

## ACT 244

H.B. NO. 2484

A Bill for an Act Relating to the Corporations.

*Be It Enacted by the Legislature of the State of Hawaii:*

SECTION 1. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

**“CHAPTER  
HAWAII REVISED BUSINESS CORPORATION ACT  
PART I. GENERAL PROVISIONS**

§ -1 **Short title.** This chapter shall be known and may be cited as the “Hawaii Revised Business Corporation Act”.

§ -2 **Reservation of power to amend or repeal.** The legislature has the 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.

§ -3 **Definitions.** As used in this chapter:  
“Articles of incorporation” include amended and restated articles of incorporation and articles of merger.  
“Authorized shares” means the shares of all classes a domestic or foreign corporation is authorized to issue.

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

“Corporation” or “domestic corporation” means a corporation for profit, which is not a foreign corporation, incorporated under or subject to this chapter.

“Deliver” includes mail.

“Department director” means the director of commerce and consumer affairs, unless the context otherwise requires.

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

“Effective date of notice” is defined in section -14.

“Employee” includes an officer but not a director. A director may accept duties that make the director also an employee.

“Entity” includes corporation and foreign corporation; not-for-profit corporation; profit and not-for-profit unincorporated association; business trust, estate, partnership, trust, and two or more persons having a joint or common economic interest; and state, United States, and foreign government.

“Foreign corporation” means a corporation for profit incorporated under a law other than the law of this State.

“Governmental subdivision” includes authority, county, district, and municipality.

“Includes” denotes a partial definition.

“Individual” includes the estate of an incompetent or deceased individual.

“Means” denotes an exhaustive definition.

“Notice” is defined in section -14.

“Person” includes individual and entity.

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

“Proceeding” includes civil suit and criminal, administrative, and investigatory action.

“Record date” means the date established under part VI or VII 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.

“Secretary” means the corporate officer to whom the board of directors has delegated responsibility under section -231(c) for preparation and custody of the minutes of the meetings of the board of directors and of the shareholders and for authenticating records of the corporation.

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

“Shares” means the units into which the proprietary interests in a corporation are divided.

“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.

“Subscriber” means a person who subscribes for shares in a corporation, whether before or after incorporation.

“United States” includes district, authority, bureau, commission, department, and any other agency of the United States.

“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.

**§ -4 Notice.** (a) Notice under this chapter must be in writing unless oral notice is reasonable under the circumstances.

(b) Notice may be communicated in person; by telephone, telegraph, teletype, or other form of wire or wireless communication; or by mail or private carrier. If these forms of personal notice are impracticable, notice may be communicated by a newspaper of general circulation in the area where published; or by radio; television, or other form of public broadcast communication.

(c) Written notice by a domestic or foreign corporation to its shareholder, if in a comprehensible form, is effective when mailed, if mailed postpaid and correctly addressed to the shareholder’s address shown in the corporation’s current record of shareholders.

(d) Written notice to a domestic or foreign corporation (authorized to transact business in this State) may be addressed to its registered agent at its registered office or to the corporation or its secretary 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.

(e) Except as provided in subsection (c), written notice, if in a comprehensible form, is effective at the earliest of the following:

- (1) When received;
- (2) Five days after its deposit in the United States Mail, as evidenced by the postmark, if mailed postpaid and correctly addressed; or
- (3) On the date shown on the return receipt, if sent by registered or certified mail, return receipt requested, and the receipt is signed by or on behalf of the addressee.

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

(g) If this chapter prescribes notice requirements for particular circumstances, those requirements govern. If articles of incorporation or bylaws prescribe notice requirements not inconsistent with this section or other provisions of this chapter, those requirements govern.

**§ -5 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) Three or fewer coowners;
- (2) A corporation, partnership, trust, estate, or other entity; or
- (3) The trustees, guardians, custodians, or other fiduciaries of a single trust, estate, 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.

**§ -6 Department director; powers.** The director of commerce and consumer affairs for the State of Hawaii has the power reasonably necessary to perform the duties required of the department director by this chapter, and to administer this

chapter efficiently. The department director shall adopt necessary rules, subject to chapter 91.

**PART II. FILING DOCUMENTS**

§ **-11 Filing requirements.** (a) A document must satisfy the requirements of this section, and of any other section that adds to or varies these requirements, to be entitled to filing by the department director.

(b) This chapter must require or permit filing the document in the office of the department director.

(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.

(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 certified and executed:

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

(g) The person executing the document shall sign it and state beneath or opposite that person's signature the person's name and the capacity in which the person signs. The document may but need not contain:

- (1) The corporate seal;
- (2) An attestation by the secretary or an assistant secretary; or
- (3) An acknowledgment, verification, or proof.

(h) If the department director has prescribed a mandatory form for the document under section -12, the document must be in or on the prescribed form.

(i) The document must be delivered to the office of the department director for filing and must be accompanied by one exact or conformed copy (except as provided in sections -63 and -439), the correct filing fee, and any penalty required by this chapter.

§ **-12 Forms.** (a) The department director may prescribe and furnish on request forms for:

- (1) An application for a certificate of existence;
- (2) A foreign corporation's application for a certificate of authority to transact business in this State;
- (3) A foreign corporation's application for a certificate of withdrawal; and
- (4) The annual report.

If the department director so requires, use of these forms is mandatory.

(b) The department director 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.

§ **-13 Filing, service, and copying fees.** (a) The following fees shall be paid to the department director upon the filing of corporate documents:

- (1) Articles of incorporation, \$100;
- (2) Articles of amendment, \$50;
- (3) Restated articles of incorporation, \$50;

- (4) Articles of conversion, merger, or consolidation, \$200;
- (5) Articles of merger (subsidiary corporation), \$100;
- (6) Articles of dissolution, \$50;
- (7) Annual report of domestic and foreign corporations organized for profit, \$25;
- (8) Agent's statement of change of registered office, \$50 for each affected domestic corporation or foreign corporation, except if simultaneous filings are made the fee is reduced to \$1 for each affected domestic corporation or foreign corporation in excess of two hundred;
- (9) Any other statement, report, certificate, application, or other corporate document, except an annual report, of a domestic or foreign corporation, \$50;
- (10) Application for a certificate of authority, \$100;
- (11) Application for a certificate of withdrawal, \$50;
- (12) Reservation of corporate name, \$20;
- (13) Transfer of reservation of corporate name, \$20;
- (14) Good standing certificate, \$25;
- (15) Special handling fee for review of corporation documents, excluding articles of conversion, merger, or consolidation, \$50;
- (16) Special handling fee for review of articles of conversion, merger, or consolidation, \$150;
- (17) Special handling fee for certificates issued by the department, \$20 per certificate; and
- (18) Special handling fee for certification of documents, \$1 per page.

(b) All special handling fees shall be credited to the special fund established for use by the department of commerce and consumer affairs in expediting the processing of documents. At least two temporary business registration assistant I positions shall be paid out of the special fund.

(c) The department director shall adjust the fees assessed under this section, as necessary from time to time, through rules adopted under chapter 91.

(d) The department director shall charge and collect:

- (1) For furnishing a certified copy of any document, instrument, or paper relating to a corporation, 25 cents per page and \$10 for the certificate and affixing the seal thereto; and
- (2) At the time of any service of process on the department director as agent for service of process of a corporation, \$25, which amount may be recovered as taxable costs by the party to the suit or action causing the service to be made if the party prevails in the suit or action.

**§ -14 Effective time and date of document.** (a) Except as provided in subsection (b) and section -15(c), a document accepted for filing is effective at the time of filing on the date it is filed, as evidenced by the department director's date and time endorsement on the original document.

(b) Articles of dissolution and articles of merger or consolidation 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 later than the thirtieth day after the date it is filed.

**§ -15 Correcting filed document.** (a) A domestic or foreign corporation may correct a document filed by the department director if the document:

- (1) Contains an incorrect statement; or
- (2) Was defectively executed, attested, sealed, verified, or acknowledged.

(b) A document is corrected by:

(1) Preparing articles of correction that:

- (A) Describe the document (including its filing date) or attach a copy of it to the articles;
- (B) Specify the incorrect statement and the reason it is incorrect or the manner in which the execution was defective; and
- (C) Correct the incorrect statement or defective execution; and

(2) Delivering the articles of correction to the department director 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.

**§ -16 Filing duty of department director.** (a) If a document delivered to the department director for filing satisfies the requirements of section -11, the department director shall file it.

(b) The department director files a document by stamping or otherwise endorsing "Filed," together with the date and time of receipt, on both the original and the document copy. After filing a document, except as provided in sections -63 and -439, the department director shall deliver the document copy, stamped with the date and time of receipt, to the domestic or foreign corporation or its representative.

(c) If the department director refuses to file a document, the department director shall return it to the domestic or foreign corporation or its representative together with a brief, written explanation of the reason for the department director's refusal.

(d) The department director's duty to file documents under this section is ministerial. The department director's filing or refusing to file a document does not:

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

**§ -17 Appeal from department director's refusal to file document.** (a) If the department director refuses to file a document delivered to the department director for filing, the domestic or foreign corporation may appeal the refusal within thirty days after the return of the document in the circuit court. The appeal is commenced by petitioning the court to compel filing the document and by attaching to the petition the document and the department director's explanation of the department director's refusal to file.

(b) The court may summarily order the department director to file the document or take other action the court considers appropriate.

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

**§ -18 Evidentiary effect of copy of filed document.** A certificate attached to a copy of a document filed by the department director, bearing the department director's signature (which may be in facsimile) and the seal of the department of commerce and consumer affairs, is conclusive evidence that the original document is on file with the department director.

**§ -19 Certificates and certified copies to be received in evidence.** All certificates issued by the department director pursuant to this chapter, and all copies

of documents filed in the department director's office pursuant to this chapter when certified by the department director, shall be taken and received in all courts, public offices, and official bodies as prima facie evidence of the facts therein stated. A certificate by the department director, under the seal of the department of commerce and consumer affairs, as to the existence or nonexistence of the facts relating to corporations, shall be taken and received in all courts, public offices, and official bodies as prima facie evidence of the existence or nonexistence of the facts therein stated.

§ **-20 Penalty for signing false document.** (a) A person commits an offense if the person signs a document the person knows is false in any material respect with intent that the document be delivered to the department director for filing.

(b) An offense under this section is a class C felony.

### PART III. INCORPORATION

§ **-31 Incorporators.** One or more individuals may act as the incorporator or incorporators of a corporation by delivering articles of incorporation to the department director for filing.

§ **-32 Articles of incorporation.** (a) The articles of incorporation must set forth:

- (1) A corporate name for the corporation that satisfies the requirements of section -51;
  - (2) The number of shares the corporation is authorized to issue;
  - (3) The street address of the corporation's initial registered office and the name of its initial registered agent at that office; and
  - (4) The name and address of each incorporator.
- (b) The articles of incorporation may set forth:
- (1) The names and addresses of the individuals who are to serve as the initial directors;
  - (2) Provisions not inconsistent with law regarding:
    - (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; and
    - (E) The imposition of personal liability on shareholders for the debts of the corporation to a specified extent and upon specified conditions;
  - (3) Any provision that under this chapter is required or permitted to be set forth in the bylaws;
  - (4) A provision eliminating or limiting the liability of a director to the corporation or its shareholders for money damages for any action taken, or any failure to take any action, as a director, subject to section -222; and
  - (5) A provision permitting or making obligatory indemnification of a director for liability (as defined in section -241(5)) to any person for any action taken, or any failure to take any action, as a director, except liability for:
    - (A) Receipt of a financial benefit to which the director is not entitled;

- (B) An intentional infliction of harm on the corporation or its shareholders;
- (C) A violation of section -223; or
- (D) An intentional violation of criminal law.

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

§ **-33 Incorporation.** (a) The corporate existence begins when the articles of incorporation are filed.

(b) The department director's filing of the articles of incorporation is conclusive proof that the incorporators satisfied all conditions precedent to incorporation except in a proceeding by the State to cancel or revoke the incorporation or involuntarily dissolve the corporation.

§ **-34 Liability for pre-incorporation transactions.** All persons purporting to act as or on behalf of a corporation, knowing there was no incorporation under this chapter, are jointly and severally liable for all liabilities created while so acting.

§ **-35 Organization of corporation.** (a) After incorporation:

- (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, adopting bylaws, 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:
  - (i) Directors and complete the organization of the corporation; or
  - (ii) A board of directors who shall complete the organization of the corporation.

(b) Action required or permitted by this chapter to be taken by incorporators at an organizational meeting may be taken without a meeting if the action taken is evidenced by one or more written consents describing the action taken and signed by each incorporator.

(c) An organizational meeting may be held in or out of this State.

§ **-36 Bylaws.** (a) The incorporators or board of directors of a corporation shall adopt initial 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.

§ **-37 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). 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:

- (1) Procedures for calling a meeting of the board of directors;
- (2) Quorum requirements for the meeting; and
- (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 not effective after the emergency ends.



(c) Corporate action taken in good faith in accordance with the emergency bylaws:

- (1) Binds the corporation; and
- (2) 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 quorum of the corporation's directors cannot readily be assembled because of some catastrophic event.

#### PART IV. PURPOSES AND POWERS

§ -41 **Purposes.** (a) Every corporation incorporated under this chapter has the purpose of engaging in any lawful business 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.

§ -42 **General powers.** Unless its articles of incorporation provide otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs, including without limitation, the power:

- (1) To sue and be sued, complain and defend in its corporate name;
- (2) To 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) To 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) To purchase, receive, lease, or otherwise acquire, and own, hold, improve, use, and otherwise deal with, real or personal property, or any legal or equitable interest in property, wherever located;
- (5) To sell, convey, mortgage, pledge, lease, exchange, and otherwise dispose of all or any part of its property;
- (6) To 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) To 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 of its obligations by mortgage or pledge of any of its property, franchises, or income;
- (8) To lend money, invest and reinvest its funds, and receive and hold real and personal property as security for repayment;
- (9) To be a promoter, partner, member, associate, or manager of any partnership, joint venture, trust, or other entity;
- (10) To conduct its business, locate offices, and exercise the powers granted by this chapter within or without this State;
- (11) To elect directors and appoint officers, employees, and agents of the corporation, define their duties, fix their compensation, and lend them money and credit;
- (12) To 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 its current or former directors, officers, employees, and agents;

- (13) To make donations for the public welfare or for charitable, scientific, or educational purposes;
- (14) To transact any lawful business that will aid governmental policy; and
- (15) To make payments or donations, or do any other act, not inconsistent with law, that furthers the business and affairs of the corporation.

**§ -43 Emergency powers.** (a) In anticipation of or during an emergency defined in subsection (d), the board of directors of a corporation may:

- (1) Modify lines of succession to accommodate the incapacity of any director, officer, employee, or agent; and
- (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), unless emergency bylaws provide otherwise:

- (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; and
- (2) One or more officers of the corporation present at a meeting of the board of directors may be deemed to be directors for the meeting, in order of rank and within the same rank in order of seniority, as necessary to achieve a quorum.

(c) Corporate action taken in good faith during an emergency under this section to further the ordinary business affairs of the corporation:

- (1) Binds the corporation; and
- (2) 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 quorum of the corporation's directors cannot readily be assembled because of some catastrophic event.

**§ -44 Ultra vires.** (a) Except as provided in subsection (b), 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:

- (1) In a proceeding by a shareholder against the corporation to enjoin the act;
- (2) In a proceeding by the corporation, directly, derivatively, or through a receiver, trustee, or other legal representative, against an incumbent or former director, officer, employee, or agent of the corporation; or
- (3) In a proceeding by the attorney general under section -411.

(c) In a shareholder's proceeding under subsection (b)(1) to enjoin an unauthorized corporate act, the court may enjoin or set aside the act, if equitable and if all affected persons are parties to the proceeding, and may award damages for loss (other than anticipated profits) suffered by the corporation or another party because of enjoining the unauthorized act.

## PART V. NAME

**§ -51 Corporate name.** (a) A corporate name:

- (1) Must contain the word "corporation", "incorporated", or "limited", or the abbreviation "corp.", "inc.", or "ltd.", or words or abbreviations of like import in another language; and

- (2) May not contain language stating or implying that the corporation is organized for a purpose other than that permitted by section -41 and its articles of incorporation.
- (b) Except as authorized by subsections (c) and (d), a corporate name may not be the same as or substantially identical to:
- (1) The name of any domestic corporation, partnership, limited liability company, or limited liability partnership existing or registered under the laws of this State, or any foreign corporation, partnership, limited liability company, or limited liability partnership authorized to transact business or conduct affairs in this State;
  - (2) A name the exclusive right to which is, at the time, reserved in this State;
  - (3) The fictitious name adopted by a foreign corporation authorized to transact business in this State because its real name is unavailable; and
  - (4) Any trade name, trademark, or service mark registered in this State.
- (c) A corporation may apply to the department director for authorization to use a name that is substantially identical upon the department director's records from one or more of the names described in subsection (b). The department director shall authorize use of the name applied for if:
- (1) The other entity or holder of a reserved or registered name consents to the use in writing and one or more words are added to make the name distinguishable from the name of the applying corporation; or
  - (2) The applicant delivers to the department director 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 the name (including the fictitious name) of another domestic or foreign corporation that is used in this State if the other corporation is incorporated or authorized to transact business in this State and the proposed user corporation:
- (1) Has merged with the other corporation;
  - (2) Has been formed by reorganization of the other corporation; or
  - (3) Has acquired all or substantially all of the assets, including the corporate name, of the other corporation.
- (e) This chapter does not control the use of fictitious names.

**§ -52 Reserved name.** (a) A person may reserve the exclusive use of a corporate name, by delivering an application to the department director for filing. The application must set forth the name and address of the applicant and the name proposed to be reserved. If the department director finds that the corporate name applied for is available, the department director shall reserve the name for the applicant's exclusive use for a one hundred twenty-day period.

(b) The owner of a reserved corporate name may transfer the reservation to another person by delivering to the department director a signed notice of the transfer that states the name and address of the transferee.

**§ -53 Administrative order of abatement for infringement of corporate name.** (a) Any domestic corporation in good standing or foreign corporation authorized to do business in this State claiming that the name of any domestic corporation, partnership, limited partnership, limited liability partnership, or limited liability company existing under the laws of this State, or any foreign corporation, partnership, limited partnership, limited liability partnership, or limited liability company authorized to transact business in this State is substantially identical to, or confusingly similar to, its name may file a petition with the department director for an administrative order of abatement to address the infringement of its name. The

petition shall set forth the facts and authority that support the petitioner’s claim that further use of the name should be abated. The petitioner, at the petitioner’s expense, shall notify the registrant of the hearing in the manner prescribed by chapter 91 and the registrant shall be given an opportunity to respond to the petition at the hearing. The notice shall be made and the hearing held in accordance with the contested case provisions of chapter 91.

(b) In addition to any other remedy or sanction allowed by law, the order of abatement may:

- (1) Allow the entity to retain its registered name, but:
  - (A) Require the entity to register a new trade name with the department director; and
  - (B) Require the entity to conduct business in this State under this new trade name; or
- (2) (A) Require the entity to change its registered name;
  - (B) Require the entity to register the new name with the department director; and
  - (C) Require the entity to conduct business in this State under its new name.

If the entity fails to comply with the order of abatement within sixty days, the department director may involuntarily dissolve or terminate the entity, or cancel or revoke the entity’s registration or certificate of authority; after the time to appeal has lapsed and no appeal has been timely filed. The department director shall mail notice of the dissolution, termination, or cancellation to the entity at its last known mailing address. The entity shall wind up its affairs in accordance with this chapter or chapter 415A, 415B, 425, 425D, or 428, as applicable.

(c) Any person aggrieved by the department director’s order under this section may obtain judicial review in accordance with chapter 91 by filing a notice of appeal in circuit court within thirty days after the issuance of the department director’s order. The trial by the circuit court of any such proceeding shall be de novo. Review of any final judgment of the circuit court under this section shall be governed by chapter 602.

**PART VI. OFFICE AND AGENT**

§ -61 **Registered office and registered agent.** (a) Except as provided in subsection (b), each corporation must continuously maintain in this State:

- (1) A registered office that may be the same as any of its places of business; and
- (2) A registered agent, who may be:
  - (A) An individual who resides in this State and whose business office is identical with the registered office;
  - (B) A domestic corporation or not-for-profit domestic corporation whose business office is identical with the registered office; or
  - (C) A foreign corporation or not-for-profit foreign corporation authorized to transact business or conduct affairs in this State whose business office is identical with the registered office.

(b) A corporation may, but shall not be required, to maintain a registered office and a registered agent in this State during the time that the corporation has at least one officer or director who is a resident of this State.

§ -62 **Designation or change of registered office or registered agent.** (a) A corporation may designate or change its registered office or registered agent by delivering to the department director for filing a statement of change that sets forth:

- (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 of its current registered agent;
- (5) If the current registered agent is to be changed, the name of the new registered agent; and
- (6) That after the change or changes are made, the street addresses of its registered office and the business office of its registered agent will be identical.

(b) If the street address of the registered agent's business office changes, the registered agent may change the street address of the corporation's registered office by notifying the corporation in writing of the change and signing (either manually or in facsimile) and delivering to the department director for filing a statement that complies with the requirements of subsection (a) and recites that the corporation has been notified of the change.

**§ -63 Resignation of registered agent.** (a) A registered agent may resign from the registered agent's appointment by signing and delivering to the department director for filing the signed original and two exact or conformed copies of a statement of resignation. The statement may include a statement that the registered office is also discontinued.

(b) The registered agent shall mail one copy to the registered office (if not discontinued) and the other copy to the corporation at its principal office.

(c) The appointment of the agent is terminated, and the registered office discontinued if so provided, on the thirty-first day after the date on which the statement was filed.

**§ -64 Service on corporation.** (a) Service of any notice or process authorized by law issued against any corporation, whether domestic or foreign, by any court, judicial or administrative officer, or board, may be made in the manner provided by law upon any registered agent, officer, or director of the corporation who is found within the jurisdiction of the court, officer, or board; or if any registered agent, officer, or director cannot be found, upon the manager or superintendent of the corporation or any person who is found in charge of the property, business, or office of the corporation within the jurisdiction.

(b) If no officer, director, manager, superintendent, or other person in charge of the property, business, or office of the corporation can be found within the State, and in case the corporation has not filed with the department director pursuant to this chapter, the name of a registered agent upon whom legal notice and process from the courts of the State may be served, and likewise if the person named is not found within the State, service may be made upon the corporation by registered or certified mail, return receipt requested, addressed to the secretary of the corporation at its principal office. Service using registered or certified mail is perfected at the earliest of:

- (1) The date the corporation receives the mail;
- (2) The date shown on the return receipt, if signed on behalf of the corporation; or
- (3) Five days after its deposit in the United States mail, as evidenced by postmark, if mailed postpaid and correctly addressed.

(c) Nothing contained herein shall limit or affect the right to serve any process, notice, or demand required or permitted by law to be served upon a corporation in any other manner permitted by law.

**PART VII. SHARES AND DISTRIBUTIONS**  
**A. SHARES**

§ **-71 Authorized shares.** (a) The articles of incorporation must prescribe the classes of shares and the number of shares of each class that the corporation is authorized to issue. If more than one class of shares is authorized, the articles of incorporation must prescribe a distinguishing designation for each class, and, prior to the issuance of shares of a class, the preferences, limitations, and relative rights of that class must be described in the articles of incorporation. All shares of a class must have preferences, limitations, and relative rights identical with those of other shares of the same class except to the extent otherwise permitted by section -72.

(b) The articles of incorporation must authorize:

- (1) One or more classes of shares that together have unlimited voting rights; and
- (2) One or more classes 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 of shares that:

- (1) Have special, conditional, or limited voting rights, or no right to vote, except to the extent prohibited by this chapter;
- (2) Are redeemable or convertible as specified in the articles of incorporation:
  - (A) At the option of the corporation, the shareholder, or another person or upon the occurrence of a designated event;
  - (B) For cash, indebtedness, securities, or other property; and
  - (C) In a designated amount or in an amount determined in accordance with a designated formula or by reference to extrinsic data or events;
- (3) Entitle the holders to distributions calculated in any manner, including dividends that may be cumulative, noncumulative, or partially cumulative; or
- (4) Have preference over any other class of shares with respect to distributions, including dividends and distributions upon the dissolution of the corporation.

(d) The description of the designations, preferences, limitations, and relative rights of share classes in subsection (c) is not exhaustive.

§ **-72 Terms of class or series determined by board of directors.** (a) If and to the extent the articles of incorporation so provide, the board of directors may determine, in whole or part, the preferences, limitations, and relative rights (within the limits set forth in section -71) of:

- (1) Any class of shares before the issuance of any shares of that class; or
- (2) One or more series within a class before the issuance of any shares of that series.

(b) Each series of a class must be given a distinguishing designation.

(c) All shares of a series must have preferences, limitations, and relative rights identical with those of other shares of the same series and, except to the extent otherwise provided in the description of the series, with those of other series of the same class.

(d) Before issuing any shares of a class or series created under this section, the corporation must deliver to the department director for filing an articles of amendment, or a resolution, which is effective without shareholder action, that sets forth:

- (1) The name of the corporation;
- (2) The text of the amendment or resolution determining the terms of the class or series or shares;
- (3) The date it was adopted; and
- (4) A statement that the amendment or resolution was duly adopted by the board of directors.

Upon the filing of the articles of amendment or resolution by the department director, it shall constitute an amendment of the articles of incorporation.

**§ -73 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 canceled.

(b) The reacquisition, redemption, or conversion of outstanding shares is subject to the limitations of subsection (c) and section -111.

(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.

**§ -74 Fractional shares.** (a) A corporation may:

- (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; or
- (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 section -86(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:

- (1) That the scrip will become void if not exchanged for full shares before a specified date; and,
- (2) That the shares for which the scrip is exchangeable may be sold and the proceeds paid to the scripholders.

## B. ISSUANCE OF SHARES

**§ -81 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 section -82.

**§ -82 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 canceled in whole or part.

**§ -83 Liability of shareholders.** (a) A purchaser from a corporation of the corporation's 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 (section -82) or specified in the subscription agreement (section -81).

(b) Unless otherwise provided in the articles of incorporation a shareholder of a corporation is not personally liable for the acts or debts of the corporation except that such shareholder may become personally liable by reason of such shareholder's own acts or conduct.

**§ -84 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:

- (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; or
- (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.



§ **-85 Share options.** A corporation may issue rights, options, or warrants for the purchase of shares of the corporation. The board of directors shall determine the terms upon which the rights, options, or warrants are issued, their form and content, and the consideration for which the shares are to be issued.

§ **-86 Form and content of certificates.** (a) 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:

- (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; and
- (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:

- (1) Must be signed (either manually or in facsimile) by two officers designated in the bylaws or by the board of directors; and
- (2) 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.

§ **-87 Shares without certificates.** (a) Unless the articles of incorporation or bylaws provide otherwise, the board of directors of a corporation may authorize the issuance of some or all of the shares of any or all of its classes or series without certificates. The authorization does not affect shares already represented by certificates until they are surrendered to the corporation.

(b) Within a reasonable time after the issuance or transfer of shares without certificates, the corporation shall send the shareholder a written statement of the information required on certificates by section -86(b) and (c), and, if applicable, section -88.

§ **-88 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 section -87(b). Unless so noted, 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:

- (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; or
- (3) For any other reasonable purpose.

(d) A restriction on the transfer or registration of transfer of shares may:

- (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; or
- (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.

§ -89 **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.

#### C. SUBSEQUENT ACQUISITION OF SHARES BY SHAREHOLDERS AND CORPORATION

§ -101 **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.

(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;
- (2) A shareholder may waive the shareholder's 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:
  - (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; or
  - (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; or
- (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) Nothing in this section shall affect the validity of any action taken prior to April 21, 1953, by any corporation.

**§ -102 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 reissuance of acquired shares, the number of authorized shares is reduced by the number of shares acquired, effective upon delivery to the department director for filing, a statement of cancellation showing the reduction in the authorized shares.

(c) The statement of cancellation must set forth:

- (1) The name of the corporation;
- (2) The number of acquired shares canceled, itemized by class and series; and
- (3) The total number of authorized shares, itemized by class and series, remaining after reduction of the shares.

#### D. DISTRIBUTIONS

**§ -111 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).

(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:

- (1) The corporation would not be able to pay its debts as they become due in the usual course of business; or
- (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) 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), the effect of a distribution under subsection (c) is measured:

- (1) In the case of distribution by purchase, redemption, or other acquisition of the corporation's shares, as of the earlier of:
  - (A) The date money or other property is transferred or debt incurred by the corporation; or
  - (B) 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; and
- (3) In all other cases, as of:
  - (A) The date the distribution is authorized if the payment occurs within one hundred twenty days after the date of authorization; or
  - (B) The date the payment is made if it occurs more than one hundred 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) 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.

## PART VIII. SHAREHOLDERS

### A. MEETINGS

§ -121 **Annual meeting.** (a) A corporation shall hold a meeting of shareholders annually at a time stated in or fixed in accordance with the bylaws.

(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. 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 a corporation's bylaws does not affect the validity of any corporate action.

§ -122 **Special meeting.** (a) A corporation shall hold a special meeting of shareholders:

- (1) On call of its board of directors or the person or persons authorized to do so by the articles of incorporation or bylaws; or
- (2) If the holders of at least ten per cent of all the votes entitled to be cast on any issue proposed to be considered at the proposed special meeting sign, date, and deliver to the corporation's secretary one or more written demands for the meeting describing the purpose or purposes for which it is to be held.

(b) If not otherwise fixed under section -123 or -127, 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. If no place is stated or fixed in

accordance with the bylaws, 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 section -125(c) may be conducted at a special shareholders' meeting.

**§ -123 Court-ordered meeting.** (a) The circuit court may summarily order a meeting to be held:

- (1) On application of any shareholder of the corporation entitled to participate in an annual meeting if an annual meeting was not held within the earlier of six months after the end of the corporation's fiscal year or fifteen months after its last annual meeting; or
- (2) On application of a shareholder who signed a demand for a special meeting valid under section -122, if:
  - (A) Notice of the special meeting was not given within thirty days after the date the demand was delivered to the corporation's secretary; or
  - (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.

**§ -124 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 describing the action taken, signed before or after the intended effective date of the action 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) If not otherwise fixed under section -123 or -127, the record date for determining shareholders entitled to take action without a meeting is the date the first shareholder signs the consent under subsection (a).

(c) A consent signed under this section has the effect of a meeting vote and may be described as such in any document.

(d) If this chapter requires that notice of proposed action be given to nonvoting shareholders and the action is to be taken by unanimous consent of the voting shareholders, the corporation must give its nonvoting shareholders written notice of the proposed action at least ten days before the action is taken. The notice must contain or be accompanied by the same material that, under this chapter, would have been required to be sent to nonvoting shareholders in a notice of meeting at which the proposed action would have been submitted to the shareholders for action.

**§ -125 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, notice of an annual meeting need not include a description of the purpose or purposes for which the meeting is called.

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

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

(e) Unless the bylaws require otherwise, if an annual or special shareholders' meeting is adjourned to a different date, time, or place, notice need not be given of the new date, time, or place if the new date, time, or place is announced at the meeting before adjournment. If a new record date for the adjourned meeting is or must be fixed under section -127, however, notice of the adjourned meeting must be given under this section to persons who are shareholders as of the new record date.

§ -126 **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:

- (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; and
- (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.

§ -127 **Record date.** (a) The bylaws may fix or provide the manner of fixing the record date for one or more voting groups 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 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 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.

## B. VOTING

§ -141 **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, the shareholder's agent, or attorney is entitled on written demand to inspect and 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, 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, 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)), the circuit court, on application of the shareholder, may summarily 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.

**§ -142 Voting entitlement of shares.** (a) Except as provided in subsections (b) and (d) 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 of a corporation are not entitled to vote if they are owned, directly or indirectly, by a second corporation, domestic or foreign, and the first corporation owns, directly or indirectly, a majority of the shares entitled to vote for directors of the second corporation.

(c) Subsection (b) does not limit the power of a corporation 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.

**§ -143 Proxies.** (a) A shareholder may vote the shareholder's shares in person or by proxy.

(b) A shareholder may appoint a proxy to vote or otherwise act for the shareholder by signing an appointment form. The appointment form shall be signed by either the shareholder personally or by the shareholder's attorney-in-fact. A shareholder may authorize another person to act as a proxy for the shareholder by:

- (1) Executing a writing authorizing another person or persons to act as a proxy for the shareholder, which may be accomplished by the shareholder or the shareholder's authorized attorney-in-fact, officer, director, employee, or agent signing the writing or causing the shareholder's signature to be affixed to the writing by any reasonable means, including without limitation the use of a facsimile signature; or
- (2) Transmitting or authorizing the transmission of a telegram, cablegram, facsimile, or other means of electronic transmission authorizing the person or persons to act as a proxy for the shareholders to the person or persons who will be the holder of the proxy or to a proxy solicitation firm, proxy support service organization, or similar agent duly authorized by the person who will be the holder of the proxy to receive the transmission; provided that any such transmission shall specify that the transmission was authorized by the shareholder.

A copy, facsimile telecommunication, or other reliable reproduction of the writing or transmission created pursuant to the foregoing may be used in lieu of the original writing or transmission for any and all purposes for which the original writing or transmission could be used; provided that any such copy, facsimile telecommunica-

tion, or other reproduction shall be a complete reproduction of the entire original writing or transmission.

(c) An appointment of a proxy is effective when received by the secretary or other officer or agent 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 by the shareholder unless the appointment form conspicuously 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;
- (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 -162.

(e) 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 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) is revoked when the interest with which it is coupled is extinguished.

(g) 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 the transferee acquired 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 -145 and to any express limitation on the proxy's authority appearing on the face of the appointment form, a corporation is entitled to accept the proxy's vote or other action as that of the shareholder making the appointment.

**§ -144 Shares held by nominees.** (a) A corporation may establish a procedure by which the beneficial owner of shares that are registered in the name of a nominee is recognized by the corporation as the shareholder. The extent of this recognition may be determined in the procedure.

- (b) The procedure may set forth:
- (1) The types of nominees to which it applies;
  - (2) The rights or privileges that the corporation recognizes in a beneficial owner;
  - (3) The manner in which the procedure is selected by the nominee;
  - (4) The information that must be provided when the procedure is selected;
  - (5) The period for which selection of the procedure is effective; and
  - (6) Other aspects of the rights and duties created.

**§ -145 Corporation's acceptance of votes, etc.** (a) If the name signed on a vote, consent, waiver, or proxy appointment corresponds to the name of a shareholder, the corporation, acting in good faith, is entitled to accept the vote, consent, waiver, or proxy appointment and to 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:



- (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, or conservator representing the shareholder and, if the corporation requests, evidence of fiduciary status 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, beneficial owner, or attorney-in-fact 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; or
- (5) Two or more persons are the shareholder as cotenants or fiduciaries and the name signed purports to be the name of at least one of the coowners and the person signing appears to be acting on behalf of all the coowners.

(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 to doubt the validity of the signature on the vote, consent, waiver, or proxy appointment 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 are not liable in damages to the shareholder for the consequences of the acceptance or rejection.

(e) Corporate action based on the acceptance or rejection of a vote, consent, waiver, or proxy appointment under this section is valid unless a court of competent jurisdiction determines otherwise.

**§ -146 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 or this chapter 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 or this chapter 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) is governed by section -148.

(e) The election of directors is governed by section -149.

**§ -147 Action by single and multiple voting groups.** (a) If the articles of incorporation or this chapter 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 section -146.

(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 section -146. 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.

**§ -148 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.

**§ -149 Voting for directors; cumulative voting.** (a) Unless otherwise provided in the articles of incorporation, directors shall be 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) If, not less than forty-eight hours prior to the time fixed for any annual or special meeting, any shareholder or shareholders deliver to any officer of the corporation, a request that the election of directors to be elected at the meeting be by cumulative voting, then the directors to be elected at the meeting shall be chosen as follows:

- (1) Each shareholder present in person or represented by proxy at the meeting shall have a number of votes equal to the number of shares of capital stock owned by the shareholder multiplied by the number of directors to be elected at the meeting;
- (2) Each shareholder shall be entitled to cumulate the votes of the shareholder and to give all of the votes to one nominee or to distribute the votes among any or all of the nominees; and
- (3) The nominees receiving the highest number of votes on the foregoing basis, up to the total number of directors to be elected at the meeting, shall be the successful nominees.

The right to have directors elected by cumulative voting as provided in this section shall exist notwithstanding that provision therefor is not included in the articles of incorporation or bylaws, and this right shall not be restricted or qualified by any provisions of the articles of incorporation or bylaws; provided that this right may be restricted, qualified, or eliminated by a provision of the articles of incorporation or bylaws of any corporation having a class of equity securities registered pursuant to the Securities Exchange Act of 1934, as amended, which are either listed on a national securities exchange or traded over-the-counter on the National Market of the National Association of Securities Dealers, Inc. Automated Quotation System. This section shall not prevent the filling of vacancies in the board of directors, which vacancies may be filled in a manner that may be provided in the articles of incorporation or bylaws.

### C. VOTING TRUSTS AND AGREEMENTS

**§ -161 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 owners of beneficial interests in the trust, together with the number and class of shares each shareholder 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. A voting trust is valid for not more than ten years after its effective date unless extended under subsection (c).

(c) All or some of the parties to a voting trust may extend it for additional terms of not more than ten years each by signing written consent to the extension. An extension is valid for ten years from the date the first shareholder signs the extension agreement. The voting trustee must deliver copies of the extension agreement and list of beneficial owners to the corporation's principal office. An extension agreement binds only those parties signing it.

**§ -162 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 section -161.

(b) A voting agreement created under this section is specifically enforceable.

**§ -163 Shareholder agreements.** (a) An agreement among the shareholders of a corporation that complies with this section is effective among the shareholders and the corporation even though it is inconsistent with one or more other provisions of this chapter in that it:

- (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 limitations in section -111;
- (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; or
- (8) Otherwise 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, and is not contrary to public policy.

(b) An agreement authorized by this section shall be:

- (1) Set forth:

- (A) In the articles of incorporation or bylaws and approved by all persons who are shareholders at the time of the agreement; or
- (B) In a written agreement that is signed by all persons who are shareholders at the time of the agreement and is made known to the corporation;

(2) Subject to amendment only by all persons who are shareholders at the time of the amendment, unless the agreement provides otherwise; and

(3) Valid for ten years, unless the agreement provides otherwise.

(c) The existence of an agreement authorized by this section shall be noted conspicuously on the front or back of each certificate for outstanding shares or on the information statement required by section 87(b). 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 or information statement shall not affect the validity of the agreement or any action taken pursuant to it. Any purchaser of shares who, at the time of purchase, did not have knowledge of the existence of the agreement shall be entitled to rescission of the purchase. A purchaser shall be deemed to have knowledge of the existence of the agreement if its existence is noted on the certificate or information statement for the shares in compliance with this subsection and, if the shares are not represented by a certificate, the information statement is delivered to the purchaser at or prior to the time of purchase of the shares. 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) An agreement authorized by this section shall cease to be effective when shares of the corporation are listed on a national securities exchange or regularly traded in a market maintained by one or more members of a national or affiliated securities association. If the agreement ceases to be effective for any reason, the board of directors, if the agreement is contained or referred to in the corporation's articles of incorporation or bylaws, may adopt an amendment to the articles of incorporation or bylaws, without shareholder action, to delete the agreement and any references to it.

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

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

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

#### D. DERIVATIVE PROCEEDINGS

§ -171 **Definitions.** As used in this subpart:

“Derivative proceeding” means a civil suit in the right of a domestic corporation or, to the extent provided in section 178, in the right of a foreign corporation.

“Shareholder” includes a beneficial owner whose shares are held in a voting trust or held by a nominee on the beneficial owner’s behalf.

§ **-172 Standing.** A shareholder may not commence or maintain a derivative proceeding unless the shareholder:

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

§ **-173 Demand.** No shareholder may commence a derivative proceeding until:

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

§ **-174 Stay of proceedings.** If the corporation commences an inquiry into the allegations made in the demand or complaint, the court may stay any derivative proceeding for a period that the court deems appropriate.

§ **-175 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 (f) 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 (f), the determination in subsection (a) shall be made by:

- (1) A majority vote of independent directors present at a meeting of the board of directors if the independent directors constitute a quorum; or
- (2) A majority vote of a committee consisting of two or more independent directors appointed by majority vote of independent directors present at a meeting of the board of directors, whether or not the independent directors constituted a quorum.

(c) None of the following by itself shall cause a director to be considered not independent for purposes of this section:

- (1) The nomination or election of the director by persons who are defendants in the derivative proceeding or against whom action is demanded;
- (2) The naming of the director as a defendant in the derivative proceeding or as a person against whom action is demanded; or
- (3) The approval by the director of the act being challenged in the derivative proceeding or demand if the act resulted in no personal benefit to the director.

(d) If a derivative proceeding is commenced after a determination has been made rejecting a demand by a shareholder, the complaint shall allege with particularity facts establishing either:

- (1) That a majority of the board of directors did not consist of independent directors at the time the determination was made; or
- (2) That the requirements of subsection (a) have not been met.

(e) If a majority of the board of directors does not consist of independent directors at the time the determination is made, the corporation shall have the burden

of proving that the requirements of subsection (a) have been met. If a majority of the board of directors consists of independent directors at the time the determination is made, the plaintiff shall have the burden of proving that the requirements of subsection (a) have not been met.

(f) The court may appoint a panel of one or more independent persons upon motion by the corporation to make a determination whether the maintenance of the derivative proceeding is in the best interests of the corporation. In the case, the plaintiff shall have the burden of proving that the requirements of subsection (a) have not been met.

§ -176 **Discontinuance or settlement.** 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.

§ -177 **Payment of expenses.** On termination of the derivative proceeding the court may:

- (1) Order the corporation to pay the plaintiff's reasonable expenses (including counsel fees) 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 reasonable expenses (including counsel fees) incurred in defending the proceeding if it finds that the proceeding was commenced or maintained without reasonable cause or for an improper purpose; or
- (3) Order a party to pay an opposing party's reasonable expenses (including counsel fees) 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.

§ -178 **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 sections -174, -176, and -177.

## PART IX. DIRECTORS AND OFFICERS

### A. BOARD OF DIRECTORS

§ -191 **Requirement for and duties of board of directors.** (a) Except as provided in section -163, each corporation must have a board of directors.

(b) All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors, subject to any limitation set forth in the articles of incorporation or in an agreement authorized under section -163.

§ -192 **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.

**§ -193 Number and election of directors.** (a) A board of directors must consist of one or more individuals, with the number specified in or fixed in accordance with the articles of incorporation or bylaws.

(b) If a board of directors has power to fix or change the number of directors, the board may increase or decrease by thirty per cent or less the number of directors last approved by the shareholders, but only the shareholders may increase or decrease by more than thirty per cent the number of directors last approved by the shareholders.

(c) The articles of incorporation or bylaws may establish a variable range for the size of the board of directors by fixing a minimum and maximum number of directors. If a variable range is established, the number of directors may be fixed or changed from time to time, within the minimum and maximum, by the shareholders or the board of directors. After shares are issued, only the shareholders may change the range for the size of the board or change from a fixed to a variable-range size board or vice versa.

(d) Directors are elected at the first annual shareholders' meeting and at each annual meeting thereafter unless their terms are staggered under section -196.

**§ -194 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.

**§ -195 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 annual shareholders' meeting following their election unless their terms are staggered under section -196.

(c) A decrease in the number of directors does not shorten an incumbent director's term.

(d) The term of a director elected to fill a vacancy expires at the next shareholders' meeting at which directors are elected.

(e) Despite the expiration of a director's term, the director continues to serve until the director's successor is elected and qualifies or until there is a decrease in the number of directors.

**§ -196 Staggered terms for directors.** If there are nine or more directors, the articles of incorporation may provide for staggering their terms 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. 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.

**§ -197 Resignation of directors.** (a) A director may resign at any time by delivering written notice to the board of directors, its chairperson, or the corporation.

(b) A resignation is effective when the notice is delivered unless the notice specifies a later effective date.

§ -198 **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 the 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 the director's removal. If cumulative voting is not authorized, a director may be removed only if the number of votes cast to remove the director exceeds the number of votes cast not to remove the director.

(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.

§ -199 **Removal of directors by judicial proceeding.** (a) The circuit court may remove a director of the corporation from office in a proceeding commenced either by the corporation or by its shareholders holding at least ten per cent of the outstanding shares of any class if the court finds that:

(1) The director engaged in fraudulent or dishonest conduct, or gross abuse of authority or discretion, with respect to the corporation; and

(2) Removal is in the best interest of the corporation.

(b) The court that removes a director may bar the director from reelection for a period prescribed by the court.

(c) If shareholders commence a proceeding under subsection (a), they shall make the corporation a party defendant.

§ -200 **Vacancy on board.** (a) Unless the articles of incorporation provide otherwise, if a vacancy occurs on a board of directors, including a vacancy resulting from an increase in the number of directors:

(1) The shareholders may fill the vacancy;

(2) The board of directors may fill the vacancy; or

(3) If the directors remaining in office constitute fewer than a quorum of the board, they may fill the vacancy by the affirmative vote of a majority of all the directors remaining in office.

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

(c) A vacancy that will occur at a specific later date (by reason of a resignation effective at a later date under section -197(b) or otherwise) may be filled before the vacancy occurs but the new director may not take office until the vacancy occurs.

§ -201 **Compensation of directors.** Unless the articles of incorporation or bylaws provide otherwise, the board of directors may fix the compensation of directors.

## B. MEETINGS AND ACTION OF THE BOARD

§ -211 **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.

§ **-212 Action without meeting.** (a) Unless the articles of incorporation or bylaws provide otherwise, action required or permitted by this chapter to be taken at a board of directors' meeting may be taken without a meeting if the action is taken by all members of the board. The action must be evidenced by one or more written consents describing the action taken, signed before or after the intended effective date of the action by each director, and included in the minutes or filed with the corporate records reflecting the action taken.

(b) Action taken under this section is effective when the last director signs the consent, unless the consent specifies a different effective date.

(c) A consent signed under this section has the effect of a meeting vote and may be described as such in any document.

§ **-213 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 two days' notice of the date, time, and place of the meeting. The notice need not describe the purpose of the special meeting unless required by the articles of incorporation or bylaws.

§ **-214 Waiver of notice or meeting.** (a) A director 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. Except as provided by subsection (b), the waiver must be in writing, signed by the director entitled to the notice, and filed with the minutes or corporate records.

(b) A director's attendance at or participation in a meeting waives any required notice to the director of the meeting unless the director at the beginning of the meeting (or promptly upon the director's arrival) objects to holding the meeting or transacting business at the meeting and does not thereafter vote for or assent to action taken at the meeting.

§ **-215 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:

- (1) A majority of the fixed number of directors if the corporation has a fixed board size; or
- (2) A majority of the number of directors prescribed, or if no number is prescribed the number in office immediately before the meeting begins, if the corporation has a variable-range size board.

(b) The articles of incorporation or bylaws may authorize a quorum of a board of directors to consist of no fewer than one-third of the fixed or prescribed number of directors determined under subsection (a).

(c) If a quorum is present when a vote is taken, the affirmative vote of a majority of directors present is the act of the board of directors unless the articles of incorporation or bylaws require the vote of a greater number of directors.

(d) A director who is present at a meeting of the board of directors or a committee of the board of directors when corporate action is taken is deemed to have assented to the action taken unless:

- (1) The director objects at the beginning of the meeting (or promptly upon the director's arrival) to holding it or transacting business at the meeting;
- (2) The director's dissent or abstention from the action taken is entered in the minutes of the meeting; or
- (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.

§ -216 **Committees.** (a) Unless the articles of incorporation or bylaws provide otherwise, a board of directors may create one or more committees and appoint members of the board of directors to serve on them. Each committee must have two or more members, who serve at the pleasure of the board of directors.

(b) The creation of a committee and appointment of members to it must be approved by the greater of:

- (1) A majority of all the directors in office when the action is taken; or
- (2) The number of directors required by the articles of incorporation or bylaws to take action under section -215.

(c) Sections -211 to -215, which govern meetings, action without meetings, notice and waiver of notice, and quorum and voting requirements of the board of directors, apply to committees and their members as well.

(d) To the extent specified by the board of directors or in the articles of incorporation or bylaws, each committee may exercise the authority of the board of directors under section -191.

(e) A committee may not, however:

- (1) Authorize distributions;
- (2) Approve or propose to shareholders action that this chapter requires be approved by shareholders;
- (3) Fill vacancies on the board of directors or on any of its committees;
- (4) Amend articles of incorporation pursuant to section -282;
- (5) Adopt, amend, or repeal bylaws;
- (6) Approve a plan of merger not requiring shareholder approval;
- (7) Authorize or approve reacquisition of shares, except according to a formula or method prescribed by the board of directors; or
- (8) Authorize or approve the issuance or sale or contract for sale of shares, or determine the designation and relative rights, preferences, and limitations of a class or series of shares, except that the board of directors may authorize a committee (or a senior executive officer of the corporation) to do so within limits specifically prescribed by the board of directors.

(f) The creation of, delegation of authority to, or action by a committee does not alone constitute compliance by a director with the standards of conduct described in section -221.

### C. STANDARDS OF CONDUCT

§ -221 **General standards for directors.** (a) A director shall discharge the director's duties as a director, including the director's duties as a member of a committee:

- (1) In good faith;
- (2) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

- (3) In a manner the director reasonably believes to be in the best interests of the corporation.
- (b) In determining the best interests of the corporation, a director, in addition to considering the interests of the corporation's shareholders, may consider, in the director's discretion, any of the following factors:
- (1) The interests of the corporation's employees, customers, suppliers, and creditors;
  - (2) The economy of the State and the nation;
  - (3) Community and societal considerations, including, without limitation, the impact of any action upon the communities in or near which the corporation has offices or operations; and
  - (4) The long-term as well as short-term interests of the corporation and its shareholders, including, without limitation, the possibility that these interests may be best served by the continued independence of the corporation.
- (c) In discharging duties as a director, the director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:
- (1) One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;
  - (2) Legal counsel, public accountants, or other persons as to matters the director reasonably believes are within the person's professional or expert competence; or
  - (3) A committee of the board of directors of which the director is not a member if the director reasonably believes the committee merits confidence.
- (d) A director is not acting in good faith if the director has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (c) unwarranted.
- (e) A director is not liable for any action taken as a director, or any failure to take any action, if the director performed the duties of the director's office in compliance with this section.

**§ -222 Limitation of liability of directors; shareholder approval required.** (a) A corporation may eliminate or limit the personal liability of its directors in any action brought by the shareholders or the corporation for monetary damages against any director of the corporation for any action taken, or any failure to take any action, as a director; provided that:

- (1) The elimination or limitation shall be authorized, directed, or provided for in:
    - (A) The articles of incorporation of the corporation; or
    - (B) Any duly adopted amendment of the articles of incorporation; and
  - (2) If the provision eliminating or limiting the personal liability of a corporation's directors is authorized, directed, or provided for by amendments to the articles of incorporation, it shall be adopted upon the affirmative vote of the holders of two-thirds of the shares represented at the shareholders' meeting and entitled to vote; provided that the vote also constitutes a majority of the shares entitled to vote.
- (b) A corporation shall not eliminate or limit the personal liability of a director for:
- (1) The amount of a financial benefit received by a director to which the director is not entitled;

- (2) An intentional infliction of harm on the corporation or the shareholders;
- (3) A violation of section -223; or
- (4) An intentional violation of criminal law.

(c) The shareholders of the corporation shall receive written notice of any proposal by the corporation to eliminate or limit the personal liability of the directors under subsection (a)(2), and the corporation shall in such cases submit the duly adopted amendment to the articles of incorporation to the department director.

(d) No provision pursuant to subsection (a)(1) shall be authorized by the corporation to eliminate or limit the liability of directors for acts, omissions, or causes of action occurring, accruing, or arising prior to June 7, 1989.

(e) Nothing in this section shall impair or affect the validity of any provisions of the bylaws of a corporation eliminating or limiting the personal liability of the directors, which were authorized, directed, or provided for and approved by the shareholders of the corporation in compliance with then existing law prior to July 1, 1996.

**§ -223 Liability for unlawful distributions.** (a) A director who votes for or assents to a distribution made in violation of section -111 or the articles of incorporation is personally liable to the corporation for the amount of the distribution that exceeds what could have been distributed without violating section -111 or the articles of incorporation, if it is established that the director did not perform the director's duties in compliance with section -221. In any proceeding commenced under this section, a director has all of the defenses ordinarily available to a director.

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

- (1) From every other director who could be held liable under subsection (a) for the unlawful distribution; and
- (2) From each shareholder for the amount the shareholder accepted knowing the distribution was made in violation of section -111 or the articles of incorporation.

(c) A proceeding under this section is barred unless it is commenced within two years after the date on which the effect of the distribution was measured under section -111(e) or (g).

(d) Nothing in this chapter shall prohibit the distribution of assets to shareholders permitted or authorized by the Federal Housing Commissioner by any corporation organized for the purpose of providing housing for rent pursuant to regulations of the Federal Housing Commissioner under the provisions of Title VIII of the National Housing Act, as amended, where the principal assets of the corporation consist of real property belonging to the United States and leased to the corporation pursuant to Title VIII of the National Housing Act as amended or supplemented from time to time.

#### D. OFFICERS

**§ -231 Required officers.** (a) A corporation has the officers described in its bylaws or appointed by the board of directors in accordance with the bylaws.

(b) A duly appointed officer may appoint one or more officers or assistant officers if authorized by the bylaws or the board of directors.

(c) The bylaws or the board of directors shall delegate to one of the officers responsibility for preparation and custody of minutes of the directors' and shareholders' meetings and for authenticating records of the corporation.

(d) The same individual may simultaneously hold more than one office in a corporation.

§ -232 **Duties of officers.** Each officer has the authority and shall perform the duties set forth in the bylaws or, to the extent consistent with the bylaws, the duties prescribed by the board of directors or by direction of an officer authorized by the board of directors to prescribe the duties of other officers.

§ -233 **Standards of conduct for officers.** (a) An officer with discretionary authority shall discharge the officer's duties under that authority:

- (1) In good faith;
- (2) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
- (3) In a manner the officer reasonably believes to be in the best interests of the corporation.

(b) In discharging the duties of an officer, the officer is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

- (1) One or more officers or employees of the corporation whom the officer reasonably believes to be reliable and competent in the matters presented; or
- (2) Legal counsel, public accountants, or other persons as to matters the officer reasonably believes are within the person's professional or expert competence.

(c) An officer is not acting in good faith if the officer has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) unwarranted.

(d) An officer is not liable for any action taken as an officer, or any failure to take any action, if the officer performed the duties of the officer's office in compliance with this section.

§ -234 **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 delivered unless the notice specifies a later effective date. If a resignation is made effective at a later date and the corporation accepts the future effective date, its board of directors may fill the pending vacancy before the effective date if the board of directors provides that the successor does not take office until the effective date.

(b) Any officer or agent may be removed by the board of directors whenever in its judgment the best interests of the corporation will be served thereby, but the removal shall be without prejudice to the contract rights, if any, of the person so removed. Election or appointment of an officer or agent shall not of itself create contract rights.

§ -235 **Contract rights of officers.** (a) The appointment or election 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.

## E. INDEMNIFICATION

§ -241 **Definitions.** As used in this subpart:

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

"Director" or "officer" means an individual who is or was a director or officer, respectively, of a corporation or who, while a director or officer of the corporation, is or was serving at the corporation's request as a director, officer,

partner, trustee, employee, or agent of another domestic or foreign corporation, partnership, joint venture, trust, employee benefit plan, or other entity. A director or officer is considered to be serving an employee benefit plan at the corporation's request if the duties of the director or officer to the corporation also impose duties on, or otherwise involve services by, the director or officer 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.

"Disinterested director" means a director who, at the time of a vote referred to in section -244(c) or a vote or selection referred to in section -246(b) or (c), is not:

- (1) A party to the proceeding; or
- (2) An individual having a familial, financial, professional, or employment relationship with the director whose indemnification or advance for expenses is the subject of the decision being made, which relationship would, in the circumstances, reasonably be expected to exert an influence on the director's judgment when voting on the decision being made.

"Expenses" includes counsel fees.

"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.

"Official capacity" means:

- (1) When used with respect to a director, the office of director in a corporation; and
- (2) When used with respect to an officer, as contemplated in section -247, 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.

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

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

**§ -242 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:

- (1) (A) The individual conducted the individual's self in good faith; and
  - (B) The individual reasonably believed:
    - (i) In the case of conduct of official capacity, that the individual's conduct was in the best interests of the corporation; and
    - (ii) In all other cases, that the individual's conduct was at least not opposed to the best interests of the corporation; and
  - (C) In the case of any criminal proceeding, the individual had no reasonable cause to believe the individual's conduct was unlawful; or
- (2) The individual engaged in conduct for which broader indemnification has been made permissible or obligatory under a provision of the articles of incorporation (as authorized by section -32(b)(5)).

(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 subsection (a)(1)(B)(ii).

(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 section -245(a)(3), a corporation may not indemnify a director:

- (1) In connection with a proceeding by or in the right of the corporation, except for reasonable expenses incurred in connection with the proceeding if it is determined that the director has met the relevant standard of conduct under subsection (a); or
- (2) In connection with any proceeding with respect to conduct for which the director was adjudged liable on the basis that the director received a financial benefit to which the director was not entitled, whether or not involving action in the director's official capacity.

**§ -243 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 the director was a director of the corporation against reasonable expenses incurred by the director in connection with the proceeding.

**§ -244 Advance for expenses.** (a) A corporation, before final disposition of a proceeding, may advance funds to pay for or reimburse the reasonable expenses incurred by a director who is a party to a proceeding because the director is a director if the director delivers to the corporation:

- (1) A written affirmation of the director's good faith belief that the director has met the relevant standard of conduct described in section -242 or that the proceeding involves conduct for which liability has been eliminated under a provision of the articles of incorporation as authorized by section -32(b)(4); and
- (2) The director's written undertaking to repay any funds advanced if the director is not entitled to mandatory indemnification under section -243 and it is ultimately determined under section -245 or -246 that the director has not met the relevant standard of conduct described in section -242.

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

(c) Authorizations under this section shall be made:

- (1) By the board of directors:
  - (A) If there are two or more disinterested directors, by a majority vote of all the disinterested directors (a majority of whom for this purpose, shall constitute a quorum) or by a majority of the members of a committee of two or more disinterested directors appointed by such a vote; or
  - (B) If there are fewer than two disinterested directors, by the vote necessary for action by the board in accordance with section -215(c), in which authorization directors who do not qualify as disinterested directors may participate; or

- (2) By the shareholders, but shares owned by or voted under the control of a director who at the time does not qualify as a disinterested director may not be voted on the authorization.

**§ -245 Court-ordered indemnification and advance for expenses. (a)**

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

- (1) Order indemnification if the court determines that the director is entitled to mandatory indemnification under section -243;
- (2) Order indemnification or advance for expenses if the court determines that the director is entitled to indemnification or advance for expenses pursuant to a provision authorized by section -249(a); or
- (3) Order indemnification or advance for expenses if the court determines, in view of all the relevant circumstances, that it is fair and reasonable:
  - (A) To indemnify the director; or
  - (B) To advance expenses to the director, even if the director has not met the relevant standard of conduct set forth in section -242(a), failed to comply with section -244 or was adjudged liable in a proceeding referred to in section -242(d)(1) or (2), but if the director was adjudged so liable the director's indemnification shall be limited to reasonable expenses incurred in connection with the proceeding.

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

**§ -246 Determination and authorization of indemnification. (a)**

A corporation may not indemnify a director under section -242 unless authorized for a specific proceeding after a determination has been made that indemnification of the director is permissible because the director has met the relevant standard of conduct set forth in section -242.

(b) The determination shall be made:

- (1) If there are two or more disinterested directors, by the board of directors by a majority vote of all the disinterested directors (a majority of whom for this purpose shall constitute a quorum), or by a majority of the members of a committee of two or more disinterested directors appointed by such a vote;
- (2) By special legal counsel:
  - (A) Selected in the manner prescribed in paragraph (1); or
  - (B) If there are fewer than two disinterested directors, selected by the board of directors (in which selection directors who do not qualify as disinterested directors may participate); or
- (3) By the shareholders, but shares owned by or voted under the control of a director who at the time does not qualify as a disinterested 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 disinterested directors or if the determination is made by special legal counsel, authorization of indemnification shall be made by those entitled under subsection (b)(2)(B) to select special legal counsel.

§ -247 **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 the officer is an officer of the corporation

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

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

(c) An officer of a corporation who is not a director is entitled to mandatory indemnification under section -243, and may apply to a court under section -245 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.

§ -248 **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 director or officer in that capacity or arising from the director's or officer's status as a director or officer, whether or not the corporation would have power to indemnify or advance expenses to the director or officer against the same liability under this subpart.

§ -249 **Variation by corporate action; application of subpart.** (a) A corporation, 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, may obligate itself in advance of the act or omission giving rise to a proceeding to provide indemnification in accordance with section -242 or advance funds to pay for or reimburse expenses in accordance with section -244. Any such obligatory provision shall be deemed to satisfy the requirements for authorization referred to in section -244(c) and -246(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 section -244 to the fullest extent permitted by law, unless the provision specifically provides otherwise.

(b) Any provision pursuant to subsection (a) shall not obligate the corporation to indemnify or advance expenses to a director of a predecessor of the corporation, pertaining to conduct with respect to the predecessor, unless otherwise specifi-

cally provided. Any provision for indemnification or advance for expenses in the articles of incorporation, bylaws, or a resolution of the board of directors or shareholders of a predecessor of the corporation in a merger or in a contract to which the predecessor is a party, existing at the time the merger takes effect, shall be governed by section -316(a)(3).

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

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

(e) 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.

**§ -250 Nonexclusivity of subpart.** (a) The indemnification provided by this subpart shall not be deemed exclusive of any other rights to which those indemnified may be entitled under any bylaw, agreement, vote of shareholders, or disinterested directors or otherwise, both as to action in a person's official capacity and as to action in another capacity while holding the office, and shall continue as to a person who has ceased to be an agent and shall inure to the benefit of the heirs and personal representatives of that person.

(b) This subpart does not apply to any proceeding against any trustee, investment manager, or other fiduciary of an employee benefit plan in that person's capacity, though the person may also be an agent of the employer corporation. Nothing contained in this section shall limit any right to indemnification to which a trustee, investment manager, or other fiduciary may be entitled by contract or otherwise.

## F. DIRECTORS' CONFLICTING INTEREST TRANSACTIONS

**§ -261 Definitions.** As used in this subpart:

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

- (1) Whether or not the transaction is brought before the board of directors of the corporation for action, the director knows at the time of commitment that the director or a related person is a party to the transaction or has a beneficial financial interest in or so closely linked to the transaction and of such financial significance to the director or a related person that the interest would reasonably be expected to exert an influence on the director's judgment if the director were called upon to vote on the transaction; or
- (2) The transaction is brought (or is of such character and significance to the corporation that it would in the normal course be brought) before the board of directors of the corporation for action, and the director knows at the time of commitment that any of the following persons is either a party to the transaction or has a beneficial financial interest in or so closely linked to the transaction and of such financial significance to the person that the interest would reasonably be expected to exert an influence on the director's judgment if the director were called upon to vote on the transaction:

- (A) An entity (other than the corporation) of which the director is a director, general partner, agent, or employee;
- (B) A person that controls one or more of the entities specified in subparagraph (A) or an entity that is controlled by, or is under common control with, one or more of the entities specified in subparagraph (A); or
- (C) An individual who is a general partner, principal, or employer of the director.

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

“Related person” of a director means:

- (1) The spouse (or a parent or sibling thereof) of the director, or a child, grandchild, sibling, parent (or spouse of any thereof) of the director, or an individual having the same home as the director, or a trust or estate of which an individual specified in this paragraph is a substantial beneficiary; or
- (2) A trust, estate, incompetent, conservatee, or minor of which the director is a fiduciary.

“Required disclosure” means disclosure by the director who has a conflicting interest of:

- (1) The existence and nature of the director’s conflicting interest; and
- (2) All facts known to the director respecting the subject matter of the transaction that an ordinarily prudent person would reasonably believe to be material to a judgment about whether or not to proceed with the transaction.

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

**§ -262 Judicial action.** (a) A transaction effected or proposed to be effected by a corporation (or by a subsidiary of the corporation or any other entity in which the corporation has a controlling interest) that is not a director’s conflicting interest transaction may not be enjoined, set aside, or give rise to an award of damages or other sanctions, in a proceeding by a shareholder or by or in the right of the corporation, because a director of the corporation, or any person with whom or which the director has a personal, economic, or other association, has an interest in the transaction.

(b) A director’s conflicting interest transaction may not be enjoined, set aside, or give rise to an award of damages or other sanctions, in a proceeding by a shareholder or by or in the right of the corporation, because the director, or any person with whom or which the director has a personal, economic, or other association, has an interest in the transaction, if:

- (1) Directors’ action respecting the transaction was at any time taken in compliance with section -263;
- (2) Shareholders’ action respecting the transaction was at any time taken in compliance with section -264; or
- (3) The transaction, judged according to the circumstances at the time of commitment, is established to have been fair to the corporation.

§ **-263 Directors' action.** (a) The action of directors respecting a transaction is effective for purposes of section -262(b)(1) if the transaction received the affirmative vote of a majority (but no fewer than two) of those qualified directors on the board of directors or on a duly empowered committee of the board who voted on the transaction after either required disclosure to them (to the extent the information was not known by them) or compliance with subsection (b); provided that action by a committee is so effective only if:

- (1) All its members are qualified directors; and
- (2) Its members are either all the qualified directors on the board or are appointed by the affirmative vote of a majority of the qualified directors on the board.

(b) If a director has a conflicting interest respecting a transaction, but neither the director nor a related person of the director, as set forth in paragraph (2) of the definition of related person in section -261, is a party to the transaction, and if the director has a duty under law or professional canon, or a duty of confidentiality to another person, respecting information relating to the transaction such that the director may not make the required disclosure described in paragraph (2) of the definition of related person in section -261, then disclosure is sufficient for purposes of subsection (a) if the director:

- (1) Discloses to the directors voting on the transaction the existence and nature of the director's conflicting interest and informs them of the character and limitations imposed by that duty before their vote on the transaction; and
- (2) Plays no part, directly or indirectly, in their deliberations or vote.

(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. The action of directors that otherwise complies with this section is not affected by the presence or vote of a director who is not a qualified director.

(d) For purposes of this section, "qualified director" means, with respect to a director's conflicting interest transaction, any director who does not have either:

- (1) A conflicting interest respecting the transaction; or
- (2) A familial, financial, professional, or employment relationship with a second director who does have a conflicting interest respecting the transaction, which relationship would, in the circumstances, reasonably be expected to exert an influence on the first director's judgment when voting on the transaction.

§ **-264 Shareholders' action.** (a) Shareholders' action respecting a transaction is effective for purposes of section -262(b)(2) if a majority of the votes entitled to be cast by the holders of all qualified shares were cast in favor of the transaction after:

- (1) Notice to shareholders describing the director's conflicting interest transaction;
- (2) Provision of the information referred to in subsection (d); and
- (3) Required disclosure to the shareholders who voted on the transaction (to the extent the information was not known by them).

(b) For purposes of this section, "qualified shares" means any shares entitled to vote with respect to the director's conflicting interest transaction except shares that, to the knowledge, before the vote, of the secretary (or other officer or agent of the corporation authorized to tabulate votes), are beneficially owned (or the voting of which is controlled) by a director who has a conflicting interest respecting the transaction or by a related person of the director, or both.

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

(d) For purposes of compliance with subsection (a), a director who has a conflicting interest respecting the transaction, before the shareholders' vote, shall inform the secretary (or other officer or agent of the corporation authorized to tabulate votes) of the number, and the identity of persons holding or controlling the vote, of all shares that the director knows are beneficially owned (or the voting of which is controlled) by the director or by a related person of the director, or both.

(e) If a shareholders' vote does not comply with subsection (a) solely because of a failure of a director to comply with subsection (d), and if the director establishes that the director's failure did not determine and was not intended by the director to influence the outcome of the vote, the court, with or without further proceedings respecting section -262(b)(3), may take such action respecting the transaction and the director, and give such effect, if any, to the shareholders' vote, as it considers appropriate in the circumstances.

## PART X. CONVERSIONS

§ -271 **Conversion into and from corporations.** (a) A domestic corporation may adopt a plan of conversion and convert to a foreign corporation or any other entity if:

- (1) The board of directors and shareholders of the domestic corporation approve a plan of conversion in the manner prescribed by section -313 and the conversion is treated as a merger to which the converting entity is a party and not the surviving entity;
- (2) The conversion is permitted by, and complies with the laws of the state or country in which the converted entity is to be incorporated, formed, or organized; and the incorporation, formation, or organization of the converted entity complies with those laws;
- (3) At the time the conversion becomes effective, each shareholder of the domestic corporation, unless otherwise agreed to by that shareholder, owns an equity interest or other ownership interest in, and is a shareholder, partner, member, owner, or other security holder of, the converted entity;
- (4) The shareholders of the domestic corporation, as a result of the conversion, shall not become personally liable, without the shareholders' consent, for the liabilities or obligations of the converted entity; and
- (5) The converted entity is incorporated, formed, or organized as part of or pursuant to the plan of conversion.

(b) Any foreign corporation or other entity may adopt a plan of conversion and convert to a domestic corporation if the conversion is permitted by and complies with the laws of the state or country in which the foreign corporation or other entity is incorporated, formed, or organized.

(c) A plan of conversion shall set forth:

- (1) The name of the converting entity and the converted entity;
- (2) A statement that the converting entity is continuing its existence in the organizational form of the converted entity;
- (3) A statement describing the organizational form of the converted entity and the state or country under the laws of which the converted entity is to be incorporated, formed, or organized;

- (4) The manner and basis of converting the shares or other forms of ownership of the converting entity into shares or other forms of ownership of the converted entity, or any combination thereof;
- (5) If the converted entity is a domestic corporation, the articles of incorporation of the domestic corporation shall be attached; and
- (6) If the converted entity is not a domestic corporation, proof that the converted entity is registered in this State shall be attached.

(d) A plan of conversion may set forth any other provisions relating to the conversion that are not prohibited by law, including without limitation the initial bylaws and officers of the converted entity.

(e) After a conversion of a domestic or foreign corporation is approved, and at any time before the conversion becomes effective, the plan of conversion may be abandoned by the converting entity without shareholder action and in accordance with the procedures set forth in the plan of conversion or, if these procedures are not provided in the plan, in the manner determined by the board of directors. If articles of conversion have been filed with the department director but the conversion has not become effective, the conversion may be abandoned if a statement, executed on behalf of the converting entity by an officer or other duly authorized representative and stating that the plan of conversion has been abandoned in accordance with applicable law, is filed with the department director prior to the effective date of the conversion. If the department director finds the statement satisfies the requirements provided by law, the department director, after all fees have been paid shall:

- (1) Stamp the word "Filed" on the statement and the date of the filing;
- (2) File the document in the department director's office; and
- (3) Issue a certificate of abandonment to the converting entity or its authorized representatives.

(f) Once the statement provided in subsection (e) is filed with the department director, the conversion shall be deemed abandoned and shall not be effective.

**§ -272 Articles of conversion.** (a) If a plan of conversion has been approved in accordance with section -271 and has not been abandoned, articles of conversion shall be executed by an officer or other duly authorized representative of the converting entity and shall set forth:

- (1) A statement certifying the following:
  - (A) The name, state, or country of incorporation, formation, or organization of the converting entity;
  - (B) That a plan of conversion has been approved in accordance with section -271;
  - (C) That an executed plan of conversion is on file at the principal place of business of the converting entity and stating the address thereof; and
  - (D) That a copy of the plan of conversion shall be furnished by the converting entity prior to the conversion or by the converted entity after the conversion on written request and without cost, to any shareholder, partner, member, or owner of the converting entity or the converted entity;
- (2) If the converting entity is a domestic corporation, the number of shares outstanding and, if the shares of any class or series are entitled to vote as a class, the designation and number of outstanding shares of each class or series;
- (3) If the converting entity is a domestic corporation, the number of shares outstanding that voted for and against the plan, and, if the shares of any class or series are entitled to vote as a class, the number of shares of each such class or series that voted for and against the plan; and

- (4) If the converting entity is a foreign corporation or other entity, a statement that the approval of the plan of conversion was duly authorized and complied with the laws under which it was incorporated, formed, or organized.

(b) The articles of conversion shall be delivered to the department director. If the converted entity is a domestic corporation, the articles of incorporation shall also be delivered to the department director with the articles of conversion.

(c) If the department director finds that the articles of conversion satisfy the requirements provided by law, and that all required documents are filed, the department director, after all fees have been paid, shall:

- (1) Stamp the word "Filed" on the articles of conversion and the date of the filing;
- (2) File the document in the department director's office; and
- (3) Issue a certificate of conversion to the converted entity or its authorized representatives.

§ **-273 Effective date of the conversion.** Upon the issuance of the certificate of conversion by the department director, the conversion shall be effective.

§ **-274 Effect of conversion.** When a conversion becomes effective:

- (1) The converting entity shall continue to exist without interruption, but in the organizational form of the converted entity;
- (2) All rights, title, and interest in all real estate and other property owned by the converting entity shall automatically be owned by the converted entity without reversion or impairment, subject to any existing liens or other encumbrances thereon;
- (3) All liabilities and obligations of the converting entity shall automatically be liabilities and obligations of the converted entity without impairment or diminution due to conversion;
- (4) The rights of creditors of the converting entity shall continue against the converted entity and shall not be impaired or extinguished by the conversion;
- (5) Any action or proceeding pending by or against the converting entity may be continued by or against the converted entity without any need for substitution of parties;
- (6) The shares and other forms of ownership in the converting entity that are to be converted into shares, or other forms of ownership, in the converted entity as provided in the plan of conversion shall be converted, and if the converting entity is a domestic corporation, the shareholders of the domestic corporation shall be entitled only to the rights provided in the plan of conversion or to the rights to dissent under section -342;
- (7) A shareholder, partner, member, or other owner of the converted entity shall be liable for the debts and obligations of the converting entity that existed before the conversion takes effect only to the extent that the shareholder, partner, member, or other owner:
  - (A) Agreed in writing to be liable for the debts or obligations;
  - (B) Was liable under applicable law prior to the effective date of the conversion, for the debts or obligations; or
  - (C) Becomes liable under applicable law for existing debts and obligations of the converted entity by becoming a shareholder, partner, member, or other owner of the converted entity;

- (8) If the converted entity is a foreign corporation or other entity, the converted entity shall:
  - (A) Appoint a resident of this State, as its agent for service of process in a proceeding to enforce any obligation or the rights of dissenting shareholders of the converting domestic corporation; and
  - (B) Promptly pay the dissenting shareholders of the converting domestic corporation the amount, if any, to which they are entitled under part XIV of this chapter; and
- (9) If the converting entity is a domestic corporation, part XIV of this chapter shall apply as if the converted entity were the survivor of a merger with the converting entity.

**PART XI. AMENDMENT OF ARTICLES OF INCORPORATION AND BYLAWS**

**A. AMENDMENT OF ARTICLES OF INCORPORATION**

§ -281 **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 or to delete a provision not required in the articles of incorporation. Whether a provision is required or permitted in the articles of incorporation is determined as of the effective date of the amendment.

(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.

§ -282 **Amendment by board of directors.** Unless the articles of incorporation provide otherwise, a corporation's board of directors may adopt one or more amendments to the corporation's articles of incorporation without shareholder action:

- (1) To delete the names and addresses of the initial directors;
- (2) To delete the name and address of the initial registered agent or registered office, if a statement of change is on file with the department director; or
- (3) To make any other change expressly permitted by this chapter to be made without shareholder action.

§ -283 **Amendment by board of directors and shareholders.** (a) A corporation's board of directors may propose one or more amendments to the articles of incorporation for submission to the shareholders.

(b) For the amendment to be adopted:

- (1) The board of directors must recommend the amendment 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 with the amendment; and
- (2) The shareholders entitled to vote on the amendment must approve the amendment as provided in subsection (e).

(c) The board of directors may condition its submission of the proposed amendment on any basis.

(d) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with section -125. The notice of meeting must also state that the purpose, or one of the purposes, of the



meeting is to consider the proposed amendment and contain or be accompanied by a copy or summary of the amendment.

(e) Unless this chapter, the articles of incorporation, or the board of directors (acting pursuant to subsection (c)) require a greater vote or a vote by voting groups, the amendment to be adopted must be approved by:

- (1) With respect to corporations incorporated on or after July 1, 1987, at the meeting a vote of the shareholders entitled to vote thereon shall be taken on the proposed amendment. The proposed amendment shall be adopted upon receiving the affirmative vote of the holders of a majority of the shares entitled to vote thereon, unless any class of shares is entitled to vote thereon as a class, in which event the proposed amendment shall be adopted upon receiving the affirmative vote of the holders of a majority of the shares of each class of shares entitled to vote thereon as a class and of the total shares entitled to vote thereon.
- (2) With respect to corporations incorporated before July 1, 1987, at such meeting a vote of the shareholders entitled to vote thereon shall be taken on a proposed amendment. The proposed amendment shall be adopted upon receiving the affirmative vote of the holders of two-thirds of the shares entitled to vote thereon. The articles of incorporation may be amended by the vote set forth in the preceding sentence to provide for a lesser proportion of shares, or of any class or series thereof, than is provided in the preceding sentence, in which case the articles of incorporation shall control; provided that the lesser proportion shall not be less than the proportion set forth in paragraph (1). Any number of amendments may be submitted to the shareholders, and voted upon by them, at one meeting.

**§ -284 Voting on amendments by voting groups.** (a) 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 chapter) on a proposed amendment if the amendment would:

- (1) Increase or decrease the aggregate number of authorized shares of the class;
- (2) Effect an exchange or reclassification of all or part of the shares of the class into shares of another class;
- (3) 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;
- (4) Change the designation, rights, preferences, or limitations of all or part of the shares of the class;
- (5) Change the shares of all or part of the class into a different number of shares of the same class;
- (6) Create a new class of shares having rights or preferences with respect to distributions or to dissolution that are prior, superior, or substantially equal to the shares of the class;
- (7) 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 or to dissolution that are prior, superior, or substantially equal to the shares of the class;
- (8) Limit or deny an existing preemptive right of all or part of the shares of the class; or
- (9) Cancel or otherwise affect rights to distributions or dividends that have accumulated but not yet been declared 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), the shares of that series are entitled to vote as a separate voting group on the proposed amendment.

(c) If a proposed amendment that entitles two or more series of shares to vote as separate voting groups under this section would affect those two or more series in the same or a substantially similar way, the shares of all the series so affected must vote together as a single voting group on the proposed amendment.

(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.

§ -285 **Amendment before issuance of shares.** If a corporation has not yet issued shares, its incorporators or board of directors may adopt one or more amendments to the corporation's articles of incorporation.

§ -286 **Articles of amendment.** A corporation amending its articles of incorporation shall deliver to the department director for filing articles of amendment setting forth:

- (1) The name of the corporation;
- (2) The text of each amendment adopted;
- (3) If an amendment provides for an exchange, reclassification, or cancellation of issued shares, a statement that provisions necessary to effect the exchange, reclassification, or cancellation have been made;
- (4) The date of each amendment's adoption;
- (5) If an amendment was adopted by the incorporators or board of directors without shareholder action, a statement to that effect and that shareholder action was not required; and
- (6) If an amendment was approved by the shareholders:
  - (A) The designation, number of outstanding shares, number of votes entitled to be cast by each voting group entitled to vote separately on the amendment, and number of votes of each voting group indisputably represented at the meeting; and
  - (B) Either the total number of votes cast for and against the amendment by each voting group entitled to vote separately on the amendment or the total number of undisputed votes cast for the amendment by each voting group and a statement that the number cast for the amendment by each voting group was sufficient for approval by that voting group.

§ -287 **Restated articles of incorporation.** (a) A corporation's board of directors may restate its articles of incorporation at any time with or without shareholder action.

(b) The restatement may include one or more amendments to the articles. If the restatement includes an amendment requiring shareholder approval, it must be adopted as provided in section -283.

(c) If the board of directors submits a restatement for shareholder action, the corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with section -125. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider the proposed restatement and contain or be accompanied by a copy of the restatement that identifies any amendment or other change it would make in the articles of incorporation.

(d) A corporation restating its articles of incorporation shall deliver to the department director 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 setting forth:

- (1) Whether the restatement contains an amendment to the articles requiring shareholder approval and, if it does not, that the board of directors adopted the restatement; or
- (2) If the restatement contains an amendment to the articles requiring shareholder approval, the information required by section -286.
- (e) Duly adopted restated articles of incorporation supersede the original articles of incorporation and all amendments to them.
- (f) The department director may certify restated articles of incorporation as the articles of incorporation currently in effect, without including the certificate information required by subsection (d).

**§ -288 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 federal statute, if the articles of incorporation after amendment contain only provisions required or permitted by section -32.

(b) The individual or individuals designated by the court shall deliver to the department director for filing articles of amendment setting forth:

- (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; and
- (5) A statement that the court had jurisdiction of the proceeding under federal statute.

(c) Shareholders of a corporation undergoing reorganization do not have dissenters' rights except as and to the extent provided in the reorganization plan.

(d) 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.

**§ -289 Effect of amendment.** An amendment to 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.

## B. AMENDMENT OF BYLAWS

**§ -301 Amendment by board of directors or shareholders.** (a) A corporation's board of directors may amend or repeal the corporation's bylaws unless:

- (1) The articles of incorporation or this chapter reserve this power exclusively to the shareholders in whole or part; or
- (2) The shareholders in amending or repealing a particular bylaw provide expressly that the board of directors may not amend or repeal that bylaw.

(b) A corporation's shareholders may amend or repeal the corporation's bylaws even though the bylaws may also be amended or repealed by its board of directors.

**§ -302 Bylaw increasing quorum or voting requirement for shareholders.** (a) If authorized by the articles of incorporation, the shareholders may adopt or amend a bylaw that fixes a greater quorum or voting requirement for shareholders (or voting groups of shareholders) than is required by this chapter. The adoption or amendment of a bylaw that adds, changes, or deletes a greater quorum or voting requirement for shareholders 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 requirement then in effect or proposed to be adopted, whichever is greater.

(b) A bylaw that fixes a greater quorum or voting requirement for shareholders under subsection (a) may not be adopted, amended, or repealed by the board of directors.

**§ -303 Bylaw increasing quorum or voting requirement for directors.** (a) A bylaw that fixes a greater quorum or voting requirement for the board of directors may be amended or repealed:

- (1) If originally adopted by the shareholders, only by the shareholders;
- (2) If originally 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 fixes a greater quorum or voting requirement for the board of directors may provide that it may 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)(2) to adopt or amend 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.

## **PART XII. MERGER AND SHARE EXCHANGE**

**§ -311 Merger.** (a) One or more corporations may merge into another corporation if the board of directors of each corporation adopts and its shareholders (if required by section -313) approve a plan of merger.

(b) The plan of merger must set forth:

- (1) The name of each corporation planning to merge and the name of the surviving corporation into which each other corporation plans to merge;
- (2) The terms and conditions of the merger; and
- (3) The manner and basis of converting the shares of each corporation into shares, obligations, or other securities of the surviving or any other corporation or into cash or other property in whole or in part.

(c) The plan of merger may set forth:

- (1) Amendments to the articles of incorporation of the surviving corporation and;
- (2) Other provisions relating to the merger.

**§ -312 Share exchange.** (a) A corporation may acquire all of the outstanding shares of one or more classes or series of another corporation if the board of directors of each corporation adopts and its shareholders (if required by section -313) approve the exchange.

(b) The plan of exchange must set forth:

- (1) The name of the corporation whose shares will be acquired and the name of the acquiring corporation;

- (2) The terms and conditions of the exchange; and
- (3) The manner and basis of exchanging the shares to be acquired for shares, obligations, or other securities of the acquiring corporation or any other corporation or for cash or other property in whole or in part.
- (c) The plan of exchange may set forth other provisions relating to the exchange.
- (d) This section does not limit the power of a corporation to acquire all or part of the shares of one or more classes or series of another corporation through a voluntary exchange or otherwise.

**§ -313 Action plan.** (a) After adopting a plan of merger or share exchange, the board of directors of each corporation party to the merger, and the board of directors of the corporation whose shares will be acquired in the share exchange, shall submit the plan of merger (except as provided in subsection (g)) or share exchange for approval by its shareholders.

(b) For a plan of merger or share exchange to be approved:

- (1) The board of directors must recommend the plan of merger or share exchange 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 with the plan; and
- (2) The shareholders entitled to vote must approve the plan.
- (c) The board of directors may condition its submission of the proposed merger or share exchange on any basis.

(d) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with section -125. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider the plan of merger or share exchange and contain or be accompanied by a copy or summary of the plan.

(e) With respect to corporations incorporated on or after July 1, 1987, at such a meeting, a vote of the shareholders shall be taken on the proposed plan. The plan shall be approved upon receiving the affirmative vote of the holders of a majority of each class of the shares entitled to vote thereon as a class and of the total shares entitled to vote thereon. Any class of shares of any such corporation shall be entitled to vote as a class if any such plan contains any provision that, if contained in a proposed amendment to articles of incorporation, would entitle that class of shares to vote as a class and, in the case of an exchange, if the class is included in the exchange.

(f) With respect to corporations incorporated before July 1, 1987, at such meeting, a vote of the shareholders shall be taken on the proposed plan. The plan shall be approved upon receiving the affirmative vote of the holders of three-fourths of all the issued and outstanding shares of stock having voting power even though their right to vote is otherwise restricted or denied by the articles, bylaws, or resolutions of any such corporation. The articles of incorporation may be amended by the vote set forth in the preceding sentence to provide for a lesser proportion of shares, or of any class or series thereof, than is provided in the preceding sentence, in which case the articles of incorporation shall control; provided that the lesser proportion shall be not less than the proportion set forth in subsection (e).

(g) Separate voting by voting groups is required:

- (1) On a plan of merger if the plan contains a provision that, if contained in a proposed amendment to articles of incorporation, would require action by one or more separate voting groups on the proposed amendment under section -284; or

- (2) On 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.
- (h) Action by the shareholders of the surviving corporation on a plan of merger is not required if:
  - (1) The articles of incorporation of the surviving corporation will not differ (except for amendments enumerated in section -282) from the articles of incorporation before the merger;
  - (2) Each shareholder of the surviving corporation whose shares were outstanding immediately before the effective date of the merger will hold the same number of shares, with identical designations, preferences, limitations, and relative rights, immediately after the merger;
  - (3) The number of voting shares outstanding immediately after the merger, plus the number of voting shares issuable as a result of the merger (either by the conversion of securities issued pursuant to the merger or the exercise of rights and warrants issued pursuant to the merger), will not exceed by more than twenty per cent the total number of voting shares of the surviving corporation outstanding immediately before the merger; and
  - (4) The number of participating shares outstanding immediately after the merger, plus the number of participating shares issuable as a result of the merger (either by the conversion of securities issued pursuant to the merger or exercise of rights and warrants issued pursuant to the merger), will not exceed by more than twenty per cent the total number of participating shares outstanding immediately before the merger.

(i) As used in subsection (h):

“Participating shares” means shares that entitle their holders to participate without limitations in distributions.

“Voting shares” means shares that entitle their holders to vote unconditionally in elections of directors.

(j) After a merger or share exchange is authorized, and at any time before articles of merger or share exchange are filed, the planned merger or share exchange may be abandoned (subject to any contractual rights), without further shareholder action, in accordance with the procedure set forth in the plan of merger or share exchange or, if none is set forth, in the manner determined by the board of directors.

**§ -314 Merger of subsidiary.** (a) A parent corporation owning at least ninety per cent of the outstanding shares of each class of a subsidiary corporation may merge the subsidiary into itself without approval of the shareholders of the parent or subsidiary.

(b) The board of directors of the parent corporation shall adopt a plan of merger that sets forth:

- (1) The names of the parent and subsidiary; and
- (2) The manner and basis of converting the shares of the subsidiary into shares, obligations, or other securities of the parent or any other corporation or into cash or other property in whole or in part.

(c) The parent corporation shall mail a copy of the plan of merger to each shareholder of the subsidiary corporation who does not waive the mailing requirement in writing.

(d) The parent may not deliver articles of merger to the department director for filing until at least thirty days after the date it mailed a copy of the plan of merger to each shareholder of the subsidiary corporation who did not waive the mailing requirement.

(e) Articles of merger under this section may not contain amendments to the articles of incorporation of the parent corporation (except for amendments enumerated in section -282).

**§ -315 Articles of merger or share exchange.** (a) After a plan of merger or share exchange is approved by the shareholders, or adopted by the board of directors if shareholder approval is not required, the surviving or acquiring corporation shall deliver to the department director for filing articles of merger or share exchange setting forth:

- (1) A statement that the plan of merger or share exchange has been approved by the board of directors of each corporation involved in the merger or share exchange;
- (2) If shareholder approval was not required, a statement to that effect;
- (3) If approval of the shareholders of one or more corporations party to the merger or share exchange was required:
  - (A) The designation, number of outstanding shares, and number of votes entitled to be cast by each voting group entitled to vote separately on the plan as to each corporation; and
  - (B) Either the total number of votes cast for and against the plan by each voting group entitled to vote separately on the plan or the total number of undisputed votes cast for the plan separately by each voting group and a statement that the number cast for the plan by each voting group was sufficient for approval by that voting group; and
- (4) If a merger, a statement indicating the changes in the articles of incorporation of the surviving corporation to be effected by the merger.

(b) A merger or share exchange takes effect upon the effective date of the articles of merger or share exchange.

**§ -316 Effect of merger or share exchange.** (a) When a merger takes effect:

- (1) Every other corporation party to the merger merges into the surviving corporation and the separate existence of every corporation except the surviving corporation ceases;
- (2) The title to all real estate and other property owned by each corporation party to the merger is vested in the surviving corporation without reversion or impairment;
- (3) The surviving corporation has all liabilities of each corporation party to the merger;
- (4) A proceeding pending against any corporation party to the merger may be continued as if the merger did not occur or the surviving corporation may be substituted in the proceeding for the corporation whose existence ceased;
- (5) The articles of incorporation of the surviving corporation are amended to the extent provided in the plan of merger and indicated in the articles of merger; and
- (6) The shares of each corporation party to the merger that are to be converted into shares, obligations, or other securities of the surviving or any other corporation or into cash or other property are converted, and the former holders of the shares are entitled only to the rights provided in the articles of merger or to their rights under part XIV of this chapter.

(b) When a share exchange takes effect, the shares of each acquired corporation are exchanged as provided in the plan, and the former holders of the shares are

entitled only to the exchange rights provided in the articles of share exchange or to their rights under part XIV of this chapter.

§ -317 **Merger or share exchange with foreign corporation.** (a) One or more foreign corporations may merge or enter into a share exchange with one or more domestic corporations if:

- (1) In a merger, the merger is permitted by the law of the state or country under whose law each foreign corporation is incorporated and each foreign corporation complies with that law in effecting the merger;
- (2) In a share exchange, the corporation whose shares will be acquired is a domestic corporation, whether or not a share exchange is permitted by the law of the state or country under whose law the acquiring corporation is incorporated;
- (3) The foreign corporation complies with section -315 if it is the surviving corporation of the merger or acquiring corporation of the share exchange; and
- (4) Each domestic corporation complies with the applicable provisions of sections -311 to 314 and, if it is the surviving corporation of the merger or acquiring corporation of the share exchange, with section -315.

(b) Upon the merger or share exchange taking effect, the surviving foreign corporation of a merger and the acquiring foreign corporation of a share exchange is deemed:

- (1) To appoint the department director as its agent for service of process in a proceeding to enforce any obligation or the rights of dissenting shareholders of each domestic corporation party to the merger or share exchange; and
- (2) To agree that it will promptly pay to the dissenting shareholders of each domestic corporation party to the merger or share exchange the amount, if any, to which they are entitled under part XIV of this chapter.

(c) This section does not limit the power of a foreign corporation to acquire all or part of the shares of one or more classes or series of a domestic corporation through a voluntary exchange or otherwise.

§ -318 **Merger of subsidiary corporations.** (a) Any corporation owning at least ninety per cent of the outstanding shares of each class of two or more corporations may adopt a plan of merger pursuant to section -314 and deliver to the department director for filing articles of merger. The articles of merger shall be signed by the parent corporation and the surviving subsidiary corporation, and the plan of merger shall set forth:

- (1) The name of the parent corporation owning at least ninety per cent of the shares of the subsidiary corporations, the name of any nonsurviving subsidiary corporation, and the name of the surviving subsidiary corporation; and
- (2) The manner and basis of converting the shares of any nonsurviving subsidiary corporation into shares, obligations, or other securities of the surviving subsidiary corporation or of any other corporation or, in whole or in part, into cash or other property.

(b) A copy of the plan of merger shall be mailed to each shareholder of record of any nonsurviving subsidiary corporation, except the parent corporation.

(c) On or after the thirtieth day after the mailing of a copy of the plan of merger to shareholders of any nonsurviving subsidiary corporation or upon the waiver thereof by the holders of all outstanding shares, the articles of merger shall be delivered to the department director for filing. Articles of merger shall set forth:



- (1) A statement that the plan of merger has been approved by the board of directors of the parent corporation;
- (2) The number of outstanding shares of each class of any nonsurviving subsidiary corporation and the number of the shares of each class owned by the parent corporation; and
- (3) The date a copy of the plan of merger is mailed to shareholders of any nonsurviving subsidiary corporation entitled to receive the plan of merger.

**§ -319 Merger with or into domestic or foreign limited liability company.** (a) As used in this section, the terms “limited liability company” and “foreign limited liability company” shall have the meanings defined in section 428-101.

(b) One or more corporations or foreign corporations may merge with or into one or more limited liability companies or foreign limited liability companies if in the case of a domestic corporation the board of directors and the shareholders approve a plan of merger as provided in sections -311 and -313, and in the case of a foreign corporation it complies with section -312.

(c) In addition to the requirements of section -311, the plan of merger shall also set forth:

- (1) The name of each limited liability company and foreign limited liability company proposing to merge; and
- (2) If the surviving entity is a limited liability company or a foreign limited liability company:
  - (A) The manner and basis of converting the shares of each corporation or foreign corporation and the interests as members of each limited liability company or foreign limited liability company into interests as members of the surviving domestic limited liability company or foreign limited liability company pursuant to the merger, or a statement that the information is contained in the operating agreement proposed for the surviving entity;
  - (B) The contents of the articles of organization of the surviving entity pursuant to the merger in accordance with section 428-203 if a domestic limited liability company is the surviving entity, or in accordance with comparable provisions of applicable law if a foreign limited liability company is the surviving entity; and
  - (C) The contents of the operating agreement to be entered into among the persons who will be the members of the surviving entity pursuant to the merger, which, if not separately provided in the plan of merger, shall state the manner and basis for the conversion of the shares of each merging corporation or foreign corporation and the interests as members of each merging limited liability company or foreign limited liability company into interests as members of the surviving entity and that notice of the approval of the merger will be deemed to be execution of the operating agreement by these persons.

(d) After a plan of merger is approved by the shareholders of each corporation and foreign corporation as provided in subsection (b), and by the members of each domestic limited liability company as provided in section 428-904, or as provided in comparable provisions of applicable law for each foreign limited liability company, the surviving entity shall deliver to the office of the department director for filing articles of merger complying with section -315, executed on behalf of each party to the merger.

(e) Section -316 shall be applicable to each corporation that is a party to the plan of merger.

(f) If a foreign corporation is a party to the merger, section -317 shall apply to the foreign corporation.

### PART XIII. SALE OF ASSETS

**§ -331 Sale of assets in regular course of business and mortgage of assets.** (a) A corporation, on the terms and conditions and for the consideration determined by the board of directors, may:

- (1) Sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property in the usual and regular course of business;
- (2) Mortgage, pledge, dedicate to the repayment of indebtedness (whether with or without recourse), or otherwise encumber any or all of its property whether or not in the usual and regular course of business; or
- (3) Transfer any or all of its property to a corporation all the shares of which are owned by the corporation.

(b) Unless the articles of incorporation require it, approval by the shareholders of a transaction described in subsection (a) is not required.

**§ -332 Sale of assets other than in regular course of business.** (a) A corporation may sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property (with or without the good will), otherwise than in the usual and regular course of business, on the terms and conditions and for the consideration determined by the corporation's board of directors, if the board of directors proposes and its shareholders approve the proposed transaction.

(b) For a transaction to be authorized:

- (1) The board of directors must recommend the proposed transaction 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 with the submission of the proposed transaction; and
- (2) The shareholders entitled to vote must approve the transaction.

(c) The board of directors may condition its submission of the proposed transaction on any basis.

(d) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with section -125. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider the sale, lease, exchange, or other disposition of all, or substantially all, the property of the corporation and contain or be accompanied by a description of the transaction.

(e) With respect to the corporations incorporated on or after July 1, 1987, at the meeting the shareholders may authorize the sale, lease, exchange, or other disposition and may fix, or may authorize the board of directors to fix, any or all of the terms and conditions thereof and the consideration to be received by the corporation therefor. The authorization shall require the affirmative vote of the holders of a majority of the shares of the corporation entitled to vote thereon, unless any class of shares is entitled to vote thereon as a class, in which event the authorization shall require the affirmative vote of the holders of a majority of the shares of each class of shares entitled to vote as a class thereon and of the total shares entitled to vote thereon.

(f) With respect to corporations incorporated before July 1, 1987, at the meeting the shareholders may authorize the sale, lease, exchange, or other disposition and may fix, or may authorize the board of directors to fix, any or all of the

terms and conditions therefor. The authorization shall require the affirmative vote of the holders of three-fourths of the shares of the corporation entitled to vote as a class thereon and of the total shares entitled to vote thereon. The articles of incorporation may be amended by the vote set forth in the preceding sentence to provide for a lesser proportion of shares, or of any class or series thereof, than is provided in the preceding sentence, in which case the articles of incorporation shall control; provided that the lesser proportion shall not be less than the proportion set forth in subsection (e).

(g) After a sale, lease, exchange, or other disposition of property is authorized, the transaction may be abandoned (subject to any contractual rights) without further shareholder action.

(h) A transaction that constitutes a distribution is governed by section -111 and not by this section.

#### PART XIV. DISSENTERS' RIGHTS

##### A. RIGHT TO DISSENT AND OBTAIN PAYMENT FOR SHARES

§ -341 **Definitions.** As used in this part:

“Beneficial shareholder” means the person who is a beneficial owner of shares held in a voting trust or by a nominee as the record shareholder.

“Corporation” means the issuer of the shares held by a dissenter before the corporate action, or the surviving or acquiring corporation by merger or share exchange of that issuer.

“Dissenter” means a shareholder who is entitled to dissent from corporate action under section -342 and who exercises that right when and in the manner required by sections -351 to -359.

“Fair value”, with respect to a dissenter’s shares, means the value of the shares immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action unless exclusion would be inequitable.

“Interest” means interest from the effective date of the corporate action until the date of payment, at the average rate currently paid by the corporation on its principal bank loans or, if none, at a rate that is fair and equitable under all the circumstances.

“Record shareholder” means the person in whose name shares are registered in the records of a corporation or the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with a corporation.

“Shareholder” means the record shareholder or the beneficial shareholder.

§ -342 **Right to dissent.** (a) A shareholder is entitled to dissent from, and obtain payment of the fair value of the shareholder’s shares in the event of, any of the following corporate actions:

- (1) Consummation of a plan of merger to which the corporation is a party:
  - (A) If shareholder approval is required for the merger by section -313 or the articles of incorporation and the shareholder is entitled to vote on the merger; or
  - (B) If the corporation is a subsidiary that is merged with its parent under section -314;
- (2) Consummation of a plan of share exchange to which the corporation is a party as the corporation whose shares will be acquired, if the shareholder is entitled to vote on the plan;
- (3) Consummation of a sale or exchange of all, or substantially all, of the property of the corporation other than in the usual and regular course of business, if the shareholder is entitled to vote on the sale or exchange,

including a sale in dissolution, but not including a sale pursuant to court order or a sale for cash pursuant to a plan by which all or substantially all of the net proceeds of the sale will be distributed to the shareholders within one year after the date of sale;

- (4) An amendment of the articles of incorporation that materially and adversely affects rights in respect of a dissenter's shares because it:
  - (A) Alters or abolishes a preferential right of the shares;
  - (B) Creates, alters, or abolishes a right in respect of redemption, including a provision respecting a sinking fund for the redemption or repurchase, of the shares;
  - (C) Alters or abolishes a preemptive right of the holder of the shares to acquire shares or other securities;
  - (D) Excludes or limits the right of the shares to vote on any matter, or to cumulate votes, other than a limitation by dilution through issuance of shares or other securities with similar voting rights; or
  - (E) Reduces the number of shares owned by the shareholder to a fraction of a share if the fractional share so created is to be acquired for cash under section -74;
- (5) Any corporate action taken pursuant to a shareholder vote to the extent the articles of incorporation, bylaws, or a resolution of the board of directors provides that voting or nonvoting shareholders are entitled to dissent and obtain payment for their shares; or
- (6) Consummation of a plan of conversion to which the corporation is the converting entity, if the shareholder is entitled to vote on the plan.

(b) A shareholder entitled to dissent and obtain payment for the shareholder's shares under this part may not challenge the corporate action creating the shareholder's entitlement unless the action is unlawful or fraudulent with respect to the shareholder or the corporation.

**§ -343 Dissent by nominees and beneficial owners.** (a) A record shareholder may assert dissenters' rights as to fewer than all the shares registered in the shareholder's name only if the shareholder dissents with respect to all shares beneficially owned by any one person and notifies the corporation in writing of the name and address of each person on whose behalf the record shareholder asserts dissenters' rights. The rights of a partial dissenter under this subsection are determined as if the shares as to which the partial dissenter dissents and the partial dissenter's other shares were registered in the names of different shareholders.

(b) A beneficial shareholder may assert dissenters' rights as to shares held on the beneficial shareholder's behalf only if:

- (1) The beneficial shareholder submits to the corporation the record shareholder's written consent to the dissent not later than the time the beneficial shareholder asserts dissenters' rights; and
- (2) The beneficial shareholder does so with respect to all shares of which the beneficial shareholder is the beneficial shareholder or over which the beneficial shareholder has power to direct the vote.

## B. PROCEDURE FOR EXERCISE OF DISSENTERS' RIGHTS

**§ -351 Notice of dissenters' rights.** (a) If proposed corporate action creating dissenters' rights under section -342 is submitted to a vote at a shareholders' meeting, the meeting notice must state that shareholders are or may be entitled to assert dissenters' rights under this part and be accompanied by a copy of this part.

(b) If corporate action creating dissenters' rights under section -342 is taken without a vote of shareholders, the corporation shall notify in writing all shareholders entitled to assert dissenters' rights that the action was taken and send them the dissenters' notice described in section -353.

**§ -352 Notice of intent to demand payment.** (a) If proposed corporate action creating dissenters' rights under section -342 is submitted to a vote at a shareholders' meeting, a shareholder who wishes to assert dissenters' rights:

- (1) Must deliver to the corporation before the vote is taken written notice of the shareholder's intent to demand payment for the shareholder's shares if the proposed action is effectuated; and
- (2) Must not vote the shareholder's shares in favor of the proposed action.

(b) A shareholder who does not satisfy the requirements of subsection (a) is not entitled to payment for the shareholder's shares under this part.

**§ -353 Dissenters' notice.** (a) If proposed corporate action creating dissenters' rights under section -342 is authorized at a shareholders' meeting, the corporation shall deliver a written dissenters' notice to all shareholders who satisfied the requirements of section -352.

(b) The dissenters' notice must be sent no later than ten days after the corporate action was taken, and must:

- (1) State where the payment demand must be sent and where and when certificates for certificated shares must be deposited;
- (2) Inform holders of uncertificated shares to what extent transfer of the shares will be restricted after the payment demand is received;
- (3) Supply a form for demanding payment that includes the date of the first announcement to news media or to shareholders of the terms of the proposed corporate action and requires that the person asserting dissenters' rights certify whether or not the person acquired beneficial ownership of the shares before that date;
- (4) Set a date by which the corporation must receive the payment demand, which date may not be fewer than thirty nor more than sixty days after the date the subsection (a) notice is delivered; and
- (5) Be accompanied by a copy of this part.

**§ -354 Duty to demand payment.** (a) A shareholder sent a dissenters' notice described in section -353 must demand payment, certify whether the shareholder acquired beneficial ownership of the shares before the date required to be set forth in the dissenter's notice pursuant to section -353(b)(3), and deposit the shareholder's certificates in accordance with the terms of the notice.

(b) The shareholder who demands payment and deposits the shareholder's share certificates under subsection (a) retains all other rights of a shareholder until these rights are canceled or modified by the taking of the proposed corporate action.

(c) A shareholder who does not demand payment or deposit the shareholder's share certificates where required, each by the date set in the dissenters' notice, is not entitled to payment for the shareholder's shares under this part.

**§ -355 Share restrictions.** (a) The corporation may restrict the transfer of uncertificated shares from the date the demand for their payment is received until the proposed corporate action is taken or the restrictions released under section -357.

(b) The person for whom dissenters' rights are asserted as to uncertificated shares retains all other rights of a shareholder until these rights are canceled or modified by the taking of the proposed corporate action.

§ **-356 Payment.** (a) Except as provided in section -358, as soon as the proposed corporate action is taken, or upon receipt of a payment demand, the corporation shall pay each dissenter who complied with section -354 the amount the corporation estimates to be the fair value of the dissenter's shares, plus accrued interest.

(b) The payment must be accompanied by:

- (1) The corporation's balance sheet as of the end of a fiscal year ending not more than sixteen months before the date of payment, an income statement for that year, a statement of changes in shareholders' equity for that year, and the latest available interim financial statements, if any;
- (2) A statement of the corporation's estimate of the fair value of the shares;
- (3) An explanation of how the interest was calculated;
- (4) A statement of the dissenter's right to demand payment under section -359; and
- (5) A copy of this part.

§ **-357 Failure to take action.** (a) If the corporation does not take the proposed action within sixty days after the date set for demanding payment and depositing share certificates, the corporation shall return the deposited certificates and release the transfer restrictions imposed on uncertificated shares.

(b) If after returning deposited certificates and releasing transfer restrictions, the corporation takes the proposed action, it must send a new dissenters' notice under section -353 and repeat the payment demand procedure.

§ **-358 After-acquired shares.** (a) A corporation may elect to withhold payment required by section -356 from a dissenter unless the dissenter was the beneficial owner of the shares before the date set forth in the dissenters' notice as the date of the first announcement to news media or to shareholders of the terms of the proposed corporate action.

(b) To the extent the corporation elects to withhold payment under subsection (a), after taking the proposed corporate action, it shall estimate the fair value of the shares, plus accrued interest, and shall pay this amount to each dissenter who agrees to accept it in full satisfaction of the dissenter's demand. The corporation shall send with its offer a statement of its estimate of the fair value of the shares, an explanation of how the interest was calculated, and a statement of the dissenter's right to demand payment under section -359.

§ **-359 Procedure if shareholder dissatisfied with payment or offer.** (a) A dissenter may notify the corporation in writing of the dissenter's own estimate of the fair value of the dissenter's shares and amount of interest due, and demand payment of the dissenter's estimate (less any payment under section -356), or reject the corporation's offer under section -358 and demand payment of the fair value of the dissenter's shares and interest due, if:

- (1) The dissenter believes that the amount paid under section -356 or offered under section -358 is less than the fair value of the dissenter's shares or that the interest due is incorrectly calculated;
- (2) The corporation fails to make payment under section -356 within sixty days after the date set for demanding payment; or
- (3) The corporation, having failed to take the proposed action, does not return the deposited certificates or release the transfer restrictions imposed on uncertificated shares within sixty days after the date set for demanding payment.

(b) A dissenter waives the dissenter's right to demand payment under this section unless the dissenter notifies the corporation of the dissenter's demand in writing under subsection (a) within thirty days after the corporation made or offered payment for the dissenter's shares.

### C. JUDICIAL APPRAISAL OF SHARES

§ -371 **Court action.** (a) If a demand for payment under section -359 remains unsettled, the corporation shall commence a 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 each dissenter whose demand remains unsettled the amount demanded.

(b) The corporation shall commence the proceeding in the circuit court. If the corporation is a foreign corporation without a registered office in this State, it shall commence the proceeding in the county in this State where the registered office of the domestic corporation merged with or whose shares were acquired by the foreign corporation was located.

(c) The corporation shall make all dissenters (whether or not residents of this State) whose demands remain unsettled parties to the proceeding as in an action against their shares and all parties must be served with a copy of the petition. Nonresidents may be served by registered or certified mail or by publication as provided by law.

(d) The jurisdiction of the court in which the proceeding is commenced under subsection (b) is plenary and exclusive. The court may appoint one or more persons as appraisers to receive evidence and recommend decision on the question of fair value. The appraisers have the powers described in the order appointing them, or in any amendment to it. The dissenters are entitled to the same discovery rights as parties in other civil proceedings.

(e) Each dissenter made a party to the proceeding is entitled to judgment:

- (1) For the amount, if any, by which the court finds the fair value of the dissenter's shares, plus interest, exceeds the amount paid by the corporation; or
- (2) For the fair value, plus accrued interest, of the dissenter's after-acquired shares for which the corporation elected to withhold payment under section -358.

§ -372 **Court costs and counsel fees.** (a) The court in an appraisal proceeding commenced under section -371 shall determine all costs of the proceeding, including the reasonable compensation and expenses of appraisers appointed by the court. The court shall assess the costs against the corporation, except that the court may assess costs against all or some of the dissenters, in amounts the court finds equitable, to the extent the court finds the dissenters acted arbitrarily, vexatiously, or not in good faith in demanding payment under section -359.

(b) The court may also assess the fees and expenses of counsel and experts for the respective parties, in amounts the court finds equitable:

- (1) Against the corporation and in favor of any or all dissenters if the court finds the corporation did not substantially comply with the requirements of sections -351 to -359; or
- (2) Against either the corporation or a dissenter, in favor of any other party, if the court finds that the party against whom the fees and expenses are assessed acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided by this part.

(c) If the court finds that the services of counsel for any dissenter were of substantial benefit to other dissenters similarly situated, and that the fees for those services should not be assessed against the corporation, the court may award to these counsel reasonable fees to be paid out of the amounts awarded the dissenters who were benefited.

**PART XV. DISSOLUTION**  
**A. VOLUNTARY DISSOLUTION**

§ -381 **Dissolution by incorporators or initial directors.** A majority of the incorporators or initial directors of a corporation that has not issued shares or has not commenced business may dissolve the corporation by delivering to the department director for filing articles of dissolution that set forth:

- (1) The name of the corporation;
- (2) The date of its incorporation;
- (3) Either:
  - (A) That none of the corporation's shares has been issued; or
  - (B) That the corporation has not commenced business;
- (4) That no debt of the corporation remains unpaid;
- (5) That the net assets of the corporation remaining after winding up have been distributed to the shareholders, if shares were issued; and
- (6) That a majority of the incorporators or initial directors authorized the dissolution.

§ -382 **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:

- (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; and
- (2) The shareholders entitled to vote must approve the proposal to dissolve as provided in subsection (e).

(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 in accordance with section -125. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider dissolving the corporation.

(e) With respect to the corporations incorporated on or after July 1, 1987, at the meeting a vote of shareholders entitled to vote thereat shall be taken on a resolution to dissolve the corporation. The resolution shall be adopted upon receiving the affirmative vote of the holders of a majority of the shares of the corporation entitled to vote thereon, unless any class of shares is entitled to vote thereon as a class, in which event the resolution shall be adopted upon receiving the affirmative vote of the holders of a majority of the shares of each class of shares entitled to vote thereon as a class and of the total shares entitled to vote thereon.

(f) With respect to corporations incorporated before July 1, 1987, at the meeting a vote of shareholders entitled to vote thereat shall be taken on a resolution to dissolve the corporation. The resolution shall be adopted upon receiving the affirmative vote of the holders of three-fourths of the shares of the corporation entitled to vote thereon, unless any class of shares is entitled to vote thereon as a



class, in which event the resolution shall be adopted upon receiving the affirmative vote of the holders of three-fourths of the shares of each class of shares entitled to vote thereon as a class and of the total shares entitled to vote thereon. The articles of incorporation may be amended by the vote set forth in the preceding sentence to provide for a lesser proportion of shares, or of any class or series thereof, than is provided in the preceding sentence, in which case the articles of incorporation shall control; provided that the lesser proportion shall not be less than the proportion set forth in subsection (e).

§ **-383 Articles of dissolution.** (a) At any time after dissolution is authorized, the corporation may dissolve by delivering to the department director for filing articles of dissolution setting forth:

- (1) The name of the corporation;
- (2) The date dissolution was authorized;
- (3) If dissolution was approved by the shareholders;
  - (A) The number of votes entitled to be cast on the proposal to dissolve; and
  - (B) Either the total number of votes cast for and against dissolution or the total number of undisputed votes cast for dissolution and a statement that the number cast for dissolution was sufficient for approval; and
- (4) If voting by voting groups was required, the information required by paragraph (3) must be separately provided for each voting group entitled to vote separately on the plan to dissolve.

(b) A corporation is dissolved upon the effective date of its articles of dissolution.

§ **-384 Revocation of dissolution.** (a) A corporation may revoke its dissolution within one hundred 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 department director for filing articles of revocation of dissolution, together with a copy of its articles of dissolution, that set forth:

- (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; and
- (6) If shareholder action was required to revoke the dissolution, the information required by section -383(a)(3) or (4).

(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.

§ **-385 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:

- (1) Collecting its assets;
  - (2) Disposing of its properties that will not be distributed in kind to its shareholders;
  - (3) Discharging or making provision for discharging its liabilities;
  - (4) Distributing its remaining property among its shareholders according to their interests; and
  - (5) Doing every other act necessary to wind up and liquidate its business and affairs.
- (b) Dissolution of a corporation does not:
- (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 director or officers to standards of conduct different from those prescribed in part IX 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; or
  - (7) Terminate the authority of the registered agent of the corporation.

§ **-386 Known claims against dissolved corporation.** (a) A dissolved corporation may dispose of the known claims against it by following the procedure described in this section.

(b) The dissolved corporation shall notify its known claimants in writing of the dissolution at any time after its effective date. The written notice must:

- (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 twenty days from the effective date of the written notice, by which the dissolved corporation must receive the claim; and
- (4) State the claim will be barred if not received by the deadline.

(c) A claim against the dissolved corporation is barred:

- (1) If a claimant who was given written notice under subsection (b) 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 within ninety days from 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.

§ **-387 Unknown claims against dissolved corporation.** (a) A dissolved corporation may also publish notice of its dissolution and request that persons with claims against the corporation present them in accordance with the notice.

(b) The notice must:

- (1) Be published one time in a newspaper of general circulation in the county 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 provided a mailing address where the claim may be sent; and
- (3) State that a claim against the corporation will be barred unless a proceeding to enforce the claim is commenced within five years after the publication of the notice.

(c) If the dissolved corporation publishes a newspaper notice in accordance with subsection (b), the claim of each of the following claimants is barred unless the claimant commences a proceeding to enforce the claim against the dissolved corporation within five years after the publication date of the newspaper notice:

- (1) A claimant who did not receive written notice under section -386;
  - (2) A claimant whose claim was timely sent to the dissolved corporation but not acted on;
  - (3) A claimant whose claim is contingent or based on an event occurring after the effective date of dissolution.
- (d) A claim may be enforced under this section:
- (1) Against the dissolved corporation, to the extent of its undistributed assets; or
  - (2) If the assets have been distributed in liquidation, against a shareholder of the dissolved corporation to the extent of the shareholder's pro rata share of the shareholder 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 such shareholder.

## B. ADMINISTRATIVE DISSOLUTION

§ -401 **Grounds for administrative dissolution.** The department director may commence a proceeding under section -402 to administratively dissolve a corporation if:

- (1) The corporation has failed to file its annual report with the department director for a period of two years;
- (2) The corporation procured its articles of incorporation through fraud;
- (3) The corporation has continued to exceed or abuse the authority conferred upon it by law; or
- (4) The corporation does not notify the department director within sixty days that its registered agent or registered office has been changed, that its registered agent has resigned, or that its registered office has been discontinued.

§ -402 **Procedure for and effect of administrative dissolution.** (a) If the department director determines that one or more grounds exist under section -401 for dissolving a corporation, the department director shall give written notice of the department director's determination by mailing the notice to the corporation at its last known address appearing in the records of the department director.

(b) If the corporation does not correct each ground for dissolution or demonstrate to the reasonable satisfaction of the department director that each ground determined by the department director does not exist within sixty days after the date of mailing of the department director's written notice, the department director shall administratively dissolve the corporation by signing a decree of dissolution that recites the ground for dissolution and its effective date. The decree shall be filed in the department director's office.

(c) A corporation administratively dissolved continues its corporate existence but may not carry on any business except that necessary to wind up and liquidate its business and affairs under section -385 and notify claimants under sections -386 and -387.

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

(e) Parties of interest may petition a court of competent jurisdiction to appoint a trustee to settle the affairs of any corporation so dissolved. If a trustee is appointed, the trustee shall pay to the State out of any funds that may come into the trustee's hands as trustee, a sum equal to any penalty imposed under section -473. If a trustee is not appointed by a court of competent jurisdiction, the last directors of the dissolved corporation shall be and act as trustees for the creditors and shareholders of the dissolved corporation with full powers to settle its affairs.

(f) A corporation whose articles of incorporation have expired shall cease to exist by operation of law.

**§ -403 Reinstatement following administrative dissolution.** (a) A corporation administratively dissolved under section -402 may apply to the department director for reinstatement within two years after the effective date of dissolution. The application must:

- (1) Recite the name of the corporation and the effective date of its administrative dissolution;
- (2) Contain all reports due and unfiled;
- (3) Contain the payment of all delinquent fees and penalties; and
- (4) Contain a certificate from the department of taxation reciting that all taxes owed by the corporation have been paid.

(b) Within the applicable reinstatement period, should the name of the corporation, or a name substantially identical thereto be registered or reserved by another corporation, partnership, limited liability company, or limited liability partnership, or should the name or a name substantially identical thereto be registered as a trade name, trademark, or service mark, then reinstatement shall be allowed only upon the registration of a new name by the involuntary dissolved corporation pursuant to the amendment provisions of this chapter.

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

**§ -404 Appeal from denial of reinstatement.** (a) If the department director denies a corporation's application for reinstatement following administrative dissolution, the department director shall mail a written notice to the corporation that explains the reason or reasons for denial.

(b) The corporation may appeal the denial of reinstatement to the circuit court within thirty days after service of the notice of denial is perfected. The corporation appeals by petitioning the court to set aside the dissolution and attaching to the petition copies of the department director's certificate of dissolution, the corporation's application for reinstatement, and the department director's notice of denial.

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

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

## C. JUDICIAL DISSOLUTION

**§ -411 Grounds for judicial dissolution.** The circuit court may dissolve a corporation:

- (1) In a proceeding by the attorney general if it is established that:
  - (A) The corporation obtained its articles of incorporation through fraud; or
  - (B) The corporation has continued to exceed or abuse the authority conferred upon it by law;
- (2) In a proceeding by a shareholder if it is established that:
  - (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) The directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent;
  - (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; or
  - (D) The corporate assets are being misapplied or wasted;
- (3) In a proceeding by a creditor if it is established that:
  - (A) The creditor's claim has been reduced to judgment, the execution on the judgment returned unsatisfied, and the corporation is insolvent; or
  - (B) The corporation has admitted in writing that the creditor's claim is due and owing and the corporation is insolvent; or
- (4) In a proceeding by the corporation to have its voluntary dissolution continued under court supervision.

**§ -412 Procedure for judicial dissolution.** (a) Venue for a proceeding by the attorney general to dissolve a corporation lies in circuit court. Venue for a proceeding brought by any other party named in section -411 lies in the county where a corporation's principal office (or, if none in this State, its registered office) is or was last located.

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

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

(d) Within ten days after the commencement of a proceeding under section -411(2) to dissolve a corporation that has no shares listed on a national securities exchange or regularly traded in a market maintained by one or more members of a national or affiliated securities association, 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 section -415 and accompanied by a copy of section -415.

**§ -413 Receivership or custodianship.** (a) A court in a judicial proceeding brought to dissolve a corporation may appoint one or more receivers to wind up and liquidate, or one or more custodians to manage, the business and affairs of the

corporation. The court shall hold a hearing, after notifying all parties to the proceeding and any interested persons designated by the court, before appointing a receiver or custodian. The court appointing a receiver or custodian has exclusive 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 custodian. The court may require the receiver or custodian to post bond, with or without sureties, in an amount the court directs.

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

- (1) The receiver:
  - (A) May dispose of all or any part of the assets of the corporation wherever located, at a public or private sale, if authorized by the court; and
  - (B) May sue and defend in the receiver's own name as receiver of the corporation in all courts of this State; and
- (2) The custodian 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 during a receivership may redesignate the receiver a custodian, and during a custodianship may redesignate the custodian a receiver, if doing so is in the best interests of the corporation, its shareholders, and creditors.

(e) The court from time to time during the receivership or custodianship may order compensation paid and expense disbursements or reimbursements made to the receiver or custodian and the receiver's or custodian's counsel from the assets of the corporation or proceeds from the sale of the assets.

**§ -414 Decree of dissolution.** (a) If after a hearing the court determines that one or more grounds for judicial dissolution described in section -411 exist, it may enter a decree dissolving the corporation and specifying the effective date of the dissolution, and the clerk of the court shall deliver a certified copy of the decree to the department director, who shall file it.

(b) After entering the decree of dissolution, the court shall direct the winding up and liquidation of the corporation's business and affairs in accordance with section -385 and the notification of claimants in accordance with sections -386 and -387.

**§ -415 Election to purchase in lieu of dissolution.** (a) In a proceeding under section -411(2) to dissolve a corporation that has no shares listed on a national securities exchange or regularly traded in a market maintained by one or more members of a national or affiliated securities association, 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) 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 section -411(2) or at such later time as the court in its discretion may allow. If the election to purchase is filed by one or more shareholders, the corporation, within ten days thereafter, shall 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. 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. After an election has been filed by the corporation or one or more shareholders, the proceeding under section -411(2) may not be discontinued or settled, nor may the petitioning shareholder sell or otherwise dispose of the shareholder's shares, unless the court determines that it would be equitable to the corporation and the shareholders, other than the petitioner, to permit the discontinuance, settlement, sale, or other disposition.

(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), the court, upon application of any party, shall stay the section -411(2) proceedings and determine the fair value of the petitioner's shares as of the day before the date on which the petition under section -411(2) was filed or as of any other date 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 the terms and conditions that 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 costs, fees, and 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 should 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. If the court finds that the petitioning shareholder had probable grounds for relief under section -411(2)(B) or (D), it may award to the petitioning shareholder reasonable fees and expenses of counsel and of any experts employed by the petitioning shareholder.

(f) Upon entry of an order under subsections (c) or (e), the court shall dismiss the petition to dissolve the corporation under section -411, 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 to the petitioning shareholder by the order of the court that shall be enforceable in the same manner as any other judgment.

(g) The purchase ordered pursuant to subsection (e), 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 sections -382 and -383, which articles must then be adopted and filed within fifty days thereafter. Upon filing of the articles of dissolution, the corporation shall be dissolved in accordance with sections -385 to -387, and the order entered pursuant to subsection (e) shall no longer be of any force or effect, except that the court may award the petitioning shareholder reasonable fees and expenses in accord-

ance with the provisions of the last sentence of subsection (e) and 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), other than an award of fees and expenses pursuant to subsection (e), is subject to section -111.

D. MISCELLANEOUS

§ -421 **Deposit with director of finance.** Assets of a dissolved corporation that should be transferred to a creditor, claimant, or shareholder of the corporation who cannot be found or who is not competent to receive them shall be reduced to cash and deposited with the director of finance for disposition in accordance with chapter 523A.

PART XVI. FOREIGN CORPORATIONS

A. CERTIFICATE OF AUTHORITY

§ -431 **Authority to transact business required.** (a) A foreign corporation may not transact business in this State until it obtains a certificate of authority from the department director.

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

- (1) Maintaining, defending, or settling any proceeding;
  - (2) Holding meetings of the board of directors or shareholders or carrying on other activities concerning internal corporate affairs;
  - (3) Maintaining bank accounts;
  - (4) Maintaining offices or agencies for the transfer, exchange, and registration of the corporation's own securities or maintaining trustees or depositories with respect to those securities;
  - (5) Selling through independent contractors;
  - (6) Soliciting or obtaining orders, whether by mail or through employees or agents or otherwise, if the orders require acceptance outside this State before they become contracts;
  - (7) Creating as borrower or lender, or acquiring, as borrower or lender, indebtedness, mortgages, and security interests in real or personal property;
  - (8) Securing or collecting debts or enforcing mortgages and security interests in property securing the debts;
  - (9) Owning, without more, real or personal property;
  - (10) Conducting an isolated transaction that is completed within thirty days and that is not one in the course of repeated transactions of a like nature; and
  - (11) Transacting business in interstate commerce.
- (c) The list of activities in subsection (b) is not exhaustive.

§ -432 **Consequences of transacting business without authority.** (a) A foreign corporation transacting business in this State without a certificate of authority may not maintain a proceeding in any court in this State until it obtains a certificate of authority.

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



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

(d) A foreign corporation that transacts business in this State without a certificate of authority shall be liable to this State, for the years or parts thereof during which it transacted business in this State without a certificate of authority, in an amount equal to all fees that would have been imposed by this chapter upon the corporation had it duly applied for and received a certificate of authority to transact business in this State as required by this chapter and thereafter filed all reports required by this chapter, plus all penalties imposed by this chapter for failure to pay the fees.

The attorney general shall bring proceedings to recover all amounts due this State under this section.

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

**§ -433 Application for certificate of authority.** (a) A foreign corporation may apply for a certificate of authority to transact business in this State by delivering an application to the department director for filing. The application must set forth:

- (1) The name of the foreign corporation or, if its name is unavailable for use in this State, a corporate name that satisfies the requirements of section -436;
- (2) The name of the state or country under whose law it is incorporated;
- (3) Its date of incorporation and period of duration;
- (4) The street address of its principal office;
- (5) The street address of its registered office in this State and the name of its registered agent at that office; and
- (6) The names and usual business addresses of its current directors and officers.

(b) The foreign corporation shall deliver with the completed application a certificate of existence (or a document of similar import) duly authenticated by the secretary of state or other official having custody of corporate records in the state or country under whose law it is incorporated.

**§ -434 Change of name by foreign corporation.** (a) Whenever the name of a foreign corporation authorized to transact business in this State is changed by the amendment of its articles of incorporation, the foreign corporation, within thirty days after the amendment becomes effective, shall deliver to the department director a certificate evidencing the name change, duly authenticated by the proper officer of the state or country under the laws of which it is incorporated. If the certificate is in a foreign language, a translation under oath of the translator shall accompany the certificate.

(b) Whenever a foreign corporation that is authorized to transact business in this State shall change its name to one under which a certificate of authority would not be granted to it on application therefor, the foreign corporation shall not thereafter transact any business in this State until it has changed its name to a name that is available to it under the laws of this State or has otherwise complied with this chapter.

(c) If a foreign corporation is unable to change its name to a name that is available to it under the laws of this State, it may deliver to the department director a copy of a certificate of registration of a trade name for the foreign corporation's file

and thereafter shall become authorized to transact business in the State under that name.

**§ -435 Effect of certificate of authority.** (a) A certificate of authority authorizes the foreign corporation to which it is issued to transact business in this State subject to the right of this State to revoke the certificate as provided in this chapter.

(b) A foreign corporation with a valid certificate of authority has the same but no greater rights and has the same but no greater privileges as, and except as otherwise provided by this chapter is subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic corporation of like character.

(c) This chapter does not authorize this State to regulate the organization or internal affairs of a foreign corporation authorized to transact business in this State.

**§ -436 Corporate name of foreign corporation.** (a) If the corporate name of a foreign corporation does not satisfy the requirements of section -51, the foreign corporation to obtain or maintain a certificate of authority to transact business in this State may use a fictitious name to transact business in this State if its real name is unavailable and it delivers to the department director for filing a copy of a certificate of registration of a trade name by the foreign corporation under which the foreign corporation will transact business in this State.

(b) Except as authorized by subsections (c) and (d), the corporate name (including a fictitious name) of a foreign corporation may not be the same as, or substantially identical to:

- (1) The name of any domestic corporation, partnership, limited liability company, or limited liability partnership existing or registered under the laws of this State, or any foreign corporation, partnership, limited liability company, or limited liability partnership authorized to transact business in this State;
- (2) A name the exclusive right to which is, at the time, reserved in this State;
- (3) The fictitious name of another foreign corporation authorized to transact business in this State; and
- (4) Any trade name, trademark, or service mark registered in this State.

(c) A foreign corporation may apply to the department director for authorization to use in this State the name of another corporation (incorporated or authorized to transact business in this State) that is substantially identical based upon the department director's records from the name applied for. The department director shall authorize use of the name applied for if:

- (1) The other entity or holder of a reserved or registered name consents to the use in writing and one or more words are added to the other entity's name to make the name distinguishable from the name of the applicant; or
- (2) The applicant delivers to the department director a certified copy of a final judgment of a court of competent jurisdiction establishing the applicant's right to use the name applied for in this State.

(d) A foreign corporation may use in this State the name (including the fictitious name) of another domestic or foreign corporation that is used in this State if the other corporation is incorporated or authorized to transact business in this State and the foreign corporation:

- (1) Has merged with the other corporation;
- (2) Has been formed by reorganization of the other corporation; or

- (3) Has acquired all or substantially all of the assets, including the corporate name, of the other corporation.

**§ -437 Registered office and registered agent of foreign corporation.**

Each foreign corporation authorized to transact business in this State must continuously maintain in this State:

- (1) A registered office that may be the same as any of its places of business; and
- (2) A registered agent, who may be:
  - (A) An individual who resides in this State and whose business office is identical with the registered office;
  - (B) A domestic corporation or not-for-profit domestic corporation whose business office is identical with the registered office; or
  - (C) A foreign corporation or foreign not-for-profit corporation authorized to transact business or conduct affairs in this State whose business office is identical with the registered office.

**§ -438 Change of registered office or registered agent of foreign corporation.**

(a) A foreign corporation authorized to transact business in this State may change its registered office or registered agent by delivering to the department director for filing a statement of change that sets forth:

- (1) Its name;
- (2) The street address of its current registered office;
- (3) If the current registered office is to be changed, the street address of its new registered office;
- (4) The name of its current registered agent;
- (5) If the current registered agent is to be changed, the name of its new registered agent; and
- (6) That after the change or changes are made, the street addresses of its registered office and the business office of its registered agent will be identical.

(b) If a registered agent changes the street address of the agent's business office, the agent may change the street address of the registered office of any foreign corporation for which the agent is the registered agent by notifying the corporation in writing of the change and signing (either manually or in facsimile) and delivering to the department director for filing a statement of change that complies with the requirements of subsection (a) and recites that the corporation has been notified of the change.

**§ -439 Resignation of registered agent of foreign corporation.** (a) The registered agent of a foreign corporation may resign from the registered agent's appointment by signing and delivering to the department director for filing the original and two exact or conformed copies of a statement of resignation. The statement of resignation may include a statement that the registered office is also discontinued.

(b) The registered agent shall attach the filing receipt to one copy and mail the copy and receipt to the registered office if not discontinued. The department director shall mail the other copy to the foreign corporation at its principal office address shown in its most recent annual report.

(c) The appointment of the agent is terminated, and the registered office discontinued if so provided, on the thirty-first day after the date on which the statement was filed.

§ -440 **Service on foreign corporation.** (a) The registered agent of a foreign corporation authorized to transact business in this State is the corporation's agent for service of process, notice, or demand required or permitted by law to be served on the foreign corporation.

(b) A foreign corporation may be served by registered or certified mail, return receipt requested, addressed to the secretary of the foreign corporation at its principal office shown in its application for a certificate of authority or in its most recent annual report if the foreign corporation:

- (1) Has no registered agent or its registered agent cannot with reasonable diligence be served;
  - (2) Has withdrawn from transacting business in this State under 451; or
  - (3) Has had its certificate of authority revoked under section -462.
- (c) Service is perfected under subsection (b) at the earliest of:
- (1) The date the foreign corporation receives the mail;
  - (2) The date shown on the return receipt, if signed on behalf of the foreign corporation; or
  - (3) Five days after its deposit in the United States mail, as evidenced by the postmark, if mailed postpaid and correctly addressed.

(d) This section does not prescribe the only means, or necessarily the required means, of serving a foreign corporation.

§ -441 **Application to corporations heretofore authorized to transact business in this State.** Foreign corporations that are duly authorized to transact business in this State at the time this chapter takes effect, for a purpose or purposes for which a corporation might secure the authority under this chapter, shall be entitled to all of the rights and privileges applicable to foreign corporations procuring certificates of authority to transact business in this State under this chapter, and from the time this chapter takes effect the corporations shall be subject to all of the limitations, restrictions, liabilities, and duties prescribed herein for foreign corporations procuring certificates of authority to transact business in this State under this chapter.

## B. WITHDRAWAL

§ -451 **Withdrawal of foreign corporation.** (a) A foreign corporation authorized to transact business in this State may not withdraw from this State until it obtains a certificate of withdrawal from the department director.

(b) A foreign corporation authorized to transact business in this State may apply for a certificate of withdrawal by delivering an application to the department director for filing. The application must set forth:

- (1) The name of the foreign corporation and the name of the state or country under whose law it is incorporated;
- (2) That it is not transacting business in this State and that it surrenders its authority to transact business in this State;
- (3) That it revokes the authority of its registered agent to accept service on its behalf and appoints the department director as its agent for service of process in any proceeding based on a cause of action arising during the time it was authorized to transact business in this State;
- (4) A mailing address to which the department director may mail a copy of any process served on the department director under paragraph (3); and
- (5) A commitment to notify the department director in the future of any change in its mailing address.

(c) After the withdrawal of the corporation is effective, service of process on the department director under this section is service on the foreign corporation. Upon

receipt of process, the department director shall mail a copy of the process to the foreign corporation at the mailing address set forth under subsection (b).

(d) After the filing of the application of withdrawal, the department director shall issue a certificate of withdrawal that shall be effective as of the date of the filing of the application of withdrawal, and the authority of the foreign corporation to transact business in this State shall cease.

### C. REVOCATION OF CERTIFICATE OF AUTHORITY

§ **-461 Grounds for revocation.** The department director may commence a proceeding under section -462 to revoke the certificate of authority of a foreign corporation authorized to transact business in this State if:

- (1) The foreign corporation has failed to file its annual report with the department director for a period of two years;
- (2) The foreign corporation is without a registered agent or registered office in this State as required by this chapter;
- (3) The foreign corporation does not inform the department director under section -438 or -439 that its registered agent or registered office has changed, that its registered agent has resigned, or that its registered office has been discontinued within sixty days of the change, resignation, or discontinuance;
- (4) An incorporator, director, officer, or agent of the foreign corporation signed a document that incorporator, director, officer, or agent knew was false in any material respect with intent that the document be delivered to the department director for filing; or
- (5) The department director receives a duly authenticated certificate from the department director or other official having custody of corporate records in the state or country under whose law the foreign corporation is incorporated stating that it has been dissolved or disappeared as the result of a merger.

§ **-462 Procedure for and effect of revocation.** (a) If the department director determines that one or more grounds exist under section -461 for revocation of a certificate of authority, the department director shall give written notice of the department director's determination by mailing the notice to the foreign corporation at its last known address appearing in the records of the department director.

(b) If the foreign corporation does not correct each ground for revocation or demonstrate to the reasonable satisfaction of the department director that each ground determined by the department director does not exist within sixty days after the date of mailing of the department director's written notice, the department director may revoke the foreign corporation's certificate of authority by signing a certificate of revocation that recites the ground or grounds for revocation and its effective date. The department director shall file the original of the certificate and serve a copy on the foreign corporation under section -440.

(c) The authority of a foreign corporation to transact business in this State ceases on the date shown on the certificate revoking its certificate of authority.

(d) The department director's revocation of a foreign corporation's certificate of authority appoints the department director the foreign corporation's agent for service of process in any proceeding based on a cause of action that arose during the time the foreign corporation was authorized to transact business in this State. Service of process on the department director under this subsection is service on the foreign corporation. Upon receipt of process, the department director shall mail a copy of the process to the secretary of the foreign corporation at its principal office shown in its most recent annual report or in any subsequent communication received from the

corporation stating the current mailing address of its principal office, or, if none are on file, in its application for a certificate of authority.

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

**§ -463 Appeal from revocation.** (a) A foreign corporation may appeal the department director's revocation of its certificate of authority to the circuit court within thirty days after the certificate of revocation is signed. The foreign corporation appeals by petitioning the court to set aside the revocation and attaching to the petition copies of its certificate of authority and the department director's certificate of revocation.

(b) The court may summarily order the department director to reinstate the certificate of authority or may take any other action the court considers appropriate.

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

## PART XVII. RECORDS AND REPORTS

### A. RECORDS

**§ -470 Books and records.** (a) Each corporation shall keep accurate and complete books and records of account and shall keep and maintain at its principal office, or other place as its board of directors may order, minutes of the proceedings of its shareholders and board of directors. The books and records of account shall include accounts of the corporation's assets, liabilities, receipts, disbursements, gains, and losses. The minutes of the proceedings of the shareholders and board of directors of the corporation shall show, as to each meeting of the shareholders or the board of directors, the time and place thereof, whether regular or special, whether notice thereof was given, and if so in what manner, the names of those present at directors' meetings, the number of shares present or represented at shareholders' meetings, and the proceedings at each meeting.

(b) In every corporation incorporated under this chapter, the board of directors of the corporation shall cause a book to be kept for registering the names of all persons who are or shall become shareholders of the corporation, showing the number of shares of stock held by them respectively, and the time when they respectively became the owner of the shares. The book shall be open at all reasonable times for the inspection of the shareholders. The secretary or the person having the charge thereof shall give a certified transcript of anything therein contained to any shareholder applying therefor; provided that the shareholder pays a reasonable charge for the preparation of the certified transcript. The transcript shall be legal evidence of the facts therein set forth in any suit by or against the corporation.

### B. REPORTS

**§ -472 Annual report.** (a) Each domestic corporation, and each foreign corporation authorized to transact business in this State, shall deliver to the department director for filing an annual report that sets forth:

- (1) The name of the corporation and the state or country under whose law it is incorporated;
- (2) The address of its registered office and the name of its registered agent at that office in this State;
- (3) The address of its principal office;
- (4) The names and business addresses of its directors and principal officers;
- (5) A brief description of the nature of its business;

- (6) The total number of authorized shares, itemized by class and series, if any, within each class; and
- (7) The total number of issued and outstanding shares, itemized by class and series, if any, within each class.

(b) Information in the annual report must reflect the state of the corporation's affairs as of December 31, of the year preceding the year of filing.

(c) The first annual report must be delivered to the department director between January 1 and April 1 of the year following the calendar year in which a domestic corporation was incorporated or a foreign corporation was authorized to transact business. Subsequent annual reports must be delivered to the department director between January 1 and April 1 of the following calendar years.

(d) If an annual report does not contain the information required by this section, the department director shall promptly notify the reporting domestic or foreign 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 department director within thirty days after the effective date of notice, it is deemed to be timely filed.

§ **-473 Penalties imposed upon corporations.** Each corporation, domestic or foreign, that fails or refuses to file its annual report for any year within the time prescribed by this part shall be subject to a forfeiture of an amount to be determined by the department director not exceeding \$100 for every violation, neglect, or failure, to be recovered by action brought in the name of the State by the department director. A continuance of a failure to file the required report shall be a separate offense for each thirty days of the continuance. The department director, for good cause shown, may reduce or waive the penalty imposed by this section.

## PART XVIII. TRANSITION PROVISIONS

§ **-481 Application to existing domestic corporations.** This chapter applies to all domestic corporations in existence on its effective date that were incorporated under any general statute of this State providing for incorporation of corporations for profit if the power to amend or repeal the statute under which the corporation was incorporated was reserved.

§ **-482 Application to qualified foreign corporations.** A foreign corporation authorized to transact business in this State on the effective date of this chapter is subject to this chapter but is not required to obtain a new certificate of authority to transact business under this chapter.

§ **-483 Savings provision.** (a) Except as provided in subsection (b), the repeal of a statute by this chapter does not affect:

- (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.

## ACT 244

(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) Nothing in this chapter shall affect the validity of any action taken by any corporation, or shall impair or affect the validity of any provision of the articles of incorporation or bylaws adopted by any corporation, prior to the effective date of this chapter.

§ -484 **Severability.** If any provision of this chapter or its application to any person or circumstance is held invalid by a court of competent jurisdiction, the invalidity does not affect other provisions or applications of the chapter that can be given effect without the invalid provision or application, and to this end the provisions of the chapter are severable.’’

SECTION 2. Chapter 415, Hawaii Revised Statutes, is repealed except for the grouping control share acquisitions, sections 415-171 and 415-172, Hawaii Revised Statutes, which shall remain in effect.

SECTION 3. The revisor of statutes shall prepare a table indicating the Hawaii Revised Statutes section numbers in section 1 of this Act when codified and the equivalent Model Corporation Act as of January 1, 1984, section number. The table shall be placed in the Hawaii Revised Statutes preceding the new chapter added in section 1 of this Act.

SECTION 4. This Act shall take effect on July 1, 2001.

(Approved June 19, 2000.)