director or officer against liability for the conduct that is being challenged in a lawsuit, that Section and Subparagraph (A)(1)(a) of this Section preclude the imposition of liability regardless of whether the plaintiff can satisfy the remainder of the requirements imposed by R.S. 12:1-831.

§1-832. Protection against monetary liability

A. Except to the extent that the articles of incorporation limit or reject the protection against liability provided by this Section, no director or officer shall be liable to the corporation or its shareholders for money damages for any action taken, or any failure to take action, as a director or officer, except for one of the following:

(1) A breach of the director's or officer's duty of loyalty to the corporation or the shareholders.

(2) An intentional infliction of harm on the corporation or the shareholders.

(3) A violation of R.S. 12:1-833.

(4) An intentional violation of criminal law.

B. The liability of a director or officer for conduct described in Paragraphs (A)(1) through (4) of this Section may not be limited or eliminated, but the corporation may purchase insurance against that liability as provided in R.S. 12:1-857.

C. For purposes of this Section, the duty of loyalty does not include any duty to act with any degree of care in the exercise of the director's or officer's responsibilities to the corporation or its shareholders.

Comments - 2014 Revision

(a) Paragraph 2.04(b)(4) of the Model Act authorizes the exculpation of directors against liability to the corporation or its shareholders through an optional provision in a corporation's articles of incorporation. Because articles that are prepared with the benefit of legal advice nearly always provide exculpation "to the fullest extent allowed by law," this Section reflects the normal preference for exculpation by making it the default rule. To prevent unfair surprise, R.S. 12:1-202(A)(5) requires the articles of incorporation to state whether the corporation accepts, rejects or limits the default rule under this Section.

(b) If the articles of incorporation contain a statement to the effect that the protection against liability provided by Subsection A of this Section is rejected, the liability of a director or officer is not affected by Subsection A of this Section. If the articles of incorporation contain a limitation on the protection against liability provided by Subsection A of this Section, the stated limitation applies even if the articles of incorporation do not otherwise say that they limit the protection. If the articles of incorporation contain a statement to the effect that they limit the protection against liability provided by Subsection A of this Section, but fail to state the nature of the limitation, the protection against liability provided by Subsection A of this Section applies without limitation.

(c) The limitations on exculpation provided by this Section are the same as those provided by Model Act Section 2.02(b)(4), with one exception. This Section prohibits the exculpation of a director from liability for damages caused by the director's breaching the duty of loyalty owed by the director to the corporation or its shareholders. The comparable Model Act provision is narrower, prohibiting exculpation only for the amount of an improper financial benefit received by a director. The broader exception was adopted in Louisiana to avoid the exculpation of a director who caused more harm to the corporation through disloyalty than the director received in the form of a personal financial benefit. Under the broader Louisiana exception, for example, a director who received a kickback of only a portion of a corporate overpayment for supplies would be at risk for the entire amount of the overpayment, not merely the amount of the kickback.

(d) This Section does not provide or permit the exculpation of a director or officer from liability for disloyalty. But it does provide protection against liability for carelessness. Delaware courts have suggested that some egregious forms of carelessness may be tantamount to disloyalty, and so be nonexculpable under a "breach of loyalty" exception like the one in this Section. See, e.g., Stone v. Ritter, 911 A.2d 362 (Del. 2006). Subsection C of this Section rejects that view. No level of carelessness may be treated as a breach of the duty of loyalty for purposes of the default form of exculpation provided by this Section. If shareholders wish to adopt the Delaware approach, or any other limitation on the exculpation provided by this Section, they may do so by adding appropriate language to the articles of incorporation.

§1-833. Directors' liability for unlawful distributions

A. A director who votes for or assents to a distribution in excess of what may be authorized and made pursuant to R.S. 12:1-640(A) or 1-1409(A) is personally liable to the corporation for the amount of the distribution that exceeds what could have been distributed without violating R.S. 12:1-640(A) or 1-1409(A) if the party asserting liability establishes that when taking the action the director did not comply with R.S. 12:1-830.

B. A director held liable under Subsection A of this Section for an unlawful distribution is entitled to both of the following:

(1) Contribution from every other director who could be held liable under Subsection A of this Section for the unlawful distribution.

(2) Indemnity from each shareholder, for the pro-rata portion of the amount of the unlawful distribution the shareholder received.

C.(1) A proceeding to enforce the liability of a director under Subsection A of this Section is barred unless it is commenced within two years after of one of the following:

(a) The date on which the effect of the distribution was measured under R.S.12:1-640(E) or (G).

(b) The date as of which the violation of R.S. 12:1-640(A) occurred as the consequence of disregard of a restriction in the articles of incorporation.

(c) The date on which the distribution of assets to shareholders under R.S. 12:1-1409(A) was made.

(2) A proceeding to enforce contribution or indemnity under Subsection B of this Section is barred unless it is commenced within one year after the liability of the claimant has been finally adjudicated under Subsection A of this Section.

D. The time limits provided in Subsection C of this Section are peremptive.

Source: MBCA §8.33.

Comments - 2014 Revision

(a) Model Act Subsection (b)(2) is modified in this Section to make it consistent with the rule in R.S. 12:1-622(C), also added, that makes a shareholder liable without fault to return the amount of an unlawful distribution received by the shareholder.

(b) The Model Act reference to recoupment was replaced in this Section by a reference to indemnity, to retain the prior law on the subject.

(c) This Section adds a new Subsection D to the Model Act to make it clear that the time periods provided in Subsection C of this Section are peremptive.

SUBPART D. OFFICERS

§1-840. Officers

A. A corporation shall have a secretary and such other officers as described in its bylaws or appointed by the board of directors in a manner not inconsistent with any bylaws.

B. The board of directors may elect individuals to fill one or more offices of the corporation. An officer may appoint one or more officers if authorized by the bylaws or the board of directors.

C. The secretary shall have the authority and responsibility for preparing the minutes of the directors' and shareholders' meetings and for maintaining and authenticating the records of the corporation required to be kept under R.S. 12:1-1601(A) and 1-1601(E).

D. The same individual may simultaneously hold more than one office in a corporation.

Source: MBCA §8.40.

Comments - 2014 Version

(a) The Model Act does not require the appointment of an officer called the "secretary," but it does require the corporation to appoint an officer who is given a secretary's responsibilities. See Model Act Section 8.40(c). The Model Act also uses the term "secretary" as a defined term that means the person who is given a secretary's usual recordkeeping responsibilities under Section 7.40(c) (see Model Act Section 1.40(20)). It also names the secretary in several places as the appropriate recipient on the corporation's behalf of some legally-relevant notification. See, e.g., Sections 7.03 (shareholder demand for shareholder meeting), 7.04 (delivery of shareholder written consents), 8.07 (resignation of a director), and 8.63 (notice of a director's conflicting interest).

(b) This Section requires a corporation to appoint an officer with the title, "secretary," and then gives to that named officer the responsibility for preparing the corporation's minutes and for maintaining and authenticating the corporation's records as provided in R.S. 12:1-840(C). The required use of the usual "secretary" terminology is designed to facilitate the efforts of shareholders and third parties, who may be unaware of a particular corporation's preferences concerning officer titles, to contact the person who has the authority provided by this Section to the corporation's secretary. The person designated as secretary may hold other offices and titles in addition to that of secretary.

(c) The reference to "the" bylaws in Subsection A of this Section changes to "any" bylaws, to reflect the optional nature of bylaws under this Chapter. Nevertheless, if the corporation has adopted bylaws concerning the appointment of officers, the board of directors must comply with those bylaws. Although the board of directors ordinarily has the power to adopt, amend and repeal bylaws, the shareholders of the corporation do have the power under R.S. 12:1-1020(B) to adopt a bylaw that may not be amended or repealed by the board of directors. Moreover, even if the board of directors does have the power to amend or repeal a relevant bylaw, the board must comply with the bylaw until the amendment or repeal takes effect. The board is not entitled to ignore a bylaw in lieu of amending or repealing it.

§1-841. Functions of officers

In addition to the secretary's authority under R.S. 12:1-840, each officer has the authority and shall perform the functions set forth in the bylaws or, to the extent consistent with any bylaws, the authority and functions prescribed by the board of directors or by direction of an officer authorized by the board of directors to prescribe the authority and functions of other officers.

Source: MBCA §8.41.

Comment - 2014 Revision

This Section modifies the Model Act Section in three respects: (1) it adds a reference to the statutory authority conferred by R.S. 12:1-840 on the corporation's secretary; (2) it requires the conferral of authority by the board of directors or by an appropriate officer to be consistent with "any" bylaws (rather than "the" bylaws), to reflect the optional nature of bylaws under this Chapter; and (3) it uses the phrase "authority and functions" consistently throughout the provision to describe the matters that may be addressed in the bylaws or by the board of directors or an appropriate officer.

§1-842. Standards of conduct for officers

A. An officer, when performing in such capacity, has the duty to act in all of the following manners:

(1) In good faith.

(2) With the care that a person in a like position would reasonably exercise under similar circumstances.

(3) In a manner the officer reasonably believes to be in the best interests of the corporation.

B. [Reserved.]

C. In discharging his or her duties, an officer who does not have knowledge that makes reliance unwarranted is entitled to rely on either of the following:

(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.

(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 within the particular person's professional or expert competence or 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 R.S. 12:1-831 that have relevance.

Source: MBCA §8.42.

Comment - 2014 Revision

Model Act Subsection (b) states that an officer's duty includes the obligation to inform the officer's superiors or other appropriate persons of certain information, and of any actual or probable material violation of law or breach of duty to the corporation that the officer believes has occurred or is likely to occur. This Section deletes Model Act Subsection (b) as being ill-suited to many of the informally-managed, closely-held corporations that are common in Louisiana corporate practice. The deletion of Subsection (b) does not mean that an officer never owes the duties described in Subsection (b), but rather that the extent of an officer's duty to inform others of information in the officer's possession should be judged based on the standards stated in Subsection A of this Section.

§1-843. Resignation and removal of officers

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

B. An officer may be removed at any time with or without cause by any of the following:

(1) The board of directors.

(2) The officer who appointed such officer, unless the bylaws or the board of directors provide otherwise.

(3) Any other officer if authorized by the bylaws or the board of directors.

C. In this Section, "appointing officer" means the officer, including any successor to that officer, who appointed the officer resigning or being removed.

Source: MBCA §8.43.

§1-844. Contract rights of officers

A. The appointment of an officer does not itself create contract rights.

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

Source: MBCA §8.44.

SUBPART E. INDEMNIFICATION AND ADVANCE FOR EXPENSES

§1-850. Subpart definitions

In this Subpart, the following meanings shall apply:

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

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

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

(4) "Official capacity" means, when used with respect to a director, the office of director in a corporation. "Official capacity" means, when used with respect to an officer, as contemplated in R.S. 12: 1-856, the office in a corporation held by the officer. "Official capacity" does not include service for any other domestic or foreign corporation or any partnership, joint venture, trust, employee benefit plan, or other entity.

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

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

Source: MBCA §8.50.

§1-851. Permissible indemnification

A. Except as otherwise provided in this Section, a corporation may indemnify an individual who is a party to a proceeding because the individual is a director against liability incurred in the proceeding if either condition exists:

(1)(a) The director conducted himself or herself in good faith and reasonably believed either of the following:

(i) In the case of conduct in an official capacity, that his or her conduct was in the best interests of the corporation.

(ii) In all other cases, that the director's conduct was at least not opposed to the best interests of the corporation.

(b) In the case of any criminal proceeding, the director had no reasonable cause to believe his or her conduct was unlawful.

(2) The director engaged in conduct for which broader indemnification has been made permissible or obligatory under a provision of the articles of

incorporation, as authorized by R.S. 12:1-202(B)(5), for which liability has been eliminated under R.S. 12:1-832.

B. A director's conduct with respect to an employee benefit plan for a purpose the director reasonably believed to be in the interests of the participants in, and the beneficiaries of, the plan is conduct that satisfies the requirement of Item (A)(1)(a)(ii) of this Section.

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

D. Unless ordered by a court under R.S. 12:1-854(A)(3), a corporation may not indemnify a director in connection with either of the following:

(1) A proceeding by or in the right of the corporation, except for expenses incurred in connection with the proceeding if it is determined that the director has met the relevant standard of conduct under Subsection A of this Section.

(2) Any proceeding with respect to conduct for which the director was adjudged liable on the basis of receiving a financial benefit to which he or she was not entitled, whether or not involving action in the director's official capacity.

Source: MBCA §8.51.

Comment - 2014 Revision

The Model Act language in Paragraph (A)(2) of this Section was modified to add a reference to the exculpation provided by R.S. 12:1-832. Under this Section, a corporation may indemnify a director for any liability that arises from conduct for which the director is exculpated under R.S. 12:1-832. Of course, if the director is exculpated then no "liability" in the usual sense of that term should be imposed on the director. But the term "liability" as defined for indemnity purposes in R.S. 12:1-850(3) includes litigation expenses. The exculpable conduct language is included in this provision to make it clear that litigation expenses of that kind are subject to permissive indemnification under this Section.

§1-852. Mandatory indemnification

A corporation shall indemnify a director who was wholly successful, on the merits or otherwise, in the defense of any proceeding to which the director was a

party because he or she was a director of the corporation against expenses incurred by the director in connection with the proceeding.

Source: MBCA §8.52.

Comment - 2014 Revision

This Chapter, like the Model Act, covers the indemnification of directors separately from the indemnification of officers because a decision by directors concerning their own indemnification poses conflicting interest problems that are not present in the case of non-director officers. This Section provides for mandatory indemnification only of directors simply because it is one of the director-indemnity provisions. However, officers actually are covered by this Section through one of the officer-indemnity provisions, R.S. 12:1-856(C), which provides that an officer is entitled, among other things, to mandatory indemnification to the same extent as a director.

§1-853. Advance for expenses

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

(1) A written affirmation of the director's good faith belief that the relevant standard of conduct described in R.S. 12:1-851 has been met by the director or that the proceeding involves conduct for which liability has been eliminated under R.S. 12: 1-832.

(2) A written undertaking of the director to repay any funds advanced if the director is not entitled to mandatory indemnification under R.S. 12:1-852 and it is ultimately determined under R.S. 12:1-854 or 1-855 that the director has not met the relevant standard of conduct described in R.S. 12:1-851.

B. The undertaking required by Paragraph (A)(2) of this Section must be an unlimited general obligation of the director but need not be secured and may be accepted without reference to the financial ability of the director to make repayment.

C. Authorizations under this Section shall be made by one of the following:

(1) By the board of directors in either of the following manners:

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

(b) If there are fewer than two qualified directors, by the vote necessary for action by the board in accordance with R.S. 12:1-824(C), in which authorization directors who are not qualified directors may participate.

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

Source: MBCA §8.53.

Comment - 2014 Revision

The Model Act language in Paragraph (A)(1) of this Section was modified to substitute the reference to R.S. 12:1-832 for the Model Act's optional exculpatory provision.

§1-854. Court-ordered indemnification and advance for expenses

A. A director who is a party to a proceeding because he or she is a director may petition the court conducting the proceeding for indemnification or an advance for expenses or, if the indemnification or advance for expenses is beyond the scope of the proceeding or of the jurisdiction of the court or other forum for the proceeding, may petition another court of competent jurisdiction. After ordering any notice it considers necessary, the court shall hear the petition by summary proceeding and shall order one of the following:

(1) Indemnification if the court determines that the director is entitled to mandatory indemnification under R.S. 12:1-852.

(2) Indemnification or advance for expenses if the court determines that the director is entitled to indemnification or advance for expenses pursuant to a provision authorized by R.S. 12:1-858(A).

(3) Indemnification or advance for expenses if the court determines, in view of all the relevant circumstances, that it is fair and reasonable to do either of the following:

(a) Indemnify the director.

(b) Advance expenses to the director, even if he or she has not met the relevant standard of conduct set forth in R.S. 12:1-851(A), failed to comply with R.S. 12:1-853 or was adjudged liable in a proceeding referred to in R.S. 12:1-851(D)(1) or (D)(2), but if the director was adjudged so liable indemnification shall be limited to expenses incurred in connection with the proceeding.

B. If the court determines that the director is entitled to indemnification under Paragraph (A)(1) of this Section or to indemnification or advance for expenses under Paragraph (A)(2) of this Section, it shall also order the corporation to pay the director's expenses incurred in connection with obtaining court-ordered indemnification or advance for expenses. If the court determines that the director is entitled to indemnification or advance for expenses under Paragraph (A)(3) of this Section, it may also order the corporation to pay the director's expenses to obtain court-ordered indemnification or advance for expenses.

Source: MBCA §8.54.

Comments - 2014 Revision

(a) Model Act Subsection (a) permits a director to make application for indemnification or an advance of expenses either to the court conducting the proceeding in which the relevant expenses are incurred or to another court of competent jurisdiction. This Section uses the Louisiana term "petition" in place of the Model Act term "application" and specifies that the petition is to be heard by summary proceeding.

(b) This Section also modifies Model Act Subsection (a) to allow resort to another court only if the court or other forum that is conducting the proceeding in which the relevant expenses are being incurred cannot itself consider the petition.

§1-855. Determination and authorization of indemnification

A. A corporation may not indemnify a director under R.S. 12:1-851 unless authorized for a specific proceeding after a determination has been made that indemnification is permissible because the director has met the relevant standard of conduct set forth in R.S. 12:1-851.

B. The determination shall be made by one of the following:

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

(2) By special legal counsel selected using either of the following means:

(a) Selected in the manner prescribed in Paragraph (B)(1) of this Section.

(b) If there are fewer than two qualified directors, selected by the board of directors, in which selection directors who are not qualified directors may participate.

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

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

Source: MBCA §8.55.

§1-856. Indemnification of officers

A. A corporation may indemnify and advance expenses under this Subpart to an officer of the corporation who is a party to a proceeding because he or she is an officer of the corporation to the same extent as a director and, if he or she is an officer but not a director, to such further extent as may be provided by the articles of incorporation, the bylaws, a resolution of the board of directors, or contract except for either of the following:

(1) Liability in connection with a proceeding by or in the right of the corporation other than for expenses incurred in connection with the proceeding.

(2) Liability arising out of conduct that constitutes any of the following:

(a) A breach of the officer's duty of loyalty to the corporation or its shareholders.

(b) An intentional infliction of harm on the corporation or the shareholders.

(c) An intentional violation of criminal law.

B. [Reserved.]

C. An officer of a corporation is entitled to mandatory indemnification under R.S. 12:1-852, and may apply to a court under R.S. 12:1-854 for indemnification or an advance for expenses, in each case to the same extent to which a director may be entitled to indemnification or advance for expenses under those provisions.

Source: MBCA §8.56.

Comments - 2014 Revision

(a) Model Act Item (a)(2)(B)(I) was changed to make it consistent with the change made to the source language for the exculpation of directors from liability under R.S. 12:1-832. This Section does not permit either the exculpation from liability or the indemnification of an officer or director for conduct that violates the officer or director's duty of loyalty to the corporation.

(b) Model Act Subsection (b) was omitted from this Section. The omitted Subsection would have permitted officers who were also directors to be indemnified under the more liberal rules applicable to officers if the conduct that was the subject of the litigation had been carried out in the indemnitee's capacity as an officer rather than as a director. But, as the comments to the Model Act indicate, the purpose of the stricter rules in the indemnification of directors is to minimize the effects of the conflicts of interests faced by directors in voting for their own or a fellow board member's indemnification. Because those conflicts of interest arise from the indemnitee's status as a director, and not from the nature of the conduct that is being challenged in the litigation, this Section rejects the Model Act's approval of more liberal indemnity rules in the case of officer-capacity conduct by directors.

(c) This Section eliminates a phrase in Model Act Subsection (c) which could have been interpreted to limit the effects of the Subsection to an officer "who [was] not a director." As modified, Subsection B of this Section extends the described indemnity and court-ordered payment rights to officers without regard to whether they are also directors.

§1-857. Insurance

A corporation may purchase and maintain insurance on behalf of an individual who is a director or officer of the corporation, or who, while a director or officer of the corporation, serves at the corporation's request as a director, officer, partner, trustee, employee, or agent of another domestic or foreign corporation, partnership, joint venture, trust, employee benefit plan, or other entity, against

liability asserted against or incurred by the individual in that capacity or arising from his or her status as a director or officer, whether or not the individual could be protected against the same liability under R.S. 12:1-832 and whether or not the corporation would have power to indemnify or advance expenses to the individual against the same liability under this Subpart.

Source: MBCA §8.57.

Comments - 2014 Revision

(a) A reference to R.S. 12:1-832 was added to the Model Act language to permit the corporation to purchase insurance against liability even if that liability could not be the subject of exculpation under R.S. 12:1-832. The rationale for allowing a corporation to purchase insurance to cover liability that it could not exculpate is the same as that for insuring against a liability that could not indemnified. The insurer will provide an outside source of funds to cover the liability, and will have the incentive to exclude from coverage the types of non-accidental risks of loss that pose serious risks of moral hazard.

(b) Under former R.S. 12:83(F), a corporation could "self insure" liability that could not be indemnified. This Section has repealed that rule. Corporations may still purchase insurance from true insurance companies, licensed and regulated by the appropriate jurisdictions, even if they are affiliated companies. And self-insurance may still be used to fund a corporation's indemnity and advance-of-expense payments. But self-insurance, not purchased from a regulated insurance company, may not be used to avoid the limitations imposed by this Subpart on indemnification and exculpation.

§1-858. Variation by corporate action; application of Subpart

A. A corporation may, by a provision in its articles of incorporation or bylaws or in a resolution adopted or a contract approved by its board of directors or shareholders, obligate itself in advance of the act or omission giving rise to a proceeding to provide indemnification in accordance with R.S. 12:1-851 or advance funds to pay for or reimburse expenses in accordance with R.S. 12:1-853. Any such obligatory provision shall be deemed to satisfy the requirements for authorization referred to in R.S. 12:1-853(C) and 1-855(C). Any such provision that obligates the corporation to provide indemnification to the fullest extent permitted by law shall be deemed to obligate the corporation to advance funds to pay for or reimburse expenses in accordance with R.S. 12:1-853 to the fullest extent permitted by law, unless the provision specifically provides otherwise.

B. A right of indemnification or to advances for expenses created by this Subpart or under Subsection A of this Section and in effect at the time of an act or omission shall not be eliminated or impaired with respect to such act or omission by an amendment of the articles of incorporation or bylaws or a resolution of the directors or shareholders, adopted after the occurrence of such act or omission, unless, in the case of a right created under Subsection A of this Section, the provision creating such right and in effect at the time of such act or omission explicitly authorizes such elimination or impairment after such act or omission has occurred.

C. Any provision pursuant to Subsection A of this Section shall not obligate the corporation to indemnify or advance expenses to a director of a predecessor of the corporation, pertaining to conduct with respect to the predecessor, unless otherwise specifically provided. Any provision for indemnification or advance for expenses in the articles of incorporation, bylaws, or a resolution of the board of directors or shareholders of a predecessor of the corporation in a merger or in a contract to which the predecessor is a party, existing at the time the merger takes effect, shall be governed by R.S. 12:1-1107(A)(4).

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

E. This Subpart does not limit a corporation's power to pay or reimburse expenses incurred by a director or an officer in connection with appearing as a witness in a proceeding at a time when he or she is not a party.

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

Source: MBCA §8.58.

Comment - 2014 Revision

Under R.S. 12:1-851(A)(1), a corporation may indemnify any liability that may be made the subject of exculpation under R.S. 12:1-832. As a result, under this Section, a corporation that obligates itself in advance to indemnify a director or officer "to the fullest extent permitted by law" also obligates itself both to indemnify and to advance expenses for any liability that is exculpated under R.S. 12:1-832. However, unlike R.S. 12: 1-832 itself, which provides exculpation by statute except

as limited in the articles of incorporation, this Section does not by itself obligate a corporation to indemnify or to advance expenses for conduct that is covered by R.S. 12:1-832. A corporation is permitted in such cases to provide indemnification under R.S. 12:1-851 and to advance expenses under R.S. 12:1-853. But in the absence of an advance obligation under this Section, a corporation is required to make indemnity or expense payments in connection with litigation over exculpated liability only if the prospective indemnitee actually succeeds in the defense of the suit, thus triggering his right to indemnity under R.S. 12:1-852, or if he convinces a court to order indemnification or expense payments under the "fair and equitable" standards of R.S. 12:1-854.

§1-859. Exclusivity of Subpart

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

Source: MBCA § 8.59.

SUBPART F. DIRECTORS' CONFLICTING INTEREST TRANSACTIONS

§1-860. Subpart definitions

In this Subpart, the following meanings shall apply:

(1) "Director's conflicting interest transaction" means any of the following:

(a) A transaction effected or proposed to be effected by the corporation, or by an entity controlled by the corporation, to which, at the relevant time, the director is a party.

(b) A transaction effected or proposed to be effected by the corporation, or by an entity controlled by the corporation, respecting which, at the relevant time, the director had knowledge and a material financial interest known to the director.

(c) A transaction effected or proposed to be effected by the corporation, or by an entity controlled by the corporation, respecting which, at the relevant time, the director knew that a related person was a party or had a material financial interest.

(2) "Control", including the term "controlled by", means either of the following:

(a) Having the power, directly or indirectly, to elect or remove a majority of the members of the board of directors or other governing body of an entity, whether through the ownership of voting shares or interests, by contract, or otherwise.

(b) Being subject to a majority of the risk of loss from the entity's activities or entitled to receive a majority of the entity's residual returns.

(3) "Relevant time" means the time at which directors' action respecting the transaction is taken in compliance with R.S. 12:1-862, or if the transaction is not brought before the board of directors of the corporation or its committee for action under R.S. 12:1-862, at the time the corporation, or an entity controlled by the corporation, becomes legally obligated to consummate the transaction.

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

(5) "Related person" means, at the relevant time, one of the following:

(a) The director's spouse.

(b) A child, stepchild, grandchild, parent, step parent, grandparent, sibling, step sibling, half sibling, aunt, uncle, niece or nephew, or spouse of any thereof, of the director or of the director's spouse.

(c) An individual living in the same home as the director.

(d) An entity, other than the corporation or an entity controlled by the corporation, controlled by the director or any person specified above in this Paragraph;

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

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

(g) A person with whom the director has a material relationship.

(6) "Fair to the corporation" means, for purposes of R.S. 12:1-861(B)(3), that the transaction as a whole was beneficial to the corporation, taking into appropriate account whether it was fair in terms of the director's dealings with the corporation,

and comparable to what might have been obtainable in an arm's length transaction, given the consideration paid or received by the corporation.

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

Source: MBCA §8.60.

Comments - 2014 Revision

(a) This Section modifies the Model Act definition of "related person" in Paragraph 8.60(5) to add as a new Subparagraph (5)(g) of this Section the phrase, "person with whom the director has a material relationship." The purpose of the added language is to broaden the description of the persons whose financial interests in a transaction would cause the transaction to be treated as a conflicting interest transaction for a director.

(b) The Model Act definition of "related persons" does capture the more common kinds of relationships, such as those among spouses and immediate family members, that would cause a reasonable person to perceive a serious conflict of interest on the part of a director. But left out of the list are other types of relationships, such one between a director and someone with whom the director was having an adulterous affair, that would cause a reasonable person to question the objectivity of the director's judgment in approving a transaction. Those types of relationships would be covered by the reference in Subparagraph (5)(g) of this Section to a "material relationship," which is defined in R.S. 12:1-143 to mean any form of relationship "that would reasonably be expected to impair the objectivity of the director's judgment when participating in the action to be taken." R.S. 12:1-143(B)(1).

(c) This Section also adds the phrase "at the relevant time" to the introductory clause in R.S. 12:1-860(5). The relationships listed in R.S. 12:1-860(5) are to be determined as of the "relevant time" as defined in R.S. 12:1-860(3). A transaction would not fit the definition of a director's conflicting interest transaction if the listed relationship arose only after the relevant time, or had been terminated before the relevant time.

§1-861. Judicial action

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

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

(1) Directors' action respecting the transaction was taken in compliance with R.S. 12:1-862 at any time.

(2) Shareholders' action respecting the transaction was taken in compliance with R.S. 12: 1-863 at any time.

(3) The transaction, judged according to the circumstances at the relevant time, is established to have been fair to the corporation.

Source: MBCA §8.61.

Comments - 2014 Revision

(a) As the Model Act Official Comments explain, the current Model Act protects a transaction between a corporation and a director from any form of judicial remedy based on the director's conflicting interest in the transaction unless the transaction first fits the statutory definition of a "director's conflicting interest transaction" and then, if it does so, also fails to satisfy any one of the three statutory grounds for upholding the transaction against any challenge that is based on the conflicting interest. The current approach differs sharply from that taken in earlier versions of the Model Act (those before 1989) and under prior Louisiana law. Under the earlier approach, compliance with the statutory rules concerning what were then called self-dealing transactions did not wholly protect a transaction from a challenge based on the conflicting interest, it merely prevented application of the early corporation law rule that a self-dealing transaction was automatically voidable by the corporation without regard to the fairness of the transaction. See former R.S. 12:84.

(b) This Section adopts the Model Act approach. This Section differs from the Model Act in one respect, however. It adds a residual category of relationship, called a "material relationship," to the definition of "related person" in R.S. 12:1-860(5). The effect of that addition is to broaden the types of relationships between a director and another person that could cause the other person's financial interest in the transaction to be treated as a conflicting interest in the transaction on the part of the director.

§1-862. Directors' action

A. Directors' action respecting a director's conflicting interest transaction is effective for purposes of R.S. 12:1-861(B)(l) if the transaction has been authorized by the affirmative vote of a majority, but no fewer than two, of the qualified directors who voted on the transaction, after required disclosure by the conflicted director of

information not already known by such qualified directors, or after modified disclosure in compliance with Subsection B of this Section, provided that both of the following criteria are satisfied:

(1) The qualified directors have deliberated and voted outside the presence of and without the participation by any other director.

(2) Where the action has been taken by a committee, all members of the committee were qualified directors, and either the committee was composed of all the qualified directors on the board of directors or the members of the committee were appointed by the affirmative vote of a majority of the qualified directors on the board.

B. Notwithstanding Subsection A of this Section, when a transaction is a director's conflicting interest transaction only because a related person described in R.S. 12: 1-860(5)(e), (f), or (g) is a party to or has a material financial interest in the transaction, the conflicted director is not obligated to make required disclosure to the extent that the director reasonably believes that doing so would violate a duty imposed under law, a legally enforceable obligation of confidentiality, or a professional ethics rule, provided that the conflicted director discloses to the qualified directors voting on the transaction all of the following:

(1) All information required to be disclosed that is not so violative.

(2) The existence and nature of the director's conflicting interest.

(3) The nature of the conflicted director's duty not to disclose the confidential information.

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

D. Where directors' action under this Section does not satisfy a quorum or voting requirement applicable to the authorization of the transaction by reason of the articles of incorporation, the bylaws, or a provision of law, independent action to satisfy those authorization requirements must be taken by the board of directors or

a committee, in which action directors who are not qualified directors may participate.

Source: MBCA §8.62.

§1-863. Shareholders' action

A. Shareholders' action respecting a director's conflicting interest transaction is effective for purposes of R.S. 12:1-861(B)(2) if a majority of the votes cast by the holders of all qualified shares are in favor of the transaction after notice to shareholders describing the action to be taken respecting the transaction, provision to the corporation of the information referred to in Subsection B of this Section, and communication to the shareholders entitled to vote on the transaction of the information that is the subject of required disclosure, to the extent the information is not known by them.

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

C.(1) For purposes of this Section, "holder" means and "held by" refers to shares held by a record shareholder, a beneficial shareholder, and an unrestricted voting trust beneficial shareholder.

(2) For the purposes of this Section, "qualified shares" means all shares entitled to be voted with respect to the transaction except for shares that the secretary or other officer or agent of the corporation authorized to tabulate votes either knows or, under Subsection B of this Section, is notified are held by a director who has a conflicting interest respecting the transaction or a related person of the director, excluding a person described in R.S. 12:1-860(5)(f).

D. A majority of the votes entitled to be cast by the holders of all qualified shares constitutes a quorum for purposes of compliance with this Section. Subject to the provisions of Subsection E of this Section, shareholders' action that otherwise

complies with this Section is not affected by the presence of holders, or by the voting, of shares that are not qualified shares.

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

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

Source: MBCA §8.63.

SUBPART G. BUSINESS OPPORTUNITIES

§1-870. Business opportunities

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

(1) Action by qualified directors disclaiming the corporation's interest in the opportunity is taken in compliance with the procedures set forth in R.S. 12:1-862, as if the decision being made concerned a director's conflicting interest transaction.

(2) Shareholders' action disclaiming the corporation's interest in the opportunity is taken in compliance with the procedures set forth in R.S. 12:1-863, as if the decision being made concerned a director's conflicting interest transaction;

except that, rather than making "required disclosure" as defined in R.S. 12: 1-860, in each case the director shall have made prior disclosure to those acting on behalf of the corporation of all material facts concerning the business opportunity that are then known to the director.

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

Source: MBCA §8.70.

PART 9. DOMESTICATION AND CONVERSION

SUBPART A. PRELIMINARY PROVISIONS

§1-901. Excluded transactions

A. This Part may not be used to effect a transaction that causes an eligible entity or domestic or foreign corporation to hold any right, privilege, license, or franchise under the laws of this state that it is ineligible to hold.

B. Property received through a conditional donation, grant, or devise, or held in trust or for charitable purposes pursuant to the laws of this state by a party to a transaction under this Part shall not be diverted by that transaction from the objects for which it was donated, granted, or devised, except to the extent authorized by a court judgment based upon principles of cy pres or approximation.

C. A person who is a member, interest holder, or an affiliate of an eligible entity with a charitable purpose may not receive a direct or indirect financial benefit in connection with a transaction under this Part to which the eligible entity is a party

unless the person is itself an eligible entity with a charitable purpose. This Subsection does not apply to the receipt of reasonable compensation for services rendered.

Source: MBCA §9.01.

Comments - 2014 Revision

(a) Louisiana law does not permit the use of an ordinary business corporation for the operation of an insurance company, bank or other financial institution. Separate statutes govern the creation and operation of those forms of corporation. See Title 6 on Banks and Banking and Title 22 on Insurance. This Section does not purport to authorize domestications or conversions involving those special forms of corporation, so the optional provisions of the Model Act concerning those forms of corporation are not needed in this Section. Instead, this Section states a rule for conversions and domestications similar to the rule in R.S. 12:1-1107 concerning mergers: that the transactions authorized by this Part cannot cause a domestic or foreign corporation or eligible entity to hold any right or license under the laws of this state that the corporation or entity is ineligible to hold.

(b) This Section adds a new Subsection B, based on optional Model Act Section 9.02 (b), to impose the same limitations on transactions available under this Part as apply to mergers under R.S. 12:1-1102(F).

§1-902. Required approvals

[Reserved.]

Comment - 2014 Revision

Subsection (a) of this optional Model Act provision was deleted as unnecessary for the reasons explained in Comment (a) to R.S. 12:1-901. Subsection B of this Section was moved to R.S. 12:1-901(B), making a separate R.S. 12:1-902 unnecessary.

SUBPART B. DOMESTICATION

§1-920. Domestication

A. A foreign business corporation may become a domestic business corporation only if the domestication is permitted by the organic law of the foreign corporation.

B. A domestic business corporation may become a foreign business corporation if the domestication is permitted by the laws of the foreign jurisdiction. Regardless of whether the laws of the foreign jurisdiction require the adoption of a plan of domestication, the domestication shall be approved by the adoption by the corporation of a plan of domestication in the manner provided in this Subpart.

C. The plan of domestication must include all of the following:

(1) A statement of the jurisdiction in which the corporation is to be domesticated.

(2) The terms and conditions of the domestication.

(3) The manner and basis of reclassifying the shares of the corporation following its domestication into shares or other securities, obligations, rights to acquire shares or other securities, or into cash, other property, or any combination of the foregoing.

(4) Any desired amendments to the articles of incorporation of the corporation following its domestication.

D. The plan of domestication may also include a provision that the plan may be amended prior to filing the document required by the laws of this state or the other jurisdiction to consummate the domestication, except that subsequent to approval of the plan by the shareholders the plan may not be amended to change any of the following:

(1) The amount or kind of shares or other securities, obligations, rights to acquire shares or other securities, or the cash or other property to be received by the shareholders under the plan.

(2) The articles of incorporation as they will be in effect immediately following the domestication, except for changes permitted by R.S. 12:1-1005 or by comparable provisions of the laws of the other jurisdiction.

(3) Any of the other terms or conditions of the plan if the change would adversely affect any of the shareholders in any material respect.

E. Terms of a plan of domestication may be made dependent upon facts objectively ascertainable outside the plan in accordance with R.S. 12:1-120(K).

F. If any debt security, note, or similar evidence of indebtedness for money borrowed, whether secured or unsecured, or a contract of any kind, issued, incurred, or signed by a domestic business corporation before January 1, 2015, contains a provision applying to a merger of the corporation and the document does not refer to a domestication of the corporation, the provision shall be deemed to apply to a

domestication of the corporation until such time as the provision is amended subsequent to that date.

Source: MBCA §9.20.

§1-921. Action on a plan of domestication

In the case of a domestication of a domestic business corporation in a foreign jurisdiction, all of the following shall apply:

(1) The plan of domestication must be adopted by the board of directors.

(2) After adopting the plan of domestication, the board of directors must submit the plan to the shareholders for their approval. The board of directors must also transmit to the shareholders a recommendation that the shareholders approve the plan, unless the board of directors makes a determination that because of conflicts of interest or other special circumstances it should not make such a recommendation or R.S. 12:1-826 applies. If either the board of director makes such a determination or R.S. 12:1-826 applies, the board of directors must transmit to the shareholders the basis for so proceeding.

(3) The board of directors may condition its submission of the plan of domestication to the shareholders on any basis.

(4) If the approval of the shareholders is to be given at a meeting, the corporation must notify each shareholder, whether or not entitled to vote, of the meeting of shareholders at which the plan of domestication is to be submitted for approval. The notice must state that the purpose, or one of the purposes, of the meeting is to consider the plan and must contain or be accompanied by a copy or summary of the plan. The notice shall include or be accompanied by a copy of the articles of incorporation as they will be in effect immediately after the domestication.

(5) Unless the articles of incorporation, or the board of directors acting pursuant to Paragraph (3) of this Section, requires a greater vote, approval of the plan of domestication requires the approval of at least a majority of the votes entitled to be cast on the plan, and, if any class or series of shares is entitled to vote as a separate group on the plan, the approval of each such separate voting group by at

least a majority of the votes entitled to be cast on the domestication by that voting group.

(6) Subject to Paragraph (7) of this Section, separate voting by voting groups is required by each class or series of shares that are any of the following:

(a) To be reclassified under the plan of domestication into other securities, obligations, rights to acquire shares or other securities, or into cash, other property, or any combination of the foregoing.

(b) Entitled to vote as a separate group on a provision of the plan that, if contained in a proposed amendment to articles of incorporation, would require action by separate voting groups under R.S. 12: 1-1004.

(c) Entitled under the articles of incorporation to vote as a voting group to approve an amendment of the articles.

(7) The articles of incorporation may expressly limit or eliminate the separate voting rights provided for in Subparagraph (6)(a) of this Section.

(8) If any provision of the articles of incorporation, bylaws or an agreement to which any of the directors or shareholders are parties, adopted or entered into before January 1, 2015, applies to a merger of the corporation and that document does not refer to a domestication of the corporation, the provision shall be deemed to apply to a domestication of the corporation until such time as the provision is amended subsequent to that date.

Source: MBCA §9.21.

Comment - 2014 Revision

This Section changes Model Act paragraph (5) to require that a plan of domestication be approved by a majority of the votes entitled to be cast on the plan and, if applicable, a majority of the votes of each class or series of shares entitled to vote as a separate group on the plan. The Model Act would have permitted a plan to be approved by each voting group by a majority of votes cast at a meeting at which a majority quorum existed.

§1-922. Articles of domestication

A. After the domestication of a foreign business corporation has been authorized as required by the laws of the foreign jurisdiction, articles of

domestication shall be signed by any officer or other duly authorized representative. The articles shall set forth all of the following:

(1) The name of the corporation immediately before the filing of the articles of domestication and, if that name is unavailable for use in this state or the corporation desires to change its name in connection with the domestication, a name that satisfies the requirements of R.S. 12:1-401.

(2) The jurisdiction of incorporation of the corporation immediately before the filing of the articles of domestication and the date the corporation was incorporated in that jurisdiction.

(3) A statement that the domestication of the corporation in this state was duly authorized as required by the laws of the jurisdiction in which the corporation was incorporated immediately before its domestication in this state.

B. The articles of domestication shall either contain all of the provisions that R.S. 12:1-202(A) requires to be set forth in articles of incorporation and any other desired provisions that R.S. 12:1-202(B) permits to be included in articles of incorporation, or shall have attached articles of incorporation. In either case, provisions that would not be required to be included in restated articles of incorporation may be omitted.

C. The articles of domestication shall be delivered to the secretary of state for filing, and shall take effect at the effective time provided in R.S. 12:1-123.

D. If the foreign corporation is authorized to transact business in this state under Chapter 3 of Title 12, its certificate of authority shall be cancelled automatically on the effective date of its domestication.

E. Within thirty days after the date that articles of domestication take effect, a duplicate original or certified copy of the articles shall be filed in the conveyance records of each parish in this state in which the corporation owns immovable property.

Source: MBCA §9.22.

Comment - 2014 Revision

This Act adds a new Subsection E, which requires the filing of a multiple original or certified copy of the articles of domestication in any parish in which the domesticated corporation owns immovable property.

§1-923. Surrender of charter upon domestication

A. Whenever a domestic business corporation has adopted and approved, in the manner required by this Subpart, a plan of domestication providing for the corporation to be domesticated in a foreign jurisdiction, articles of charter surrender shall be signed on behalf of the corporation by any officer or other duly authorized representative. The articles of charter surrender shall set forth all of the following:

(1) The name of the corporation.

(2) A statement that the articles of charter surrender are being filed in connection with the domestication of the corporation in a foreign jurisdiction.

(3) A statement that the domestication was duly approved by the shareholders and, if voting by any separate voting group was required, by each such separate voting group, in the manner required by this Subpart and the articles of incorporation.

(4) The corporation's new jurisdiction of incorporation.

B. The articles of charter surrender shall be delivered by the corporation to the secretary of state for filing. The articles of charter surrender shall take effect on the effective time provided in R.S. 12:1-123.

Source: MBCA §9.23.

§1-924. Effect of domestication

A. When a domestication becomes effective, all of the following shall apply:

(1) The title to all real and personal property, both tangible and intangible, of the corporation remains in the corporation without any transfer, assignment, reversion, or impairment.

(2) The liabilities of the corporation remain the liabilities of the corporation.

(3) An action or proceeding pending against the corporation continues against the corporation as if the domestication had not occurred,

(4) The articles of domestication, or the articles of incorporation attached to the articles of domestication, constitute the articles of incorporation of a foreign corporation domesticating in this state,

(5) The shares of the corporation are reclassified into shares, other securities, obligations, rights to acquire shares or other securities, or into cash or other property in accordance with the terms of the domestication, and the shareholders are entitled only to the rights provided by those terms and to any appraisal rights they may have under the organic law of the domesticating corporation,

(6) The corporation is deemed to be all of the following:

(a) Incorporated under and subject to the organic law of the domesticated corporation for all purposes.

(b) The same corporation without interruption as the domesticating corporation.

(c) Incorporated on the date the domesticating corporation was originally incorporated.

B. When a domestication of a domestic business corporation in a foreign jurisdiction becomes effective, the foreign business corporation remains both of the following:

(1) Obligated under the laws of this state to pay promptly the amount, if any, to which shareholders who exercise appraisal rights in connection with the domestication are entitled under Part 13 of this Chapter.

(2) Subject to the personal jurisdiction of the courts of this state in accordance with R.S. 13:3201, and to service of process in accordance with law.

C. The owner liability of a shareholder in a foreign corporation that is domesticated in this state shall be as follows:

(1) The domestication does not discharge any owner liability under the laws of the foreign jurisdiction to the extent any such owner liability arose before the effective time of the articles of domestication.

(2) The shareholder shall not have owner liability under the laws of the foreign jurisdiction for any debt, obligation, or liability of the corporation that arises after the effective time of the articles of domestication.

(3) The provisions of the laws of the foreign jurisdiction shall continue to apply to the collection or discharge of any owner liability preserved by Paragraph (C)(1) of this Section, as if the domestication had not occurred.

(4) The shareholder shall have whatever rights of contribution from other shareholders are provided by the laws of the foreign jurisdiction with respect to any owner liability preserved by Paragraph (C)(1) of this Section, as if the domestication had not occurred.

Source: MBCA §9.24.

Comments - 2014 Revision

(a) Model Act Subsection (b) uses legal fictions to state the legal obligations of an "outbound" domesticating corporation, deeming the corporation to "agree" to pay appraisal rights and to appoint the secretary of state as its agent for service of process in connection with appraisal rights suits. This Section modifies Subsection (b) to state the outbound corporation's legal obligations in a more straightforward fashion. The corporation remains liable under the laws of this state to pay any appraisal rights when due, not because it agrees to make the payments but because the law requires it to do so. Similarly, the corporation remains subject to the personal jurisdiction of the courts of this state not because the corporation has made the secretary of state its agent for service of process, but because this state asserts the personal jurisdiction of its courts to the full extent constitutionally permissible, and provides by law for appropriate forms of service of process.

(b) This Section omits Model Act Subsection (d), which deals with transition issues associated with a shareholder's becoming subject to owner liability as a result of a domestication of that corporation in Louisiana. Those issues cannot arise under this Act because this Act omits the Model Act provision under which owner liability, as defined in R.S. 12:1-140(15C), could be imposed. See Comment (b) to R.S. 12:1-202.

§1-925. Abandonment of a domestication

A. Unless otherwise provided in a plan of domestication of a domestic business corporation, after the plan has been adopted and approved as required by this Subpart, and at any time before the domestication has become effective, it may be abandoned by the board of directors without action by the shareholders.

B. If a domestication is abandoned under Subsection A of this Section after articles of charter surrender have been filed with the secretary of state but before the

domestication has become effective, a statement that the domestication has been abandoned in accordance with this Section, signed by an officer or other duly authorized representative, shall be delivered to the secretary of state for filing prior to the effective date of the domestication. The statement shall take effect upon filing and the domestication shall be deemed abandoned and shall not become effective.

C. If the domestication of a foreign business corporation in this state is abandoned in accordance with the laws of the foreign jurisdiction after articles of domestication have been filed with the secretary of state, a statement that the domestication has been abandoned, signed by an officer or other duly authorized representative, shall be delivered to the secretary of state for filing. The statement shall take effect upon filing and the domestication shall be deemed abandoned and shall not become effective.

Source: MBCA §9.25.

SUBPART C. NONPROFIT CONVERSION

§1-930. Nonprofit conversion

A. A domestic business corporation may become a domestic nonprofit corporation pursuant to a plan of nonprofit conversion.

B. A domestic business corporation may become a foreign nonprofit corporation if the nonprofit conversion is permitted by the laws of the foreign jurisdiction. Regardless of whether the laws of the foreign jurisdiction require the adoption of a plan of nonprofit conversion, the foreign nonprofit conversion shall be approved by the adoption by the domestic business corporation of a plan of nonprofit conversion in the manner provided in this Subpart.

C. The plan of nonprofit conversion must include all of the following:

(1) The terms and conditions of the conversion.

(2) The manner and basis of reclassifying the shares of the corporation following its conversion into memberships, if any, or securities, obligations, rights to acquire memberships or securities, or into cash, other property, or any combination of the foregoing.

(3) Any desired amendments to the articles of incorporation of the corporation following its conversion.

(4) If the domestic business corporation is to be converted to a foreign nonprofit corporation, a statement of the jurisdiction in which the corporation will be incorporated after the conversion.

D. The plan of nonprofit conversion may also include a provision that the plan may be amended prior to filing articles of nonprofit conversion, except that subsequent to approval of the plan by the shareholders the plan may not be amended to change any of the following:

(1) The amount or kind of memberships or securities, obligations, rights to acquire memberships or securities, or the cash or other property to be received by the shareholders under the plan.

(2) The articles of incorporation as they will be in effect immediately following the conversion, except for changes permitted by R.S. 12:1-1005.

(3) Any of the other terms or conditions of the plan if the change would adversely affect any of the shareholders in any material respect.

E. Terms of a plan of nonprofit conversion may be made dependent upon facts objectively ascertainable outside the plan in accordance with R.S. 12:1-120(K).

F. If any debt security, note, or similar evidence of indebtedness for money borrowed, whether secured or unsecured, or a contract of any kind, issued, incurred or signed by a domestic business corporation before January 1, 2015, contains a provision applying to a merger of the corporation and the document does not refer to a nonprofit conversion of the corporation, the provision shall be deemed to apply to a nonprofit conversion of the corporation until such time as the provision is amended subsequent to that date.

Source: MBCA §9.30.

§1-931. Action on a plan of nonprofit conversion

In the case of a conversion of a domestic business corporation to a domestic or foreign nonprofit corporation, all of the following shall apply:

(1) The plan of nonprofit conversion must be adopted by the board of directors.

(2) After adopting the plan of nonprofit conversion, the board of directors must submit the plan to the shareholders for their approval. The board of directors must also transmit to the shareholders a recommendation that the shareholders approve the plan, unless the board of directors makes a determination that because of conflicts of interest or other special circumstances it should not make such a recommendation, or R.S. 12: 1-826 applies. If the board of directors makes such ad determination or R.S. 12:1-826 applies, the board must transmit to the shareholders the basis for so proceeding.

(3) The board of directors may condition its submission of the plan of nonprofit conversion to the shareholders on any basis.

(4) If the approval of the shareholders is to be given at a meeting, the corporation must notify each shareholder of the meeting of shareholders at which the plan of nonprofit conversion is to be submitted for approval. The notice must state that the purpose, or one of the purposes, of the meeting is to consider the plan and must contain or be accompanied by a copy or summary of the plan. The notice shall include or be accompanied by a copy of the articles of incorporation as they will be in effect immediately after the nonprofit conversion.

(5) Unless the articles of incorporation, or the board of directors acting pursuant to Paragraph (3) of this Section, requires a greater vote, approval of the plan of nonprofit conversion requires the approval of each class or series of shares of the corporation voting as a separate voting group by at least a majority of the votes entitled to be cast on the nonprofit conversion by that voting group.

(6) If any provision of the articles of incorporation, bylaws or an agreement to which any of the directors or shareholders are parties, adopted before January 1, 2015, applies to a merger, other than a provision that limits or eliminates voting or appraisal rights, and the document does not refer to a nonprofit conversion of the

corporation, the provision shall be deemed to apply to a nonprofit conversion of the corporation until such time as the provision is amended subsequent to that date.

Source: MBCA §9.31.

Comments - 2014 Revision

This Section changes Model Act paragraph (5) to require that a plan of nonprofit conversion be approved by a majority of the votes entitled to be cast on the plan and, if applicable, a majority of the votes of each class or series of shares entitled to vote as a separate group on the plan. The Model Act would have permitted a plan to be approved by each voting group by a majority of votes cast at a meeting at which a majority quorum existed.

§1-932. Articles of nonprofit conversion

A. After a plan of nonprofit conversion providing for the conversion of a domestic business corporation to a domestic nonprofit corporation has been adopted and approved as required by this Subpart, articles of nonprofit conversion shall be signed on behalf of the corporation by any officer or other duly authorized representative. The articles shall set forth both of the following:

(1) The name of the corporation immediately before the filing of the articles of nonprofit conversion and if that name does not satisfy the requirements of the Nonprofit Corporation Law, or the corporation desires to change its name in connection with the conversion, a name that satisfies the requirements of the Nonprofit Corporation Law.

(2) A statement that the plan of nonprofit conversion was duly approved by the shareholders in the manner required by this Subpart and the articles of incorporation.

B. The articles of nonprofit conversion shall either contain all of the provisions that the Nonprofit Corporation Law requires to be set forth in articles of incorporation of a domestic nonprofit corporation and any other desired provisions permitted by the Nonprofit Corporation Law, or shall have attached articles of incorporation that satisfy the requirements of the Nonprofit Corporation Law. In either case, provisions that would not be required to be included in restated articles of incorporation of a domestic nonprofit corporation may be omitted.

C. The articles of nonprofit conversion shall be delivered to the secretary of state for filing, and shall take effect at the effective time provided in R.S. 12:1-123.

Source: MBCA §9.32.

§1-933. Surrender of charter upon foreign nonprofit conversion

A. Whenever a domestic business corporation has adopted and approved, in the manner required by this Subpart, a plan of nonprofit conversion providing for the corporation to be converted to a foreign nonprofit corporation, articles of charter surrender shall be signed on behalf of the corporation by any officer or other duly authorized representative. The articles of charter surrender shall set forth all of the following:

(1) The name of the corporation.

(2) A statement that the articles of charter surrender are being filed in connection with the conversion of the corporation to a foreign nonprofit corporation.

(3) A statement that the foreign nonprofit conversion was duly approved by the shareholders in the manner required by this Act and the articles of incorporation.

(4) The corporation's new jurisdiction of incorporation.

B. The articles of charter surrender shall be delivered by the corporation to the secretary of state for filing. The articles of charter surrender shall take effect on the effective time provided in R.S. 12:1-123.

Source: MBCA §9.33.

§1-934. Effect of nonprofit conversion

A. When a conversion of a domestic business corporation to a domestic nonprofit corporation becomes effective, all of the following shall apply:

(1) The title to all real and personal property, both tangible and intangible, of the corporation remains in the corporation without any transfer, assignment, reversion, or impairment.

(2) The liabilities of the corporation remain the liabilities of the corporation.

(3) An action or proceeding pending against the corporation continues against the corporation as if the conversion had not occurred.

(4) The articles of incorporation of the domestic or foreign nonprofit corporation become effective.

(5) The shares of the corporation are reclassified into memberships, securities, obligations, rights to acquire memberships or securities, or into cash or other property in accordance with the plan of conversion, and the shareholders are entitled only to the rights provided in the plan of nonprofit conversion or to any rights they may have under Part 13 of this Chapter.

(6) The corporation is deemed to be all of the following:

(a) A domestic nonprofit corporation for all purposes.

(b) The same corporation without interruption as the corporation that existed prior to the conversion.

(c) Incorporated on the date that it was originally incorporated as a domestic business corporation.

B. When a conversion of a domestic business corporation to a foreign nonprofit corporation becomes effective, the foreign nonprofit corporation remains both of the following:

(1) Obligated under the laws of this state to pay promptly the amount, if any, to which shareholders who exercise appraisal rights in connection with the conversion are entitled under Part 13 of this Chapter.

(2) Subject to the personal jurisdiction of the courts of this state in accordance with R.S. 13:3201, and to service of process in accordance with law.

C. [Reserved.]

D. A shareholder who becomes subject to owner liability for some or all of the debts, obligations, or liabilities of the nonprofit corporation shall have owner liability only for those debts, obligations, or liabilities of the nonprofit corporation that arise after the effective time of the articles of nonprofit conversion.

Source: MBCA §9.34.

Comments - 2014 Revision

(a) Model Act Subsection (b) uses legal fictions to state the legal obligations of the "outbound" corporation in a conversion of a domestic business corporation

into a foreign nonprofit corporation, deeming that the resulting foreign corporation has agreed to pay appraisal rights and to appoint the secretary of state as its agent for service of process in connection with appraisal rights suits. This Section modifies Subsection (b) to state the outbound corporation's legal obligations in a more straightforward fashion. The corporation remains liable under the laws of this state to pay any appraisal rights when due, not because it agrees to make the payments but because the law requires it to do so. Similarly, the corporation remains subject to the personal jurisdiction of the courts of this state not because the corporation has made the secretary of state its agent for service of process, but because this state asserts the personal jurisdiction of its courts to the full extent constitutionally permissible, and provides by law for appropriate forms of service of process.

(b) Model Act Subsection (c) was omitted from this Section because it deals with transition issues associated with the nonprofit conversion of a domestic business corporation in which a shareholder is made subject to owner liability, as defined in R.S. 12:1-140(15C). Transition issues of that kind cannot arise under this Section because the form of liability addressed by Subsection (c) is not imposed by this Section. Subsection (c) was omitted to avoid the implication that the form of liability addressed by the Subsection could exist. This Section retained Model Act Subsection (d), which addresses a similar transition issue for owner liability arising under the law governing a post-conversion nonprofit corporation, because it is possible for the nonprofit corporation law of another state to permit the imposition of owner liability. Louisiana's Nonprofit Corporation Law does not impose owner liability.

§1-935. Abandonment of a nonprofit conversion

A. Unless otherwise provided in a plan of nonprofit conversion of a domestic business corporation, after the plan has been adopted and approved as required by this Subpart, and at any time before the nonprofit conversion has become effective, it may be abandoned by the board of directors without action by the shareholders.

B. If a nonprofit conversion is abandoned under Subsection A of this Section after articles of nonprofit conversion or articles of charter surrender have been filed with the secretary of state but before the nonprofit conversion has become effective, a statement that the nonprofit conversion has been abandoned in accordance with this Section, signed by an officer or other duly authorized representative, shall be delivered to the secretary of state for filing prior to the effective date of the nonprofit conversion. The statement shall take effect upon filing and the nonprofit conversion shall be deemed abandoned and shall not become effective.

Source: MBCA §9.35.

SUBPART D. FOREIGN NONPROFIT DOMESTICATION AND CONVERSION

§1-940. Foreign nonprofit domestication and conversion

A foreign nonprofit corporation may become a domestic business corporation if the domestication and conversion is permitted by the organic law of the foreign nonprofit corporation.

Source: MBCA §9.40.

§1-941. Articles of nonprofit domestication and conversion

A. After the conversion of a foreign nonprofit corporation to a domestic business corporation has been authorized as required by the laws of the foreign jurisdiction, articles of nonprofit domestication and conversion shall be signed by any officer or other duly authorized representative. The articles shall set forth all of the following:

(1) The name of the corporation immediately before the filing of the articles of nonprofit domestication and conversion and, if that name is unavailable for use in this state or the corporation desires to change its name in connection with the domestication and conversion, a name that satisfies the requirements of R.S. 12:1-401.

(2) The jurisdiction of incorporation of the corporation immediately before the filing of the articles of nonprofit domestication and conversion and the date the corporation was incorporated in that jurisdiction.

(3) A statement that the domestication and conversion of the corporation in this state was duly authorized as required by the laws of the jurisdiction in which the corporation was incorporated immediately before its domestication and conversion in this state.

B. The articles of nonprofit domestication and conversion shall either contain all of the provisions that R.S. 12:1-202(A) requires to be set forth in articles of incorporation and any other desired provisions that R.S. 12:1-202(B) permits to be included in articles of incorporation, or shall have attached articles of incorporation.

In either case, provisions that would not be required to be included in restated articles of incorporation may be omitted.

C. The articles of nonprofit domestication and conversion shall be delivered to the secretary of state for filing, and shall take effect at the effective time provided in R.S. 12:1-123.

D. If the foreign nonprofit corporation is authorized to transact business in this state under Chapter 3 of this Title, its certificate of authority shall be cancelled automatically on the effective date of its domestication and conversion.

Source: MBCA §9.41.

§1-942. Effect of foreign nonprofit domestication and conversion

A. When a domestication and conversion of a foreign nonprofit corporation to a domestic business corporation becomes effective, all of the following shall apply:

(1) The title to all real and personal property, both tangible and intangible, of the corporation remains in the corporation without any transfer, assignment, reversion or impairment.

(2) The liabilities of the corporation remain the liabilities of the corporation.

(3) An action or proceeding pending against the corporation continues against the corporation as if the domestication and conversion had not occurred.

(4) The articles of nonprofit domestication and conversion, or the articles of incorporation attached to the articles of nonprofit domestication and conversion, constitute the articles of incorporation of the corporation.

(5) Shares, other securities, obligations, rights to acquire shares or other securities of the corporation, or cash or other property shall be issued or paid as provided pursuant to the laws of the foreign jurisdiction, so long as at least one share is outstanding immediately after the effective time.

(6) The corporation is deemed to be all of the following:

(a) A domestic corporation for all purposes.

(b) The same corporation without interruption as the foreign nonprofit corporation.

(c) Incorporated on the date the foreign nonprofit corporation was originally incorporated.

B. The owner liability of a member of a foreign nonprofit corporation that domesticates and converts to a domestic business corporation shall be as follows:

(1) The domestication and conversion does not discharge any owner liability under the laws of the foreign jurisdiction to the extent any such owner liability arose before the effective time of the articles of nonprofit domestication and conversion.

(2) The member shall not have owner liability under the laws of the foreign jurisdiction for any debt, obligation, or liability of the corporation that arises after the effective time of the articles of nonprofit domestication and conversion.

(3) The provisions of the laws of the foreign jurisdiction shall continue to apply to the collection or discharge of any owner liability preserved by Paragraph (B)(1) of this Section, as if the domestication and conversion had not occurred.

(4) The member shall have whatever rights of contribution from other members are provided by the laws of the foreign jurisdiction with respect to any owner liability preserved by Paragraph (B)(1) of this Section, as if the domestication and conversion had not occurred.

Source: MBCA §9.42.

Comment - 2014 Revision

Model Act Subsection (c), which deals with the transition issues associated with the conversion of a foreign nonprofit corporation into a domestic business corporation in which the shareholders are subject to owner liability as defined in R.S. 12:1-140(15C), was omitted from this Section because this Section does not permit the form of owner liability that made the transition provision necessary. See Comment (b) to R.S. 12:1-202. Subsection B of this Section, which deals with similar transition issues in connection with the conversion into a Louisiana business corporation of a foreign nonprofit corporation, was retained because it is possible that the laws of the foreign jurisdiction would allow the imposition of this form of liability.

§1-943. Abandonment of a foreign nonprofit domestication and conversion

If the domestication and conversion of a foreign nonprofit corporation to a domestic business corporation is abandoned in accordance with the laws of the

foreign jurisdiction after articles of nonprofit domestication and conversion have been filed with the secretary of state, a statement that the domestication and conversion has been abandoned, signed by an officer or other duly authorized representative, shall be delivered to the secretary of state for filing. The statement shall take effect upon filing and the domestication and conversion shall be deemed abandoned and shall not become effective.

Source: MBCA §9.43.

SUBPART E. ENTITY CONVERSION

§1-950. Entity conversion authorized; definitions

A. A domestic business corporation may become a domestic unincorporated entity pursuant to a plan of entity conversion.

B. A domestic business corporation may become a foreign unincorporated entity if the entity conversion is permitted by the laws of the foreign jurisdiction.

C. A domestic unincorporated entity may become a domestic business corporation or another form of domestic unincorporated entity. If the organic law of a domestic unincorporated entity does not provide procedures for the approval of an entity conversion, the conversion shall be adopted and approved, and the entity conversion effectuated, in the same manner as a merger of the unincorporated entity.

D. A foreign unincorporated entity may become a domestic business corporation if the organic law of the foreign unincorporated entity authorizes it to become a corporation in another jurisdiction.

E. If any debt security, note, or similar evidence of indebtedness for money borrowed, whether secured or unsecured, or a contract of any kind, issued, incurred, or signed by a domestic business corporation before January 1, 2015, applies to a merger of the corporation and the document does not refer to an entity conversion of the corporation, the provision shall be deemed to apply to an entity conversion of the corporation until such time as the provision is amended subsequent to that date.

F. As used in this Subpart:

(1) "Converting entity" means the domestic business corporation or domestic unincorporated entity that adopts a plan of entity conversion or the foreign unincorporated entity converting to a domestic business corporation.

(2) "Surviving entity" means the corporation or unincorporated entity that is in existence immediately after consummation of an entity conversion pursuant to this Subpart.

Source: MBCA §9.50.

Comments - 2014 Revision

(a) This Section broadens the scope of Model Act Subsection (c) to cover conversions of one form of domestic unincorporated entity into another. The procedures in this Subpart replace those formerly provided in Chapter 25 of Title 12 for that form of transaction. Chapter 25 continues to provide rules concerning licensing and taxing issues relating to the surviving entity in an entity conversion, regardless of whether the surviving entity is incorporated or unincorporated. See R.S. 12:1603-04.

(b) The provisions in Model Act Subsection (c) that govern the procedures for approval of an entity conversion in an entity whose organic law does not provide procedures for either an entity conversion or merger were deleted from this Section as unnecessary. Louisiana law does provide procedures for the merger of its unincorporated business organizations. The merger of limited liability companies is governed by R.S. 12:1357-62. The merger of partnerships, including partnerships in commendam and registered limited liability partnerships, is governed by R.S. 9:3441-47.

§1-951. Plan of entity conversion

A. A plan of entity conversion must include all of the following:

(1) A statement of the type of entity the surviving entity will be and, if it will be a foreign entity, its jurisdiction of organization.

(2) The terms and conditions of the conversion.

(3) If the converting entity is a domestic business corporation, the manner and basis of converting the shares of the corporation following its conversion into interests or other securities, obligations, rights to acquire interests or other securities, or into cash, other property, or any combination of the foregoing.

(4) If the converting entity is an unincorporated entity, the manner and basis of converting the interests in the entity into shares, interests, or other securities,

obligations, rights to acquire shares, interests, or other securities, or into cash, other property, or any combination of the foregoing.

(5) The full text, as they will be in effect immediately after consummation of the conversion, of the organic documents of the surviving entity.

B. The plan of entity conversion may also include a provision that the plan may be amended prior to filing articles of entity conversion, except that subsequent to approval of the plan by the shareholders the plan may not be amended to change any of the following:

(1) The amount or kind of shares or other securities, interests, obligations, rights to acquire shares, other securities or interests, or the cash or other property to be received under the plan by the shareholders.

(2) The organic documents that will be in effect immediately following the conversion, except for changes permitted by a provision of the organic law of the surviving entity comparable to R.S. 12:1-1005.

(3) Any of the other terms or conditions of the plan if the change would adversely affect any of the shareholders in any material respect.

C. Terms of a plan of entity conversion may be made dependent upon facts objectively ascertainable outside the plan in accordance with R.S. 12:1-120(K).

Source: MBCA §9.51.

Comments - 2014 Revision

(a) This Section changes the references in Model Act Paragraph (a)(1) to an "other entity" to "entity." The term "other entity" was a defined term in earlier versions of the Model Act that has since been eliminated as a defined term. The term "entity" is used in this Section to refer to whatever form of entity survives an entity conversion. Because the survivor of an entity conversion must be either a domestic corporation or a domestic or foreign unincorporated entity, the term "entity" in Subsection A of this Section is limited in meaning to one of those forms of entity.

(b) This Section adds a new Paragraph (A)(4) of this Section, and modifies Model Act Paragraph (a)(3), to take account of conversions not only of domestic corporations into unincorporated entities but also of unincorporated entities into domestic corporations or other forms of domestic unincorporated entities.

§1-952. Action on a plan of entity conversion

In the case of an entity conversion of a domestic business corporation to a domestic or foreign unincorporated entity, all of the following shall apply:

(1) The plan of entity conversion must be adopted by the board of directors.

(2) After adopting the plan of entity conversion, the board of directors must submit the plan to the shareholders for their approval. The board of directors must also transmit to the shareholders a recommendation that the shareholders approve the plan, unless the board of directors makes a determination that because of conflicts of interest or other special circumstances it should not make such a recommendation or R.S. 12:1-826 applies. If the board of directors makes such a determination or R.S. 12:1-826 applies, the board must transmit to the shareholders the basis for so proceeding.

(3) The board of directors may condition its submission of the plan of entity conversion to the shareholders on any basis.

(4) If the approval of the shareholders is to be given at a meeting, the corporation must notify each shareholder, whether or not entitled to vote, of the meeting of shareholders at which the plan of entity conversion is to be submitted for approval. The notice must state that the purpose, or one of the purposes, of the meeting is to consider the plan and must contain or be accompanied by a copy or summary of the plan. The notice shall include or be accompanied by a copy of the organic documents as they will be in effect immediately after the entity conversion.

(5) Unless the articles of incorporation, or the board of directors acting pursuant to Paragraph (3) of this Section, requires a greater vote, approval of the plan of entity conversion requires the approval of each class or series of shares of the corporation voting as a separate voting group by at least a majority of the votes entitled to be cast on the conversion by that voting group.

(6) If any provision of the articles of incorporation, bylaws, or an agreement to which any of the directors or shareholders are parties, adopted, or entered into before January 1, 2015, applies to a merger of the corporation, other than a provision that limits or eliminates voting or appraisal rights, and the document does not refer to an entity conversion of the corporation, the provision shall be deemed to apply to

an entity conversion of the corporation until such time as the provision is subsequently amended.

(7) If as a result of the conversion one or more shareholders of the corporation would become subject to owner liability for the debts, obligations, or liabilities of any other person or entity, approval of the plan of conversion shall require the signing, by each such shareholder, of a separate written consent to become subject to such owner liability.

Source: MBCA §9.52.

Comment - 2014 Revision

This Section modifies Model Act Paragraph (5) to require shareholder approval of an entity conversion by a majority of the votes entitled to be cast in each relevant voting group. The Model Act requires approval from each group by only a majority of the votes cast at a meeting at which a majority quorum exists.

§1-953. Articles of entity conversion

A. After the conversion of a domestic business corporation to a domestic unincorporated entity has been adopted and approved as required by this Subpart, articles of entity conversion shall be signed on behalf of the corporation by any officer or other duly authorized representative. The articles shall do all of the following:

(1) Set forth the name of the corporation immediately before the filing of the articles of entity conversion and the name to which the name of the corporation is to be changed, which shall be a name that satisfies the organic law of the surviving entity.

(2) State the type of unincorporated entity that the surviving entity will be.

(3) Set forth a statement that the plan of entity conversion was duly approved by the shareholders in the manner required by this Subpart and the articles of incorporation.

(4) If the surviving entity is a filing entity, either contain all of the provisions required to be set forth in its public organic document and any other desired provisions that are permitted, or have attached such a public organic document;

except that, in either case, provisions that would not be required to be included in a restated public organic document may be omitted.

B. After the conversion of a domestic unincorporated entity to a domestic business corporation or to another form of domestic unincorporated entity has been adopted and approved as required by the organic law of the converting entity, articles of entity conversion shall be signed on behalf of the converting entity by an officer or other duly authorized partner, member, manager or other representative. The articles shall do all of the following:

(1) Set forth the name of the converting entity immediately before the filing of the articles of entity conversion and the name to which the name of the converting entity is to be changed, which shall be a name that satisfies the requirements of the organic law of the surviving entity.

(2) Set forth a statement that the plan of entity conversion was duly approved in accordance with the organic law of the converting entity.

(3) Satisfy one of the following requirements concerning the provisions required by law to be included in the organic document of the surviving entity and, if required, in its initial report, do either of the following:

(a) If the surviving entity is a domestic business corporation, the articles of entity conversion shall either contain all of the provisions that R.S. 12:1-202(A) requires to be set forth in articles of incorporation and any other desired provisions that R.S. 12:1-202(B) permits to be included in articles of incorporation, or have attached articles of incorporation; except that, in either case, provisions that would not be required to be included in restated articles of incorporation of a domestic business corporation may be omitted.

(b) If the surviving entity is a domestic filing entity, either contain all of the provisions required to be set forth in its public organic document and any other desired provisions that are permitted, or have attached such a public organic document; except that, in either case, provisions that would not be required to be included in a restated public organic document may be omitted.

C. After the conversion of a foreign unincorporated entity to a domestic business corporation has been authorized as required by the laws of the foreign jurisdiction, articles of entity conversion shall be signed on behalf of the foreign unincorporated entity by any officer or other duly authorized representative. The articles shall do all of the following:

(1) Set forth the name of the unincorporated entity immediately before the filing of the articles of entity conversion and the name to which the name of the unincorporated entity is to be changed, which shall be a name that satisfies the requirements of R.S. 12:1-401.

(2) Set forth the jurisdiction under the laws of which the unincorporated entity was organized immediately before the filing of the articles of entity conversion and the date on which the unincorporated entity was organized in that jurisdiction.

(3) Set forth a statement that the conversion of the unincorporated entity was duly approved in the manner required by its organic law.

(4) Either contain all of the provisions that R.S. 12:1-202(A) requires to be set forth in articles of incorporation and any other desired provisions that R.S. 12:1-202(B) permits to be included in articles of incorporation, or have attached articles of incorporation; except that, in either case, provisions that would not be required to be included in restated articles of incorporation of a domestic business corporation may be omitted.

D. The articles of entity conversion shall be delivered to the secretary of state for filing, and shall take effect at the effective time provided in R.S. 12:1-123. Articles of entity conversion under Subsection A or B of this Section may be combined with any required conversion filing under the organic law of the domestic unincorporated entity if the combined filing satisfies the requirements of both this Section and the other organic law.

E. If the converting entity is a foreign unincorporated entity that is authorized to transact business in this state under a provision of law similar to

Chapter 3 of this Title, its certificate of authority or other type of foreign qualification shall be cancelled automatically on the effective date of its conversion.

F. Within thirty days after the date that the articles of entity conversion are delivered for filing to the secretary of state, a duplicate original of the articles shall be filed in the conveyance records of each parish in this state in which the converting entity owns immovable property.

Source: MBCA §9.53.

Comments - 2014 Revision

(a) Model Act Subsection (b) covers only the conversion of a domestic unincorporated entity into a domestic business corporation. This Section broadens Model Act Subsection (b) to also cover a conversion of one form of domestic unincorporated entity into another.

(b) The terms "filing entity" and "public organic document" are defined in R.S. 12:1-140. Under those definitions, limited liability companies and partnerships, including partnerships in commendam and registered limited liability partnerships, are "filing entities." If a limited liability company or partnership is the surviving entity in an entity conversion, the items required in a public organic document for that form of entity must be included either in the articles of conversion or in a public organic document that is attached to the articles of entity conversion. In the case of a limited liability company, the public organic document consists of both the articles of organization and the initial report, as both must be filed to create a limited liability company. See R.S. 12:1-140(17B); R.S. 12:1304. This Section utilizes the singular term "document" to refer to both limited liability company documents, together, in accordance with the general interpretational rule in R.S. 1:7 that the singular includes the plural.

(c) This Section adds a new Subsection F of this Section to harmonize the parish filing requirements in an entity conversion with those in a merger or domestication.

§1-954. Surrender of charter upon conversion

A. Whenever a domestic business corporation has adopted and approved, in the manner required by this Subpart, a plan of entity conversion providing for the corporation to be converted to a foreign unincorporated entity, articles of charter surrender shall be signed on behalf of the corporation by any officer or other duly authorized representative. The articles of charter surrender shall set forth all of the following:

(1) The name of the corporation.

(2) A statement that the articles of charter surrender are being filed in connection with the conversion of the corporation to a foreign unincorporated entity.

(3) A statement that the conversion was duly approved by the shareholders in the manner required by this Subpart and the articles of incorporation.

(4) The jurisdiction under the laws of which the surviving entity will be organized.

(5) If the surviving entity will be a nonfiling entity, the address of its executive office immediately after the conversion.

B. The articles of charter surrender shall be delivered by the corporation to the secretary of state for filing. The articles of charter surrender shall take effect on the effective time provided in R.S. 12:1-123.

Source: MBCA §9.54.

§1-955. Effect of entity conversion

A. When a conversion under this Subpart becomes effective, all of the following shall apply:

(1) The title to all real and personal property, both tangible and intangible, of the converting entity remains in the surviving entity without transfer, assignment, reversion or impairment.

(2) The liabilities of the converting entity remain the liabilities of the surviving entity.

(3) A pending action or proceeding by or against the converting entity continues by or against the surviving entity as if the conversion had not occurred without any need for substitution of parties.

(4) The provisions included in or attached to the articles of entity conversion in accordance with R.S. 12:1-953(B)(3) become effective as the articles of incorporation, articles of organization, initial report, registered contract of partnership, or registered application for registry of a registered limited liability partnership, as appropriate for the surviving entity.

(5) In the case of a surviving entity that is a nonfiling entity, its private organic document becomes effective.

(6) The shares or interests of the converting entity are reclassified into shares, interests, other securities, obligations, rights to acquire shares, interests, or other securities, or into cash or other property in accordance with the plan of conversion; and the shareholders or interest holders of the converting entity are entitled only to the rights provided to them under the terms of the conversion and to any appraisal rights they may have under the organic law of the converting entity.

(7) The surviving entity is deemed to be all of the following:

(a) Incorporated or organized under and subject to the organic law of the surviving entity for all purposes.

(b) The same corporation or unincorporated entity without interruption as the converting entity.

(c) Incorporated or otherwise organized on the date that the converting entity was originally incorporated or organized.

B. When a conversion of a domestic business corporation to a foreign unincorporated entity becomes effective, the surviving entity remains both of the following:

(1) Obligated under the laws of this state to pay promptly the amount, if any, to which shareholders who exercise appraisal rights in connection with the conversion are entitled under Part 13 of this Chapter.

(2) Subject to the personal jurisdiction of the courts of this state in accordance with R.S. 13:3201, and to service of process in accordance with law.

C. A shareholder who becomes subject to owner liability for some or all of the debts, obligations, or liabilities of the surviving entity shall be personally liable only for those debts, obligations, or liabilities of the surviving entity that arise after the effective time of the articles of entity conversion.

D. The owner liability of an interest holder in an unincorporated entity that converts to another form of domestic unincorporated entity or to a domestic business corporation shall be as follows:

(1) The conversion does not discharge any owner liability under the organic law of the converting entity to the extent any such owner liability arose before the effective time of the articles of entity conversion.

(2) The interest holder shall not have owner liability under the organic law of the converting entity for any debt, obligation, or liability of the corporation that arises after the effective time of the articles of entity conversion.

(3) The provisions of the organic law of the converting entity shall continue to apply to the collection or discharge of any owner liability preserved by Paragraph (D)(1) of this Section, as if the conversion had not occurred.

(4) The interest holder shall have whatever rights of contribution from other interest holders are provided by the organic law of the converting entity with respect to any owner liability preserved by Paragraph (D)(1) of this Section, as if the conversion had not occurred.

E. The provisions of R.S. 12:1603 and 12:1604, concerning tax filing requirements and professional licenses, apply in either of the following cases of an entity conversion:

(1) By a domestic business corporation to a domestic unincorporated entity.

(2) By a domestic unincorporated entity to a domestic business corporation or to another form of domestic unincorporated entity.

Source: MBCA §9.55.

Comments - 2014 Revision

(a) This Section modifies Model Act Paragraph (a)(4) to name the particular forms of public organic documents most likely to be relevant in an entity conversion transaction.

(b) Model Act Subsection (b) uses legal fictions to state the legal obligations of an "outbound" surviving entity in an entity conversion, deeming the surviving entity to "agree" to pay appraisal rights and to appoint the secretary of state as its agent for service of process in connection with appraisal rights suits. This Section modifies Subsection (b) to state the surviving entity's legal obligations in a more straightforward fashion. The surviving entity remains liable under the laws of this state to pay any appraisal rights when due, not because it agrees to make the payments but because the law requires it to do so. Similarly, the surviving entity remains subject to the personal jurisdiction of the courts of this state not because the entity has made the secretary of state its agent for service of process, but because this state asserts the personal jurisdiction of its courts to the full extent constitutionally permissible, and provides by law for appropriate forms of service of process.

(c) This Section adds a new Subsection E of this Section to retain the substance of prior law concerning the filing of short-period tax returns by the converting entity and the continuation of licensing with respect to a surviving entity that is a domestic business corporation or domestic unincorporated entity.

§1-956. Abandonment of an entity conversion

A. Unless otherwise provided in a plan of entity conversion of a domestic business corporation, after the plan has been adopted and approved as required by this Subpart, and at any time before the entity conversion has become effective, it may be abandoned by the board of directors without action by the shareholders.

B. If an entity conversion is abandoned after articles of entity conversion or articles of charter surrender have been filed with the secretary of state but before the entity conversion has become effective, a statement that the entity conversion has been abandoned in accordance with this Section, signed by an officer or other duly authorized representative, shall be delivered to the secretary of state for filing prior to the effective date of the entity conversion. Upon filing, the statement shall take effect and the entity conversion shall be deemed abandoned and shall not become effective.

Source: MBCA §9.56.

PART 10. AMENDMENT OF ARTICLES OF INCORPORATION AND BYLAWS

SUBPART A. AMENDMENT OF ARTICLES OF INCORPORATION

§1-1001. Authority to amend

A. A corporation may amend its articles of incorporation at any time to add or change a provision that is required or permitted in the articles of incorporation as of the effective date of the amendment or to delete a provision that is not required to be contained in the articles of incorporation.

B. A shareholder of the corporation does not have a vested property right resulting from any provision in the articles of incorporation, including provisions relating to management, control, capital structure, dividend entitlement, or purpose or duration of the corporation.

C. An amendment that extends the duration of a corporation may be adopted even after that duration expires unless one of the following conditions exist:

(1) Articles of termination or a certificate of termination has been filed and the existence of the corporation has not been reinstated.

(2) Articles of dissolution have been delivered to the secretary of state and have not been revoked.

(3) A judgment ordering dissolution has become final.

D. If the duration of a corporation has expired and the adoption of an amendment extending that duration is permissible under Subsection C of this Section, then the following shall apply:

(1) The amendment may be adopted in the same manner as if the corporation's duration had not expired.

(2) The amendment has the same effect as if it had been adopted before the duration expired.

Source: MBCA §10.01, R.S. 12:31.

Comments - 2014 Revision

(a) The authority of a business corporation to amend its articles of incorporation in accordance with Subsection A of this Section is not limited by the principles that were applied to an amendment of the articles of a charitable, nonprofit corporation in New Orleans Opera Ass'n, Inc. v. Southern Regional Opera Endowment Fund, 993 So.2d 791(La. App. 4th Cir. 8/27/08), writ denied, 996 So.2d 1114 (11/21/08).

(b) Subsections C and D of this Section were added to the Model Act provision to retain the effect of former R.S. 12:31(D). Under the former provision, the duration of a corporation could be extended through an amendment to its articles that was adopted even after the expiration of the corporation's duration, but before liquidation procedures had begun, and the amendment was given retroactive effect. This Section retains the rule against duration-extending amendments while a dissolution process is ongoing through Paragraph (C)(2) of this Section. But it adds a new Paragraph (C)(1) to take account of the availability of reinstatement for a terminated corporation under R.S. 12:-1444.

§1-1002. Amendment before issuance of shares

If a corporation has not yet issued shares, its board of directors, or its incorporators if it has no board of directors, may adopt one or more amendments to the corporation's articles of incorporation.

Source: MBCA §10.02.

§1-1003. Amendment by board of directors and shareholders

A. If a corporation has issued shares, but is not a public corporation, an amendment to the articles of incorporation shall be adopted in the following manner:

(1) Except as provided in R.S. 12:1-1005, 1-1007, and 1-1008, the amendment must be approved by the shareholders.

(2) If the approval is to be given at a meeting, the corporation must notify each shareholder, whether or not entitled to vote, of the meeting of shareholders at which the amendment is to be submitted for approval. The notice must state that the purpose, or one of the purposes, of the meeting is to consider the amendment and must contain or be accompanied by a copy of the amendment. If Paragraph (A)(3) of this Section requires the approval of one or more separate voting groups, in addition to the approval of all shareholders entitled to vote on the amendment, the notice must also identify each class or series of shares that the corporation plans to treat as part of each separate voting group.

(3) Unless the articles of incorporation require a greater vote, approval of the amendment by the shareholders requires the approval of at least a majority of the votes entitled to be cast on the amendment, and, if any class or series of shares is entitled to vote as a separate group on the amendment, except as provided in R.S. 12:1-1004(C), the approval of at least a majority of the votes entitled to be cast on the amendment by each such separate voting group.

B. An amendment to the articles of incorporation of a public corporation shall be adopted in the following manner:

(1) The proposed amendment must be adopted by the board of directors.

(2) Except as provided in R.S. 12:1-1005, 1-1007, and 1-1008, after adopting the proposed amendment the board of directors must submit the amendment to the shareholders for their approval. The board of directors must also transmit to the shareholders a recommendation that the shareholders approve the amendment, unless the board of directors makes a determination that because of conflicts of interest or other special circumstances it should not make such a recommendation, in which

case the board of directors must transmit to the shareholders the basis for that determination.

(3) The board of directors may condition its submission of the amendment to the shareholders on any basis.

(4) If the amendment is required to be approved by the shareholders, and the approval is to be given at a meeting, the corporation must notify each shareholder, whether or not entitled to vote, of the meeting of shareholders at which the amendment is to be submitted for approval. The notice must state that the purpose, or one of the purposes, of the meeting is to consider the amendment and must contain or be accompanied by a copy of the amendment. If Paragraph (B)(5) of this Section requires the approval of one or more separate voting groups, in addition to the approval of all shareholders entitled to vote on the amendment, the notice must also identify each class or series of shares that the corporation plans to treat as part of each separate voting group.

(5) Unless the articles of incorporation, or the board of directors acting pursuant to Paragraph (B)(3) of this Section, requires a greater vote, approval of the amendment by the shareholders requires the approval of at least a majority of the votes entitled to be cast on the amendment, and, if any class or series of shares is entitled to vote as a separate group on the amendment, except as provided in R.S. 12:1-1004(C), the approval of at least a majority of the votes entitled to be cast on the amendment by each such separate voting group.

Source: MBCA §10.03.

Comments - 2014 Revision

(a) The Model Act provides a single set of rules for the adoption of an amendment to the articles of incorporation. Two features of those rules seem better-suited to public corporations than to the closely-held, often one-shareholder corporations that dominate corporate practice in Louisiana. Those two features are: (1) that shareholders be unable to amend the articles without board approval; and (2) that the board, after adopting an amendment, also make an affirmative recommendation to shareholders of approval, or provide an acceptable explanation of why the board is unable to make such a recommendation.

(b) This Section provides two separate procedures for the adoption of an amendment to the articles of incorporation, one for public corporations, as defined in R.S. 12:1-140, and another for nonpublic corporations. The nonpublic corporation

rules are provided in Subsection A of this Section. They eliminate the requirements of prior board adoption and recommendation of an amendment. The public corporation rules are provided in Subsection B of this Section. They track the Model Act, except that: (1) they add a requirement that the notice of the meeting include an identification of any voting group that is eligible to vote separately on the amendment; and (2) require an amendment to be approved by at least a majority of the votes entitled to be cast on the amendment, and by a majority of the votes of any class of shares entitled to vote separately on the amendment as a class.

§1-1004. Voting on amendments by voting groups

A. If a corporation has more than one class of shares outstanding, the holders of the outstanding shares of a class are entitled to vote as a separate voting group, if shareholder voting is otherwise required by this Subpart, on a proposed amendment to the articles of incorporation if the amendment would do any of the following:

(1) Effect an exchange or reclassification of all or part of the shares of the class into shares of another class.

(2) Effect an exchange or reclassification, or create the right of exchange, of all or part of the shares of another class into shares of the class.

(3) Change the rights, preferences, or limitations of all or part of the shares of the class.

(4) Change the shares of all or part of the class into a different number of shares of the same class.

(5) Create a new class of shares having rights or preferences with respect to distributions that are prior or superior to the shares of the class.

(6) Increase the rights, preferences, or number of authorized shares of any class that, after giving effect to the amendment, have rights or preferences with respect to distributions that are prior or superior to the shares of the class.

(7) Limit or deny an existing preemptive right of all or part of the shares of the class.

(8) Cancel or otherwise affect rights to distributions that have accumulated but not yet been authorized on all or part of the shares of the class.

B. If a proposed amendment would affect a series of a class of shares in one or more of the ways described in Subsection A of this Section, the holders of shares

of that series are entitled to vote as a separate voting group on the proposed amendment.

C. If a proposed amendment that entitles the holders of two or more classes or series of shares to vote as separate voting groups under this Section would affect those two or more classes or series in the same or a substantially similar way, the holders of shares of all the classes or series so affected must vote together as a single voting group on the proposed amendment, unless otherwise provided in the articles of incorporation or required by the board of directors.

D. A class or series of shares is entitled to the voting rights granted by this Section although the articles of incorporation provide that the shares are nonvoting shares.

Source: MBCA §10.04.

§1-1005. Amendment by board of directors

Unless the articles of incorporation provide otherwise, a corporation's board of directors may adopt amendments to the corporation's articles of incorporation without shareholder approval to do any of the following:

(1) Extend the duration of the corporation if it was incorporated at a time when limited duration was required by law.

(2) Delete the names and addresses of the initial directors.

(3) Delete the name and address of the initial registered agent or registered office, if a statement of change is on file with the secretary of state, or to delete the address of the initial principal office if the corporation has provided the address of its principal office in an annual report on file with the secretary of state.

(4) If the corporation has only one class of shares outstanding, then to do either of the following:

(a) Change each issued and unissued authorized share of the class into a greater number of whole shares of that class.

(b) Increase the number of authorized shares of the class to the extent necessary to permit the issuance of shares as a share dividend.

(5) Change the corporate name by substituting the word "corporation", "incorporated", "company", "limited", or the abbreviation, with or without punctuation, "corp", "inc", "co", or "ltd", for a similar word or abbreviation in the name, or by adding, deleting, or changing a geographical attribution for the name.

(6) Reflect a reduction in authorized shares, as a result of the operation of R.S. 12:1-631(B), when the corporation has acquired its own shares and the articles of incorporation prohibit the reissue of the acquired shares.

(7) Delete a class of shares from the articles of incorporation, as a result of the operation of R.S. 12:1-631(B), when there are no remaining shares of the class because the corporation has acquired all shares of the class and the articles of incorporation prohibit the reissue of the acquired shares.

(8) To make any change expressly permitted by R.S. 12:1-602(A) or (B) to be made without shareholder approval.

Source: MBCA §10.05.

§1-1006. Articles of amendment

After an amendment to the articles of incorporation has been adopted and approved in the manner required by this Subpart and by the articles of incorporation, the corporation shall deliver to the secretary of state, for filing, articles of amendment, which shall set forth all of the following:

(1) The name of the corporation.

(2) The text of each amendment adopted, or the information required by R.S. 12:1-120(K)(5).

(3) If an amendment provides for an exchange, reclassification, or cancellation of issued shares, provisions for implementing the amendment if not contained in the amendment itself, which may be made dependent upon facts objectively ascertainable outside the articles of amendment in accordance with R.S. 12:1-120(K)(5).

(4) The date of each amendment's adoption.

(5)(a) If an amendment was adopted by the incorporators or board of directors without shareholder approval, a statement that the amendment was duly approved by the incorporators or by the board of directors, as the case may be, and that shareholder approval was not required.

(b) If an amendment required approval by the shareholders, a statement that the amendment was duly approved by the shareholders in the manner required by this Act and by the articles of incorporation.

(c) If an amendment is being filed pursuant to R.S. 12:1-120(K)(5), a statement to that effect.

Source: MBCA §10.06.

§1-1007. Restated articles of incorporation

A. A corporation's board of directors may restate its articles of incorporation at any time, with or without shareholder approval, to consolidate all amendments into a single document.

B. If the restated articles include one or more new amendments that require shareholder approval, the amendments must be adopted and approved as provided in R.S. 12:1-1003.

C. A corporation that restates its articles of incorporation shall deliver to the secretary of state for filing articles of restatement setting forth the name of the corporation and the text of the restated articles of incorporation together with a certificate which states that the restated articles consolidate all amendments into a single document and, if a new amendment is included in the restated articles, which also includes the statements required under R.S. 12:1-1006.

D. Duly adopted restated articles of incorporation supersede the original articles of incorporation and all amendments thereto.

E. The secretary of state may certify restated articles of incorporation as the articles of incorporation currently in effect, without including the certificate information required by Subsection C of this Section.

Source: MBCA §10.07.

§1-1008. Amendment pursuant to reorganization

A. A corporation's articles of incorporation may be amended without action by the board of directors or shareholders to carry out a plan of reorganization ordered or decreed by a court of competent jurisdiction under the authority of a law of the United States.

B. The individual or individuals designated by the court shall deliver to the secretary of state for filing articles of amendment setting forth all of the following:

(1) The name of the corporation.

(2) The text of each amendment approved by the court.

(3) The date of the court's order or decree approving the articles of amendment.

(4) The title of the reorganization proceeding in which the order or decree was entered.

(5) A statement that the court had jurisdiction of the proceeding under federal statute.

C. This Section does not apply after entry of a final decree in the reorganization proceeding even though the court retains jurisdiction of the proceeding for limited purposes unrelated to consummation of the reorganization plan.

Source: MBCA §10.08.

§1-1009. Effect of amendment

An amendment to the articles of incorporation does not affect a cause of action existing against or in favor of the corporation, a proceeding to which the corporation is a party, or the existing rights of persons other than shareholders of the corporation. An amendment changing a corporation's name does not abate a proceeding brought by or against the corporation in its former name.

Source: MBCA §10.09.

SUBPART B. AMENDMENT OF BYLAWS

§1-1020. Amendment by board of directors or shareholders

A. A corporation's shareholders may amend or repeal the corporation's bylaws.

B. A corporation's board of directors may adopt, amend or repeal the corporation's bylaws, unless either of the following conditions exist:

(1) The articles of incorporation, R.S. 12:1-1021 or, if applicable, R.S. 12:1-1022 reserve that power exclusively to the shareholders in whole or part.

(2) The shareholders in amending, repealing, or adopting a bylaw expressly provide that the board of directors may not amend, repeal, or reinstate that bylaw.

Source: MBCA §10.20.

§1-1021. Bylaw increasing quorum or voting requirement for directors

A. A bylaw that increases a quorum or voting requirement for the board of directors may be amended or repealed under either of the following circumstances:

(1) If originally adopted by the shareholders, only by the shareholders, unless the bylaw otherwise provides.

(2) If adopted by the board of directors, either by the shareholders or by the board of directors.

B. A bylaw adopted or amended by the shareholders that increases a quorum or voting requirement for the board of directors may provide that it can be amended or repealed only by a specified vote of either the shareholders or the board of directors.

C. Action by the board of directors under Subsection A of this Section to amend or repeal a bylaw that changes the quorum or voting requirement for the board of directors must meet the same quorum requirement and be adopted by the same vote required to take action under the quorum and voting requirement then in effect or proposed to be adopted, whichever is greater.

Source: MBCA §10.21.

§1-1022. Public corporation bylaw provisions relating to the election of directors

A. Unless the articles of incorporation specifically prohibit the adoption of a bylaw pursuant to this Section, alter the vote specified in R.S. 12:1-728(A), or provide for cumulative voting, a public corporation may elect in its bylaws to be governed in the election of directors as follows:

(1) Each vote entitled to be cast may be voted for or against up to that number of candidates that is equal to the number of directors to be elected, or a shareholder may indicate an abstention, but without cumulating the votes.

(2) To be elected, a nominee must have received a plurality of the votes cast by holders of shares entitled to vote in the election at a meeting at which a quorum is present, provided that a nominee who is elected but receives more votes against than for election shall serve as a director for a term that shall terminate on the date that is the earlier of ninety days from the date on which the voting results are determined pursuant to R.S. 12:1-729(B)(5) or the date on which an individual is selected by the board of directors to fill the office held by such director, which selection shall be deemed to constitute the filling of a vacancy by the board to which R.S. 12:1-810 applies. Subject to Paragraph (3) of this Subsection, a nominee who is elected but receives more votes against than for election shall not serve as a director beyond the ninety-day period referenced above.

(3) The board of directors may select any qualified individual to fill the office held by a director who received more votes against than for election.

B. Subsection A of this Section does not apply to an election of directors by a voting group if at the expiration of the time fixed under a provision requiring advance notification of director candidates, or absent such a provision, at a time fixed by the board of directors which is not more than fourteen days before notice is given of the meeting at which the election is to occur, there are more candidates for election by the voting group than the number of directors to be elected, one or more of whom are properly proposed by shareholders. An individual shall not be considered a candidate for purposes of this Subsection if the board of directors

determines before the notice of meeting is given that such individual's candidacy does not create a bona fide election contest.

C. A bylaw electing to be governed by this Section may be repealed by either of the following:

(1) If originally adopted by the shareholders, only by the shareholders, unless the bylaw otherwise provides.

(2) If adopted by the board of directors, by the board of directors or the shareholders.

Source: MBCA §10.22.

PART 11. MERGERS AND SHARE EXCHANGES

§1-1101. Definitions

As used in this Part, the following meanings shall apply:

A. "Merger" means a business combination pursuant to R.S. 12:1-1102.

B. "Party to a merger" or "party to a share exchange" means any domestic or foreign corporation or eligible entity that will do any of the following:

(1) Merge under a plan of merger.

(2) Acquire shares or eligible interests of another corporation or an eligible entity in a share exchange.

(3) Have all of its shares or eligible interests or all of one or more classes or series of its shares or eligible interests acquired in a share exchange.

C. "Share exchange" means a business combination pursuant to R.S. 12:1-1103.

D. "Survivor" in a merger means the corporation or eligible entity into which one or more other corporations or eligible entities are merged. A survivor of a merger may preexist the merger or be created by the merger.

Source: MBCA §11.01.

Comment - 2014 Revision

Model Act Comment 4, concerning the meaning of the term "other entity" is irrelevant under this Section. Comment 4 covered a defined term in an earlier draft of Model Act Section 11.01 that was changed before final adoption. Compare, 56 Bus.Law. 1633 (2001) (proposed amendments) with 58 Bus.Law. 219 (2002) (final

adoption). As adopted in its final form, the term used in the Model Act to express the "other entity" concept is "eligible entity." See Paragraph 1.40 (7D). At the time that this Section was enacted, the Model Act used the older term in some provisions and the newer terms in other provisions. This Section uses the term "eligible entity" consistently throughout its provisions to identify the types of entities that may enter with a business corporation into a merger, share exchange, domestication, nonprofit conversion, or entity conversion transaction.

§1-1102. Merger

A. One or more domestic business corporations may merge with one or more domestic or foreign business corporations or eligible entities pursuant to a plan of merger, or two or more eligible entities or foreign business corporations may merge into a new domestic business corporation to be created in the merger in the manner provided in this Part.

B. A foreign business corporation, or a foreign eligible entity, may be a party to a merger with a domestic business corporation, or may be created by the terms of the plan of merger, only if the merger is permitted by the organic law governing the foreign business corporation or foreign eligible entity, and only if the requirements of that law concerning the merger have been satisfied. A domestic eligible entity must approve the merger in accordance with the organic law applicable to it.

C. The plan of merger must include all of the following:

(1) The name of each domestic or foreign business corporation or eligible entity that will merge and the name of the domestic or foreign business corporation or eligible entity that will be the survivor of the merger.

(2) The terms and conditions of the merger.

(3) The manner and basis of converting the shares of each merging domestic or foreign business corporation and eligible interests of each merging eligible entity into shares or other securities, eligible interests, obligations, rights to acquire shares other securities or eligible interests, or into cash, other property, or any combination of the foregoing.

(4) The articles of incorporation of any domestic or foreign business or nonprofit corporation, or the organic documents of any domestic or foreign unincorporated entity, to be created by the merger, or if a new domestic or foreign

business or nonprofit corporation or unincorporated entity is not to be created by the merger, any amendments to the survivor's articles of incorporation or organic documents.

(5) Any other provisions required by the laws under which any party to the merger is organized or by which it is governed, or by the articles of incorporation or organic document of any such party.

D. Terms of a plan of merger may be made dependent on facts objectively ascertainable outside the plan in accordance with R.S. 12:1-120(K).

E. The plan of merger may also include a provision that the plan may be amended prior to filing articles of merger, but if the shareholders of a domestic corporation that is a party to the merger are required or permitted to vote on the plan, the plan must provide that subsequent to approval of the plan by such shareholders the plan may not be amended to change any of the following:

(1) The amount or kind of shares or other securities; eligible interests; obligations; rights to acquire shares, other securities or eligible interests; or the cash or other property to be received under the plan by the shareholders of or owners of eligible interests in any party to the merger.

(2) The articles of incorporation of any corporation, or the organic documents of any unincorporated entity, that will survive or be created as a result of the merger, except for changes permitted by R.S. 12:1-1005 or by comparable provisions of the organic laws of any such foreign corporation or domestic or foreign unincorporated entity.

(3) Any of the other terms or conditions of the plan if the change would adversely affect such shareholders in any material respect.

F. Property received through a conditional donation, grant, or devise, or held in trust or for charitable purposes under the laws of this state by an eligible entity shall not be diverted by a merger from the object for which it was donated, granted, or devised, except to the extent authorized by a court judgment based upon principles of cy pres or approximation.

G. A person who is a member, interest holder, or an affiliate of an eligible entity with a charitable purpose shall not receive a direct or indirect financial benefit in connection with a merger to which the eligible entity is a party unless the person is itself a charitable corporation or unincorporated entity with a charitable purpose. This Subsection does not apply to the receipt of reasonable compensation for services rendered.

Source: MBCA §11.02.

Comments - 2014 Revision

(a) Subsection (b) of the Model Act appears to contain an editorial error. It allows a merger with a foreign business corporation or eligible entity if the foreign corporation or entity itself permits the merger. This Section corrects the apparent error by adding a phrase that refers not to the foreign corporation or entity itself, but rather to the organic law that governs it. This Section also adds the requirement that the foreign organization actually comply with the foreign law that permits its participation in a merger, thus making explicit what was merely implicit in the Model Act.

(b) The Model Act contains an optional Paragraph (b)(1) that provides rules analogous to the corporate law rules for mergers involving unincorporated business organizations. This Section replaces the optional provision with the sentence at the end of Subsection B of this Section, which requires the domestic eligible entity, i.e., a partnership, partnership in commendam or limited liability company, to comply with the organic law applicable to it. The organic law governing the merger of a partnership or partnership in commendam is set forth in R.S. 9:3441-3447, while that governing limited liability company mergers is set forth in R.S. 12:1357-1362.

(c) This Section modifies the anti-diversion rule in Model Act Subsection (f) slightly by replacing its reference to a particular cy pres or anti-diversion statute with a reference to the legal principles of cy pres more generally, whether those principles are expressed in particular statutes, such as R.S. 9:2331, or the civil law doctrine of approximation. See, e.g., Succession of Mizell, 468 So.2d 1371 (La. App. 1st Cir. 1985), rev'd on other grounds, 475 So.2d 765 (1985); Ada C. Pollock-Blundon Ass'n, Inc. v. Evans' Heirs, 273 So.2d 552 (La. App. 1st Cir. 1973). Because Subsection D of this Section is designed merely to include cy pres principles by reference, and not to state any independent or fixed understanding of those principles, the Subsection does not limit itself to any particular statutory or jurisprudential formulation of the controlling rules.

(d) Subsection G of this Section is based on Section 9.03 of the Model Nonprofit Corporation Act and was added to this Section as a complement to Subsection F of this Section to prevent the misuse of assets held for charitable purposes. The term "charitable" means the same thing in Subsection F of this Section as it does under federal income tax law.

(e) The Model Act Official Comment to Section 11.02 contains several references to an "other entity," a term used in an earlier draft of the Model Act that was changed before final adoption to the term "eligible entity." Compare, 56 Bus.Law. 1633 (2001) (proposed amendments) with 58 Bus.Law. 219 (2002) (final adoption). The Model Act sometimes uses the older term and sometimes the newer term. This Section consistently uses the newer term "eligible entity" in place of the

older one. Also, because the term "eligible entity," unlike the term it replaced, includes both domestic and foreign forms of entity, Model Act references to "domestic or foreign eligible entities" have been corrected to eliminate the redundancy. References to "foreign eligible entities" or "domestic eligible entities" have been retained where appropriate to indicate the narrower category of eligible entity intended.

§1-1103. Share exchange

A. Through a share exchange, either of the following may occur:

(1) A domestic corporation may acquire all of the shares of one or more classes or series of shares of another domestic or foreign corporation, or all of the interests of one or more classes or series of interests of an eligible entity, in exchange for shares or other securities, eligible interests, obligations, rights to acquire shares or other securities, or for cash, other property, or any combination of the foregoing, pursuant to a plan of share exchange.

(2) All of the shares of one or more classes or series of shares of a domestic corporation may be acquired by another domestic or foreign corporation or eligible entity, in exchange for shares or other securities, eligible interests, obligations, rights to acquire shares or other securities, or for cash, other property, or any combination of the foregoing, pursuant to a plan of share exchange.

B. A foreign corporation or foreign eligible entity may be a party to a share exchange only if the share exchange is permitted by the organic law governing the foreign corporation or foreign eligible entity and only if the requirements of that law concerning the share exchange have been satisfied.

C. The plan of share exchange must include all of the following:

(1) The name of each corporation or eligible entity whose shares or interests will be acquired and the name of the corporation or eligible entity that will acquire those shares or interests.

(2) The terms and conditions of the share exchange.

(3) The manner and basis of exchanging shares of a corporation or interests in an eligible entity whose shares or interests will be acquired under the share exchange into shares or other securities, eligible interests, obligations, rights to

acquire shares or other securities, or into cash, other property, or any combination of the foregoing.

(4) Any other provisions required by the laws under which any party to the share exchange is organized or by the articles of incorporation or organic document of any such party.

D. Terms of a plan of share exchange may be made dependent on facts objectively ascertainable outside the plan in accordance with R.S. 12:1-120(K).

E. The plan of share exchange may also include a provision that the plan may be amended prior to filing articles of share exchange, but if the shareholders of a domestic corporation that is a party to the share exchange are required or permitted to vote on the plan, the plan must provide that subsequent to approval of the plan by such shareholders the plan may not be amended to change either of the following:

(1) The amount or kind of shares or other securities, interests, obligations, rights to acquire shares, other securities, or interests, or the cash or other property, to be issued by the corporation or to be received under the plan by the shareholders of or owners of interests in any party to the share exchange.

(2) Any of the other terms or conditions of the plan if the change would adversely affect such shareholders in any material respect.

F. This Section does not limit the power of any person to acquire shares of another corporation or interests in an eligible entity in a transaction other than a share exchange.

Source: MBCA §11.03.

Comments - 2014 Revision

(a) In an apparent error of terminology, the Model Act uses the term "other entity" (instead of "eligible entity") in this Section and its comments to refer to unincorporated business organizations and nonprofit corporations. The error appears due to a change in terminology between the text originally proposed and that finally adopted in dealing with such entities in Sections 11.01 and 11.02. Compare, 56 Bus.Law. 1633 (2001) (proposed amendments) with 58 Bus.Law. 219 (2002) (final adoption). Reflecting the final terminology, this Section substitutes the term "eligible entity," defined in R.S. 12:1-140(7B), for "other entity" throughout R.S. 12:1-1104 and its Official Comments. Also, because the term "eligible entity" includes both domestic and foreign forms of entity, Model Act references to "domestic and foreign other entities" have been corrected to eliminate the redundancy. References to "foreign eligible entities" or "domestic eligible entities"

have been retained where appropriate to indicate the narrower category of eligible entity intended.

(b) Subsection (b) of the Model Act appears to contain an editorial error. It allows a share exchange with a foreign business corporation or eligible entity if the foreign corporation or entity itself permits the share exchange. This Section corrects the apparent error by adding a phrase that refers not to the foreign corporation or entity itself, but rather to the organic law that governs it. This Section also adds the requirement that the foreign organization actually comply with the foreign law that permits its participation in a share exchange, thus making explicit what was merely implicit in the Model Act.

(c) The Model Act provides in Subsection (f) that Section 11.03 does not affect the power of a domestic corporation to acquire shares or interests outside of a share exchange. The limitation of the statement to domestic corporations is likely due to the limited scope of Section 11.03 itself, which reaches only share exchanges that involve a domestic corporation. Nevertheless, to avoid the unintended negative implication that Section 11.03 might affect acquisitions by persons other than a domestic corporation, this Section broadens the statement in Subsection (f) to make it applicable to acquisitions outside a share exchange by any person.

§1-1104. Action on a plan of merger or share exchange

In the case of a domestic corporation that is a party to a merger or share exchange, all of the following shall apply:

A. The plan of merger or share exchange must be adopted by the board of directors.

B. Except as provided in Subsection H of this Section and in R.S. 12:1-1105, after adopting the plan of merger or share exchange, the board of directors must submit the plan to the shareholders for their approval. The board of directors must also transmit to the shareholders a recommendation that the shareholders approve the plan, unless the board of directors makes a determination that because of conflicts of interest or other special circumstances it should not make such a recommendation or R.S. 12:1-826 applies. If the board of directors makes such a determination ro R.S. 12:1-826 applies, the board must transmit to the shareholders the basis for so proceeding.

C. The board of directors may condition its submission of the plan of merger or share exchange to the shareholders on any basis.

D. If the plan of merger or share exchange is required to be approved by the shareholders, and if the approval is to be given at a meeting, the corporation must notify each shareholder, whether or not entitled to vote, of the meeting of

shareholders at which the plan is to be submitted for approval. The notice must state that the purpose, or one of the purposes, of the meeting is to consider the plan and must contain or be accompanied by a copy or summary of the plan. If the corporation is to be merged into an existing corporation or eligible entity, the notice shall also include or be accompanied by a copy or summary of the articles of incorporation or organizational documents of that corporation or eligible entity. If the corporation is to be merged into a corporation or eligible entity that is to be created pursuant to the merger, the notice shall include or be accompanied by a copy or a summary of the articles of incorporation or organizational documents of the new corporation or eligible entity.

E. Unless the articles of incorporation, or the board of directors acting pursuant to Subsection C of this Section, requires a greater vote, approval of the plan of merger or share exchange requires the approval of at least a majority of the votes entitled to be cast on the plan, and, if any class or series of shares is entitled to vote as a separate group on the plan of merger or share exchange, the approval of each such separate voting group at a meeting by at least a majority of the votes entitled to be cast on the merger or share exchange by that voting group.

F. Subject to Subsection G of this Section, separate voting by voting groups is required on all of the following:

(1) A plan of merger, by each class or series of shares that is either of the following:

(a) To be converted under the plan of merger into other securities, interests, obligations, rights to acquire shares, other securities, or interests, or into cash, other property, or any combination of the foregoing.

(b) Entitled to vote as a separate group on a provision in the plan that constitutes a proposed amendment to articles of incorporation of a surviving corporation and that requires action by separate voting groups under R.S. 12:1-1004.

(2) A plan of share exchange, by each class or series of shares included in the exchange, with each class or series constituting a separate voting group.

(3) A plan of merger or share exchange, if the voting group is entitled under the articles of incorporation to vote as a voting group to approve a plan of merger or share exchange.

G. The articles of incorporation may expressly limit or eliminate the separate voting rights provided in Subparagraph (F)(1)(a) and Paragraph (F)(2) of this Section as to any class or series of shares, except for a transaction that includes what is or would be, if the corporation were the surviving corporation, an amendment subject to Subparagraph (F)(1)(b) of this Section, and that will effect no significant change in the assets of the resulting entity, including all parents and subsidiaries on a consolidated basis.

H. Unless the articles of incorporation otherwise provide, approval by the corporation's shareholders of a plan of merger or share exchange is not required if all of the following criteria are satisfied:

(1) The corporation will survive the merger or is the acquiring corporation in a share exchange.

(2) Except for amendments permitted by R.S. 12:1-1005, its articles of incorporation will not be changed.

(3) Each shareholder of the corporation whose shares were outstanding immediately before the effective date of the merger or share exchange will hold the same number of shares, with identical preferences, limitations, and relative rights, immediately after the effective date of change.

(4) The issuance in the merger or share exchange of shares or other securities convertible into or rights exercisable for shares does not require a vote under R.S. 12:1-621(F).

I. If as a result of a merger or share exchange one or more shareholders of a domestic corporation would become subject to owner liability for the debts, obligations, or liabilities of any other person or entity, approval of the plan of merger

or share exchange shall require the execution, by each such shareholder, of a separate written consent to become subject to such owner liability.

Source: MBCA §11.04.

Comment - 2014 Revision

Model Act Subsection (f) requires that shareholders approve a plan of merger or share exchange by a majority of votes cast at a meeting at which at least a majority of the votes entitled to be cast on the plan is present in person or by proxy, plus separate approvals by voting groups that are entitled to vote separately on the plan using the same quorum and majority-of-votes-cast standards. This Section increases the vote required for approval of a plan of merger from a majority of votes cast to a majority of the shares entitled to vote. Because the higher voting standard can be achieved only if the quorum requirement of the Model Act is also satisfied, the Model Act's separate reference to a required quorum is eliminated.

§1-1105. Merger between parent and subsidiary or between subsidiaries

A. A domestic parent corporation that owns shares of a domestic or foreign subsidiary corporation that carry at least ninety percent of the voting power of each class and series of the outstanding shares of the subsidiary that have voting power may merge the subsidiary into itself or into another such subsidiary, or merge itself into the subsidiary, without the approval of the board of directors or shareholders of the subsidiary, unless the articles of incorporation of any of the corporations otherwise provide, or unless, in the case of a foreign subsidiary, approval by the subsidiary's board of directors or shareholders is required by the laws under which the subsidiary is organized.

B. If under Subsection A of this Section approval of a merger by the subsidiary's shareholders is not required, the parent corporation shall, within ten days after the effective date of the merger, notify each of the subsidiary's shareholders that the merger has become effective.

C. Except as provided in Subsections A and B of this Section, a merger between a parent and a subsidiary shall be governed by the provisions of Part 11 of this Chapter applicable to mergers generally.

Source: MBCA §11.05.

§1-1106. Articles of merger or share exchange

A. After a plan of merger or share exchange has been adopted and approved as required by this Subpart, articles of merger or share exchange shall be signed on behalf of each party to the merger or share exchange by any officer or other duly authorized representative. The articles shall set forth all of the following:

(1) The names of the parties to the merger or share exchange.

(2) If the articles of incorporation of the survivor of a merger are amended, or if a new corporation is created as a result of a merger, the amendments to the survivor's articles of incorporation or the articles of incorporation of the new corporation.

(3) If the plan of merger or share exchange required approval by the shareholders of a domestic corporation that was a party to the merger or share exchange, a statement that the plan was duly approved by the shareholders and, if voting by any separate voting group was required, by each such separate voting group, in the manner required by this Subpart and the articles of incorporation.

(4) If the plan of merger or share exchange did not require approval by the shareholders of a domestic corporation that was a party to the merger or share exchange, a statement to that effect.

(5) As to each eligible entity or foreign corporation that was a party to the merger or share exchange, a statement that the participation of the eligible entity or foreign corporation was duly authorized as required by the organic law of the eligible entity or corporation.

B. Articles of merger or share exchange shall be delivered to the secretary of state for filing by the survivor of the merger or the acquiring corporation in a share exchange, and shall take effect at the effective time provided in R.S. 12:1-123. Articles of merger or share exchange filed under this Section may be combined with any filing required under the organic law of any domestic eligible entity involved in the transaction if the combined filing satisfies the requirements of both this Section and the other organic law.

C. Within thirty days of the date that articles of merger take effect, a duplicate original or certified copy of the articles shall be filed in the conveyance records of each parish in this state in which any of the parties to the merger has immovable property.

Source: MBCA §11.06.

Comments - 2014 Revision

(a) This Section adds a new Subsection C to the Model Act provision, to retain the rule in prior law that required a parish-level filing of merger documents in those parishes in which one or more parties to the merger owned immovable property. The earlier requirement that the merger documents also be filed in any parish in which any of the merger parties had its registered office has been eliminated.

(b) The duplicate filing requirement in Subsection C of this Section does not apply to articles of share exchange because a share exchange does not change the ownership of immovable property by the parties to the share exchange.

§1-1107. Effect of merger or share exchange

A. When a merger becomes effective, all of the following shall apply:

(1) The corporation or eligible entity that is designated in the plan of merger as the survivor continues or comes into existence, as the case may be.

(2) The separate existence of every corporation or eligible entity that is merged into the survivor ceases.

(3) All property owned by, and every contract right possessed by, each corporation or eligible entity that merges into the survivor is vested in the survivor without any transfer, assignment, reversion or impairment.

(4) All liabilities of each corporation or eligible entity that is merged into the survivor are vested in the survivor.

(5) The name of the survivor may, but need not be, substituted in any pending proceeding for the name of any party to the merger whose separate existence ceased in the merger.

(6) The articles of incorporation or organic documents of the survivor are amended to the extent provided in the plan of merger.

(7) The articles of incorporation or organic documents of a survivor that is created by the merger become effective.

(8) The shares of each corporation that is a party to the merger, and the interests in an eligible entity that is a party to a merger, that are to be converted under the plan of merger into shares, eligible interests, obligations, rights to acquire securities, other securities, or eligible interests, or into cash, other property, or any combination of the foregoing, are converted, and the former holders of such shares or eligible interests are entitled only to the rights provided to them in the plan of merger or to any rights they may have under Part 13 of this Chapter or the organic law of the eligible entity.

(9) The survivor possesses all the rights, licenses, privileges, and franchises possessed by each of the parties to the merger, except that the survivor does not possess any right, license, privilege, or franchise that meets either of the following conditions:

(a) The survivor is ineligible to possess or to exercise.

(b) Does not survive a merger because of a provision to that effect in the law or administrative rules under which the right, license, privilege, or franchise is held at the time of the merger.

B. When a share exchange becomes effective, the shares of each domestic corporation that are to be exchanged for shares or other securities, eligible interests, obligations, rights to acquire shares, other securities. or eligible interests, or for cash, other property, or any combination of the foregoing, are entitled only to the rights provided to them in the plan of share exchange or to any rights they may have under Part 13 of this Chapter.

C. A person who becomes subject to owner liability for some or all of the debts, obligations, or liabilities of any entity as a result of a merger or share exchange shall have owner liability only to the extent provided in the organic law of the entity and only for those debts, obligations, and liabilities that arise after the effective time of the articles of merger or share exchange.

D. Upon a merger becoming effective, a foreign corporation, or a foreign eligible entity, that is the survivor of the merger remains both of the following:

(1) Obligated under the laws of this state to pay promptly the amount, if any, to which shareholders of each domestic corporation who exercise appraisal rights are entitled under Part 13 of this Chapter.

(2) Subject to the personal jurisdiction of the courts of this state in accordance with R.S. 13:3201, and to service of process in accordance with law.

E. The effect of a merger or share exchange on the owner liability of a person who had owner liability for some or all of the debts, obligations, or liabilities of a party to the merger or share exchange shall be as follows:

(1) The merger or share exchange does not discharge any owner liability under the organic law of the entity in which the person was a shareholder or interest holder to the extent any such owner liability arose before the effective time of the articles of merger or share exchange.

(2) The person shall not have owner liability under the organic law of the entity in which the person was a shareholder or interest holder prior to the merger or share exchange for any debt, obligation, or liability that arises after the effective time of the articles of merger or share exchange.

(3) The provisions of the organic law of any entity for which the person had owner liability before the merger or share exchange shall continue to apply to the collection or discharge of any owner liability preserved by Paragraph (E)(1) of this Section, as if the merger or share exchange had not occurred.

(4) The person shall have whatever rights of contribution from other persons are provided by the organic law of the entity for which the person had owner liability with respect to any owner liability preserved by Paragraph (E)(1) of this Section, as if the merger or share exchange had not occurred.

F. For purposes of service of process under Paragraph (D)(2) of this Section, a foreign eligible entity that is a survivor of a merger may be served in accordance

with the rules applicable to service of process on a foreign corporation, as if both of the following conditions exist:

(1) The survivor were a foreign corporation.

(2) Each of following persons were a director of that corporation:

(a) A general partner if the survivor is a partnership of any kind.

(b) A member if the survivor is a member-managed limited liability company.

(c) A manager if the survivor is a manager-managed limited liability company.

(d) A person holding managerial authority in the survivor, regardless of the form of the surviving entity, that is similar to that of an officer or director of a domestic business corporation.

Source: MBCA §11.07.

Comments - 2014 Revision

(a) This Section adds a new Paragraph (9) to Subsection A of this Section to retain the rule in prior law that the survivor of a merger holds all of the rights, privileges and franchises held by each of the parties to the merger. Prior law restricted the operation of the rule to those objects or functions for which a domestic business corporation could be formed. Because the survivor of a merger under this Section may be something other than a domestic corporation, and because the prior limitation did not yield even to contrary provision in the controlling licensing laws, the limitation of the rule in Paragraph (A)(9) of this Section has been broadened in this Section from that in prior law. Under the broader limitation, the survivor does not possess the rights and licenses of the merging parties under two circumstances: (1) the survivor would be ineligible to hold the right or license or (2) the licensing or regulatory law applicable to the activity or business in question precludes the right or license from surviving a merger. Hence, as a general matter, Paragraph (A)(9) of this Section is designed to let the survivor of a merger continue to operate all of the businesses that were engaged in by the merging parties before the merger, without triggering the need for new license applications or approvals merely because the licensing or regulatory body may deem the survivor of the merger not to be the same legal person as the merged company. A survivor becomes a licensee through a merger with a licensed party not by means of transfer but by operation of law, subject only to the exceptions stated in Paragraph (A)(9) of this Section. The exceptions in Paragraph (A)(9) of this Section are designed not to permit a merger party that would be ineligible for a particular form of license or franchise to acquire one through a merger (as in a merger between a bank and an ordinary business corporation in which the business corporation survived and claimed the right to operate a bank), and to yield to more specific provisions on the subject that may exist in a given licensing or regulatory scheme.

(b) Model Act Paragraph (d)(1) provides that a foreign survivor of a merger is deemed to appoint the secretary of state as its agent for service of process in a proceeding to enforce the appraisal rights of shareholders of any domestic

corporations that were parties to the merger. Because service on the secretary of state is a last-resort mechanism for serving foreign entities under Louisiana law, this Section modifies Paragraph (d)(1) to say simply that service of process may be carried out in accordance with law. The Code of Civil Procedure, supplemented by reference to provisions of the long arm statute, R.S. 13:3201-3207, provides the rules for service of process. The rules for domestic and foreign corporations are stated in Arts. 1261 and 1262, for partnerships in Art. 1263, for unincorporated associations in Art. 1264, and for domestic and foreign limited liability companies in Arts. 1266 and 1267.

(c) The rules in the Code of Civil Procedure for service of process on foreign entities are well-developed and similar with respect to corporations and limited liability companies. The partnership and unincorporated association rules, however, are more abbreviated and may not apply or work as well as the corporate rules would work in dealing with foreign partnerships and other foreign entities that do not fit well into any of the listed categories of organizations. This Section addresses those problems in the context of appraisal rights suits by adding a new Subsection F. Subsection F of this Section provides that, for purposes of service under Paragraph (D)(1) of this Section, all foreign eligible entities are treated as foreign corporations, and those who hold managerial authority in a foreign eligible entity comparable to that of a corporate officer or director are treated as directors. Combining the rules in Subsection F of this Section with those in Code of Civil Procedure Arts. 1261 and 1262, all forms of foreign eligible entities may be served process in a suit to enforce appraisal rights through personal service on a registered agent of the entity or, if no registered agent can be served, then by personal service on any of the directors or director-like participants in the organization or on an entity employee of suitable age and discretion at any place where the foreign eligible entity regularly does business, or by service, typically by registered or certified mail, in accordance with the long arm statute or, finally, failing all those other efforts, by service on the secretary of state.

§1-1108. Abandonment of a merger or share exchange

A. Unless otherwise provided in a plan of merger or share exchange or in the laws under which an eligible entity or foreign business corporation that is a party to a merger or a share exchange is organized or by which it is governed, after the plan has been adopted and approved as required by this Part, and at any time before the merger or share exchange has become effective, it may be abandoned by a domestic business corporation that is a party thereto without action by its shareholders in accordance with any procedures set forth in the plan of merger or share exchange or, if no such procedures are set forth in the plan, in the manner determined by the board of directors, subject to any contractual rights of other parties to the merger or share exchange.

B. If a merger or share exchange is abandoned under Subsection A of this Section after articles of merger or share exchange have been filed with the secretary of state but before the merger or share exchange has become effective, a statement

that the merger or share exchange has been abandoned in accordance with this Section, signed on behalf of a party to the merger or share exchange by an officer or other duly authorized representative, shall be delivered to the secretary of state for filing prior to the effective date of the merger or share exchange. Upon filing, the statement shall take effect and the merger or share exchange shall be deemed abandoned and shall not become effective.

Source: MBCA §11.08.

PART 12. DISPOSITION OF ASSETS

§1-1201. Disposition of assets not requiring shareholder approval

No approval of the shareholders of a corporation is required for any of the following actions, unless the articles of incorporation otherwise provide:

(1) To sell, lease, exchange, or otherwise dispose of any or all of the corporation's assets in the usual and regular course of business.

(2) To mortgage, pledge, dedicate to the repayment of indebtedness, whether with or without recourse, or otherwise encumber any or all of the corporation's assets, whether or not in the usual and regular course of business,

(3) To transfer any or all of the corporation's assets to one or more corporations or other entities all of the shares or interests of which are owned by the corporation,

(4) To distribute assets pro rata to the holders of one or more classes or series of the corporation's shares, provided that the distribution does not violate the rights of any class or series of shares.

Source: MBCA §12.01.

Comment - 2014 Revision

This Section adds a requirement to the rule in Model Act Paragraph (4) that the distribution be made without violating the rights of any class or series of shares.

§1-1202. Shareholder approval of certain dispositions

A. A sale, lease, exchange, or other disposition of assets, other than a disposition described in R.S. 12:1-1201, requires approval of the corporation's shareholders if the disposition would leave the corporation without a significant

continuing business activity. If a corporation retains a business activity that represented at least twenty-five percent of total assets at the end of the most recently completed fiscal year, and twenty-five percent of either income from continuing operations before taxes or revenues from continuing operations for that fiscal year, in each case of the corporation and its subsidiaries on a consolidated basis, the corporation will conclusively be deemed to have retained a significant continuing business activity.

B. A disposition that requires approval of the shareholders under Subsection A of this Section shall be initiated by a resolution by the board of directors authorizing the disposition. After adoption of such a resolution, the board of directors shall submit the proposed disposition to the shareholders for their approval. The board of directors shall also transmit to the shareholders a recommendation that the shareholders approve the proposed disposition, unless the board of directors makes a determination that because of conflicts of interest or other special circumstances it should not make such a recommendation, or R.S. 12:1-826 applies. If the board of directors makes such a determination or R.S. 12:1-826 applies, the board of directors shall transmit to the shareholders the basis for so proceeding.

C. The board of directors may condition its submission of a disposition to the shareholders under Subsection B of this Section on any basis.

D. If a disposition is required to be approved by the shareholders under Subsection A of this Section, and if the approval is to be given at a meeting, the corporation shall notify each shareholder, whether or not entitled to vote, of the meeting of shareholders at which the disposition is to be submitted for approval. The notice shall state that the purpose, or one of the purposes, of the meeting is to consider the disposition and shall contain a description of the disposition, including the terms and conditions thereof and the consideration to be received by the corporation.

E. Unless the articles of incorporation or the board of directors acting pursuant to Subsection C of this Section requires a greater vote, the approval of a

disposition by the shareholders shall require the approval of at least a majority of the votes entitled to be cast on the disposition.

F. After a disposition has been approved by the shareholders under Subsection B of this Section, and at any time before the disposition has been consummated, it may be abandoned by the corporation without action by the shareholders, subject to any contractual rights of other parties to the disposition.

G. A disposition of assets in the course of dissolution under Part 14 of this Chapter is not governed by this Section.

H. The assets of a direct or indirect consolidated subsidiary shall be deemed the assets of the parent corporation for the purposes of this Section.

Source: MBCA §12.02.

Comment - 2014 Revision

This Section modifies Model Act Subsection (e) to increase the vote required to approve a covered disposition of assets from a majority of the votes cast at a meeting with at least a majority quorum to a majority of all votes entitled to be cast.

PART 13. APPRAISAL RIGHTS

SUBPART A. RIGHT TO APPRAISAL AND PAYMENT FOR SHARES

§1-1301. Definitions

In this Part, the following meanings shall apply:

(1) "Affiliate" means a person that directly or indirectly through one or more intermediaries controls, is controlled by, or is under common control with another person or is a senior executive thereof. For purposes of R.S. 12:1-1302(B)(4), an entity is deemed to be an affiliate of its senior executives.

(2) "Beneficial owner" means any person who, directly or indirectly, through any contract, arrangement, or understanding, other than a revocable proxy, has or shares the power to vote, or to direct the voting of, shares; except that a member of a national securities exchange is not deemed to be a beneficial owner of securities held directly or indirectly by it on behalf of another person solely because the member is the record holder of the securities if the member is precluded by the rules of the exchange from voting without instruction on contested matters or matters that

may affect substantially the rights or privileges of the holders of the securities to be voted. When two or more persons agree to act together for the purpose of voting their shares of the corporation, each member of the group formed thereby is deemed to have acquired beneficial ownership, as of the date of the agreement, of all voting shares of the corporation beneficially owned by any member of the group.

(3) "Corporation" means the issuer of the shares held by a shareholder demanding appraisal and, for matters covered in R.S. 12:1-1322 through 1-1331, includes the surviving entity in a merger.

(3.1) "Excluded shares" means shares acquired pursuant to an offer for all shares having voting power if the offer was made within one year prior to the corporate action for consideration of the same kind and of a value equal to or less than that paid in connection with the corporate action.

(4) "Fair value" means the value of the corporation's shares determined immediately before the effectuation of the corporate action to which the shareholder objects, using customary and current valuation concepts and techniques generally employed for similar businesses in the context of the transaction requiring appraisal, and without discounting for lack of marketability or minority status except, if appropriate, for amendments to the articles pursuant to R.S. 12:1-1302(A)(5).

(5) "Interest" means interest from the effective date of the corporate action until the date of payment, at the rate of judicial interest.

(5.1) "Interested person" means a person, or an affiliate of a person, who at any time during the one-year period immediately preceding approval by the board of directors of the corporate action, satisfies one of the following criteria:

(a) Was the beneficial owner of twenty percent or more of the voting power of the corporation, other than as owner of excluded shares.

(b) Had the power, contractually or otherwise, other than as owner of excluded shares, to cause the appointment or election of twenty-five percent or more of the directors to the board of directors of the corporation.

(c) Was a senior executive or director of the corporation or a senior executive of any affiliate thereof, and that senior executive or director will receive, as a result of the corporate action, a financial benefit not generally available to other shareholders as such, other than any of the following:

(i) Employment, consulting, retirement, or similar benefits established separately and not as part of or in contemplation of the corporate action.

(ii) Employment, consulting, retirement, or similar benefits established in contemplation of, or as part of, the corporate action that are not more favorable than those existing before the corporate action or, if more favorable, that have been approved on behalf of the corporation in the same manner as is provided in R.S. 12:1-862.

(iii) In the case of a director of the corporation who will, in the corporate action, become a director of the acquiring entity in the corporate action or one of its affiliates, rights and benefits as a director that are provided on the same basis as those afforded by the acquiring entity generally to other directors of such entity or such affiliate.

(5.2) "Interested transaction" means a corporate action described in R.S. 12:1-1302(A) involving an interested person in which any of the shares or assets of the corporation are being acquired or converted.

(6) "Preferred shares" means a class or series of shares whose holders have preference over any other class or series with respect to distributions.

(7) [Reserved.]

(8) "Senior executive" means the chief executive officer, chief operating officer, chief financial officer, and anyone in charge of a principal business unit or function.

(9) "Shareholder" means a record shareholder, a beneficial shareholder, and a voting trust beneficial owner.

Source: MBCA §13.01

Comment - 2014 Revision

The Model Act excludes so-called "short form mergers" from its definition of "interested transaction" in Paragraph (5.2) of this Section. A short form merger is a merger that is carried out between a ninety percent or greater parent company and one or more of its subsidiaries, or among one or more ninety-percent-or-greater subsidiaries of the same parent. See Subsection 11.05(a). The merger is called "short form" because it may be carried out without the approval of either the board or shareholders of the subsidiary. Id. The purpose of the "interested transaction" definition is to prevent the defined transaction from qualifying for the so-called "market out" exception that makes appraisal rights unavailable in transactions in which they would otherwise be provided.

This Section removes the exclusion of short form mergers from the definition of "interested transaction" so that short form mergers may be treated as "interested transactions" in the same way as ordinary mergers if they otherwise fit the definition in Paragraph (5.2) of this Section. The effect is to make appraisal rights available, and the market out exception unavailable, in a short form mergers that qualifies as an interested transaction.

The Model Act's removal of short form mergers from the definition of an interested transaction is puzzling because a short form merger is one of the clearest examples imaginable of a conflicting-interest transaction. It allows a parent company to dictate unilaterally to a ninety-percent subsidiary the terms under which a merger with the subsidiary will occur, without even the formality of an approving vote by the subsidiary's board or shareholders.

The only setting in which a market-out exception for a short-term merger or, indeed, for any parent-subsidiary merger, is justified is in a two-step cash, or public-shares, transaction in which the terms are set by market forces in the first step, and then carried through to the second step short-form merger as well. A typical example would be an unrelated acquirer making an all-shares cash tender offer that resulted in the acquisition of at least a majority of the target's shares, followed soon thereafter by a second-step merger at the same price, paid in cash, as that provided in the tender offer. In that kind of transaction, the usual justifications for the market out exception, i.e., liquidity and a market-set price, are met.

But the Model Act deals with that form of transaction elsewhere, through more narrowly-tailored provisions. In general, without the exception for short form mergers that this Section rejects, a parent company is an interested person because it owns twenty percent or more of the subsidiary's shares. See Model Act Item 13.01(5.1)(i)(A). However, in calculating the percentage of shares owned by the parent, so-called "excluded shares" are not counted. Excluded shares are shares that are acquired in an all-shares offer within one year of the date of a merger, as long as the merger terms provide at least the same price, paid in the same form, as offered in the first-step deal. See Subparagraph (3.1) of this Section. Hence, a bidder that acquired control of a target through a first-stage cash tender offer would not be treated as an interested person in a second-stage merger (whether short form or ordinary), as long as the merger occurred within a year and on the same terms as the tender offer. Note, however, that two-step management buyout could not use the excluded share concept to avoid being treated as an "interested transaction." Another provision, Item (5.1)(i)(C), would independently cause that kind of transaction to be treated as an "interested transaction" if the transaction otherwise fit the terms of that provision.

Because the "excluded shares" definition deals appropriately with the kinds of mergers in which the market out exception should apply, this Section rejects the

general exception for short form mergers provided by the Model Act in Subsection (5.2) of this Section.

§1-1302. Right to appraisal

A. A shareholder is entitled to appraisal rights, and to obtain payment of the fair value of that shareholder's shares, in the event of any of the following corporate actions:

(1) Consummation of a merger to which the corporation is a party if shareholder approval is required for the merger by R.S. 12:1-1104, except that appraisal rights shall not be available to any shareholder of the corporation with respect to shares of any class or series that remain outstanding after consummation of the merger, or if the corporation is a subsidiary and the merger is governed by R.S. 12:1-1105.

(2) Consummation of a share exchange to which the corporation is a party as the corporation whose shares will be acquired, except that appraisal rights shall not be available to any shareholder of the corporation with respect to any class or series of shares of the corporation that is not exchanged.

(3) Consummation of a disposition of assets pursuant to R.S. 12:1-1202, except that appraisal rights shall not be available to any shareholder of the corporation with respect to shares of any class or series if, under the terms of the corporate action approved by the shareholders, there is to be distributed to shareholders in cash its net assets in excess of a reasonable amount reserved to meet claims of the type described in R.S. 12:1-1406 and 1-1407, within one year after the shareholders' approval of the action and in accordance with their respective interests determined at the time of distribution, and the disposition of assets is not an interested transaction.

(4) An amendment of the articles of incorporation with respect to a class or series of shares that reduces the number of shares of a class or series owned by the shareholder to a fraction of a share if the corporation has the obligation or right to repurchase the fractional share so created.

(5) Any other amendment to the articles of incorporation, merger, share exchange, or disposition of assets to the extent provided by the articles of incorporation, bylaws, or a resolution of the board of directors.

(6) Consummation of a domestication if the shareholder does not receive shares in the foreign corporation resulting from the domestication that have terms as favorable to the shareholder in all material respects, and represent at least the same percentage interest of the total voting rights of the outstanding shares of the corporation, as the shares held by the shareholder before the domestication,

(7) Consummation of a conversion of the corporation to nonprofit status pursuant to Subpart 9C of this Part.

(8) Consummation of a conversion of the corporation to an unincorporated entity pursuant to Subpart 9E of this Part.

B. Notwithstanding Subsection A of this Section, the availability of appraisal rights under Paragraphs (A)(1), (2), (3), (4), (6), and (8) of this Section shall be limited in accordance with the following provisions:

(1) Appraisal rights shall not be available for the holders of shares of any class or series of shares which is one of the following:

(a) A covered security under Section 18(b)(1)(A) or (B) of the Securities Act of 1933, as amended.

(b) Traded in an organized market and has at least two thousand shareholders and a market value of at least twenty million dollars, exclusive of the value of such shares held by the corporation's subsidiaries, senior executives, and directors and by beneficial shareholders and voting trust beneficial owners owning more than ten percent of such shares.

(c) Issued by an open end management investment company registered with the Securities and Exchange Commission under the Investment Company Act of 1940 and may be redeemed at the option of the holder at net asset value.

(2) The applicability of Paragraph (B)(1) of this Section shall be determined as of either of the following:

(a) The record date fixed to determine the shareholders entitled to receive notice of the meeting of shareholders to act upon the corporate action requiring appraisal rights.

(b) The day before the effective date of such corporate action if there is no meeting of shareholders.

(3) Paragraph (B)(1) of this Section shall not be applicable and appraisal rights shall be available pursuant to Subsection A of this Section for the holders of any class or series of shares who are required by the terms of the corporate action requiring appraisal rights to accept for such shares anything other than cash or shares of any class or any series of shares of any corporation, or any other proprietary interest of any other entity, that satisfies the standards set forth in Paragraph (B)(1) of this Section at the time the corporate action becomes effective or, in the case of the consummation of a disposition of assets pursuant to R.S. 12:1-1202, unless such cash, shares, or proprietary interests are, under the terms of the corporate action approved by the shareholders, to be distributed to the shareholders as part of a distribution to shareholders of the net assets of the corporation in excess of a reasonable amount to meet claims of the type described in R.S. 12:1-1406 and 1-1407, within one year after the shareholders' approval of the action and in accordance with their respective interests determined at the time of the distribution.

(4) Paragraph (B)(1) of this Section shall not be applicable and appraisal rights shall be available pursuant to Subsection A of this Section for the holders of any class or series of shares where the corporate action is an interested transaction.

C. Notwithstanding any other provision of this Section, the articles of incorporation as originally filed or any amendment thereto may limit or eliminate appraisal rights for any class or series of preferred shares, except for both of the following:

(1) No such limitation or elimination shall be effective if the class or series does not have the right to vote separately as a voting group, alone or as part of a group, on the action or if the action is a nonprofit conversion under Subpart 9C of

this Part or a conversion to an unincorporated entity under Subpart 9E of this Part, or a merger having a similar effect.

(2) Any such limitation or elimination contained in an amendment to the articles of incorporation that limits or eliminates appraisal rights for any of such shares that are outstanding immediately prior to the effective date of such amendment or that the corporation is or may be required to issue or sell thereafter pursuant to any conversion, exchange, or other right existing immediately before the effective date of such amendment shall not apply to any corporate action that becomes effective within one year of that date if such action would otherwise afford appraisal rights.

Source: MBCA §13.02.

§1-1303. Assertion of rights by nominees and beneficial shareholders

A. A record shareholder may assert appraisal rights as to fewer than all the shares registered in the record shareholder's name but owned by a beneficial shareholder or a voting trust beneficial owner only if the record shareholder objects with respect to all shares of the class or series owned by the beneficial shareholder or the voting trust beneficial owner and notifies the corporation in writing of the name and address of each beneficial shareholder or voting trust beneficial owner on whose behalf appraisal rights are being asserted. The rights of a record shareholder who asserts appraisal rights for only part of the shares held of record in the record shareholder's name under this Subsection shall be determined as if the shares as to which the record shareholder objects and the record shareholder's other shares were registered in the names of different record shareholders.

B. A beneficial shareholder and voting trust beneficial owner may assert appraisal rights as to shares of any class or series held on behalf of the shareholder only if such shareholder submits to the corporation the record shareholder's written consent to the assertion of such rights no later than the date referred to in R.S. 12:1-1322(B)(2)(b), and does so with respect to all shares of the class or series that are beneficially owned by the beneficial shareholder or voting trust beneficial owner.

Source: MBCA §13.03.

SUBPART B. PROCEDURE FOR EXERCISE OF APPRAISAL RIGHTS

§1-1320. Notice of appraisal rights

A. Where any corporate action specified in R.S. 12:1-1302(A) is to be submitted to a vote at a shareholders' meeting, the meeting notice must state that the corporation has concluded that the shareholders are, are not, or may be entitled to assert appraisal rights under this Part. If the corporation concludes that appraisal rights are or may be available, the following statement shall be included in the meeting notice sent to those record shareholders entitled to exercise appraisal rights:

"Appraisal rights allow a shareholder to avoid the effects of the proposed corporate action described in this notice by selling the shareholder's shares to the corporation at their fair value, paid in cash. To retain the right to assert appraisal rights, a shareholder is required by law: (1) to deliver to the corporation, before the vote is taken on the action described in this notice, a written notice of the shareholder's intent to demand appraisal if the corporate action proposed in this notice takes effect, and (2) not to vote, or cause or permit to be voted, in favor of the proposed corporate action any shares of the class or series for which the shareholder intends to assert appraisal rights. If a shareholder complies with those requirements, and the action proposed in this notice takes effect, the law requires the corporation to send to the shareholder an appraisal form that the shareholder must complete and return, and a copy of Part 13 of the Business Corporation Act, governing appraisal rights".

B. In a merger pursuant to R.S. 12:1-1105, the parent corporation must notify in writing all record shareholders of the subsidiary who are entitled to assert appraisal rights that the corporate action became effective. Such notice must be sent within ten days after the corporate action became effective and include the materials described in R.S. 12:1-1322.

C. Where any corporate action specified in R.S. 12:1-1302(A) is to be approved by written consent of the shareholders pursuant to R.S. 12:1-704.

(1) Written notice that appraisal rights are, are not, or may be available must be sent to each record shareholder from whom a consent is solicited at the time consent of such shareholder is first solicited and, if the corporation has concluded that appraisal rights are or may be available, the following statement must be included in the notice:

"Appraisal rights allow a shareholder to avoid the effects of the proposed corporate action described in this notice by selling the shareholder's shares to the corporation at their fair value, paid in cash. To retain the right to assert appraisal rights, a shareholder is required by law not to sign any consent in favor of the proposed corporate action with respect to any shares of the class or series for which the shareholder intends to assert appraisal rights. If a shareholder complies with this requirement, and the corporate action proposed in this notice takes effect, the law requires the corporation to send to the shareholder an appraisal form that the shareholder must complete and return, and a copy of Part 13 of the Business Corporation Act, governing appraisal rights".

(2) Written notice that appraisal rights are, are not, or may be available must be delivered together with the notice to nonconsenting and nonvoting shareholders required by R.S. 12:1-704(E) and (F), may include the materials described in R.S. 12:1-1322 and, if the corporation has concluded that appraisal rights are or may be available, must be accompanied by a copy of this Part and the following statement:

"Appraisal rights allow a shareholder to avoid the effects of the corporate action described in this notice by selling the shareholder's shares to the corporation at their fair value, paid in cash. A shareholder may obtain appraisal rights only by completing and returning an appraisal form that the law requires the corporation to send to the shareholder, and by complying with all other requirements of Part 13 of the Business Corporation Act, a copy of which is enclosed".

D. Where corporate action described in R.S. 12:1-1302(A) is proposed, or a merger pursuant to R.S. 12:1-1105 is effected, the notice referred to in Subsection A or C of this Section, if the corporation concludes that appraisal rights are or may be available, and in Subsection B of this Section shall be accompanied by both of the following:

(1) The annual financial statements specified in R.S. 12:1-1620(B) of the corporation that issued the shares that may be subject to appraisal, which shall be as of a date ending not more than sixteen months before the date of the notice and shall comply with R.S. 12: 1-1620(B); provided that, if such annual financial statements are not reasonably available, the corporation shall provide reasonably equivalent financial information.

(2) The latest available quarterly financial statements of such corporation, if any.

E. The right to receive the information described in Subsection D of this Section may be waived in writing by a shareholder before or after the corporate action. If the information described in Subsection D of this Section is not publicly available, the shareholder who receives it owes a duty to the corporation to use and disclose the information only for purposes of deciding whether to exercise appraisal rights and for other proper purposes.

Source: MBCA §13.20.

Comments - 2014 Revision

(a) The Model Act requires the corporation to send a copy of Part 13 of the Business Corporation Act along with the initial notice of a meeting or other shareholder action that may give rise to appraisal rights. This Section replaces that requirement with a shorter, statutorily-specified form of notice that apprises the shareholders of the information most relevant to the stage of the transaction at which they receive the notice. This Section requires the sending of the complete Part only when the corporation sends the appraisal form under R.S. 12:1-1322 or when it is sending a notice to nonconsenting and nonvoting shareholders under R.S. 12:1-704 that an appraisal-triggering action has already been approved by the written consent of shareholders. See R.S. 12:1-1322(B)(3) and 1-1320(C)(2).

(b) This Section adds a sentence to Subsection E of this Section that imposes a duty on a shareholder who receives the financial information specified in Subsection D of this Section to use that information for proper purposes only.

§1-1321. Notice of intent to demand appraisal and consequences of voting or consenting

A. If a corporate action specified in R.S. 12:1-1302(A) is submitted to a vote at a shareholders' meeting, a shareholder who wishes to assert appraisal rights with respect to any class or series of shares must do both of the following:

(1) Deliver to the corporation, before the vote is taken, written notice of the shareholder's intent to demand appraisal if the proposed action is effectuated

(2) Not vote, or cause or permit to be voted, any shares of such class or series in favor of the proposed action.

B. If a corporate action specified in R.S. 12:1-1302(A) is to be approved by written consent, a shareholder may assert appraisal rights with respect to a class or series of shares only if the shareholder does not sign a consent in favor of the proposed action with respect to that class or series of shares.

C. A shareholder who fails to satisfy the requirements of Subsection A or B of this Section is not entitled to appraisal under this Part.

Source: MBCA §13.21.

Comments - 2014 Revision

(a) The Model Act references to "payment" in the caption of this Section and in Paragraph (A)(1) and Subsection C of this Section have been replaced with the term "appraisal" to avoid possible confusion between the payment that may be available through appraisal rights and the payment being offered under the terms of the transaction with respect to which the appraisal rights are being asserted.

(b) This Section modifies the Model Act language in Subsection B of this Section to make it clear that a shareholder is not entitled to exercise appraisal rights with respect to a class or series of shares if the shareholder has signed a consent with respect to the relevant shares in a transaction that is approved by the written consent of shareholders.

§1-1322. Appraisal notice and form

A. If a corporate action requiring appraisal rights under R.S. 12:1-1302(A) becomes effective, the corporation must send a written appraisal notice and the form required by Paragraph (B)(1) of this Section to all shareholders who satisfy the requirements of R.S. 12:1-1321(A) or R.S. 12:1-1321(B). In the case of a merger under R.S. 12:1-1105, the parent must deliver an appraisal notice and form to all record shareholders who may be entitled to assert appraisal rights.

B. The appraisal notice must be delivered no earlier than the date the corporate action specified in R.S. 12:1-1302(A) became effective, and no later than ten days after such date, and must do all of the following:

(1) Supply a form that requires the shareholder asserting appraisal rights to certify that such shareholder did not vote for or consent to the transaction.

(2) State all of the following:

(a) Where the form must be sent and where certificates for certificated shares must be deposited and the date by which those certificates must be deposited, which date may not be earlier than the date for receiving the required form under Subparagraph (B)(2)(b) of this Section.

(b) A date by which the corporation must receive the form, which date may not be fewer than forty nor more than sixty days after the date the appraisal notice

is sent pursuant to Subsection A of this Section, and state that the shareholder shall have waived the right to demand appraisal with respect to the shares unless the form is received by the corporation by such specified date.

(c) The corporation's estimate of the fair value of the shares.

(d) That, if requested in writing, the corporation will provide, to the shareholder so requesting, within ten days after the date specified in Subparagraph (B)(2)(b) of this Section the number of shareholders who return the forms by the specified date and the total number of shares owned by them.

(e) The date by which the notice to withdraw under R.S. 12:1-1323 must be received, which date must be at least twenty days after the date specified in Subparagraph (B)(2)(b) of this Section.

(3) Be accompanied by a copy of this Part.

C. A corporation may elect to withhold payment as permitted by R.S. 12:1-1325 only if the form required by Subsection B of this Section does both of the following:

(1) Specifies the first date of any announcement to shareholders made prior to the date the corporate action became effective of the principal terms of the proposed corporate action.

(2) If such announcement was made, requires the shareholder asserting appraisal rights to certify whether beneficial ownership of those shares for which appraisal rights are asserted was acquired before that date.

Source: MBCA §13.22.

Comment - 2014 Revision

Model Act Paragraph (b)(1) requires all notices of appraisal to include "announcement date" information concerning the transaction with respect to which a shareholder is demanding appraisal rights, and to require certifications from the shareholder that the relevant shares were acquired before that date. Those items are relevant only where the corporation wishes to exercise its right not to make an immediate payment for so-called "after acquired" shares under R.S. 12:1-1324 and 1-1325. Because the after-acquired shares issue is irrelevant to most closely-held corporations, this Section moves the announcement and acquisition date items from the general rules in Paragraph (B)(1) of this Section to a new Subsection C of this Section. The notice required by Subsection B of this Section need not include the items covered by new Subsection C of this Section unless the corporation wishes to preserve its right to withhold an immediate payment for after-acquired shares,

something that is likely to be relevant only where an active trading market exists for the corporation's shares.

§1-1323. Perfection of rights and right to withdraw

A. A shareholder who receives notice pursuant to R.S. 12:1-1322 and who wishes to exercise appraisal rights must sign and return the form sent by the corporation and, in the case of certificated shares, deposit the shareholder's certificates in accordance with the terms of the notice by the date referred to in the notice pursuant to R.S. 12:1-1322(B)(2)(b). In addition, if applicable, the shareholder must certify on the form whether the beneficial owner of such shares acquired beneficial ownership of the shares before the date required to be set forth in the notice pursuant to R.S. 12:1-1322(B)(1). If a shareholder fails to make this certification, the corporation may elect to treat the shareholder's shares as after-acquired shares under R.S. 12:1-1325. Once a shareholder deposits that shareholder's certificates or, in the case of uncertificated shares, returns the signed forms, that shareholder loses all rights as a shareholder, unless the shareholder withdraws pursuant to Subsection B of this Section.

B. A shareholder who has complied with Subsection A of this Section may nevertheless decline to exercise appraisal rights and withdraw from the appraisal process by so notifying the corporation in writing by the date set forth in the appraisal notice pursuant to R.S. 12:1-1322(B)(2)(e). A shareholder who fails to so withdraw from the appraisal process may not thereafter withdraw without the corporation's written consent.

C. A shareholder who does not sign and return the form and, in the case of certificated shares, deposit that shareholder's share certificates where required, each by the date set forth in the notice described in R.S. 12:1-1322(B), shall not be entitled to payment under this Part.

Source: MBCA §13.23.

§1-1324. Payment

A. Except as provided in R.S. 12:1-1325, within thirty days after the form required by R.S. 12:1-1322(B)(2)(b) is due, the corporation shall pay in cash to those shareholders who complied with R.S. 12:1-1323(A) the amount the corporation estimates to be the fair value of their shares, plus interest.

B. Except as provided in Subsection C of this Section, the payment to each shareholder pursuant to Subsection A of this Section must be accompanied by all of the following:

(1)(a) The annual financial statements specified in R.S. 12:1-1620(B) of the corporation that issued the shares to be appraised, which shall be of a date ending not more than sixteen months before the date of payment and shall comply with R.S. 12:1-1620(B); provided that, if such annual financial statements are not reasonably available, the corporation shall provide reasonably equivalent financial information.

(b) The latest available quarterly financial statements of such corporation, if any.

(2) A statement of the corporation's estimate of the fair value of the shares, which estimate must equal or exceed the corporation's estimate given pursuant to R.S. 12:1-1322(B)(2)(c);

(3) A statement that shareholders described in Subsection A of this Section have the right to demand further payment under R.S. 12:1-1326 and that if any such shareholder does not do so within the time period specified therein, such shareholder shall be deemed to have accepted such payment in full satisfaction of the corporation's obligations under this Part.

C. The financial information described in Paragraph (B)(1) of this Section need not accompany the corporation's payment under Subsection A of this Section if the corporation has earlier delivered to the shareholder financial information that meets the requirements of Paragraph (B)(1) of this Section as of the time of the payment.

Source: MBCA §13.24.

Comments - 2014 Revision

This Section adds a new Subsection C that allows a corporation to avoid duplicative deliveries of financial information. R.S. 12:1-1320(D) requires the notice of appraisal rights to be accompanied by the same financial statements as those required under Subsection B of this Section in connection with the corporation's payment of the amount it estimates as the fair value of the shares. Under new Subsection C of this Section, the second delivery of financial statements is excused if the statements sent earlier still meet the requirements of Subsection B. of this Section. A second delivery of annual financial statements or their equivalents would be required only if enough time had passed between the notice of appraisal under R.S. 12:1-1320 and the payment under this Section to cause the earlier-delivered financial statements no longer to meet the requirement that they be stated as of a date ending not more than sixteen months before the date of the payment. The elimination of the duplicate delivery requirement does not affect the discovery rights of a shareholder in an action to enforce the shareholder's appraisal rights.

§1-1325. After-acquired shares

A. A corporation may elect to withhold payment required by R.S. 12:1-1324 from any shareholder who was required to, but did not, certify that beneficial ownership of all of the shareholder's shares for which appraisal rights are asserted was acquired before the date specified in the appraisal notice sent in accordance with R.S. 12:1-1322(B)(1) and R.S. 12:1-1322(C).

B. If the corporation elects to withhold payment under Subsection A of this Section, it must, within thirty days after the form required by R.S. 12:1-1322(B)(2)(b) is due, notify all shareholders who are described in Subsection A of this Section of all of the following:

(1) The information required by R.S. 12:1-1324(B)(1).

(2) The corporation's estimate of fair value pursuant to R.S. 12:1-1324(B)(2).

(3) That they may accept the corporation's estimate of fair value, plus interest, in full satisfaction of their demands or demand appraisal under R.S. 12:1-1326.

(4) That those shareholders who wish to accept such offer must so notify the corporation of their acceptance of the corporation's offer within thirty days after receiving the offer.

(5) That those shareholders who do not satisfy the requirements for demanding appraisal under R.S. 12:1-1326 shall be deemed to have accepted the corporation's offer.

C. Within ten days after receiving the shareholder's acceptance pursuant to Subsection B of this Section, the corporation must pay in cash the amount it offered under Paragraph (B)(2) of this Section to each shareholder who agreed to accept the corporation's offer in full satisfaction of the shareholder's demand.

D. Within forty days after sending the notice described in Subsection B of this Section, the corporation must pay in cash the amount it offered to pay under Paragraph (B)(2) of this Section to each shareholder described in Paragraph (B)(5) of this Section.

Source: MBCA §13.25.

§1-1326. Procedure if shareholder dissatisfied with payment or offer

A. A shareholder paid pursuant to R.S. 12:1-1324 who is dissatisfied with the amount of the payment must notify the corporation in writing of that shareholder's estimate of the fair value of the shares and demand payment of that estimate plus interest, less any payment under R.S. 12:1-1324. A shareholder offered payment under R.S. 12:1-1325 who is dissatisfied with that offer must reject the offer and demand payment of the shareholder's stated estimate of the fair value of the shares plus interest.

B. A shareholder who fails to notify the corporation in writing of that shareholder's demand to be paid the shareholder's stated estimate of the fair value plus interest under Subsection A of this Section within thirty days after receiving the corporation's payment or offer of payment under R.S. 12:1-1324 or 1-1325, respectively, waives the right to demand payment under this Section and shall be entitled only to the payment made or offered pursuant to those respective Sections.

Source: MBCA §13.26.

SUBPART C. JUDICIAL APPRAISAL OF SHARES

§1-1330. Court action

A. If a shareholder makes demand for payment under R.S. 12:1-1326 which remains unsettled, the corporation shall commence a summary proceeding within sixty days after receiving the payment demand and petition the court to determine the fair value of the shares and accrued interest. If the corporation does not commence the proceeding within the sixty-day period, it shall pay in cash to each shareholder the amount the shareholder demanded pursuant to R.S. 12:1-1326, plus interest, within ten days after the expiration of the sixty-day period.

B. The corporation shall commence the proceeding in the district court of the parish where the corporation's principal office or, if none, its registered office in this state is located. If the corporation is a foreign corporation without a registered office in this state, it shall commence the proceeding in the parish in this state where the principal office or registered office of the domestic corporation merged with the foreign corporation was located at the time of the transaction.

C. The corporation shall make all shareholders, whether or not residents of this state, whose demands remain unsettled parties to the proceeding, and all parties must be served with a copy of the petition. Nonresidents may be served as provided by law.

D. The jurisdiction of the court in which the proceeding is commenced under Subsection B of this Section is exclusive. The court may appoint an appraiser to file a written report with the court on the question of fair value. The appraiser shall have the powers described in the appointing order, or in any amendment to it. The shareholders demanding appraisal rights are entitled to the same discovery rights as parties in other civil proceedings. If the court appoints an appraiser, the appraiser's written report shall be treated as the report of an expert witness, and the corporation and shareholders demanding appraisal shall be entitled to depose and to examine and cross-examine the appraiser as an expert witness.

E. Each shareholder made a party to the proceeding is entitled to judgment for either of the following:

(1) The amount, if any, by which the court finds the fair value of the shareholder's shares, plus interest, exceeds the amount paid by the corporation to the shareholder for such shares.

(2) The fair value, plus interest, of the shareholder's shares for which the corporation elected to withhold payment under R.S. 12:1-1325.

Source: MBCA §13.30.

Comments - 2014 Revision

(a) This Section modifies Model Act Subsection (a) to state that the proceeding to be commenced by the corporation is to be a summary proceeding. Because a jury is unavailable in a summary proceeding, the Model Act rule against a jury trial in Subsection (d) was deleted as redundant.

(b) This Section also adds a date by which the corporation must pay the amount demanded by a shareholder if the corporation fails to commence the appraisal proceeding within the sixty-day period specified in Subsection A of this Section. The peremptive period for the enforcement of this payment obligation, which is provided in R.S. 12:1-1331(D), is measured from that date.

(c) Model Act Subsection (d) provides that a court-appointed appraiser may "receive evidence and a recommend a decision" in the appraisal proceeding. This Section modifies Subsection (d) to treat the appraiser as a court-appointed expert witness.

§1-1331. Court costs and expenses

A. The court in an appraisal proceeding commenced under R.S. 12:1-1330 shall determine all court costs of the proceeding, including the reasonable compensation and expenses of appraisers appointed by the court. The court shall assess the court costs against the corporation, except that the court may assess court costs against all or some of the shareholders demanding appraisal, in amounts which the court finds equitable, to the extent the court finds such shareholders acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided by this Part.

B. The court in an appraisal proceeding may also assess the expenses of the respective parties in amounts the court finds equitable against either of the following:

(1) The corporation and in favor of any or all shareholders demanding appraisal if the court finds the corporation did not substantially comply with the requirements of R.S. 12:1-1320, 1-1322, 1-1324, or 1-1325.

(2) Either the corporation or a shareholder demanding appraisal, in favor of any other party, if the court finds the party against whom expenses are assessed acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided by this Part.

C. If the court in an appraisal proceeding finds that the expenses incurred by any shareholder were of substantial benefit to other shareholders similarly situated and that such expenses should not be assessed against the corporation, the court may direct that such expenses be paid out of the amounts awarded the shareholders who were benefitted.

D. To the extent the corporation fails to make a required payment pursuant to R.S. 12:1-1324, 1-1325, 1-1326, or 1-1330(A), the shareholder may sue directly for the amount owed, and to the extent successful, shall be entitled to recover from the corporation all expenses of the suit. The shareholder's right to enforce the corporation's payment obligation under this Subsection is perempted five years after the date that the payment by the corporation becomes due under the relevant provision.

Source: MBCA §13.31.

Comments - 2014 Revision

(a) This Section adds R.S. 12:1-1330(A) to the list of Sections under which a corporation's payment obligation may provide a cause of action under Subsection D of this Section.

(b) This Section also adds a five year peremptive period for the actions authorized by Subsection D of this Section, measured from the date that the payment from the corporation becomes due under the relevant provision.

SUBPART D. OTHER REMEDIES

§1-1340. Other remedies limited

A. The legality of a proposed or completed corporate action described in R.S. 12:1-1302(A) may not be contested, nor may the corporate action be enjoined,

set aside or rescinded, in any proceeding commenced by a shareholder after the shareholders have approved the corporate action.

B. Subsection A of this Section does not apply to a corporate action that is any of the following:

(1) Not authorized and approved in accordance with the applicable provisions of any of the following:

(a) Part 9, 10, 11, or 12 of this Chapter.

(b) The articles of incorporation or bylaws.

(c) The resolution of the board of directors authorizing the corporate action.

(2) [Reserved.]

(3) [Reserved.]

(4) Approved by less than unanimous consent of the voting shareholders pursuant to R.S. 12:1-704 if both of the following requirements are met:

(a) The challenge to the corporate action is brought by a shareholder who did not consent and as to whom notice of the approval of the corporate action was not effective at least ten days before the corporate action was effected.

(b) The proceeding challenging the corporate action is commenced within ten days after notice of the approval of the corporate action is effective as to the shareholder bringing the proceeding.

Source: MBCA §13.40.

Comment - 2014 Revision

Model Act Paragraphs (b)(2) and (3) provide exceptions to the operation of Subsection A of this Section for a corporate action that was an "interested transaction," if not approved as provided in R.S. 12:1-862 and 1-863, or one that was procured as a result of a material mistake, misrepresentation or omission. This Section deletes those subsections because of the potential they create of negating the effects of Subsection A of this Section almost entirely.

PART 14. DISSOLUTION

SUBPART A. VOLUNTARY DISSOLUTION

§1-1401. [Reserved.]

Comment - 2014 Revision

The substance of the simplified dissolution mechanism provided by Model Act Section 14.01 has been incorporated into R.S. 12:1-1441, concerning a simplified form of termination.

§1-1402. Dissolution by board of directors and shareholders

A. A corporation's board of directors may propose dissolution for submission to the shareholders.

B. For a proposal to dissolve to be adopted, both of the following requirements must be met:

(1) The board of directors must recommend dissolution to the shareholders unless the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation and communicates the basis for its determination to the shareholders.

(2) The shareholders entitled to vote must approve the proposal to dissolve as provided in Subsection E of this Section.

C. The board of directors may condition its submission of the proposal for dissolution on any basis.

D. The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider dissolving the corporation.

E. Unless the articles of incorporation or the board of directors acting pursuant to Subsection C of this Section require a greater vote or a vote by voting groups, adoption of the proposal to dissolve shall require the approval of at least a majority of the votes entitled to be cast.

Source: MBCA §14.02.

§1-1403. Articles of dissolution

A. At any time after dissolution is authorized, the corporation may dissolve by delivering to the secretary of state for filing articles of dissolution setting forth all of the following:

(1) The name of the corporation.

(2) The date dissolution was authorized.

(3) If dissolution was approved by the shareholders, a statement that the proposal to dissolve was duly approved by the shareholders in the manner required by this Act and by the articles of incorporation.

B. A corporation is dissolved upon the effective date of its articles of dissolution.

C. For purposes of this Subpart, "dissolved corporation" means a corporation whose articles of dissolution have become effective and includes a successor entity to which the remaining assets of the corporation are transferred subject to its liabilities for purposes of liquidation.

D. The secretary of state shall deliver a notice of the filing of the articles of dissolution to all of the following:

(1) The secretary of the Department of Revenue.

(2) The secretary of the Department of Environmental Quality.

(3) The administrator of the Louisiana Employment Security Law.

Source: MBCA §14.03, R.S. 12:148.

Comments - 2014 Revision

(a) The rules in this Section concerning the content of a corporation's articles of dissolution are supplemented by the general rules in R.S. 12:1-120 for the filing of documents under this Section. The effective date of the articles is governed by R.S. 12:1-123(A), and the duty of the secretary of state to file the articles, if they meet the requirements for filing, is provided by R.S. 12:1-125(A).

(b) Subsection D of this Section is not part of the Model Act. It was added to this Section to retain a modified version of former R.S. 12:148(B). That Section conditioned the obligation of the secretary of state to file a corporation's final articles of dissolution, declaring its liquidation to be complete, on the filing of a certificate from each of the three listed agencies, to the effect that the already-liquidated corporation owed no unpaid debts to the agency or to the funds that the agency administered. The former approach was not retained unchanged in this Section because it imposed indefinite delays on the completion of the dissolution process, while providing the required notices only when they were too late to do much good, after the corporation had already liquidated and distributed all its assets.

(c) As adopted in this Section, Subsection D of this Section requires the secretary of state to notify the listed agencies of the filing of articles of dissolution under this Section. Because articles of dissolution are filed at the beginning of a corporation's liquidation process, the notice is provided when it is still useful, before the corporation has already paid its other debts and distributed its residual value to

its shareholders. And because the agencies are relieved of any obligation to take some affirmative position on whether a debt is owed, they are free to pursue the enforcement strategies they consider most efficient with respect to dissolved corporations, without delaying the completion of all corporate dissolutions for the indefinite time required to make the affirmative certifications required by the prior law.

§1-1404. Revocation of dissolution

A. A corporation that is not terminated may revoke its dissolution within one hundred and twenty days of its effective date.

B. Revocation of dissolution must be authorized in the same manner as the dissolution was authorized unless that authorization permitted revocation by action of the board of directors alone, in which event the board of directors may revoke the dissolution without shareholder action.

C. After the revocation of dissolution is authorized, the corporation may revoke the dissolution by delivering to the secretary of state for filing articles of revocation of dissolution that set forth all of the following:

(1) The name of the corporation.

(2) The effective date of the dissolution that was revoked.

(3) The date that the revocation of dissolution was authorized.

(4) If the corporation's board of directors, or incorporators, revoked the dissolution, a statement to that effect.

(5) If the corporation's board of directors revoked a dissolution authorized by the shareholders, a statement that revocation was permitted by action by the board of directors alone pursuant to that authorization.

(6) If shareholder action was required to revoke the dissolution, the information required by R.S. 12:1-1403(A)(3).

D. Revocation of dissolution is effective upon the effective date of the articles of revocation of dissolution.

E. When the revocation of dissolution is effective, it relates back to and takes effect as of the effective date of the dissolution and the corporation resumes carrying on its business as if dissolution had never occurred.

F . A dissolution under R.S. 12:1-1438 is not revocable.

Source: MBCA §14.04.

Comments - 2014 Revision

(a) Unlike the Model Act, this Section distinguishes between a corporation that has been dissolved and one that has been terminated. A corporation may revoke its dissolution under Subsection A of this Section only if the corporation is not already terminated. If the corporation is terminated, it may seek reinstatement as provided in R.S. 12:1-1444.

(b) This Section adds a new Subsection F to provide that a dissolution under R.S. 12:1-1438 is not revocable. R.S. 12:1-1438 permits a corporation to dissolve in lieu of carrying out a court-ordered buyout of an oppressed shareholder. A revocation of dissolution under those circumstances is prohibited to prevent the majority shareholders of the corporation from circumventing the effects of the remedy, either a buyout or dissolution, that this Section makes available to an oppressed shareholder.

§1-1405. Effect of dissolution

A. A dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs, including any of the following:

(1) Collecting its assets.

(2) Disposing of its properties that will not be distributed in kind to its shareholders.

(3) Discharging or making reasonable provision for discharging its liabilities.

(4) Distributing its remaining property among its shareholders according to their interests.

(5) Doing every other act necessary to wind up and liquidate its business and affairs.

B. Dissolution of a corporation does not do any of the following:

(1) Transfer title to the corporation's property.

(2) Prevent transfer of its shares or securities, although the authorization to dissolve may provide for closing the corporation's share transfer records.

(3) Subject its directors or officers to standards of conduct different from those prescribed in Part 8 of this Chapter.

(4) Change quorum or voting requirements for its board of directors or shareholders; change provisions for selection, resignation, or removal of its directors or officers or both; or change provisions for amending its bylaws.

(5) Prevent commencement of a proceeding by or against the corporation in its corporate name.

(6) Abate or suspend a proceeding pending by or against the corporation on the effective date of dissolution.

(7) Terminate the authority of the registered agent of the corporation.

C. The limitation imposed by Subsection A of this Section on the business to be conducted by a dissolved corporation does not do either of the following:

(1) Require the corporation to discontinue operations in any part of its business that the corporation plans to sell as a going concern in connection with the winding up and liquidation of the corporation's affairs.

(2) Affect any right acquired by a third person before the third person knows or has reason to know that the corporation is dissolved.

D. The filing of articles of dissolution by a corporation does not by itself give a third person knowledge or reason to know that the corporation is dissolved.

E. The provisions of Code of Civil Procedure Articles 692 and 740 do not apply to a dissolved corporation that has not been terminated. A dissolved and unterminated corporation continues to be the proper party plaintiff under Code of Civil Procedure Article 690 and the proper party defendant under Code of Civil Procedure Article 739. An action by or against a terminated corporation is governed by R.S. 12: 1-1443.

Source: MBCA §14.05.

Comments - 2014 Revision

(a) This Section adds a new Subsection C to make it clear that the limitation on the business of a dissolved corporation imposed by Subsection A of this Section does not interfere with the ability of a dissolved corporation to sell all or part of its business as a going concern, or affect any right acquired by a third party without knowledge or reason to know of the dissolution. A new Subsection D of this Section rejects the view that the simple filing of articles of dissolution is enough by itself to put a third party on notice of the dissolution.

(b) This Section adds a new Subsection E to confirm the continued procedural capacity of a dissolved corporation that has not been terminated. If the corporation has been terminated, its procedural capacity is governed by R.S. 12:1-1443.

§1-1406. Known claims against dissolved corporation

A. A dissolved corporation may dispose of the known claims against it by notifying its known claimants in writing of the dissolution at any time after its effective date.

B. The written notice must do all of the following:

(1) Describe information that must be included in a claim.

(2) Provide a mailing address where a claim may be sent.

(3) State the deadline, which may not be fewer than one hundred and twenty days from the effective date of the written notice, by which the dissolved corporation must receive the claim.

(4) State that the claim will be extinguished by peremption if not received by the deadline.

C. A claim against the dissolved corporation is perempted either of the following:

(1) If a claimant who was given written notice under Subsection B of this Section does not deliver the claim to the dissolved corporation by the deadline.

(2) If a claimant whose claim was rejected by the dissolved corporation does not commence a proceeding to enforce the claim by the deadline stated in the rejection notice for the commencement of an enforcement proceeding, which may not be fewer than ninety days after the effective date of the rejection notice.

D. For purposes of this Section, "claim" does not include a contingent liability or a claim based on an event occurring after the effective date of dissolution.

Source: MBCA §14.06.

Comments - 2014 Revision

(a) This Section changes the word "barred" in Subsection C of this Section to "perempted" to make it clear that the time limitation in Subsection C of this Section is peremptive rather than prescriptive. Reflecting that change in terminology, the language of the notice in Paragraph (B)(4) of this Section is modified to use the phrase "extinguished by peremption." That phrase is used in the

notice both because it is technically correct and because the word "extinguished" is likely to convey to a layperson the critical idea that the affected claim will be terminated or eliminated in some fashion if the deadline stated in the notice is missed.

(b) The Model Act deadline in Paragraph (C)(2) of this Section for the commencement of an enforcement proceeding on a rejected claim is ninety days after the effective date of the corporation's notice to the claimant that the corporation has rejected the claim. Unlike the initial notice to the claimant under Paragraph (B)(3) of this Section, the Model Act rejection notice is not required to state the deadline that applies. Paragraph (C)(2) of this Section is modified to require a statement of the deadline in the rejection notice similar to that required in the initial notice. As modified, the deadline for the commencement of a proceeding to enforce a rejected claim under Paragraph (C)(2) of this Section is the deadline stated in the rejection notice, and that deadline must be at least ninety days after the effective date of the rejection notice.

§1-1407. Other claims against dissolved corporation

A. A dissolved corporation may also publish notice of its dissolution and request that persons with claims against the dissolved corporation present them in accordance with the notice.

B. The notice must do all of the following:

(1) Be published one time in a newspaper of general circulation in the parish where the dissolved corporation's principal office or, if none in this state, its registered office, is or was last located.

(2) Describe the information that must be included in a claim and provide a mailing address where the claim may be sent.

(3) State that a claim against the dissolved corporation will be extinguished by peremption unless a proceeding to enforce the claim is commenced within three years after the publication of the notice.

C. If the dissolved corporation publishes a newspaper notice in accordance with Subsection B of this Section, any claim not earlier perempted by R.S. 12:1-1406(C) is perempted unless the claimant commences a proceeding to enforce the claim against the dissolved corporation within three years after the publication date of the newspaper notice.

D. A claim that is not perempted by R.S. 12:1-1406(C) or 1-1407(C) may be enforced against either of the following:

(1) The dissolved corporation, to the extent of its undistributed assets.

(2) Except as provided in R.S. 12:1-1408(D), if the assets have been distributed in liquidation, a shareholder of the dissolved corporation to the extent of the shareholder's pro rata share of the claim or the corporate assets distributed to the shareholder in liquidation, whichever is less, but a shareholder's total liability for all claims under this Section may not exceed the total amount of assets distributed to the shareholder.

E. A proceeding to enforce the liability of a shareholder under Paragraph (D)(2) of this Section is perempted unless it is commenced within two years after the date that the assets were distributed to the shareholder.

F. For purposes of this Section, the term "claim" includes a claim of any kind, including a contingent liability and a claim based on an event occurring after the effective date of dissolution.

Source: MBCA §14.07.

Comments - 2014 Revision

(a) This Section changes the Model Act word "barred" to the Louisiana term "perempted" throughout the Section, except in Paragraph (B)(3) of this Section, concerning notice, where the phrase "extinguished by peremption" is used. The longer phrase is required in the notice both because it is technically correct, and because the word "extinguished" is likely to convey to a layperson the critical idea that the affected claim will be terminated or eliminated in some fashion if the deadline stated in the notice is missed.

(b) This Section simplifies the Model Act description in Subsection C of this Section of the parties whose claims are perempted by that Subsection. The Model Act lists the three types of claimants affected, but in so doing obscures the point that the peremption in Subsection C of this Section applies to all persons whose claims are not already perempted by Subsection 14.06(c). This Section makes the connection between the two provisions more explicit.

(c) This Section corrects an apparently erroneous cross reference in Model Act Subsection (d) to Subsection 14.06(b). Subsection 14.06(c) is the provision likely intended in the Model Act, and it is the correct provision under this Chapter.

(d) The peremption of claims provided by R.S. 12:1-1406(C) and 1-1407(C) does not extend any prescriptive or peremptive period that otherwise applies to a claim. A prescribed or perempted claim may not be enforced against the corporation even if the claim is made, or the suit is filed, within the peremptive periods specified in R.S. 12:1-1406(C) and 1-1407(C).

(e) This Section adds a new Subsection E to retain the two-year limitation period from prior law on claims brought against shareholders for excess distributions, but modifies the former rule to make it clear that the period is peremptive. Unlike the three-year bar provided by Subsection C of this Section, the two-year period in Subsection E of this Section applies without regard to whether the

corporation publishes a newspaper notice in accordance with Subsection C of this Section.

(f) The effect of adding the two-year bar in Subsection E of this Section, when combined with a similar two-year bar for claims against directors under R.S. 12:1-833, is to make the three-year bar in Subsection C of this Section relevant only to claims against the corporation itself, recoverable under this Section only from undistributed assets of the corporation. Because the corporation is unlikely to hold any undistributed assets other than those unknown to the corporation itself or already dedicated to the payment of contingent and post-dissolution claims, the three-year bar is unlikely to protect the corporation itself from the adverse effects of a late-arising claim. Still, the three-year bar remains important for two other reasons. First, where the corporation has made provision for the post-dissolution payment of claimants, it allows that class to be closed and payments to be made as provided. Second, it bars successor liability claims that might otherwise be made against a firm that purchased substantially all of the assets of the dissolved corporation, or of one of its divisions or product lines. Both of those effects are consistent with the balance struck by the Model Act between the competing goals of compensating injured plaintiffs and of protecting asset transferees against liability for the dissolved corporation's contingent claims.

(g) This Section adds a new Subsection F to make it clear that the contingent and post-dissolution claims that are excluded from the effects of R.S. 12:1-1406 through the special definition of "claim" in Subsection D of that Section are not excluded from the meaning of that term in this Section. This Section applies to all claims of any kind, including those not affected by R.S. 12:1-1406.

§1-1408. Court proceedings

A. A dissolved corporation that has published a notice under R.S. 12:1-1407 may file an application with the district court of the parish where the dissolved corporation's principal office or, if none in this state, its registered office is located for a determination of the amount and form of security to be provided for payment of claims that are contingent or have not been made known to the dissolved corporation or that are based on an event occurring after the effective date of dissolution but that, based on the facts known to the dissolved corporation, are reasonably estimated to arise after the effective date of dissolution. Provision need not be made for any claim that is or is reasonably anticipated to be barred under R.S. 12:1-1407(C).

B. Within ten days after the filing of the application, notice of the proceeding shall be given by the dissolved corporation to each claimant holding a contingent claim whose contingent claim is shown on the records of the dissolved corporation.

C. The court shall appoint an attorney at law to represent all claimants whose identities or whereabouts are unknown in any proceeding brought under this Section,

as if those claimants were absentee defendants under Code of Civil Procedure Article 5091. The reasonable fees and expenses of the appointed attorney, including all reasonable expert witness fees, shall be paid by the dissolved corporation.

D. Provision by the dissolved corporation for security in the amount and the form ordered by the court under R.S. 12:1-1408(A) shall satisfy the dissolved corporation's obligations with respect to claims that are contingent, have not been made known to the dissolved corporation, or are based on an event occurring after the effective date of dissolution, and such claims may not be enforced against a shareholder who received assets in liquidation.

Source: MBCA §14.08.

Comment - 2014 Revision

Subsection C of this Section authorizes a court to appoint an attorney under Art. 5091 of the Code of Civil Procedure to perform the functions assigned by Subsection (c) of the Model Act to a guardian ad litem.

§1-1409. Responsibility of the board of directors

A. The board of directors of a dissolved corporation is responsible for winding up and liquidating the business and affairs of the corporation as contemplated by R.S. 12:1-1405 (A). The board of directors may authorize a distribution to shareholders only after the corporation pays, or makes reasonable provision to pay, all obligations owed by the corporation as contemplated by R.S. 12:1-1405(A).

B. Directors of a dissolved corporation which has disposed of claims under R.S. 12:1-1406, 1-1407, or 1-1408 shall not be liable for breach of Subsection A of this Section with respect to claims against the dissolved corporation that are barred or satisfied under R.S. 12:1-1406, 1-1407, or 1-1408.

Comments - 2014 Revision

(a) Model Act Subsection (a) has been redrafted to avoid the inadvertent suggestion in the model language that individual directors owe a personal duty to cause a dissolved corporation to pay claims, even if the corporation is insolvent. As redrafted, R.S. 12:1-1409(A) does all of the following:

(1) More clearly places responsibility for the winding up of the corporation's business and affairs on the board of directors, not on directors individually.

(2) Incorporates by reference the board's responsibilities under R.S. 12:1-1405.

(3) Makes the payment or provision for payment of claims not an absolute duty of the board, but rather a condition of the board's authority to distribute the remaining corporate assets to the corporation's shareholders.

(b) The liability of a director for distributions made in violation of Subsection A of this Section is governed by R.S. 12:1-833, not by Subsection A itself.

§1-1410. Certain sections in subpart a applicable to all dissolved corporations

R.S. 12:1-1405 through 1-1409 apply to a dissolved corporation regardless of whether the dissolution is voluntary or judicial.

Comment - 2014 Revision

This Section adds a new R.S. 12:1-1410 to make it clear that the provisions in Subpart A of Part 14 of this Chapter, which provide the rules for winding up the affairs of a dissolved corporation, apply even if the dissolution is judicial, and so occurs under Subpart C rather than Subpart A of Part 14 of this Chapter.

SUBPART B. ADMINISTRATIVE DISSOLUTION

[Reserved.]

Comment - 2014 Revision

Chapter B of the Model Act, concerning administrative dissolution, has been omitted from this Section. In place of those provisions, this Part adds two new provisions on administrative termination and reinstatement, R.S. 12:1-1442 and 1-1444, which are similar in substance to the charter revocation and reinstatement provisions in prior law.

SUBPART C. JUDICIAL DISSOLUTION

§1-1430. Grounds for judicial dissolution

A district court may dissolve a corporation in any of the following:

A.(1) A proceeding by the attorney general if either of the following is established:

(a) The corporation obtained its articles of incorporation through fraud.

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

(2) A proceeding by a shareholder if any of the following is established:

(a) The directors are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock, and irreparable injury to the

corporation is threatened or being suffered, or the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally, because of the deadlock.

(b) [Reserved.]

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

(d) [Reserved.]

(3) A proceeding by a creditor if either of the following is established:

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

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

(4) A proceeding by the corporation, or by shareholders of shares with at least twenty-five percent of the voting power in the corporation, to have its voluntary dissolution continued under court supervision.

(5) A proceeding by a shareholder if the corporation has abandoned its business and has failed within a reasonable time to liquidate and distribute its assets and dissolve.

B. Paragraph (A)(2) of this Section shall not apply in the case of a corporation that, on the date of the filing of the proceeding, has shares that are covered securities under Section 18(b)(1)(A) or (B) of the Securities Act of 1933, as amended.

C. In Subsection A of this Section, "shareholder" means a record shareholder, a beneficial shareholder, and a voting trust beneficial owner.

Source: MBCA §14.30.

Comments - 2014 Revision

(a) For reasons explained in the comments to R.S. 12:1-1435, this Part omits Model Act Subparagraphs (a)(2)(ii) and (iv).

(b) This Part changes the wording of Model Act Subparagraph (a)(3)(ii) to make it clear that an insolvent corporation need not admit its insolvency in writing to allow a creditor to obtain dissolution under that Subsection, but need only admit in writing that the creditor's claim is due and owing.

(c) This Section adds language to Model Act Paragraph (a)(4) to retain the rule in prior law that holders of twenty-five percent or more of the voting power in a corporation could obtain court supervision of a voluntary dissolution.

(d) Subsection B of this Section is modified to limit the exception provided in that Section to a corporation that has shares that are "covered securities" under the cited provisions of federal law. The term refers generally to securities that are traded on a recognized national securities exchange or trading system. This Section deletes the Model Act's alternative means of qualification for the exception based on the number of beneficial shareholders and market value of its shares.

§1-1431. Procedure for judicial dissolution

A. Venue for a proceeding by the attorney general to dissolve a corporation lies in East Baton Rouge Parish. Venue for a proceeding brought by any other party named in R.S. 12:1-1430(A) lies in the parish where the corporation's principal office or, if none in this state, its registered office is or was last located.

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

C. A court in a proceeding brought to dissolve a corporation or to continue a dissolution under court supervision may issue injunctions, appoint a receiver or liquidator with all powers and duties the court directs, take other action required to preserve the corporate assets wherever located, and carry on the business of the corporation until a full hearing can be held.

D. Within ten days of the commencement of a proceeding to dissolve a corporation under R.S. 12:1-1430(A)(2), the corporation must send to all shareholders, other than the petitioner, a notice stating that the shareholders are entitled to avoid the dissolution of the corporation by electing to purchase the petitioner's shares under R.S. 12:1-1434 and accompanied by a copy of R.S. 12:1-1434.

Source: MBCA §14.31.

Comment - 2014 Revision

This Section adds language to Model Act Subsection (c) to make it clear that the court has the same power to appoint a liquidator or receiver in a proceeding to

obtain court supervision of a voluntary dissolution as in an action for involuntary dissolution.

§1-1432. Appointment of receiver or liquidator

A. Unless an election to purchase has been filed under R.S. 12:1-1434, a court in a judicial proceeding brought to dissolve a corporation or to continue a dissolution under court supervision may appoint one or more liquidators to wind up and liquidate, or one or more receivers to manage, the business and affairs of the corporation. The court shall hold a hearing, after notifying all parties to the proceeding and any interested persons designated by the court, before appointing a receiver or liquidator. The court appointing a receiver or liquidator has jurisdiction over the corporation and all of its property wherever located.

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

C. The court shall describe the powers and duties of the receiver or liquidator in its appointing order, which may be amended from time to time and may require the receiver or liquidator to file interim and final reports with the court as the court considers appropriate. Except as limited by the court, either of the following actions may be taken:

(1) The liquidator may exercise all of the powers of the corporation, through or in place of its board of directors, to the extent necessary to wind up the business and affairs of the corporation as contemplated by R.S. 12:1-1405.

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

D. The court may redesignate the receiver a liquidator, and may redesignate the liquidator a receiver, if doing so is in the best interests of the corporation, its shareholders, and creditors.

E. The court from time to time may order compensation paid and expenses paid or reimbursed to the receiver or liquidator from the assets of the corporation or proceeds from the sale of the assets.

F. If a court appoints a receiver or liquidator under this Section, then during the period of the appointment the receiver or liquidator assumes the responsibility and authority of the board of directors, except to the extent the appointing order provides otherwise, and the board of directors is relieved of that responsibility and authority. The receiver or liquidator is liable for a breach of duty as receiver or liquidator to the same extent that a director holding the same authority and responsibility would be liable.

Source: MBCA §14.32.

Comments - 2014 Revision

(a) This Section changes the titles of the persons who may be appointed by a court under this Section to make the titles consistent with those used under prior law. What the Model Act calls a "receiver" this Section calls a "liquidator," and what the Model Act calls a "custodian" this Section calls a "receiver."

(b) This Section adds language to Model Act Subsection (a) to make it clear that the court has the same power to appoint a liquidator or receiver in a proceeding to obtain court supervision of a voluntary dissolution as in an action for involuntary dissolution. It also adds language to Model Act Subsection (c) to authorize the court to require the filing of interim and final reports by a liquidator or receiver.

(c) Subsection F of this Section addresses the effects of the appointment of a receiver or liquidator on the duties of the corporation's board of directors. To the extent that an appointing order confers authority on a receiver or liquidator, the receiver or liquidator assumes the board's normal authority and responsibilities, and the board is relieved of those responsibilities. In most cases, the receiver or liquidator will assume the full responsibility of the board to operate or liquidate the corporation. But in some cases, a court may confer a more limited form of authority on an appointed receiver or liquidator, and in that event the board's authority is supplanted only as provided in the appointing order.

§1-1433. Judgment of dissolution

A. If after a hearing the court determines that one or more grounds for judicial dissolution described in R.S. 12:1-1430 exist, it may enter a judgment dissolving the corporation and specifying the effective date of the dissolution, and the clerk of the court shall deliver a certified copy of the judgment to the secretary of state, who shall file it.

B. After entering the judgment of dissolution, the court shall direct the winding up and liquidation of the corporation's business and affairs in accordance with R.S. 12:1-1405 and the notification of claimants in accordance with R.S. 12:1-1406 and 1-1407.

Source: MBCA §14.33.

§1-1434. Election to purchase in lieu of dissolution

A. In a proceeding under R.S. 12:1-1430(A)(2) to dissolve a corporation, the corporation may elect or, if it fails to elect, one or more shareholders may elect to purchase all shares owned by the petitioning shareholder at the fair value of the shares. An election pursuant to this Section shall be irrevocable unless the court determines that it is equitable to set aside or modify the election.

B.(1) An election to purchase pursuant to this Section may be filed with the court at any time within ninety days after the filing of the petition under R.S. 12:1-1430(A)(2) or at such later time as the court in its discretion may allow or as all shareholders of the corporation may agree.

(2) If the election to purchase is filed by one or more shareholders, the corporation shall, within ten days thereafter, give written notice to all shareholders, other than the petitioner. The notice must state the name and number of shares owned by the petitioner and the name and number of shares owned by each electing shareholder and must advise the recipients of their right to join in the election to purchase shares in accordance with this Section.

(3) Shareholders who wish to participate must file notice of their intention to join in the purchase no later than thirty days after the effective date of the notice to them. All shareholders who have filed an election or notice of their intention to participate in the election to purchase thereby become parties to the proceeding and shall participate in the purchase in proportion to their ownership of shares as of the date the first election was filed, unless they otherwise agree or the court otherwise directs.

(4) After an election has been filed by the corporation or one or more shareholders, the proceeding under R.S. 12:1-1430(A)(2) may not be discontinued or settled, nor may the petitioning shareholder sell or otherwise dispose of his or her shares, unless the court determines that it would be equitable to the corporation and the shareholders, other than the petitioner, to permit such discontinuance, settlement, sale, or other disposition.

(5) If an election to purchase is filed by the corporation within ninety days after the filing of the petition under R.S. 12:1-1430(A)(2), the corporation's election shall be given precedence over any shareholder election filed within the same period, even if the shareholder's election is filed before that of the corporation.

(6) If the court allows both the corporation and one or more shareholders to file an election after the expiration of the ninety-day period, the court shall direct how the purchase of shares is to be allocated among the electing parties.

C. If, within sixty days of the filing of the first election, the parties reach agreement as to the fair value and terms of purchase of the petitioner's shares, the court shall enter an order directing the purchase of petitioner's shares upon the terms and conditions agreed to by the parties.

D. If the parties are unable to reach an agreement as provided for in Subsection C of this Section, the court, upon application of any party, shall stay the R.S. 12:1-1430(A)(2) proceedings and determine the fair value of the petitioner's shares as of the day before the date on which the petition under R.S. 12:1-1430(A)(2) was filed or as of such other date as the court deems appropriate under the circumstances.

E. Upon determining the fair value of the shares, the court shall enter an order directing the purchase upon such terms and conditions as the court deems appropriate, which may include payment of the purchase price in installments, where necessary in the interests of equity, provision for security to assure payment of the purchase price and any additional expenses as may have been awarded, and, if the shares are to be purchased by shareholders, the allocation of shares among them. In

allocating petitioner's shares among holders of different classes of shares, the court shall attempt to preserve the existing distribution of voting rights among holders of different classes insofar as practicable and may direct that holders of a specific class or classes shall not participate in the purchase. Interest may be allowed at the rate and from the date determined by the court to be equitable, but if the court finds that the refusal of the petitioning shareholder to accept an offer of payment was arbitrary or otherwise not in good faith, no interest shall be allowed.

F. Upon entry of an order under Subsections C or E of this Section, the court shall dismiss the petition to dissolve the corporation under R.S. 12:1-1430(A)(2), and the petitioning shareholder shall no longer have any rights or status as a shareholder of the corporation, except the right to receive the amounts awarded by the order of the court which shall be enforceable in the same manner as any other judgment.

G. The purchase ordered pursuant to Subsection E of this Section shall be made within ten days after the date the order becomes final unless before that time the corporation files with the court a notice of its intention to adopt articles of dissolution pursuant to R.S. 12:1-1402 and 1-1403, which articles must then be adopted and filed within fifty days thereafter. Upon filing of such articles of dissolution, the corporation shall be dissolved in accordance with the provisions of R.S. 12:1-1405 through 1-1407, and the order entered pursuant to Subsection E of this Section shall no longer be of any force or effect, except that the petitioner may continue to pursue any claims previously asserted on behalf of the corporation.

H. Any payment by the corporation pursuant to an order under Subsections C or E of this Section is subject to the provisions of R.S. 12:1-640.

Source: MBCA §14.34.

§1-1435. Oppressed shareholder's right to withdraw

A. If a corporation engages in oppression of a shareholder, the shareholder may withdraw from the corporation and require the corporation to buy all of the shareholder's shares at their fair value.

B. A corporation engages in oppression of a shareholder if the corporation's distribution, compensation, governance, and other practices, considered as a whole over an appropriate period of time, are plainly incompatible with a genuine effort on the part of the corporation to deal fairly and in good faith with the shareholder. Conduct that is consistent with the good faith performance of an agreement among all shareholders is presumed not to be oppressive. The following factors are relevant in assessing the fairness and good faith of the corporation's practices:

(1) The conduct of the shareholder alleging oppression.

(2) The treatment that a reasonable shareholder would consider fair under the circumstances, considering the reasonable expectations of all shareholders in the corporation.

C. The term "fair value" has the same meaning in this Section and in R.S. 12:1-1436 as it does in R.S. 12:1-1301(4) concerning appraisal rights, except that the value of a withdrawing shareholder's shares under this Section and R.S. 12:1-1436 is to be determined as of the effective date of the notice of withdrawal under Subsection D of this Section.

D. A shareholder may assert a right to withdraw under this Section by giving written notice to the corporation that the shareholder is withdrawing from the corporation on grounds of oppression. When the notice becomes effective it operates as an offer by the shareholder, irrevocable for sixty days, to sell to the corporation at fair value the entirety of the shareholder's shares in the corporation. The notice need not specify the price that the withdrawing shareholder proposes as the fair value of the shares, but if the notice does specify a price, the price is part of the offer to sell made by the shareholder.

E. The corporation may accept the offer to sell made in the shareholder's notice of withdrawal by giving the withdrawing shareholder written notice of its acceptance during the sixty days that the offer is irrevocable. If the shareholder's notice of withdrawal specifies a price for the shares, the corporation's notice of acceptance operates as an acceptance of both the offer to sell and the proposed price

unless the notice states that the corporation is accepting the offer to sell, but not the price; in that case the notice of acceptance operates only as an acceptance of the shareholder's offer to sell the shares at their fair value. The corporation's acceptance of the shareholder's offer does not operate as an admission or as evidence that the corporation has engaged in oppression of the shareholder.

F. A notice of acceptance that operates as an acceptance of both the shareholder's offer to sell and the shareholder's proposed price forms a contract of sale of the shares at that price, payable in cash. The contract includes the warranties of a seller of investment securities under the Uniform Commercial Code and imposes a duty on the selling shareholder to deliver any certificates issued by the corporation for the withdrawing shareholder's shares or, if a certificate has been lost, stolen, or destroyed, an affidavit to that effect. Either party may file an action to enforce the contract at the specified price if the contract is not fully performed within thirty days after the effective date of the notice of acceptance. If a withdrawing shareholder fails to deliver the certificate for a share purchased by the corporation under a contract formed under this Subsection, the shareholder owes the same indemnity obligation as a shareholder who sells shares as described in R.S. 12:1-1436(F).

G. If the corporation does not accept the withdrawing shareholder's offer as provided in Subsection E of this Section, the shareholder may file an ordinary proceeding against the corporation in district court to enforce the shareholder's right to withdraw. A judgment in the action that recognizes the right of the shareholder to withdraw on grounds of oppression is a partial judgment under Code of Civil Procedure Article 1915(B). The trial on the valuation of the shares is governed by R.S. 12:1-1436.

H. Venue for an action filed under Subsection F or G of this Section lies in the district court of the parish where the corporation's principal office or, if none in this state, its registered office is located.

I. A corporation's purchase of a withdrawing shareholder's shares is subject to the rules on a corporation's acquisition of its own shares provided in R.S. 12:1-631 and to the limitations on distribution imposed by R.S. 12:1-640.

J.(1) The shareholders of a corporation may waive the right to withdraw under this Section by unanimous written consent, provided in accordance with R.S. 12:1-704, stating that the shareholders are waiving the right provided by law to withdraw from the corporation on grounds of oppression. The waiver takes effect when the last consent required to make the consent effective under R.S. 12:1-704 is delivered to the corporation, and the corporation shall send written notice to the shareholders of that date promptly after it is known. The waiver remains in effect for fifteen years from the date that it becomes effective, or for any shorter period stated in the waiver to which the shareholders consent.

(2) The existence of the waiver shall be noted on each share certificate in the same way that the existence of a unanimous governance agreement is required to be noted under R.S. 12:1-732(C), and the failure to note the existence of the waiver on a share certificate has the same effect with respect to the waiver as a failure to note a unanimous governance agreement has with respect to that agreement. Except as stated in this Subsection and in Subsection K of this Section, the right of an oppressed shareholder to withdraw from a corporation under this Section may not be diminished.

K. This Section shall not apply in the case of a corporation that, on the effective date of the withdrawal notice under Subsection C of this Section, has shares that are covered securities under Section 18(b)(1)(A) or (B) of the Securities Act of 1933, as amended.

L. Without limiting any remedy available on other grounds, the right to withdraw in accordance with this Section and R.S. 12: 1-1436 is the exclusive remedy for oppression. An allegation of oppression, as such, does not provide an independent or additional basis for an action by a shareholder to recover damages

from the corporation or its directors, officers, employees, agents, or controlling persons.

Comments - 2014 Revision

(a) Model Act Section 14.34 provides a mechanism under which the corporation or its shareholders may elect to buy out the interests of a shareholder who is seeking to have the corporation dissolved under Model Act Paragraph 14.30(a)(2). This Section retains the Model Act approach with respect to dissolution on grounds of deadlock under R.S. 12:1-1430(A)(2)(a) and (c). But, with respect to other grounds for dissolution under R.S. 12:1-1430(A)(2), this Section replaces the Model Act scheme with four entirely new Sections, R.S. 12:1-1435 through 1-1438. As explained in Comment (c), below, the four new Sections provide remedies for a claim under R.S. 12:1-1430(A)(2) only on grounds of oppression. But the main effect of the four new Sections is to reverse the order of the remedies provided by the Model Act for oppression, from dissolution unless the corporation or its shareholders choose quickly to buy out the plaintiff shareholder, to a buyout of the plaintiff shareholder unless the corporation chooses to dissolve before final judgment in the suit is rendered.

(b) This change in the order of remedies is designed to do two things: allow the corporation to contest the plaintiff shareholder's allegations of oppression without risking an involuntary dissolution of the entire company, and align the statutory remedies for oppression more closely with those that have been provided in most of the reported American cases on the subject.

(c) This Section narrows the grounds for withdrawal from those provided in the Model Act for dissolution. Under the Model Act, a shareholder may seek dissolution on grounds of deadlock, illegality, fraud, waste or oppression. This Section retains the Model Act approach to deadlock. However, this Section provides a withdrawal remedy only for oppression, and not for illegality, fraud or waste. The elimination of the other grounds for relief does not mean that illegality, fraud or waste, even if directed toward the complaining shareholder, are irrelevant in determining whether oppression has occurred; they may highly relevant. Rather, illegality, fraud and waste are omitted as independent grounds for withdrawal to avoid the implication that simple occurrences of illegal, fraudulent, or wasteful behavior in some aspect of the corporation's operations may be enough by themselves to justify withdrawal. While illegal, fraudulent or wasteful acts are likely to justify some form of penalty or remedy in favor of an appropriate person, they do not justify the remedy of withdrawal unless, taken as a whole and in context, they amount to oppression of the complaining shareholder.

(d) The Model Act does not define the term "oppression." This Section defines the term in Subsection B in a way that combines the two leading tests of oppression used in the case law of other states, the "reasonable expectations" test and the "departure from standards of fair dealing" test. Those two tests have been incorporated into this Section to permit comparisons between cases arising under this Section and those in other jurisdictions in which oppressive behavior has been considered as grounds for relief in favor of a minority shareholder. However, the statutory definition in this Section differs in five respects from at least some versions of the oppression tests articulated by courts in other states:

(1) The failure to satisfy reasonable expectations is not itself the direct test for oppressive conduct. Rather, those expectations are to be considered in determining whether the directors or others in control have behaved in a way that is incompatible with a genuine effort to be fair to the complaining shareholder. This formulation is designed to provide a generous range of discretion to the majority

owners in designing corporate policies and operations that are fair. Withdrawal is not justified on grounds of oppression merely because the business has not been as successful as hoped, or because the minority's reasonable expectations have been disappointed in some way, or even because some instances of unfairness can be shown to have occurred. Rather, to justify withdrawal under the definition of oppression in Subsection D of this Section, the plaintiff must prove that the majority's behavior, taken as a whole over an appropriate period of time, is plainly incompatible with a genuine effort on the part of the majority to be fair to the shareholders. And the effort to be fair is to be evaluated in light of expectations that it would be reasonable for the shareholders to hold under the circumstances.

(2) In determining fairness, the interests of all shareholders, not just those of the complaining shareholder, must be considered. The majority shareholders are entitled to control the business through the exercise of their voting power, and they are entitled as much as the minority shareholders to have their reasonable expectations respected. The evaluation of challenged conduct as "oppressive" should be guided by principles appropriate to the interpretation of a contract that calls for cooperation and fair dealing from all parties in the operation of a business that entails uncertainty and risk. A failure by the majority over an extended period of time to provide a minority investor with any reasonable participation in the benefits of a successful business will be difficult in most cases to reconcile with a genuine effort on the part of the majority to be fair to all shareholders. However, the majority shareholders owe no duty to sacrifice their own legitimate interests as majority owners of the business, or to make payments or provide benefits to the minority investor that are out of proportion to the value of the contributions to the business by the minority investor or his predecessor in interest.

(3) The conduct of the complaining shareholder is to be taken into account in deciding whether withdrawal on grounds of oppression is warranted. While the shareholders of a closely-held corporation are commonly compensated largely through their employment by the corporation - making continued employment a reasonable expectation in many cases - shareholders are not entitled to keep their jobs regardless of the quality of their job performance. Incompetence, dishonesty or disloyalty on the part of an employee shareholder may justify the shareholder's termination as a corporate employee, and a justified termination would not by itself amount to oppression. Still, a minority shareholder does not forfeit all right to any economic benefit from his shares merely because his job performance may justify his termination as an employee. A complete freezeout of a shareholder from any participation in the benefits of ownership in the corporation could be considered oppression even if the shareholder's termination as an employee was itself justified. See, Gimpel v. Bolstein, 477 N.Y.S.2d 1014 (Sup. 1984).

(4) A leading case concerning "reasonable expectations" requires the plaintiff in an oppression case to prove that the conduct of the controlling shareholders has substantially defeated expectations that "objectively viewed, were both reasonable under the circumstances and were central to the petitioner's decision to join the venture." Matter of Kemp & Beatley, Inc., 473 N.E.2d 1173 (N.Y. 1984). This Section embraces the "objectively reasonable under the circumstances" part of the test, but for the reasons explained in the next comment, it drops the requirement that the plaintiff prove that the expectations in question actually played some role in the plaintiff's own decision to join the corporation as a shareholder.

(5) Among the original investors, actual expectations will be highly relevant to what a shareholder would be reasonable in considering fair under the circumstances. But disputes within closely-held corporations commonly arise among the children of the founding shareholders, making it unlikely that the litigating shareholders' expectations will have played any role in the investment decisions that were made when the inherited shares were first purchased. The arrangements made

and practices followed by the founding shareholders could play some role in shaping what a person succeeding to the founders' shares would be reasonable in expecting. But a reasonable person should expect some adjustment in those practices to occur as a result of the passing of the shares from one generation to another. The personalities, interests and skills of the second generation of shareholders may differ substantially from those that shaped the expectations and practices of the original investors. This Section allows those changed factors to be taken into account in determining the expectations that it would be reasonable for a shareholder in the plaintiff's position to hold.

(e) In contrast with the Model Act's focus on wrongful conduct by "the directors or those in control of a corporation," this Section defines oppression by reference to the corporation's treatment of the complaining shareholder. Although a corporation's oppression of a shareholder is unlikely to occur without the complicity of its directors or controlling shareholders, this Section does not require the complaining shareholder to prove that any particular participant in corporate management is responsible for the oppression that occurs.

(f) The second sentence of Subsection B of this Section creates a presumption that conduct is not oppressive if it is consistent with the good faith performance of an agreement among all shareholders. A unanimous governance agreement under R.S. 12:1-732 is included among the unanimous agreements contemplated by the presumption, but the presumption is not limited to that particular form of agreement. It applies with respect to all unanimous agreements among the shareholders.

(g) Conduct that is consistent with the good faith performance of a unanimous shareholders' agreement should be considered oppressive only rarely. The fact that an agreement operates imperfectly, and even unexpectedly in some respects, is not sufficient to rebut the presumption created in Subsection B of this Section. Conduct that qualifies for the presumption in Subsection B of this Section should be treated as oppressive only if (1) it would be considered oppressive but for the presumption and (2) the identities of the shareholders, the nature of the corporation's affairs or other relevant circumstances have changed so profoundly since the signing of the agreement that the fact finder is justified in concluding that parties to the agreement could not have intended to approve as fair, in context, the conduct being challenged as oppressive.

(h) The definition of "fair value" in Subsection C of this Section is not affected by the terms of any agreement among the shareholders or in the articles or bylaws of the company that state the value of the shares or state how the value is to be determined. But the definition in Subsection B of this Section applies only in the context of a shareholder's withdrawal on grounds of oppression. It does not affect the valuation of a withdrawing shareholder's shares under other agreements or governance documents, which often deliberately impose some form of discount as a means of discouraging the kind of withdrawal contemplated by the pertinent provision. A corporation's adherence to an agreed value or valuation methodology in connection with a shareholder's withdrawal on grounds other than oppression does not itself constitute oppression under Subsection B of this Section or violate the rule in Subsection J of this Section against the diminution of a shareholder's right to withdraw from the corporation on grounds of oppression.

(i) Subsection D of this Section treats a notice of withdrawal as an offer of sale by the withdrawing shareholder, and Subsection E of this Section treats the corporation's notice of acceptance as an acceptance of that offer of sale. But that process creates a contract of sale only if the offer includes a price for the offered shares as provided in Subsection D of this Section and if the corporation accepts that price as provided in Subsection F of this Section. Otherwise, the corporation's

acceptance of the shareholder's offer to sell triggers only the right to file an action under R.S. 12:1-1436(A) to obtain a court-ordered sale at a fair price set by the court.

(j) If a contract of sale is created as provided in Subsection F of this Section, ownership of the offered shares is transferred from the withdrawing shareholder to the corporation when the contract comes into existence, which occurs when the corporation's notice of acceptance becomes effective under the rules stated in R.S. 12:1-141. After that point, the rights of the corporation and former shareholder with respect to the relevant shares are limited to their contract rights against one another under the Subsection F contract. Because ownership of the shares will be transferred immediately and by operation of law, the only items left to be performed under the contract are (1) the corporation's obligation to pay for the shares and (2) the shareholder's obligation with respect to any certificates issued by the corporation for the shares.

(k) If the exchange of offer and acceptance does not create a contract of sale under Subsection F of this Section, but only the right to pursue a court-ordered purchase and sale, the shareholder remains a shareholder in the company until the court-ordered transaction is consummated as provided in R.S. 12:1-1436(C) or until the shares are transferred in some other fashion.

(l) In some states, courts have used a fiduciary duty theory to protect minority shareholders in a closely held corporation against conduct of the kind defined as oppression in Subsection B of this Section. Subsection L of this Section rejects the treatment of oppression as a breach of fiduciary duty that may justify an action for damages against the corporation, the directors or others in control. Instead, it provides the dissolution and buyout remedies that are set forth in this Section and in R.S. 12:1-1436. Subsection L of this Section does not affect any of the remedies that are available on grounds other than oppression, including the remedies that were available before the special remedy provided by this Section for oppression became effective.

§1-1436. Judicial determination of fair value and payment terms for withdrawing shareholder's shares

A.(1) If a shareholder's right to withdraw from a corporation is recognized by means of a notice of acceptance under R.S. 12:1-1435(E), but the notice does not create a contract under R.S. 12:1-1435(F), the corporation and shareholder shall have sixty days from the effective date of the notice of acceptance to negotiate the fair value of the shareholder's shares and the terms under which the corporation is to purchase the shares. Within one year after the expiration of the sixty-day period, either party may file an action against the other to determine the fair value of the shares and the terms for the purchase of the shares. Venue for the action lies in the district court of the parish where the corporation's principal office or, if none in this state, its registered office is located.

(2) If neither party files an action to establish the fair value of the shares within the time period provided in this Subsection, then subject to the terms of any settlement reached between the parties, the effects of the earlier notices of withdrawal and acceptance under R.S. 12:1-1435 are terminated. The termination of the effects of the earlier notices does not affect the right of the shareholder to reassert the shareholder's right to withdraw through the filing of a new notice of withdrawal in accordance with R.S. 12:1-1435(D).

B. If a shareholder's right to withdraw from a corporation is recognized by a judgment in an action under R.S. 12:1-1435(G), the court shall stay the proceeding for a period of at least sixty days from the date that the judgment is rendered to allow the corporation and shareholder to negotiate the fair value and purchase terms for the withdrawing shareholder's shares, or other terms for the settlement of their dispute. After the stay expires or is lifted, either party may file a motion to have the court determine the fair value and terms for the purchase of the shares.

C. The court shall conduct the trial of the action under Subsection A of this Section or the motion under Subsection B of this Section by summary proceeding.

D. Except as provided in Subsection E of this Section, at the conclusion of the trial the court shall render final judgment as follows:

(1) In favor of the shareholder and against the corporation for the fair value of the shareholder's shares.

(2) In favor of the corporation and against the shareholder for the following:

(a) Terminating the shareholder's ownership of shares in the corporation.

(b) Ordering the shareholder to deliver to the corporation within thirty days of the date of the judgment any certificate issued by the corporation for the shares or an affidavit by shareholder that the certificate has been lost, stolen, or destroyed.

E. If at the conclusion of the trial the court finds that the corporation has proved that a full payment in cash of the fair value of the withdrawing shareholder's shares would violate the provisions of R.S. 12:1-640 or cause undue harm to the corporation or its creditors, the court shall not render the judgment specified in

Subsection D of this Section, but shall instead render final judgment which provides for both of the following:

(1) Ordering the corporation to issue and deliver to the shareholder within thirty days of the date of the judgment an unsecured negotiable promissory note of the corporation which is all of the following:

(a) Payable to the order of the shareholder.

(b) In a principal amount equal to the fair value of the withdrawing shareholder's shares.

(c) Bearing simple interest on the unpaid balance of the note at a floating rate equal to the judicial rate of interest.

(d) Having a term up to ten years, as specified by the court in its judgment as necessary to prevent a violation of R.S. 12:1-640 or undue harm to the corporation or its creditors.

(e) Containing such other terms, customary in negotiable promissory notes issued in commercial transactions, as the court may order.

(2) Terminating the shareholder's ownership of shares in the corporation upon delivery to the shareholder of the note required by the judgment under Paragraph (E)(1) of this Section, and ordering the shareholder to deliver to the corporation, within ten days of the delivery of the note, any certificate issued by the corporation for the shares or an affidavit by shareholder that the certificate has been lost, stolen or destroyed.

F. If a withdrawing shareholder fails to deliver the certificate for a share covered by a judgment rendered under Subsection C or D of this Section, and a third person presents the certificate to the corporation after the shareholder's ownership of the share is terminated by the judgment, the shareholder shall indemnify the corporation for any dilution in value imposed on other shareholders as a result of the corporation's obligations to recognize the person presenting the certificate as the owner of the shares represented by the certificate.

§1-1437. Stay of duplicative proceedings

A. On motion by the corporation, a court shall stay a duplicative proceeding by a shareholder who has given a notice of withdrawal to the corporation as provided in R.S. 12:1-1435(D). The court shall lift the stay on motion by the shareholder when a judgment denying the shareholder's right to withdraw becomes final and definitive.

B. For purposes of this Section, a "duplicative proceeding" is any proceeding in which a shareholder, on his own behalf or as a representative of the corporation, alleges a cause of action against the corporation, or against a director, officer, agent, employee, or controlling person of the corporation, on grounds of a breach of duty owed by that person to the corporation or to the shareholder in the shareholder's capacity as shareholder.

Comments - 2014 Revision

(a) A shareholder's filing of a notice of withdrawal under R.S. 12:1-1435(D) begins a process under which the corporation may be required to purchase the entirety of the withdrawing shareholder's shares in the corporation at the fair value of the shares. The continuation of other shareholder litigation while the complaining shareholder is attempting to withdraw under R.S. 12:1-1435 imposes litigation expenses that will not be justified if the withdrawal remedy is granted, either voluntarily or by virtue of a judgment in an action to enforce the withdrawal remedy. This Section allows the corporation to avoid the potentially wasteful litigation expenses by obtaining a stay of the action until the outcome of the withdrawal effort by the complaining shareholder is known.

(b) If all of the complaining shareholder's shares are purchased, the shareholder's right to pursue any action that is available only to shareholders of a corporation would be terminated, and any action stayed by this provision would then be subject to dismissal on an exception of no right of action.

§1-1438. Conversion of oppression proceeding into court-supervised dissolution

A. A corporation may by contradictory motion convert a withdrawal or valuation proceeding under R.S. 12:1-1435 or 1-1436 into a proceeding for a court-supervised dissolution of the corporation if the dissolution is approved as provided in R.S. 12:1-1402. If the court finds after the hearing on the conversion motion that the dissolution was approved as provided in R.S. 12:1-1402, it shall do all of the following:

(1) Render a judgment dissolving the corporation as provided in R.S. 12:1-1433.

(2) Dismiss the withdrawal or valuation cause of action.

(3) Make the complaining shareholder in the dismissed cause of action a party to the court-supervised dissolution proceeding.

(4) Appoint a liquidator in accordance with R.S. 12:1-1432, or order the corporation to submit to the court for its approval a plan of liquidation and such interim and final reports on the liquidation as the court may consider necessary to protect the interests of the complaining shareholder.

B. A motion under Subsection A of this Section may be filed at any time before final judgment.

C. If a corporation dissolves or terminates while a withdrawal or valuation proceeding under R.S. 12:1-1435 or 1-1436 is pending, but does not file a motion to convert the proceeding as provided in Subsection A of this Section, the complaining shareholder in the proceeding may by contradictory motion seek to convert the proceeding into one for a court-supervised dissolution of the corporation. If the court finds that the conversion is necessary to protect the interests of the shareholder, it shall grant the motion and take the actions contemplated by Subsection A of this Section for the conversion of a proceeding to a court-supervised dissolution.

SUBPART D. TERMINATION AND REINSTATEMENT

Introductory Comments to Subpart D

(a) This Subpart omits Model Act Section 14.40, which would have allowed a dissolved corporation that is unable to find a creditor, claimant or shareholder to deposit any funds owed to the missing payee with the state treasurer, in a manner similar to that provided by the Uniform Unclaimed Property Act, R.S. 9:151-88. The Section was omitted to allow the state treasurer to deal with the unclaimed funds of a dissolved corporation in the same way as other unclaimed property, as provided in the Unclaimed Property Act.

(b) Because Section 14.40 was the only provision contained in Subchapter D of Model Act Chapter 14, the omission of the Section made the Subsection available for other purposes. Subpart D is utilized to deal with the termination and reinstatement of a corporation's existence. The Model Act does not deal with those topics because the Model Act does not terminate the existence of a dissolved corporation; even a dissolved corporation continues to exist perpetually. Subpart D of this Part adopts an approach to corporate dissolution that is similar to that taken

under prior Louisiana law, which provided a mechanism for terminating the existence of a dissolved corporation.

(c) Under prior Louisiana law, a corporation was dissolved in four steps. In the first step, the dissolution process was begun, either through the filing of articles of dissolution or through a court order of dissolution. The first step resulted in the transfer of managerial power over the corporation from the board of directors to a liquidator. The liquidator was then responsible for the second step, that of winding up and liquidating the business and affairs of the corporation, in some cases subject to court supervision. When the liquidation was completed, the statute required the liquidator to take the third step in the process, that of filing what were confusingly called "articles of dissolution", also the name for the document that began, rather than ended, a liquidation, or if the dissolution was judicially supervised, an order of dissolution. Finally, in the fourth step, if the order or articles of liquidation met the requirements of law and certain listed state agencies certified that the corporation owed no unpaid obligations to them, the secretary of state was required to issue a "certificate of dissolution," which caused the corporation to be dissolved in the sense that its existence was terminated as of the effective date of the certificate. The law dealt with any late-discovered assets or claims by vesting the assets in the liquidator and empowering the liquidator to take any action required to preserve the interests of the corporation, its creditors or shareholders. If the liquidator died or was unwilling or unable to serve, the statute allowed the appointment of a new liquidator "for any proper purpose."

(d) Under the Model Act, the dissolution of a corporation involves only two steps: (1) the dissolution is triggered by articles or an order of dissolution and (2) the board of directors (or a liquidator if one is judicially-appointed) conducts or supervises the winding up and liquidation of the corporation's business and affairs. At no point does the Model Act require (or permit) the filing of the documents contemplated by steps three and four of prior Louisiana law, those declaring the liquidation to be complete and the existence of the corporation to be terminated. Instead, a dissolved corporation continues to exist forever under the Model Act scheme, but only for purposes of winding up and liquidating its affairs. Section 14.05 of the Model Act provides a single set of rules to govern a dissolved corporation, both during the period in which the corporation is engaged in winding up its affairs and during the perpetual period that follows the completion of that process. In effect, Section 14.05 provides that all of the normal corporate governance rules continue to apply forever to a dissolved corporation, except for the change in the object of corporate operations from normal business to liquidation, even after the corporation has been fully liquidated and its operations - for any purpose - fully shut down.

(e) This Subpart adopts the Model Act approach to the continued existence of a dissolved corporation while the corporation is still engaged in the process of winding up its affairs. It also adopts the Model Act concept that a dissolved corporation continues to exist perpetually for purposes of identifying the person, i.e. the corporation, that owns any undistributed corporate assets and owes any undischarged corporate debts. But this Subpart rejects the Model Act view that a dissolved corporation may continue to be governed by the same Section 14.05 rules both during its active liquidation phase and during the infinitely longer period after the completion of its liquidation. After the active liquidation of the corporation is completed, the corporation continues to exist only to help conceptualize how to deal with items missed during its liquidation. This Subpart provides a mechanism similar to that provided under prior law under which the existence of an already-liquidated corporation may be terminated for all other purposes.

(f) This Subpart differs from prior law by eliminating the theoretical vesting of undiscovered assets in a liquidator. Instead, the corporation itself, even after its

termination, will continue to hold any undistributed assets and to owe any undischarged debts. The continuation of the corporation for this limited purpose may be viewed either as an exception to the termination of the corporation's existence for other purposes or as a legal fiction that helps conceptualize properly the nature of the interests in any undistributed assets held by various types of claimants or shareholders of the terminated corporation. The practical question posed by the terminated corporation's continuing role with respect to undistributed assets or undischarged debts is how to deal with those items on the corporation's behalf. Those issues are addressed by R.S. 12:1-1444, which for a three-year period permits a terminated corporation to be reinstated fully and retroactively, and by R.S. 12:1-1445, which permits a court to appoint a liquidator for the terminated corporation.

§1-1440. Articles of termination

A. When the board of directors, or the liquidator acting during the liquidator's appointment, determines that the corporation has completed the winding up and liquidation of its business and affairs, the board of directors or liquidator may cause the corporation to deliver to the secretary of state for filing articles of termination.

B. The articles of termination shall state all of the following:

(1) The name of the corporation.

(2) The date of its dissolution.

(3) Whether its dissolution was voluntary or judicial.

(4) That the corporation has paid or made reasonable provision for the payment of all of its liabilities.

(5) That the net assets of the corporation remaining after winding up have been distributed to the shareholders.

C. If the articles of termination are signed by a liquidator, the secretary of state shall not file the articles unless the articles have attached or appended to them a certified copy of the court order that authorizes the liquidator to wind up the affairs of the corporation.

Comments - 2014 Revision

(a) This Section provides a means by which the board of directors or a court-appointed liquidator may declare the liquidation of a dissolved corporation to be complete and to obtain a termination of the corporation's existence for all purposes other than holding any undistributed assets or owing any undischarged corporate debts.

(b) The corporation's existence is terminated when the secretary of state files the articles of dissolution. See R.S. 12:1-1443.

§1-1441. Simplified termination procedure for certain corporations

A. The existence of a corporation may be terminated as provided in this Section if the corporation satisfies all of the following conditions:

(1) Does not owe any debts.

(2) Does not own any immovable property.

(3) Has not issued shares or is not doing business.

B. If the corporation has not issued shares, a termination under this Section may be authorized by a majority of the initial directors or, if no initial directors are named in the articles of incorporation, by a majority of the incorporators. If the corporation has issued shares the termination may be authorized as provided in R.S. 12:1-1402 or by the unanimous written consent of the shareholders.

C. After the termination is authorized, the corporation may deliver to the secretary of state for filing articles of termination that set forth all of the following:

(1) The name of the corporation.

(2) That no debt of the corporation remains unpaid.

(3) That the corporation owns no immovable property.

(4) That the corporation has not issued shares, or is not doing business.

(5) That the net assets of the corporation remaining after winding up have been distributed to the shareholders, if shares were issued.

(6) That the termination was authorized as required by R.S. 12:1-1441(B).

Source: MBCA §14.01, R.S. 12:142.1.

Comments - 2014 Revision

(a) This Section combines features of Model Act Section 14.01, which provides a simplified dissolution mechanism for a corporation that has not issued shares or has not begun business, with those of former R.S. 12:142.1, which permitted a corporation to dissolve by affidavit if it owed no debts and owned no immovable property. As used in the Model Act provision, dissolution would not terminate a corporation's existence; even dissolved corporations would continue to exist perpetually under the Model Act. As used in the former Louisiana provision, dissolution referred to the termination of the corporation's existence. This Section avoids the possible confusion between the two different meanings of dissolution by providing that the procedure authorized in this Section results in a termination of the

corporation's existence, and not a mere dissolution in the Model Act sense of the term.

(b) This Section rejects the rule in former R.S. 12:142.1 that imposed personal liability for corporate debts on shareholders who utilized that Section's simplified mechanism for terminating the existence of their corporation. The former rule encouraged shareholders who wished to shut down corporate operations to do so without any formal dissolution process, and then simply to stop filing annual reports. The failure to file annual reports for a period of three years triggered a requirement that the secretary of state revoke the non-filing corporation's charter. The charter revocation accomplished the same result as the dissolution-by-affidavit, but without the statutory imposition of personal liability on shareholders for the revoked corporation's debts. Indeed, if the corporation's existence was terminated by revocation rather than affidavit, the shareholders could reinstate their corporation during the first three years following the revocation, with retroactive effect, by filing a simple form with the secretary of state's office and paying a small filing fee. Given the choice between liability-imposing dissolution and cost-free, no-risk charter revocation, most well-advised shareholders opted for charter revocation. This Section eliminates the strong incentive created by the former liability rule to dissolve by violating, rather than by complying with, the requirements of the corporation statute.

(c) Shareholders who use the simplified form of dissolution authorized by this Section do not receive the benefits of the claims-barring and claims-discharging rules of R.S. 12:1-1406 through 1-1408. Those rules are available only if the more formalized dissolution procedure required by those provisions is utilized. But, unlike prior law, this Section does not impose personal liability on shareholders who utilize a simplified form of dissolution. Regardless of the form of dissolution that is used, shareholders bear liability only for unlawful distributions from the corporation. They do not bear personal liability for the corporation's debts.

§1-1442. Administrative termination

A. Subject to Subsection B of this Section, the secretary of state shall terminate the existence of a corporation if, according to the records of the secretary of state, the corporation has failed for ninety consecutive days to do either of the following:

(1) Comply with the requirements imposed by R.S. 12:1-501 concerning the continuous maintenance in this state of a registered office and registered agent.

(2) To file an annual report as required by R.S. 12:1-1621.

B. The secretary of state shall give the corporation at least thirty days' written notice of the secretary's intention to terminate the corporation's existence under Subsection A of this Section. If the corporation eliminates the grounds for its termination before the end of the thirty-day notice period, the secretary of state shall not terminate the existence of the corporation.

C. The secretary of state terminates the existence of a corporation under this Section by filing a certificate of termination that states the grounds for termination. The secretary shall serve a copy of the certificate of termination on the corporation in accordance with R.S. 12:1-504.

Source: R.S. 12:163.

Comment - 2014 Revision

This Section is not part of the Model Act. It is based on former R.S. 12:163, which required the secretary of state to revoke the charter of a corporation that failed to file annual reports or failed to maintain a registered office or registered agent. This Section reduces the grace period for the filing of the annual report from three years to ninety days, to discourage the practice of filing the annual report, and paying the required filing fee, only every third year, after receiving the notice of pending revocation from the secretary of state.

§1-1443. Effective date and effects of termination

A. The filing by the secretary of state of a corporation's articles of termination under R.S. 12:1-1440 or 1-1441 or a certificate of termination under R.S. 12:1-1442 causes the existence of the corporation to terminate on the effective date of the articles or certificate of termination. The effects of the filing of the articles or certificate of termination are not affected by any error in the articles or certificate, but the error may justify reinstatement of the corporation as provided in R.S. 12:1-1444 or the appointment of a liquidator as provided in R.S. 12:1-1445.

B. When the existence of the corporation terminates, the corporation's juridical personality ends except for purposes of any of the following:

(1) Reserving the corporation's name as provided in R.S. 12:1-402(C).

(2) Concluding any proceeding to which the corporation is a party at the time of the termination.

(3) Continuing to own any undistributed corporate assets and to owe any undischarged corporate obligations or liabilities.

C. The termination does not do any of the following:

(1) Extinguish any claim against the corporation.

(2) Abate any proceeding to which the corporation is a party.

(3) Cause any obligation or liability owed by the corporation to become the obligation or liability of any of the corporation's current or former shareholders, directors, officers, employees, or agents.

(4) Cause any undistributed asset of the corporation to become the property of any of the corporation's current or former shareholders, directors, officers, employees, or agents.

D. A terminated corporation's juridical personality, and the authority of a person acting on the corporation's behalf as its legal counsel or managerial representative, continues for purposes of Paragraph (B)(2) of this Section as if the termination had not occurred, but subject to the power of an authorized representative of a reinstated corporation, or of a liquidator appointed in accordance with R.S. 12:1-1445, to change the identity or authority of the legal counsel or managerial representative.

E. The existence of a terminated corporation may be reinstated as provided in R.S. 12:1-1444, and a liquidator may be appointed as provided in R.S. 12:1-1445 for any proper purpose. Unless a terminated corporation is reinstated, any action that is commenced by or against the corporation after the effective date of its termination shall be brought by or against a liquidator that is appointed in accordance with R.S. 12:1-1445.

Comments - 2014 Revision

(a) This Section is not part of the Model Act. It was added to this Part to retain a mechanism for terminating the existence of a corporation for all purposes other than owning any undistributed corporate assets or owing any undischarged corporate debts. The termination of a corporation under this provision terminates the applicability of the rules of corporate governance that would otherwise continue to apply even to a dissolved corporation under R.S. 12:1-1405.

(b) As provided in Paragraph (C)(3) of this Section, the termination of the corporation's existence does not cause any of its former directors, officers or shareholders to become personally liable for the terminated corporation's debts. The rule in Paragraph (C)(3) of this Section does not protect the former shareholders against liability for improper distributions from the terminated corporation, or for post-termination business transactions carried out by them without the protection against personal liability provided by an existing corporation. But corporate shareholders do not become substitute obligors on a corporation's debts merely because the corporation's separate juridical personality is terminated.

(c) Similarly, as provided in Paragraph (C)(4) of this Section, corporate shareholders do not become substitute owners of the corporation's assets merely because the existence of the corporation is terminated. A terminated corporation continues to own its undistributed assets and to owe its unpaid debts as provided in Paragraph (B)(3).

(d) If a termination is administrative, the terminated corporation may or may not owe unpaid debts or own undistributed assets, depending on whether the administrative termination is triggered inadvertently or deliberately. If the administrative termination occurs unexpectedly, in an ongoing business in which the corporation's annual filing obligations have simply been overlooked, the terminated corporation is very likely to own assets and to owe debts when it is terminated. In that case, the rule in Paragraph (B)(3) of this Section preserves the corporation's position in relation to its assets and liabilities during the period between its termination under R.S. 12:1-1442 and its likely reinstatement under R.S. 12:1-1444. If, on the other hand, the owners of a corporation have already shut down its operations and wound up its affairs, they may choose deliberately to stop filing their corporation's annual reports as a means of causing the secretary of state to terminate their corporation's existence. In that case, the rule in Paragraph (B)(3) of this Section will apply only to the extent that it is needed to deal with assets or liabilities that were undiscovered or overlooked in the informal winding up of the corporation's affairs.

(e) If a termination is voluntary, then all of the terminated corporation's assets ordinarily will have been paid out or distributed as part of the pre-termination winding up of the corporation's affairs. If some assets remain undistributed after a voluntary termination, then one, or both, of two explanations is likely to account for that fact: some assets were undiscovered or overlooked during the winding up, or the existence of the corporation was deliberately terminated while the corporation still owned assets and owed debts, in a misguided effort to eliminate the corporation's debts by eliminating the corporate debtor. In both circumstances, Paragraph (B)(3) of this Section continues to treat the corporation as the debtor on corporate liabilities and the owner of corporate assets, to preserve both the existence and priority of the various forms of claims and interests in the undistributed assets.

(f) Any transfer of undistributed assets from the terminated corporation to a creditor or shareholder would require the proper exercise of managerial authority on behalf of the corporation. That managerial authority could be obtained through the appointment of a liquidator under R.S. 12:1-1445 or, if the requirements for reinstatement could be satisfied, through a reinstatement of the corporation under R.S. 12:1-1444. The reinstatement would not itself create managerial authority, but it would return the corporation to the position it was in before the termination occurred. Hence, the board of directors, officers and agents of the corporation would hold the same authority after the reinstatement as they would have held had no termination occurred.

(g) Subsection D of this Section is designed to prevent the disruption of pending litigation by preserving the authority of a corporation's legal and managerial representatives in the litigation. However, the authorized representatives of a reinstated corporation, or a liquidator who is appointed in accordance with R.S. 12:1-1445 and who holds the appropriate authority, may make changes in the identity or authority of the corporation's legal counsel or managerial representatives.

(h) Although Subsection B of this Section allows a pending proceeding by or against a terminated corporation to continue, any recovery by the corporation in the litigation will become an undistributed asset of the corporation, and any monetary judgment against the corporation will be collectible only from the

corporation's undistributed assets, or through unlawful distribution claims against its former directors or shareholders.

§1-1444. Reinstatement of terminated corporation

A. A terminated corporation may be reinstated if the corporation satisfies both of the following conditions:

(1) Was not dissolved by a judgment of dissolution.

(2) Requests reinstatement in accordance with this Section no later than three years after the effective date of its articles or certificate of termination.

B. If the corporation was terminated administratively under R.S. 12:1-1442, the articles of reinstatement shall be approved by either of the following:

(1) A director or officer listed in the corporation's last annual report before its termination.

(2) A director of the corporation elected by the shareholders of the corporation after the last annual report, regardless of whether the director was elected before or after the administrative termination.

C. If the corporation was terminated after its dissolution or termination was authorized by a vote of shareholders, then all of the following actions are required:

(1) The reinstatement of the corporation shall be approved by the same vote that was required to approve the dissolution or termination, by the persons who were shareholders at the time that the dissolution or termination was approved by the shareholders.

(2) The persons entitled to vote on the reinstatement shall elect a board of directors for the reinstated corporation.

(3) The board of directors elected in accordance with Paragraph (C)(2) of this Section shall elect officers for the reinstated corporation.

D. A corporation may request reinstatement by delivering to the secretary of state for filing articles of reinstatement and an annual report. The articles of reinstatement and the annual report shall be signed by an officer or director of the corporation who is entitled to approve the articles under Subsection B of this Section or, in the case of a reinstatement authorized in accordance with Subsection C of this

Section, by a director or officer elected in accordance with that Subsection. The annual report shall be accompanied by a written consent to appointment signed by the registered agent named in the annual report.

E. The articles of reinstatement shall state all of the following:

(1) The name of the corporation.

(2) That the reinstatement was approved in accordance with either of the following:

(a) R.S. 12:1-1444(B).

(b) R.S. 12:1-1444(C) , and that the directors and officers listed in the annual report accompanying the articles of reinstatement were elected in accordance with that Subsection.

(3) That the corporation is reinstated, effective retroactively as if the corporation had never been terminated.

F. The secretary of state shall file the articles of reinstatement only if both of the following conditions are satisfied:

(1) The articles are delivered for filing to the secretary of state within three years after the effective date of the articles or certificate of termination for the corporation.

(2) The fee is paid for the filing of an annual report for each year between the corporation's last annual report and the year in which corporation is reinstated.

G. In addition to the reinstatement authorized by Subsections A through F of this Section, if the administrative termination of a corporation occurred because of an error in the records of the secretary of state not caused by the corporation, the secretary of state shall file a certificate of reinstatement that states that the certificate of termination was filed in error, and that the corporation is reinstated, with retroactive effect as if the termination had never occurred.

H. When the secretary of state files a certificate or articles of reinstatement, the existence of the terminated corporation is reinstated retroactively, and the corporation continues to exist as if the termination had never occurred.

Source: R.S. 12:163.

Comments - 2014 Revision

(a) This Section is not part of the Model Act. It is based on former R.S. 12:163(E), which permitted the reinstatement of a corporate charter that had been revoked by the secretary of state on grounds that the corporation had failed to file annual reports, or had failed to maintain a registered agent and registered office as required by law. This Part broadens the scope of the former provision by making reinstatement available not only to corporations terminated administratively, but also to those terminated voluntarily under R.S. 12:1-1440 or 1-1441.

(b) The broadening of the reinstatement option to include voluntarily-terminated corporations is designed to deal with similar cases in similar ways. Shareholders who choose to terminate their corporations voluntarily and formally, but then regret having done so because of some overlooked matter, should have the same opportunity to fix the problem as those who regret an administrative termination for a similar reason. Unlike the former law, this Section does not restrict the reinstatement privilege to those who have triggered a termination through a failure to comply with the corporation statute.

(c) The prior law's three-year time limit on reinstatements was retained in this Part. A three-year period is long enough to cover most of the post-termination issues that are likely to arise, yet short enough to make it likely that the pre-termination arrangements within the corporation can be reinstituted without the need for judicial review. If it is not possible to obtain the vote required for reinstatement, or if the three-year period allowed for reinstatement has expired, a liquidator may be appointed under R.S. 12:1-1445 to deal with any undistributed assets or undischarged claims of a terminated corporation.

(d) Articles of reinstatement may be filed by the secretary of state only if they meet the general requirements of R.S. 12:1-120 for the filing of a document under this Chapter. Subsection F of this Section imposes requirements that must be satisfied in addition to those provided in R.S. 12:1-120.

§1-1445. Appointment of liquidator for terminated corporation

On application of any interested party, a district court may, ex parte or on such notice as the court may order, appoint a liquidator to act on behalf of a terminated corporation with respect to any of its undistributed assets or undischarged claims or interests. The court's appointment of a liquidator under this Section is governed by the provisions of R.S. 12:1-1432, as if the liquidator were being appointed to conduct a dissolution of the corporation under court supervision. The costs and expenses of the liquidator and of the appointment of the liquidator under this Section shall be paid by the party seeking the appointment, subject to

reimbursement from any undistributed assets of the corporation or the proceeds of their disposition.

Comments - 2014 Revision

(a) Under the Model Act, a dissolved corporation continues to exist indefinitely after its dissolution. The dissolution simply marks the point at which the object of corporation changes from the operation of its business to the winding up and liquidation of its affairs. Hence, in theory, the Model Act deals with any late-discovered assets or claims of an already-liquidated corporation in the same way it deals with the assets and claims that were actually taken into account during the active phase of the liquidation process: it empowers the board of directors to collect the assets and to pay the claims.

(b) But if the assets or claims are discovered ten or twenty years after the liquidation of the corporation is thought to have been completed, then no board of directors will exist in any realistic sense. Nor will it be possible in most such cases for anyone to call a meeting of the shareholders, or to have the shareholders act by written consent, for the election of a new board. Hence, even if the law does recognize the dissolved or terminated corporation's continuing role as owner or obligor of the late discovered items - as both the Model Act and this Subpart do - the practical problem posed by the late-discovered items is how identify an appropriate person with authority to deal with those items.

(c) This Section addresses that problem, first, by authorizing reinstatement of the corporation for a three-year period following its termination, and, second, by authorizing the appointment by a court of a liquidator for the terminated corporation. The reinstatement is governed by R.S. 12:1-1444. The appointment of a liquidator is governed by R.S. 12:1-1445.

(d) Any interested person may seek the appointment of a liquidator for a terminated corporation under R.S. 12:1-1445. The person seeking the appointment bears the costs and expenses of the appointment proceeding, and of the liquidator, subject to reimbursement from the undistributed assets of the corporation, or their proceeds.

(e) A corporation that dissolves and completes its liquidation process is unlikely to avoid termination under this Act for more than one additional year. Once the liquidation is completed, the corporation is likely either to terminate voluntarily under R.S. 12:1-1440 or 1-1441 or to discontinue the filing of its annual report, which will cause the corporation to be terminated administratively under R.S. 12:1-1442. If the corporation does avoid termination, then the corporation will be naming in its annual reports the persons whom the corporation claims to possess the authority to deal with late-discovered assets or liabilities. Whether those persons actually possess the authority to deal with the assets or liabilities on the corporation's behalf is a question that would be governed by the normal rules for the election of directors and officers, and, if their terms have expired, for the authority of holdover officials. Any shareholder would continue to hold the power under R.S. 12:1-701(D) to demand a meeting of shareholders for the election of directors if an election of directors had not been conducted for eighteen months or more, and the owners of shares representing at least twenty-five percent of the voting power in the corporation would be entitled to seek court supervision of the dissolution under R.S. 12:1-1430(A)(4). In any case, because the corporation is dissolved, the board would be required to deal with the assets or claims as contemplated by R.S. 12:1-1405.

PART 15. FOREIGN CORPORATIONS

[Reserved.]

Comment - 2014 Revision

Chapter 15 of the Model Business Corporation Act deals with the qualification of foreign business corporations to do business in a state. A separate model act, the Model Nonprofit Corporation Act, deals with the qualification of foreign nonprofit corporations. Because existing Chapter 3 of Title 12 of the Revised Statutes covers the qualification of both forms of foreign corporation, the existing Chapter was retained, and Chapter 15 of the Model Act was omitted from this Act.

PART. 16. RECORDS AND REPORTS

SUBPART A. RECORDS

§1-1601. Corporate records

A. A corporation shall keep as permanent records minutes of all meetings of its shareholders and board of directors, a record of all actions taken by the shareholders or board of directors without a meeting, and a record of all actions taken by a committee of the board of directors in place of the board of directors on behalf of the corporation.

B. A corporation shall maintain appropriate accounting records.

C. A corporation or its agent shall maintain a record of its shareholders, in a form that permits preparation of a list of the names and addresses of all shareholders, in alphabetical order by class of shares showing the number and class of shares held by each.

D. A corporation shall maintain its records in the form of a document, including an electronic record, or in another form capable of conversion into paper form within a reasonable time.

E. A corporation shall keep a copy of all of the following records at its principal office:

(1) Its articles or restated articles of incorporation, all amendments to them currently in effect, and any notices to shareholders referred to in R.S. 12:1-120(K)(5) regarding facts on which a filed document is dependent.

(2) Its bylaws or restated bylaws and all amendments to them currently in effect.

(3) Resolutions adopted by its board of directors creating one or more classes or series of shares, and fixing their relative rights, preferences, and limitations, if shares issued pursuant to those resolutions are outstanding.

(4) The minutes of all shareholders' meetings, and records of all action taken by shareholders without a meeting, for the past three years.

(5) All written communications to shareholders generally within the past three years, including the financial statements furnished for the past three years under R.S. 12:1-1620.

(6) A list of the names and business addresses of its current directors and officers.

(7) Its most recent annual report delivered to the secretary of state under R.S. 12:1-1621.

(8) Any unanimous governance agreement, as defined in R.S. 12:1-732, then in effect.

Source: MBCA §16.01.

Comment - 2014 Revision

This Part adds a new Paragraph (E)(8) that includes unanimous governance agreements among the records that must be kept at the corporation's principal office under R.S. 12:1-1601, and be available for inspection under R.S. 12:1-1602(A). The new Subsection does not require a corporation to create or maintain a unanimous governance agreement, but only to keep a copy of it, and to allow its inspection, if one is in effect. If a corporation does have a unanimous governance agreement in effect, the agreement is one of the basic documents of corporate governance that must be available for inspection by the corporation's shareholders.

§1-1602. Inspection of records by shareholders

A. A shareholder of a corporation is entitled to inspect and copy, during regular business hours at the corporation's principal office, any of the records of the corporation described in R.S. 12:1-1601(E) if the shareholder gives the corporation a signed written notice of the shareholder's demand at least five business days before the date on which the shareholder wishes to inspect and copy.

B. For any meeting of shareholders for which the record date for determining shareholders entitled to vote at the meeting is different than the record date for notice of the meeting, any person who becomes a shareholder subsequent to the record date for notice of the meeting and is entitled to vote at the meeting is entitled to obtain from the corporation, upon request, the notice and any other information provided by the corporation to shareholders in connection with the meeting, unless the corporation has made such information generally available to shareholders by posting it on its website or by other generally recognized means. Failure of a corporation to provide such information does not affect the validity of action taken at the meeting.

C. A shareholder of at least five percent of any class of the issued shares of a corporation for at least the preceding six months is entitled to inspect and copy, during regular business hours at a reasonable location specified by the corporation, any and all of the records of the corporation if the shareholder meets the requirements of Subsection D of this Section and gives the corporation a signed written notice of the shareholder's demand at least five business days before the date on which the shareholder wishes to inspect and copy the records. A shareholder of less than five percent of a corporation's issued shares may exercise the rights provided in this Subsection if the shareholder delivers to the corporation, either before or along with the written notice of demand, written consents to the demand by other shareholders who, in the aggregate with the shareholder making the demand, own the required percentage of shares for the required period.

D. A shareholder may inspect and copy the records described in Subsection B of this Section only if the following conditions are satisfied:

(1) The shareholder's demand is made in good faith and for a proper purpose.

(2) The shareholder describes with reasonable particularity the shareholder's purpose and the records the shareholder desires to inspect.

(3) The records are directly connected with the shareholder's purpose.

E. The right of inspection granted by this Section may not be abolished or limited by a corporation's articles of incorporation, bylaws, unanimous governance agreement, or any other agreement.

F. This Section does not affect either of the following:

(1) The right of a shareholder to inspect records under R.S. 12:1-720 or, if the shareholder is in litigation with the corporation, to the same extent as any other litigant.

(2) The power of a court to deny the right of inspection as to confidential matters, or to place restrictions on the use or distribution of records as provided in R.S. 12:1-1604(D).

G. For purposes of this Section, "shareholder" means a record shareholder, a beneficial shareholder, and an unrestricted voting trust beneficial owner.

Source: MBCA §16.02.

Comments - 2014 Revision

(a) This Section amends Model Act Subsection (c) to retain the rule in prior law that limited inspection rights to shareholders who, by themselves or together with other cooperating shareholders, owned at least five percent of a class of the corporation's shares for at least six months. The prior law's reference to "outstanding" shares has been replaced in this Section with a reference to "issued" shares because "issued" shares is the correct term under this Chapter for what prior law called "outstanding" shares. Under prior law, an issued share that was owned by a third party was called an "outstanding" share, to distinguish it from an issued share that had been reacquired by the corporation, and not canceled, which was called a "treasury" share. Under R.S. 12:1-631, shares that are reacquired by the issuing corporation do not retain their issued status as treasury shares. Rather, they return to the status of unissued shares. The five percent ownership requirement under Subsection C of this Section applies only to inspections of "any and all" records under that Subsection. Any shareholder may exercise the inspection rights provided by Subsection A of this Section.

(b) This Section drops the separate and higher percentage ownership requirement, twenty-five percent, that was imposed under prior law on shareholders who were competitors of the corporation. A higher percentage requirement could interfere arbitrarily with the legitimate inspection rights of shareholders who happen to be competitors, while still failing to protect the corporation adequately against the inspection of records for improper purposes by competitors who happen to own the required percentage of shares. This Section deals with inspections by competitors in two ways. First, all inspections under Subsection C of this Section are subject to the requirements of Subsection C of this Section, which include the requirement that the demand for inspection be made in good faith and for a proper purpose. Second, the court is given the power under Subsection F of this Section to deny the inspection of records concerning confidential matters.

(c) This Section also changes the rule in prior law that multiple shareholders could "jointly" exercise an inspection, to avoid any suggestion that jointly-held inspection rights might somehow have to be exercised differently from those held by just one shareholder. This Section does not require that the inspections themselves be conducted jointly, but only that a group of shareholders owning the required percentage of shares for the required period consent to the inspecting shareholder's demand for inspection.

(d) This Section retains the rule in prior law that allowed a shareholder to inspect "any and all" records of the corporation, and not merely those records specifically listed in Model Act Subsection (c). It omits the reference in prior law to "accounts" because accounting records are included in the records that may be inspected under this Section.

(e) This Section deletes Model Act Paragraph (f)(2), which preserved the power of a court to compel the production of corporate records independently of the Section. The statement was deleted as unnecessary to preserve any such power and to eliminate the risk that the statement of preservation could itself be construed as an implicit recognition of some unspecified additional authority.

(f) This Section uses Paragraph (F)(2) of this Section to retain the rule from prior law that permits a court to deny inspection rights as to confidential matters. The court's power to deny inspection exists in addition to its authority to restrict the use or distribution of inspected items under R.S. 12:1-1604(D). A court should deny the inspection of confidential items only if it concludes that the restrictions that the court may impose on the use or distribution of the inspected records under R.S. 12:1-1604(D) are not sufficient to protect the corporation's interests in the confidentiality of the records.

§1-1603. Scope of inspection right

A. A shareholder's agent or attorney has the same inspection and copying rights as the shareholder represented.

B. The right to copy records under R.S. 12:1-1602 includes, if reasonable, the right to receive copies by xerographic or other means, including copies through an electronic transmission if electronic transmission is available and requested by the shareholder.

C. The corporation may comply at its expense with a shareholder's demand to inspect the record of shareholders by providing the shareholder with a list of shareholders that was compiled no earlier than the date of the shareholder's demand.

D. The corporation may impose a reasonable charge, covering the costs of labor and material, for copies of any documents requested by the shareholder. The charge may not exceed the estimated cost of production, reproduction, or transmission of the records.

Source: MBCA §16.03.

§1-1604. Court-ordered inspection

A. If a corporation does not within a reasonable time allow a shareholder who complies with the applicable provisions of R.S. 12:1-1602 to inspect and copy any records required by that Section to be available for inspection, the district court of the parish where the corporation's principal office or, if none in this state, its registered office is located may by summary proceeding order inspection and copying of the records demanded. If the court determines that the shareholder was entitled to inspect and copy the demanded records under R.S. 12:1-1602(A), then the court shall order the corporation to provide copies of the demanded records at the corporation's expense.

B. [Reserved.]

C. If the court orders inspection and copying of the records demanded, it shall also order the corporation to pay the shareholder's expenses incurred to obtain the order unless the corporation proves that it refused inspection in good faith because it had a reasonable basis for doubt about the right of the shareholder to inspect the records demanded.

D. If the court orders inspection and copying of the records demanded, it may impose reasonable restrictions on the use or distribution of the records by the demanding shareholder.

Source: MBCA §16.04.

Comment - 2014 Revision

This Section combines the two separate enforcement provisions in Model Act Subsections (a) and (b) into a single unified Subsection A of this Section and reserves Subsection B of this Section for future use.

§1-1605. Inspection of records by directors

A. A director of a corporation is entitled to inspect and copy the books, records, and documents of the corporation at any reasonable time to the extent reasonably related to the performance of the director's duties as a director, including duties as a member of a committee, but not for any other purpose or in any manner that would violate any duty to the corporation.

B. The district court of the parish where the corporation's principal office or, if none in this state, its registered office is located may order inspection and copying of the books, records, and documents at the corporation's expense, upon petition of a director who has been refused such inspection rights, unless the corporation establishes that the director is not entitled to such inspection rights. The court shall dispose of a petition under this Subsection by summary proceeding.

C. If an order is issued, the court may include provisions protecting the corporation from undue burden or expense, and prohibiting the director from using information obtained upon exercise of the inspection rights in a manner that would violate a duty to the corporation, and may also order the corporation to reimburse the director for the director's expenses incurred in connection with the proceeding under Subsection B of this Section. In addition to a director's rights under this Section, a director is also entitled to the corporation's payment of expenses, and to the corporation's provision of copies at the corporation's expense, on the same basis as a shareholder under R.S. 12:1-1604, regardless of whether the director is a shareholder or holds the percentage of shares specified in R.S. 12:1-1602.

Source: MBCA §16.05.

Comments -2014 Revision

(a) This Section modifies the procedural terminology in Model Act Subsection (b) to make it consistent with the Code of Civil Procedure.

(b) This Section also adds a second sentence to Subsection (b) to extend to a director the same expense-reimbursement and free-copy rights as a shareholder under R.S. 12:1-1604, regardless of whether the director owns the shares required to obtain those rights in his or her capacity as a shareholder.

§1-1606. Exception to notice requirement

A. Whenever notice would otherwise be required to be given under any provision of this Chapter to a shareholder, such notice need not be given if either of the following conditions are met:

(1) Notices to the shareholders of two consecutive annual meetings, and all notices of meetings during the period between such two consecutive annual meetings, have been sent to such shareholder at such shareholder's address as shown

on the records of the corporation and have been returned undeliverable or could not be delivered.

(2) All, but not less than two, payments of dividends on securities during a twelve-month period, or two consecutive payments of dividends on securities during a period of more than twelve months, have been sent to such shareholder at such shareholder's address as shown on the records of the corporation and have been returned undeliverable or could not be delivered.

B. If any such shareholder shall deliver to the corporation a written notice setting forth such shareholder's then-current address, the requirement that notice be given to such shareholder shall be reinstated.

Source: MBCA §16.06.

SUBPART B. REPORTS

§1-1620. Financial statements for shareholders

A. Once each calendar year a shareholder may obtain a report of financial information from the corporation. To obtain the report, a shareholder shall give a written notice of the request for the report to the corporation. The notice shall specify a postal mailing address, and if desired an electronic mailing address, to which the report should be delivered. Promptly after receiving the shareholder's notice, the corporation shall deliver to the shareholder, at one of the specified addresses, a report that complies with the requirements of Subsections B and C of this Section.

B. A report of financial information shall contain all of the following financial statements, which may be consolidated or combined statements of the corporation and one or more of its subsidiaries, as appropriate, for the last fiscal year ended at least four months before the effective date of the shareholder's notice:

(1) A balance sheet.

(2) An income statement.

(3) A statement of changes in shareholders' equity unless that information appears elsewhere in the financial statements provided.

(4) If ordinarily prepared by the corporation, a statement of cash flows.

C. If the corporation's financial statements are prepared for the corporation on the basis of generally accepted accounting principles, the statements in the report of financial information listed in Subsection B of this Section must also be prepared on that basis. If those statements are reported upon by a public accountant, the accountant's report shall be delivered as part of the report of financial information described in Subsection B of this Section.

D. A public corporation may fulfill its responsibilities under this Section by delivering the financial statements listed in Subsection B of this Section, or otherwise making them available, in any manner permitted by the applicable rules and regulations of the United States Securities and Exchange Commission. A corporation that complies with this Subsection is not required to deliver a report of financial information as provided in Subsection A of this Section.

Source: MBCA §16.20.

Comment - 2014 Revision

This Section modifies the Model Act to retain the rule in prior law that a corporation is required to provide financial reports to its shareholders only annually and only when requested. This Section adopts the substance of the Model Act rules concerning the nature of the financial statements to be provided, and the entitlement of public companies to satisfy their reporting obligations through their securities law filings.

§1-1621. Annual report for secretary of state

A. Each corporation shall deliver to the secretary of state for filing an annual report that sets forth all of the following information:

(1) The name of the corporation.

(2) The address of its registered office.

(3) The name and address of its registered agent.

(4) The address of its principal office.

(5) Names and business addresses of its directors and principal officers.

(6) The total number of issued shares, itemized by class and series, if any, within each class.

B. Information in the annual report must be current as of the date the annual report is signed on behalf of the corporation.

C. A corporation's annual report shall be delivered to the secretary of state each year on or before the anniversary of the date that the corporation was incorporated.

D. If an annual report does not contain the information required by this Section, the secretary of state shall promptly notify the corporation in writing and return the report to it for correction. If the report is corrected to contain the information required by this Section and delivered to the secretary of state within thirty days after the effective date of notice, it is deemed to be timely filed.

E. A dissolved corporation shall continue to file annual reports under this Section until the existence of the corporation is terminated.

Source: MBCA §16.21.

Comments - 2014 Revision

(a) This Section deletes the Model Act references to annual reports by foreign corporations because those are governed by Chapter 3 of this Title. As a result of those deletions, this Section applies only to corporations incorporated under the provisions of this Chapter, making the Model Act references to "domestic" corporations, as distinguished from foreign corporations, unnecessary. This Section applies to a "corporation," a term that means the same thing as "domestic corporation" when it is used without any other descriptive words. See R.S. 12:1-140(4).

(b) This Section deletes two of the items that the Model Act requires to be included in an annual report: a description of the business of the corporation and a statement of the number of authorized shares. It also modifies the required statements concerning a corporation's registered office and registered agent to reflect the rejection by this Section of the Model Act rule that the address of a registered agent has to be the same as the address of the corporation's registered office. See R.S. 12:1-501.

(c) This Section replaces the Model Act rule that annual reports be filed in the first quarter of each year with the rule from prior law that reports be filed on or before the anniversary of each corporation's date of incorporation.

(d) This Sections adds a new Subsection E that requires a dissolved corporation to continue filing its annual reports until the corporation's existence is terminated. A dissolved, non-terminated corporation continues to exist, continues to be subject to management by or under the supervision of its board of directors, and continues to be subject to claims by creditors. Under those circumstances, the information provided by an annual report should continue to be publicly available. A dissolved corporation that fails to file its annual reports is subject to administrative termination in the same way as any other corporation.

§1-1622. Reporting obligation of corporation that contracts with the state

A. A corporation that contracts with the state shall deliver for filing to the secretary of state a statement that acknowledges the contract. The statement shall include the names and addresses of all persons or entities who hold an ownership interest of five percent or more in the corporation or who hold by proxy the voting power of five percent or more in the corporation and, if anyone holds stock in his own name that actually belongs to another, the name of the person for whom held, including stock held pursuant to a counterletter.

B. This Subsection does not apply to any of the following:

(1) Any agreement entered between the state and a corporation for electric or gas service.

(2) Publicly traded corporations.

(3) State-chartered banks.

Source: MBCA §16.22.

Comment - 2014 Revision

This Section is not part of the Model Act. It was added to this Part to retain the substance of former R.S. 12:25(E). In prior law, the reporting requirement was included as part of the provision that described the requirements for incorporating a business. The requirement was moved to the reporting provisions of this Chapter because the duty to file the required statement is triggered by a contract between the corporation and the state, and not by the act of incorporating a new company.

PART 17. TRANSITION PROVISIONS

§1-1701. Application to existing domestic corporations

This Chapter applies to all domestic corporations in existence on its effective date that were incorporated under the laws of this state for a purpose or purposes for which a corporation might be formed under this Chapter.

Source: MBCA §17.01.

Comment - 2014 Revision

Under Model Act Section 17.01, this Chapter would apply to all corporations for profit formed under a general statute of this state providing for the incorporation of a corporation for profit. This Section modifies the description of the existing corporations to which it applies to those corporations formed for a purpose for which a corporation could be formed under this Chapter. The narrower description is designed to prevent the application of this Chapter to special forms of for-profit

corporations, such as banking and insurance corporations, which are governed by separate statutes.

§1-1702. Limited applicability to foreign corporations

Except where express reference is made to foreign corporations, this Chapter does not apply to foreign corporations.

Source: R.S. 12:75.

Comments - 2014 Revision

(a) Because this Chapter omits Model Act Chapter 15, concerning the qualification of foreign corporations to do business in this state, it also omits Model Act Section 17.02, concerning the transition rules applicable to already-qualified foreign corporations. Chapter 3 of Title 12 continues to govern the qualification of foreign corporations in this state, without any change by this Chapter.

(b) This Part utilizes R.S. 12:1-1702 to retain the substance of former R.S. 12:175, which rendered the predecessor statute generally inapplicable to foreign corporations. R.S. 12:1-1702 states that the Chapter does not apply to foreign corporations except where it makes an express reference to foreign corporations. Examples of express references to foreign corporations include the reference to the names of qualified foreign corporations in R.S. 12:1-401(B) and the references to foreign corporations in Parts 9 and 11 of this Chapter.

§1-1703. Saving provisions

A. Except as provided in Subsection B of this Section, the repeal of a statute by this Chapter does not affect any of the following:

(1) The operation of the statute or any action taken under it, before its repeal.

(2) Any ratification, right, remedy, privilege, obligation, or liability acquired, accrued, or incurred under the statute, before its repeal.

(3) Any violation of the statute, or any penalty, forfeiture, or punishment incurred because of the violation, before its repeal.

(4) Any proceeding, reorganization, or dissolution commenced under the statute before its repeal, and the proceeding, reorganization, or dissolution may be completed in accordance with the statute as if it had not been repealed.

B. If a penalty or punishment imposed for violation of a statute repealed by this Chapter is reduced by this Chapter, the penalty or punishment if not already imposed shall be imposed in accordance with this Chapter.

C. In the event that any provisions of this Chapter are deemed to modify, limit, or supersede the federal Electronic Signatures in Global and National

Commerce Act, 15 U.S.C. §§ 7001 et seq., the provisions of this Chapter shall control to the maximum extent permitted by Section 102(a)(2) of that federal act.

Source: MBCA §17.03.

§1-1704. [Reserved.]

Comment - 2014 Revision

Model Act Section 17.04, which provides for severability, is omitted from this Chapter. A general rule of severability is provided in R.S. 24:175 for all acts of the Legislature. A separate severability rule in this Chapter would either be repetitious of or inconsistent with the general rule.

* * *

§1501. Applicability

The provisions of this Chapter shall be applicable to all business organizations defined in R.S. 12:1502(B)~~, except as provided in R.S. 12:92(D), 93(D), or 1328(C)~~.

§1502. Actions against persons who control business organizations

A. The provisions of this Section shall apply to all business organizations formed under the laws of this state and shall be applicable to actions against any officer, director, shareholder, member, manager, general partner, limited partner, managing partner, or other person similarly situated. The provisions of this Section shall not apply to actions governed by R.S. 12:1-622, 1-833, 1-1407, or 1328(C).

* * *

§1601. ~~Definitions~~ Conversion of domestic business entities

~~As used in this Chapter, the following terms and phrases shall have the meaning ascribed to them in this Section, unless the context clearly indicates otherwise:~~

~~(1) "Conversion" means the continuance of a domestic entity of one type as a domestic entity of another type.~~

~~(2) "Converted entity" means an entity resulting from a conversion.~~

~~(3) "Converting entity" means an entity as the entity existed before the entity's conversion.~~

One form of domestic business entity may convert to another form of domestic business entity as provided in the Business Corporation Act. This authorization of domestic entity conversions does not limit the other forms of transaction authorized by the Business Corporation Act.

Comments - 2014 Revision

(a) The original version of Chapter 25 of Title 12 was enacted in 2006 to authorize the conversion of one form of domestic unincorporated business entity into another. In 2014, the Chapter was revised extensively in connection with the adoption in Louisiana of the Model Business Corporation Act, now Chapter 1 of Title 12, which contains its own provisions on entity conversion.

(b) Although the basic concept of entity conversion was similar under the Model Act and former Chapter 25, the two approaches differed in several respects:

(1) The Model Act applied only to conversions in which a domestic business corporation was either a converting or surviving entity, but permitted conversions that included as parties foreign corporations and domestic and foreign unincorporated entities, such as partnerships and limited liability companies. Chapter 25 of Title 12, in contrast, applied only to conversions in which both the converting and surviving entities were domestic, but was not limited to conversions that included domestic business corporations as parties.

(2) The Model Act rules on the content, execution and filing of the relevant documents were part of a larger model structure, widely adopted in other states. The analogous Louisiana rules were designed to work within the older structure established by Louisiana's 1968 business corporation statute.

(3) Chapter 25 of Title 12 addressed two issues on which the Model Act was silent: the need to file "short period" tax returns for the converting entity and the treatment of government-issued licenses held by the converting entity.

(c) The two approaches to entity conversion were reconciled in three ways:

(1) The scope of the Model Act conversion provisions was expanded to include the types of non-corporate conversions covered by former Chapter 25 of Title 12.

(2) The provisions of former Chapter 25 o f Title 12 concerning the content, execution and filing of the required conversion documents were repealed and replaced by a cross reference to the Model Act provisions on conversion.

(3) The substance of the tax-return and government licensing rules in Chapter 25 of Title 12 was retained.

(d) Neither this Chapter nor the Business Corporation Act authorizes the conversion of a nonprofit corporation into a business corporation. Former R.S. 12:165, which permitted a nonprofit corporation to "reincorporate" as a business corporation if the provisions of the Nonprofit Corporation Law "no longer appl[ied]," was not retained as part of the current Business Corporation Act. It was not clear how the former reincorporation provision could ever be satisfied, as it required the Nonprofit Corporation Law "no longer [to] apply" to an existing nonprofit corporation. And if the former provision could indeed be satisfied, it appeared to provide an unjustified means of circumventing the prohibition in the Nonprofit

Corporation Law against the distribution of profits. See R.S. 12:210(F). The Nonprofit Corporation Law does permit a nonprofit corporation to merge or consolidate with a business corporation. R.S. 12:242(A). But a nonprofit corporation that is not permitted to distribute its net assets to its members upon dissolution may be merged only with another corporation that is subject to the same limitation. R.S. 12:242(C).

§1602. ~~Conversion of domestic entities~~ Definitions

~~A. Any domestic limited liability company, business corporation, partnership in commendam, or partnership may convert to another type of domestic business entity by submitting a conversion application to the secretary of state. The owners or members of the converting entity must approve the conversion in the same manner provided for by law and by the document, instrument, agreement, or other writing governing the internal affairs of the converting entity and the conduct of its business.~~

~~B. An entity may not convert under this Chapter if an owner or member of the entity, as a result of the conversion, becomes personally liable, without the consent of the owner or member, for a liability or other obligation of the converted entity.~~

Terms that are defined in the Business Corporation Act have the same meaning in this Chapter as in that Act. As used in this Chapter:

(1) "Allowed update rule" means a rule of a licensing body allowed by R.S.12:1604(B) or (C).

(2) "Business entity" means any of the following business organizations: business corporation, limited liability company, partnership, partnership in commendam, and registered limited liability partnership.

(3) "Converting entity" means a domestic business corporation or domestic unincorporated entity as it exists before the effective date of an entity conversion under the Business Corporation Act.

(4) "Domestic business entity" means a business entity that is incorporated, organized, or formed under the laws of this state.

(5) "License" means any license, permit, or certificate issued by any board, commission, or agency of the state or any of its political subdivisions.

(6) "Licensing body" means the board, commission, or agency of the state or any of its political subdivisions that issues a license.

(7) "Publicly traded entity" means a business entity that is the issuer of shares, ownership interests, or other securities that are listed on a national securities exchange or regularly traded in a market maintained by one or more members of a national securities association.

(8) "Surviving entity" means a domestic business corporation or domestic unincorporated entity as it exists immediately after the consummation of an entity conversion under the Business Corporation Act.

§1603. ~~Conversion application~~ Tax filing requirements

~~A. The application shall set forth the following:~~

~~(1) The name of the converting entity and the converted entity.~~

~~(2) A statement of the type of the resulting converted entity.~~

~~(3) A statement that the converting entity is continuing its existence in the organizational form of the converted entity.~~

~~(4) The manner and basis of converting the ownership or membership interests of the converting entity into ownership or membership interests of the converted entity.~~

~~(5) The fact that the conversion has been authorized and approved in accordance with this Section.~~

~~(6)(a) The information required in the articles of organization if the converted entity is a limited liability company, along with an attached initial report.~~

~~(b) The information required in the articles of incorporation if the converted entity is a corporation along with an attached initial report.~~

~~(c) The information required in a contract of partnership if the converted entity is a partnership or a partnership in commendam.~~

~~B. The application shall be signed on behalf of the converting entity in the following manner:~~

~~(1) In the case of a limited liability company, by any member if management is reserved to the members or by any manager if management is vested in one or more managers pursuant to R.S. 12:1312.~~

~~(2) In the case of a corporation, by any officer.~~

~~(3) In the case of a partnership or partnership in commendam, by any general partner.~~

Short period tax returns shall be filed for the converting entity as required by Title 47 of the Revised Statutes if the surviving entity's tax classification is different from the converting entity's tax classification.

Comment - 2014 Revision

This Section operates strictly as a cross-reference to the controlling rule in Title 47 of the Revised Statutes. The obligation to file the short period return is governed by Title 47 itself.

§1604. ~~Filing and recording conversion application; issuance and effect of certificate of conversion~~ Continuation and updating of professional or other license

A. ~~The conversion application, and initial report if applicable, shall be filed with the secretary of state and may be delivered in advance, for filing as of any specified date, within thirty days after the date of delivery.~~ A converting entity that holds a license immediately before a nonprofit conversion or entity conversion continues to hold the license as a surviving entity unless the surviving entity fails to comply with an allowed update rule, or is not a form of business entity that may hold that kind of license. The continued holding of a license under this Subsection does not affect the expiration date or any of the terms or conditions of the license. The license continues to be held, and may be suspended, restricted, or revoked, as if the conversion had not occurred.

B. ~~If the secretary of state finds that the application and initial report, if applicable, are in compliance with the provisions of this Chapter, and after all fees have been paid as required by law, the secretary of state shall record the application and initial report, if applicable, in his office, endorse on each the date of filing~~

~~thereof with him, and issue a certificate of conversion that shall show the date of filing of the application with him and the effective date of the conversion. A duplicate certificate of conversion issued by the secretary of state shall, within thirty days after issuance of the certificate, be filed for record in the conveyance records of each parish in this state in which the entity has immovable property, title to which will be transferred as a result of the conversion.~~ The rules of a licensing body may require a surviving entity to update its licensing information by delivering a copy of any of the following documents to the licensing body within ninety days after the effective date of the conversion, or by a later date set by those rules:

(1) The articles of entity conversion, acknowledged as filed by the secretary of state as provided in the Business Corporation Act.

(2) The license being updated.

(3) A bond or certificate of insurance in the name of the surviving entity for any coverage required for the issuance of the kind of license being updated.

(4) An amendment or amended version of any contract or other agreement required for the issuance of the kind of license being updated, naming the surviving entity as a party to the required contract or agreement.

C. ~~A conversion shall be effective when the application has been recorded by the secretary of state. However, if the application was filed within five days, exclusive of legal holidays, after signing thereof, the conversion shall be effective as of the time of such signing, unless the application specifies that the effective date shall be the date filed by the secretary of state.~~ The rules of a licensing body may require the surviving entity to pay a fee of up to twenty-five dollars to update the license.

D. An updated license shall be issued by the licensing body within thirty days of its receipt of the documents and fee required by its allowed update rules, but if a surviving entity has complied with the allowed update rules of the licensing body, a failure by the licensing body to issue an updated license does not affect the continued holding of the license as provided in Subsection A of this Section.

E. A license held by a converting entity terminates on the effective date of the conversion if the surviving entity in the conversion is a form of business entity that may not hold the license.

F. If a surviving entity fails to comply with an allowed update rule concerning a license, the license terminates at the end of the ninetieth day after the effective date of the conversion or, if a later date for compliance is set by the allowed update rule, at the end of the later date.

G. Except for publicly traded entities, the provisions of this Section shall not apply to a surviving entity seeking an updated license that has any change in ownership interests or has changed ownership by including an individual or entity that did not have an ownership interest in the surviving entity immediately prior to the conversion.

Comments - 2014 Revision

(a) This Section retains the substance of former R.S. 12:1607, but has been modified to clarify the meaning of the Section and to address issues left open by the earlier provision.

(b) The former provision required an agency to "recognize" a surviving entity's license, but also conferred power on the agency to require the converted licensee to "update" its license and to submit any insurance policies and contracts required of the licensee in the new name of the converted entity. If the updated license was issued, it was given retroactive effect to the date of the entity conversion, leaving open the question of how to reconcile the agency's obligation to recognize a continuing license, while withholding an updated license that would have retroactive effect only if issued. The former language also allowed the agency to refuse to issue an updated license if the entity, presumably either before or after the conversion, owed any unpaid fees or had been "cited or charged" with a violation of the law that the agency was empowered to enforce. This power to withhold an updated license based merely on a charged or cited violation of law, or for any unpaid fee, suggested that the licensing agency could revoke an entity's license in practical effect on grounds that would not have supported license revocation under normal revocation procedures.

(c) As modified, this Section does not merely instruct the licensing body to recognize a surviving entity's license. Rather, it continues the license by operation of law, as if the conversion had not occurred, subject to two limitations: (a) the license terminates immediately on conversion if the surviving entity in the conversion is not the kind of entity that may hold that kind of license, and (b) the license terminates at the end of an "update" period of at least ninety days if the surviving entity fails to comply by the end of the update period with any update rules permitted this chapter and adopted by the agency. Otherwise, subject to any enforcement actions that may be pending or that could be initiated against the licensee in the absence of the conversion, the license of the surviving entity in the conversion continues for any period remaining in the term of the continued license.

* * *

§1701. ~~Judicial review; removal of officers, members, managers, and partners~~ Filing Methods

~~A. Should any officer, member, manager, or partner of any corporation, limited liability company, or partnership have his name removed from any document or record filed with the secretary of state in violation of state law or in contravention of any document of creation, organization or management of such business entity, the aggrieved party may file suit against the party who caused the aggrieved party's name to be removed from such document or record.~~

~~B. Such suit shall be filed in the judicial district court where the business entity is domiciled.~~

~~C. The secretary of state shall be made a party to the suit.~~

~~D. The court shall conduct a hearing within ten days after service of process of the suit on all parties.~~

~~E. Should the court find that the name of the aggrieved party was improperly or fraudulently removed from the documents and records of the secretary of state, the court shall order the secretary of state to replace the name of the aggrieved party on to all appropriate documents and records of the secretary of state.~~

~~F. Nothing in this Section shall be construed to supercede or conflict with the provisions of R.S. 12:208.~~

A.(1) The secretary of state may accept any filing authorized by this Title by electronic or facsimile transmission. All electronic filings authorized by this Title shall include an electronic or digital signature.

(2) "Digital signature" means a type of electronic signature that transforms a message using an asymmetric crypto system such that a person having the initial message and the signer's public key can accurately determine both of the following:

(a) Whether the transformation was created using the private key that corresponds to the signer's public key.

(b) Whether the initial message has been altered since the transformation was made.

(3) "Electronic signature" means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.

B. A filing by facsimile, the process of transmitting printed documents by electronic method to the secretary of state, is deemed to be properly signed when the document received by a facsimile machine or document image attachment in e-mail in the commercial division, office of the secretary of state, purports to be a copy of the original document, and contains the signatures required by this Section.

C.(1) Internet filing. The secretary of state is authorized to implement and establish procedures and systems for secure Internet-form filing for the filing of any instrument required under this Title.

(2) Any requirement that an instrument filed under this Title shall be subscribed or acknowledged before a notary public may be dispensed with if the instrument is filed and signed electronically as provided in Paragraph (A)(3) of this Section by a person authorized to sign the instrument.

D. In-person filing. Any provision of this Title requiring that an instrument filed under this Title shall be subscribed or acknowledged before a notary public may be dispensed with if the instrument is signed, by the person authorized to sign, in the presence of the employee of the secretary of state receiving the instrument for filing and the employee verifies the identity of the person signing the instrument.

§1702. Electronic mail addresses and short message service numbers; confidentiality

Any electronic mail address or short message service number submitted to or captured by the secretary of state pursuant to the provision of this Title shall be confidential and shall not be disclosed by the secretary of state or any employee or official of the Department of State.

§1703. Electronic notification of status changes

The secretary of state shall notify any person who subscribes to the secretary of state's electronic mail or short message notification service and who is an officer

of a corporation, member or manager of a limited liability company, or partner in a partnership, or any agent thereof, when a filing has occurred that purports to remove that person's name from documents and records of that entity held by the secretary of state.

§1704. Judicial review; removal of officers, members, managers, and partners

A. Should any officer, member, manager, or partner of any corporation, limited liability company, or partnership have his name removed from any document or record filed with the secretary of state in violation of state law or in contravention of any document of creation, organization, or management of such business entity, the aggrieved party may file suit against the party who caused the aggrieved party's name to be removed from such document or record.

B. Such suit shall be filed in the district court of the parish where the business entity is domiciled.

C. The secretary of state shall be made a party to the suit.

D. The court shall conduct a hearing within ten days after service of process of the suit on all parties.

E. Should the court find that the name of the aggrieved party was improperly or fraudulently removed from the documents and records of the secretary of state, the court shall order the secretary of state to restore the name of the aggrieved party in all appropriate documents and records of the secretary of state.

F. Nothing in this Section shall be construed to supersede or conflict with the provisions of R.S. 12:208.

Section 2. R.S. 44:4.1(B)(5) is hereby amended and reenacted to read as follows:

§4.1. Exceptions

* * *

B. The legislature further recognizes that there exist exceptions, exemptions, and limitations to the laws pertaining to public records throughout the revised statutes and codes of this state. Therefore, the following exceptions, exemptions, and

limitations are hereby continued in effect by incorporation into this Chapter by citation:

* * *

(5) ~~R.S. 12:2.1~~ R.S. 12:1702

* * *

Section 3. R.S. 49:222(B)(1) and (6) are hereby amended and reenacted to read as follows:

§222. Fees chargeable by secretary of state

* * *

B. The secretary of state is authorized to collect the following fees:

(1) Domestic corporations and limited liability companies.

(a) Twenty-five dollars for reserving a corporate name or limited liability company name, transferring a reserved corporate name, registering a corporate name, renewing a registered corporate name, or applying for use of an indistinguishable name by a corporation.

(b) Seventy-five dollars for filing and recording corporation articles of incorporation, ~~amended articles of incorporation, dissolution proceedings, termination of dissolution proceedings,~~ articles of amendment, articles of restatement, articles of domestication, articles of charter surrender, articles of nonprofit conversion, articles of nonprofit domestication and conversion, articles of dissolution, articles of revocation of dissolution, articles of reinstatement ~~proceedings~~, articles of merger ~~proceedings~~ or share exchange, ~~conversions,~~ and ~~certificates~~ articles of correction.

(c) One hundred dollars for filing and recording limited liability company articles of organization, amended articles of organization, dissolution proceedings, termination of dissolution proceedings, reinstatement proceedings, merger proceedings, conversions, and certificates of correction.

(d) Twenty dollars for filing any other document or issuing and sealing any other certificate required or permitted by the ~~Louisiana business corporation law~~

Business Corporation Act, ~~R.S. 12:1 et seq.~~ R.S. 12:1-101 et seq., or the limited liability companies law, R.S. 12:1301 et seq.

(e) Twenty-five dollars for a corporation's statement of change of registered agent or registered office, or both, the resignation of an agent or officer; appointment of a registered agent; change of domicile; appointment of new officers, directors, members, or managers; and change of address for agents, officers, directors, members, or managers.

(f) Twenty-five dollars for a supplemental initial report.

(g) Thirty dollars for annual reports.

* * *

(6) ~~Business~~ Articles of entity conversions.

(a) Seventy-five dollars for conversion from or to a limited liability company, except as provided in Subparagraph (B)(6)(b) of this Section.

(b) One hundred dollars for conversion from or to a partnership, including the conversion of a limited liability company from or to a partnership.

(c) ~~Seventy-five dollars for conversion of a corporation to or from a limited liability company.~~

~~(d) One hundred dollars for conversion of a corporation to or from a partnership.~~

* * *

Section 4. Code of Civil Procedure Article 611 is hereby amended and reenacted to read as follows:

Art. 611. Derivative actions; prerequisites

A. When a corporation or unincorporated association refuses to enforce a right of the corporation or unincorporated association, a shareholder, partner, or member thereof may bring a derivative action to enforce the right on behalf of the corporation or unincorporated association. A derivative action may be maintained as a class action when the persons constituting the class are so numerous as to make

it impracticable for all of them to join or be joined as parties. In the case of a derivative class action, Articles 594 and 595 shall apply.

B. If a derivative action is a "derivative proceeding" as defined in the Business Corporation Act, the action is exempt from the provisions of this Chapter other than this Subsection, and is subject instead to the provisions of the Business Corporation Act concerning derivative proceedings.

Comment - 2014

The last sentence of Article 611 was added in connection with Louisiana's adoption in 2014 of the Business Corporation Act. The added language causes a derivative action that is filed on behalf of a Louisiana business corporation or, to the limited extent provided in R.S. 12:1-747, on behalf of a foreign corporation to be governed by the derivative proceeding provisions of the Business Corporation Act instead of the class and derivative actions chapter of the Code of Civil Procedure. See R.S. 12:1-740(1). A derivative proceeding that is governed by the Business Corporation Act is exempted only from this Chapter, however, and otherwise remains subject to the provisions of the Code of Civil Procedure.

Section 5. R.S. 12:1 through 178 and 1605 through 1607 are hereby repealed in their entirety.

Section 6. The Louisiana State Law Institute, as the official advisory law revision commission of the state of Louisiana, shall direct and supervise the continuous revision, clarification, and coordination of Chapter 1 of Title 12 of the Louisiana Revised Statutes of 1950, relative to business corporations.

Section 7. The provisions of this Act shall become effective on January 1, 2015.

DIGEST

The digest printed below was prepared by House Legislative Services. It constitutes no part of the legislative instrument. The keyword, one-liner, abstract, and digest do not constitute part of the law or proof or indicia of legislative intent. [R.S. 1:13(B) and 24:177(E)]

Foil HB No. 319

Abstract: Enacts the "Business Corporation Act".

Present law (R.S. 12:1-178) provides with regard to the Business Corporation Law.

Proposed law repeals present law.

Proposed law (R.S. 12:1-101-1-1704) enacts the "Business Corporations Act", modeled after the Model Business Corporations Act.

Present law (R.S. 12:1501) provides for the applicability of Chapter 24 of Title 12 of the La. Revised Statutes of 1950 to all business organizations defined in R.S. 12:1502(B), except as provided in R.S. 12:92(D), 93(D), or 1328(C).

Proposed law repeals present law.

Present law (R.S. 12:1502(A)) provides for the applicability of present law to business organizations formed under the laws of the state and to actions against officers, directors, shareholders, members, managers, general partners, limited partners, managing partners, or other persons similarly situated.

Proposed law provides an exception for actions governed by R.S. 12:1-622, 1-833, 1-1407, or 12:1328(C).

Present law (R.S. 12:1601) provides definitions applicable to Chapter 25 of Title 12 of the La. Revised Statutes of 1950.

Proposed law repeals present law and provides for the conversion of domestic business entities.

Present law (R.S. 12:1602) provides for the conversion of domestic entities.

Proposed law repeals present law and provides definitions applicable to Chapter 25 of Title 12 of the La. Revised Statutes of 1950. Proposed law further provides that terms defined in the Business Corporation Act have the same meaning in Chapter 25 of Title 12 of the La. Revised Statutes of 1950.

Present law (R.S. 12:1603) sets forth the conversion application requirements for business organizations.

Proposed law repeals present law and provides tax filing requirements for converting entities.

Present law (R.S. 12:1604) provides for the filing and recording of a conversion application and the issuance and effect of a certificate of conversion.

Proposed law repeals present law and provides for the continuation and updating of a professional or other license.

Present law (R.S. 12:1605) provides for the effect of conversion.

Proposed law repeals present law.

Present law (R.S. 12:1606) provides for tax filing requirements for converting business organizations.

Proposed law repeals present law.

Present law (R.S. 12:1607) provides for the recognition of conversion and updating of a professional license.

Proposed law repeals present law.

Present law (R.S. 12:1701) provides for judicial review of the removal of officers, members, managers, and partners.

Proposed law deletes present law and provides for filing methods.

Proposed law (R.S. 12:1702) provides for the confidentially of electronic mail addresses and short message service numbers submitted to or captured by the secretary of state.

Proposed law (R.S. 12:1703) provides for electronic notification of status changes when a filing has occurred that may removed a person's name from documents and records of an entity.

Proposed law (R.S. 12:1704) provides for judicial review of the removal of officers, members, managers, and partners.

Present law (R.S. 44:4.1(B)(5)) provides an exception to the laws pertaining to public records for records attained under R.S. 12:2.1.

Proposed law amends present law to provide an exception to laws pertaining to public records for records attained under R.S. 12:1702.

Present law (R.S. 49:222(B)(1)) provides for fees chargeable by the secretary of state for domestic corporations and limited liability companies.

Proposed law amends present law to authorize the secretary of state to collect fees for documents permitted to be filed under the Business Corporation Act.

Present law (R.S. 49:222(B)(6)) provides for fees chargeable by the secretary of state for business entity conversions.

Proposed law amends present law to provide for fees for articles of entity conversion and to authorize the secretary of state to collect fees for conversions permitted to be filed under the Business Corporation Act.

Present law (C.C.P. Art 611) provides for derivative actions.

Proposed law maintains present law and provides that a "derivative proceeding" as defined in the Business Corporation Act is exempt from the provisions of Chapter 5 of Title II of the Code of Civil Procedure and subject to the relevant provisions of the Business Corporations Act.

Effective Jan. 1, 2015.

(Amends R.S. 12:1501, 1502(A), 1601-1604, and 1701, R.S. 44:4.1(B)(5), R.S. 49:222(B)(1) and (6), and C.C.P. Art. 611; Adds R.S. 12:1-101-1-1704 and 1702-1704; Repeals R.S. 12:1-178 and 1605-1607)

Summary of Amendments Adopted by House

Committee Amendments Proposed by House Committee on Commerce to the original bill.

1. Clarified that proposed law applies to a voting trust beneficial owner.