The Model Business Corporation Act as Adopted in Louisiana

2014

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Executive Summary: What follows is the summary of the new corporation law that I prepared for review by legislators, particularly the members of the relevant House and Senate Committees.

The last page of the summary lists the members of the committee that modified the Model Act for adoption in Louisiana. I am most grateful for the hard work, wisdom and experience that those members brought to the project.

<u>Summary of HB 319</u>

by

Glenn G. Morris

Reporter and Chair, Corporations Committee, Louisiana State Law Institute

- Adopts the Model Business Corporation Act
    - Source of the corporation law in 30 other states, including Florida, Georgia, Alabama, Mississippi, Arkansas, Tennessee, Kentucky, Virginia, North Carolina and South Carolina
    - Subject to continuous revision through the American Bar Association's Committee on Corporate Laws
    - Revision process is responsive to developments nationally, especially in Delaware, and in federal law
    - Current non-Model structure in Louisiana makes the adoption of model updates and improvements technically more difficult and error-prone

- Updates Louisiana business corporation law as the 1968 statute did when it replaced the 1928 statute.

- Modern features:
    - Eliminates complicated par-value system of corporate capital
    - Permits issuance of shares for promissory notes and contracts for services
    - Permits shareholders to agree unanimously to governance provisions that do not fit traditional corporate requirements
    - Provides consistent procedures for mergers and merger alternatives, such as share exchanges, domestications and entity conversions, that will coordinate easily with analogous provisions in other states, especially Model Act states
    - Improves the protections afforded to minority shareholders in mergers and merger-alternatives, while also exempting from this remedy the types of arms-length market transactions in publicly-traded securities that eliminate the need for judicial review of the market-set prices
    - Coordinates rules in corporation law concerning electronic forms of notice and other communications with provisions of UETA (the uniform state statute on the subject) and E-SIGN (the federal statute on the same subject)
    - Provides answers for the procedural questions that commonly arise at shareholders' meetings, including those concerning the selection and authority of the presiding officer, the appointment and authority of inspectors of election (where required or permitted), and the kinds of signatures that the corporation may accept in good faith as that of a shareholder on a consent, waiver or proxy appointment
    - Provides a means for validating transactions between a corporation and one or more of its directors, resolving the confusion over the uncertain effects of the current provision on the subject
    - Provides greater certainty concerning rules governing shareholder derivative actions
    - Provides a remedy for the oppression of minority shareholders in a closely-held firm

- Committee Revisions – To Model Act or to current Louisiana law
    - Definitions provided to reconcile Louisiana civil law vocabulary with Model Act's common law terminology
    - Retained Louisiana rule making bylaws optional
    - Retained five-day grace period for the filing of initial articles of incorporation
    - Retained existing exculpation provision for the protection of directors and officers from personal liability for decisions made without any breach of the duty of loyalty to the corporation, while making that protection the default term - to reflect the overwhelming preference for the provision when legal advice is obtained when forming a new corporation
    - Rejected Delaware rule that treated some forms of carelessness as disloyalty that could not be covered by the exculpation provision
    - Modified the model remedy for the oppression of minority shareholders from an involuntary dissolution of the corporation to a buyout of the oppressed shareholder
    - Rejected model theory that a dissolved corporation remains in existence perpetually, without any change in the normal corporate governance rules except for the change in its object to the winding up of its affairs
    - Provided a means for terminating the existence of a dissolved corporation
    - Retained a simplified procedure for what is now called "dissolution by affidavit," but eliminated the personal liability attached to that form of dissolution
    - Broadened the reinstatement provision for terminated corporations to extend the same three-year reinstatement option to shareholders who terminate their corporation in accordance with law as to those who have had their corporation terminated by the secretary of state because of a failure to file an annual report or to maintain a registered agent or registered office
    - Reduced the grace period for annual reports from three years to 90 days to discourage the practice of filing the report only every third year

<u>Attachment</u>: List of Corporations Committee Members

ATTACHMENT

LOUISIANA STATE LAW INSTITUTE

CORPORATIONS COMMITTEE

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Numbering Scheme

The entire Model Act needed to be placed in Chapter 1 of Title 12, which is the chapter occupied by the current business corporation law. So, we copied the technique used when the UCC was adopted in Title 10.

§ 1.01 of the Model Act becomes § 1-101; and § 13.01 becomes § 1-1301.

With few exceptions, when we wished to omit a provision of the Model Act, we reserved that section or subsection number in the statute so that subsequent numbers in the Model Act sequence would still line up with the Louisiana section numbers. The Act is organized into the following "Parts," which correspond with Chapters in the Model Act:

Part 1 General – Filing Rules and Definitions; Notices

Part 2 Incorporation

Part 3 Purposes and Powers; Governance Rules in Emergencies

Part 4 Name

Part 5 Registered Agent and Registered Office

Part 6 Shares – Permissible Terms; Issuance; Dividends & Other Distributions

Part 7 Shareholders – Rights; Meetings; Consents; Unanimous Governance Agreements; Derivative Actions; Receivers

Part 8 Directors and Officers – Board Meetings & Consents; Duties; Standards of Liability; Protection from Liability; Conflicting Interest Transactions; Business Opportunities

Part 9 Newer Merger-Substitute Transactions – Domestications; Nonprofit Conversions; Entity Conversions

Part 10 Amendment of Articles and Bylaws

Part 11 Mergers and Share Exchanges

Part 12 Sale of All or Substantially All Assets

Part 13 Appraisal Rights (called "Dissenters' Rights" under current law)

Part 14 Dissolution and Termination

Part 15 [Reserved] – Foreign Corporations in Model Act; We kept existing Chapter 3 of Title 12 for qualification of foreign corporations

Part 16 Records and Reports – Shareholder Record Inspection Rights; Annual Reports

Part 17 Transition

Top Ten LBCA Changes to Consider

1. Vote for amending articles, mergers, etc., – changed from 2/3 of shares present to majority of shares entitled to vote on the issue.

2. Oppression Remedy – buyout of oppressed shareholder without discounts.

3. Greater freedom of contract: "unanimous governance agreements" among shareholders that meet the statutory definition are permitted to override statutory rules that would otherwise be mandatory, including the rule that requires the corporation to be managed by a board of directors – a UGA could allow direct management by one or more shareholders.

4. Grace Period for Annual Reports – 90 days, not 3 years.

5. Personal liability for dissolution by affidavit eliminated and 3-year retroactive reinstatement allowed for all forms of termination, not just charter revocations.

6. 5-day grace period for initial articles retained; otherwise, dropped.

7. Par value system & mandatory statutory equity accounts (i.e., stated capital, capital surplus & earned surplus) abolished – distributions allowed to full extent of positive net worth, provided corporation retains ability to pay debts as they become due in the usual course of business, and retains enough net worth to cover liquidation preferences of shares senior to the shares receiving the distribution.

8. Rule against issuance of shares for promissory notes or contracts for future services abolished; those forms of payment to be allowed.

9. Current "opt in" protection of directors and officers against monetary liability made "opt out" – the default rule that applies in the absence of provisions in articles to the contrary.

10. Rules provided for electronic records, notices, and communications.

Detailed Outline of Model Act as Adopted in Louisiana

I. Part 1 – General Filing Rules

A. Unlike current law, the Model Act provides a unified set of rules concerning the requirements for the filing of all corporate documents in the secretary of state's office.

B. The rules are contained in RS 12:1-120. The key requirements are:

1. The filing of the document must be permitted or required by the Act;
2. It must contain the required information (although additional content is permitted);
3. The document must be in English and printed or typed (although handwritten entries or notations are OK) or, if electronically filed, capable of being retrieved or reproduced in typed or printed form;
4. The document must be signed by one (dual signatures are no longer required) of the following: the board chair, the president or another officer, and indicate beneath the signature the office held by the signer. (An incorporator signs if no directors have been elected, and if the corporation is in the hands of a liquidator or receiver, that person signs.);
5. The document must be "delivered" (a defined term) to the secretary's office for filing, along with the required filing fee.
6. If the secretary of state's office prescribes a particular form (and the Act gives only limited authority for such forms, such as the annual report), the document must be in or on the prescribed form.
7. In a Louisiana departure from the Model Act, the forms that have to be notarized under current law must still be notarized under the new Act, subject to the same exceptions for electronic in in-person filings.

C. Effective Time:

1. In general, a document "accepted for filing" takes effect on the date and time of its receipt, as evidenced by the secretary of state's office. 12:1-123 (A). (Although the secretary's office indicates only the date of filing on the copies it provided, 12:1-125 (B), it is possible to determine the time of filing through the secretary's computer records.)
2. A document is "accepted for filing" and is "filed" in the same way: by the secretary's recording it as filed on the date and time of receipt. 12:123 (D); 125 (B).
3. There are three exceptions to the "effective on receipt" rule:
    a. The document may state a later time on the date of receipt as its effective time 12:1-123 (A) (2).

b. The document may specify a delayed effective date and time up to 90 days after its delivery for filing (if no time on the delayed date is specified, it becomes effective at the close of business on that date). 12:1-123 (C).

c. Unless a later date is specified, a corporation's initial articles of incorporation take effect when signed properly (and notarized if required) if the articles are received for filing by the secretary of state's office within five days, exclusive of legal holidays, of their signing (and notarization if required), and the secretary accepts the articles for filing. 12:1-123 (C).

d. The five-day grace period for other documents was eliminated to prevent the legally-operative terms of a corporation's filed governance documents from being different from those stated in the publicly-available documents in the secretary's office.

e. Note that all filed documents other than annual reports are included in the definition of the term "articles of incorporation," so that such documents as articles of amendment, correction, merger, domestication, etc., are actually considered to be part of a corporation's articles. 12:1-140 (1).

II. Part 1 – Definitions: Some of the important, or perhaps odd-sounding, definitions:

A. Articles of incorporation – as noted earlier, any document filed in the secretary of state's office other than the annual reports. If the articles have been restated, articles do not included documents filed before the restatement. 12:1-140 (1)

B. Deliver or delivery – any method of delivery used in conventional commercial practice, including by hand, mail, or commercial delivery services and, if authorized by 12:1-141, by electronic transmission. 12:1-140 (5)

C. Distribution – the new all-encompassing term for dividends and share repurchases: any transfer of money or property (other than the corporation's own shares – share dividends are not treated as dividends) for the benefit of shareholders in respect of any of the corporation's shares. The term includes distributions of indebtedness (i.e., the corporation may distribute its own promissory notes as dividends). 12:1-140 (6)

D. Document - a tangible medium on which information is inscribed or an electronic record. 12:140 (6A)

E. Electronic record – information stored in an electronic or other medium and retrievable in paper form through an automated process and used in conventional commercial practice (unless both the sender and receiver have agreed in writing to a retrievable form of electronic transmission not meeting the conventionally-retrievable requirement). 12:1-140 (7B). The idea of the conventionally-retrievable requirement is to treat e-mails as records, and therefore documents, but to exclude voice and text messages from the definition (unless both the sender and recipient agree to the contrary).

F. Writing – any information in the form of a document. So, note that various provisions throughout the Act that require a writing are satisfied by "electronic records" as defined, such as e-mails.

G. Sign or signature- with present intent to authenticate or adopt a document, to execute or attach a tangible symbol in a document, including facsimile and conformed signatures, or to attach or logically associate with an electronic transmission an electronic sound, symbol or process.

H. Organic law – the statute governing the internal affairs of a domestic or foreign business or nonprofit corporation or unincorporated entity.

I. Organic document – essentially, the articles of incorporation or other analogous governance document. It is called a private organic document if it need not be filed of public record (such as a general partnership agreement) and a public organic document if does have to be filed.

J. Public organic document – a document that must be filed for any of the following purposes:

   1. To create the entity (e.g., corporation or LLC)

   2. To protect owners of the entity against owner liability (e.g., partnership in commendam)

   3. To allow the entity to own immovable property as to third persons (i.e., a Louisiana general partnership).

K. These "organic law" and "organic document" definitions, along with definitions of "filing entity", "eligible entity", "eligible interests," and "unincorporated entity" are relevant only in entity conversion transactions, where they serve to provide a common, generic term for various forms of business entity, ownership and management interests in the entities, and applicable laws.

L. Expenses – relevant to indemnification & advancing of expenses – includes reasonable expenses of any kind, including attorney's fees. 12:1-140 (9B)

M. Proceeding – includes civil suit and civil, criminal, administrative and investigatory action. 12:1-140 (18).

N. Principal Office – the office, in or out of the state, designated in the corporation's most recent annual report (or, until an annual report is filed, in the articles) where the principal executive offices of the corporation are located.

O. Personal property, real property, tangible property and intangible property are defined to include both the common law and civil law terms.

P. Voting power – the current power to vote in the election of directors 12:1-140 (27) (so, vote-on-default provisions in preferred stock would not count; nor would specialized voting rights on particular issues)

Q. Voting group – all shares of one or more classes or series that are entitled to vote and be counted collectively together on a matter at a meeting of shareholders. 12:1-140 (26)

R. Qualified director – the Model Act version of a disinterested director. The term is defined in different ways for different purposes (e.g., for conflicting interest transactions or for purposes of taking action in a derivative suit) in 12:1-143. In general, the term means a director that does not have either any personal interest or a relationship with another person that would reasonably be expected to impair the objectivity of the director's judgment concerning the decision to be made. 12:1-143 (B).

III. Notices

A. Must be written ("written" includes electronic records). Louisiana rejected the Model Act rule that notices could be oral if reasonable under the circumstances.

B. The notice may be delivered by any method of delivery, except that if the notice is delivered electronically, the recipient must have consented to receive the notice in that form. 12:1-141 (D). But the articles or bylaws may authorize or require electronic delivery of notices of meetings of the directors. 12:1-143 (K).

C. Consent to electronic notices may be revoked by notice to the person to whom the consent was delivered, and is deemed revoked if the corporation is unable to deliver two consecutive electronic transmissions given in accordance with the consent and the inability becomes known to the secretary, an assistant secretary, transfer agent or other person responsible for giving such notices (but an inadvertent failure to recognize the inability to deliver does not invalidate any meeting or action). 12:1-141 (E).

D. Electronic notices are deemed received, even if no individual is aware of it, when it enters an information processing system designated or used by the recipient for purposes of receiving electronic transmissions of the type sent, is in a form capable of being processed by that system, and is capable of being retrieved by the recipient. 12:1-141 (F), (H).

E. Effective time – Notices are effective at the earliest of:

1. Receipt (as defined) if by electronic transmission
2. If in physical form, when actually received or when left at a place apparently designated for the receipt of mail or other similar communication at the
    a. Shareholder's address in the corporation's shareholder records
    b. Director's residence or usual place of business

3. If mailed by US mail, postage prepaid and correctly addressed to a shareholder, upon deposit in the US mail.
4. If mailed by US mail to someone other than a shareholder, postage prepaid and correctly addressed, the earlier of actual receipt or either of the following:
    a. If sent by registered or certified mail, the date shown on the return receipt signed by or on behalf of the addressee.
    b. Five days after it is deposited in US mail.

IV. Part 2 – Incorporation

A. Same "any one or more persons capable of contracting" rule for incorporators as under current law. 12:1-201.

B. The items that current law divides between the articles of incorporation and an initial report will now be provided in the articles only (although no naming of initial directors will be required under the new Act). 12:1-202. Another provision allows such routine items as the identification of the corporation's initial registered agent to be deleted from the articles through amendments approved by the board of directors, without a vote of shareholders. 12:1-1005.

C. So, under the new Act, only the articles of incorporation must be filed, along with a statement of acceptance by the registered agent, either as an appendix or attachment to the articles. 12:1-201. The Model Act does not require a statement of acceptance by the registered agent, but the current Louisiana rule on the subject was retained. And while the statement is no longer described as an affidavit, it is one of the documents that must be notarized unless one of the electronic filing or in-person exceptions apply. 12:1-120 (H).

D. Required Provisions 12:1-202 (A):
    1. Name
    2. Number of Authorized Shares
    3. Street address of its initial registered office and, if different of its principal office
    4. Name and street address of its initial registered agent
    5. Whether the corporation accepts, rejects or limits the default statutory rule protecting officers and directors against monetary liability for breaches of duty other than the duty of loyalty or the duty not to authorize unlawful distributions
    6. Name and address of each incorporator

a. Note that no statement of a term or purpose is required. By default, all lawful purposes and a perpetual term will be provided by operation of law.

b. Note also that no statement concerning par value is required (although one may be provided, if desired).

E. Optional provisions – 12:1-202 (B)

1. Naming of initial directors
2. Provisions limiting the default statutory exculpation of officers and directors
3. Provision permitting director indemnity or making it obligatory (subject to the same exceptions that apply to exculpation)
4. An anti-escheat, revert to the corporation provision for unclaimed dividends and payments (an essentially verbatim copy of the provision on point in current law)
5. Any other provision not inconsistent with law concerning any of the following:
   a. the corporation's purpose or purposes
   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
6. Provisions in the articles may be made dependent on facts objectively ascertainable outside the articles in accordance with 12:1-120 (K). 12:1-202 (D).

F. Beginning of Corporate Existence; Conclusive Effect of Filing

1. When filing of articles effective under 12:1-123, (which includes the five-day grace period rule). 12:1-203 (A).
2. Certificates of incorporation are not issued under the Act. Rather, the secretary returns a copy of the articles that is stamped to show that it has been filed, with the filing date. The filing itself is conclusive proof that the corporation is duly incorporated. 12:203 (B).
3. The rule in current 12:25.1, concerning the retroactive existence of a corporation that has purported to acquire immovable property, is retained in the Act as 12:203 (C).

G. The incorporators are not authorized to complete the organization of the company. Rather, they must name initial directors to carry out such steps as adopting bylaws, issuing stock and electing officers. 12:1-205.

H. Bylaws remain optional (contrary to the model rule), and subject to adoption by the board of directors. 12:1-206. Rules for amending the bylaws, if adopted, are provided in Part 10 of the statute, Subpart B, 12:1-1020-1022.

V. Part 3 – Purposes and Powers

A. The usual broad purpose and powers provisions are provided.

B. A provision in current law, 12:41 (F), concerning inter-company guarantees among a parent and one or more wholly owned subsidiaries was not retained. But an official comment was added to explain that the provision was omitted only to avoid the negative implication that inter-company guarantees might be beyond the power of a less-than-wholly-owned subsidiary. 12:1-302, Comment (f).

C. Emergency powers are provided in 12:1-303, and are designed to overcome difficulties in providing notices and in attaining a quorum of the board of directors during a "catastrophic event."

D. An ultra vires provision similar to that in current law is provided in 12:1-304.

VI. Part 4 – Name

A. 12:1-401 retains essentially the same naming rules as exist under current law, except:

1. Corporate names will have to be distinguishable from the names of partnership that have filed their contracts of partnership with the secretary of state (in addition to being distinguishable from corporate, LLC and trade names) 12:1-401 (B) (5).

2. An injunction against an improper name under the corporation statute is now available only for violations of the naming rules other than distinguishability. Comments (f) – (h) to 12:401 explain that the distinguishability standard is designed to serve principally a record-keeping function, and not to resolve trade name disputes among competing businesses. The comments explain that trade name disputes are governed by a separate body of law, citing Gulf Coast Bank v. Gulf Coast Bank & Trust Company, 652 So.2d 1306 (La. 1995).

B. Names may be reserved for a single nonrenewable period of 120 days (replacing the current 60-day, plus up to two 30-day extensions). 12:1-402 (A).

C. A terminated corporation's name is reserved for three years after its termination, which is the period during which the corporation may be reinstated. 12:1-402 (C); 12:1444 (A) (2).

D. A foreign corporation may register its existing name (or its name plus any distinguishing additions made in accordance with relevant foreign corporation rule, 12:303 (A) (3)) on an annual basis.

   1. Registration of the name makes it unavailable for use by other corporations, so that the registered name will be available to the foreign corporation if it later decides to qualify to do business in the state.

   2. This registration rule differs from the name reservation rule. The registration is available only to foreign corporations and only for their own existing name (plus distinguishing features if required), but it's good for one year and renewable.

   3. The purpose of the registration rule is to allow a corporation that is contemplating expansion into another state to make sure that its name is available when it is ready to do so. The alternative would be to create a shell corporation to hold the name.

VII. Part 5 – Registered Agent and Registered Office

A. Similar to current law.

B. A new, nonexclusive rule is provided for an alternative form of service if the corporation has no registered agent or the registered agent cannot be served with reasonable diligence: the corporation may be served by registered or certified mail, return receipt requested, addressed to the secretary of the corporation at its principal office.

VIII. Part 6- Shares

A. The articles must set forth any class or series of shares and must specify the number of shares in each class or series that the corporation is authorized to issue. 12:1-601 (A).

B. If more than one class or series exists, the articles must prescribe a distinguishing designation for each class or series and must describe, prior to issuance of shares of a class or series the terms, including the preferences, rights and limitations of that class or series. Id.

C. Except as varied in the articles prior to issuance of the shares, all shares of a class or series must have terms identical with those of other shares of the same class or series. Id.

D. Voting – shares may have special, conditional, or limited voting rights, or no voting rights other than those provided in the Act. 12:1-601 (C) (1).

E. Redemption – shares may be redeemable or convertible at the option of the corporation or the shareholder. 12:1-601 (C) (2).

F. Entitle the holder to distributions calculated in any manner and with preference over any other class or series. 12:1-601 (C) (3) & (4).

G. Blank Check Stock – the articles may authorize the board to classify or reclassify unissued shares into classes or series, but the board must establish the terms of the relevant class or series, and file the appropriate articles of amendment with the secretary of state, before any shares of that class or series are issued. 12:602.

H. Fractional shares and scrip – 12:1-604

1. similar to current law
2. Both fractional shares and scrip are authorized
3. The holder of a fractional share is entitled to all the rights of a shareholder, including the right to vote, while the holder of scrip is not (except to the entent the terms of the scrip provide rights). Scrip merely entitles the holder to exchange the scrip for a full shares when sufficient scrip is accumulated.
4. Scrip must be conspicuously labeled "scrip."

IX. Subscriptions Share Issuance

A. Subscriptions – 12:1-620

1. Only pre-incorporation subscriptions receive special attention and rules under the Act, in 12:1-620. Post-incorporation subscriptions are simply treated as contracts between the corporation and the subscriber, subject to the share issuance rules in 12:1-621. 12:1-620 (E).
2. Pre-incorporation subscriptions are treated as irrevocable for 6 months unless the agreement provides a longer or shorter period or all the subscribers agree to revocation. 12:1-620 (A).
3. Unless the subscription specifies payment terms, the board of the corporation may determine them, but a call for payment must be uniform as far as practicable as to all shares of the same class or series (unless the subscription provides otherwise). 12:1-620 (B)
4. If the subscriber defaults, the corporation may collect the amount owed as an ordinary debt or, alternatively, cancel the subscription and sell the shares if the debt remains unpaid 20 days after the corporation sends written demand for payment to the subscriber. 12:1-620 (D).

B. Share Issuance – Generally – 12:1-621

1. Unless reserved to the shareholders in the articles of incorporation, the board of directors is the body with the authority to issue shares. 12:1-621 (A), (B).
2. Current Louisiana corporation law does not permit the issuance of shares for promissory notes or contracts for future services. This limitation applies only to corporations; partnerships and LLCs may accept promissory forms of payment for their ownership interests.
3. The new Act will permit the issuance of shares in exchange for "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."

4. The corporation may, but is not required, to place shares in escrow pending performance of contracts for services or payment of promissory notes. 12:1-621 (E).
5. The new Act also will not require the board to state the value of the payment received in dollars, or allocate any part of the payment to any particular equity account, such as stated capital or capital surplus. The comments to the Model Act explain that these are accounting functions that should be carried out by the corporation's accountants, not its board of directors.
6. The board of directors is required only to determine that the consideration received for the shares is "adequate," and that determination is conclusive with respect to the issue whether the shares are validly issued, fully paid and nonassessable.
7. When the corporation receives the consideration for which the board authorized the issuance of the shares, the shares are fully paid and nonassessable. 12:1-621 (D).

C. New Shareholder Voting Rule for Non-cash, Control-Affecting Issuances

1. In a change from current law, the new Act will require shareholder approval of the issuance of any shares, securities convertible into shares, or rights exercisable for shares, for consideration other than cash, if the voting power of the shares issued or issuable as a result of the issuance transaction or series of integrated transactions will comprise more than 20% of the voting power of the shares of the corporation that were outstanding immediately before the transaction. 12:1-621 (F).
2. A series of transactions is integrated if consummation of one transaction is made contingent on consummation of one or more of the other transactions. 12:1-621 (F)(2)(b).

D. Share Dividends

1. Unless the articles provide otherwise, the corporation may issue additional shares pro-rata to shareholders of one more classes or series of shares, without any payment for the shares. 12:1-623 (A). This is called a "share dividend" (id.), but remember that a share dividend is not treated as a "distribution" that must satisfy the statutory tests for dividends of cash or property. 12:1-140 (6).
2. As long a share dividend consists of shares of the same class and series as those to whom the dividend is being issued, the dividend may be authorized by the board, without any vote of shareholders.

3. But shares of a different class or series from the one receiving the shares may not be issued unless one of the following three requirements is satisfied:

   a. The articles authorize it.

   b. A majority of the votes entitled to be cast by the class or series to be issued approves it.

   c. There are no outstanding shares of the class or series to be issued.

E. Share Options

1. The corporation may issue rights, options, warrants for the purchase of shares or other securities of the corporation. 12:1-624 (A).

2. "Poison pill" and other defensive-maneuvering types of rights are facilitated, as the terms of the rights may preclude the exercise, transfer or receipt of the rights by a person or persons who own or are offering to acquire a specified number or percentage of shares or other securities of the corporation, or may invalidate the rights held by such a person or persons. 12:1-624 (B).

3. Compensation-related rights are also authorized, and the board may authorize officers to designate the recipients and amounts of the rights to be awarded, within the amounts and guidelines specified by the board (and, if applicable, the shareholders), except that an officer may not make awards to himself or to others that the board may specify. 12:1-624 (C).

F. Preemptive Rights – 12:1-630

1. As under current law, preemptive rights are "opt in," i.e., granted to shareholders only if the articles so provide.

   a. The new Act also carries forward the grandfathering rule for corporations formed before the 1-1-69 effective date of the current statute, when preemptive rights were "opt out," i.e., provided unless the articles said otherwise.

   b. Corporations formed under Louisiana law before 1-1-69 are deemed to contain a statement that "the corporation elects to have preemptive rights" unless the articles of the corporation contain a specific provision enlarging, limiting or denying preemptive rights. The effect of such an election is to trigger the default statutory terms for the operation of the preemptive rights.

   c. The default rules that apply if a corporation's articles simply elect to provide preemptive rights work much the same way as under current law, except that the preemptive period will generally be longer. The period will increase –

      (1) from a "reasonable" time that "need not exceed fifteen days" under current 12:72 (A) (1),

(2) to "a fair and reasonable opportunity" requirement that is deemed to be satisfied by a period of forty-five days under the new Act.

(3) The new requirement may also be satisfied by a shorter period of time if the shorter period provides a "fair and reasonable opportunity" for the exercise of preemptive rights "under the circumstances in which the shares are being issued."

(a) The comments say that the corporation bears the burden of proof on the issue of a shorter period satisfying the "fair and reasonable opportunity" standard.

(b) The comments also gives the following examples of factors that would help justify a shorter period:

1. The corporation's need for funds before the end of the 45-day period;

2. Advance knowledge and involvement by the complaining shareholder of the decision to issue additional shares; and

3. The ability of the complaining shareholder to raise the funds required to purchase the new shares without financial hardship.

(4) The forty-five day safe harbor was added to the Louisiana statute; it is not part of the Model Act.

d. Shares that are not acquired through the exercise of preemptive rights may be sold for one year after the expiration of the preemptive period for a consideration no lower than that at which the shares were offered preemptively to the shareholders. Shares that are issued after the one-year period are again subject to preemptive rights.

e. The current rule that preemptive rights are available only to holders of shares having voting rights, and only with respect to shares also having voting rights, are replaced with two new provisions that essentially deny preemptive rights (on a default basis) to holders of preferred shares, and provide them to common shareholders only for new common shares.

(1) The Model Act does not use the terms "common stock" and "preferred stock" (because the terms do not have any established legal meaning, and may be applied in practice to shares having a wide variety of attributes). Instead, the Model Act refers to the two different types of shares by their typical attributes.

(2) Holders of shares without general voting rights but with preferential rights to distributions or assets (commonly called "preferred stock") do not have preemptive rights for shares of any kind.

(3) Holders of shares that do have general voting rights, but no preferential rights to distributions or assets (commonly called "common stock") do not have preemptive rights with respect to stock with preferential rights (preferred stock) unless the shares with preferential rights (preferred stock) is convertible into or carries rights to acquire shares without preferential rights (common stock).

f. As a default rule, preemptive rights are not provided with respect to:

(1) shares issued as compensation to directors, officers, agents, or employees of the corporation or its affiliates;

(2) to satisfy conversion or option rights provided as compensation to the listed persons;

(3) shares sold for something other than money; or

(4) authorized shares that are issued within six months of the date of incorporation.

g. As with the provision on share transfer restrictions, the term "share" is defined for purposes of the preemptive rights provision to include a security that is convertible into or carries a right to acquire shares.

h. The new Act adopts new (and shorter) prescriptive and peremptive periods for preemptive rights, replacing the time limits added to current 12:72 in 1991.

(1) The current provision provides a five-year time limit that is not subject to suspension on any ground, nor to interruption on any ground other than timely suit.

(2) Beginning on January 1, 2016 (one year after the effective date of the new Act), the new provision will provide a period of one year from the time that the issuance of the share subject to preemptive rights occurs, is discovered, or should be discovered.

(3) The action is perempted three years after the issuance of the pertinent share occurs.

G. Share Certificates – 12:1-625 & 626

1. Although the Model Act makes the issuance of share certificates optional for all corporations, and older Louisiana law required all corporations to issue certificates, the Louisiana version of the new Act retains a middle position on the issue that was adopted a few years ago as part of the current statute.

2. Under both current law and the new Act, a corporation is required to issue share certificates to the holders of its shares unless the corporation is a participant in the Direct Registration System of the Depository Trust & Clearing Corporation, or a similar book-entry system used in trading the shares of public corporations. 12:1-625 (A). Share certificates are

optional for participants in the Direct Registration System, id., and if the option is available, it may be exercised differently by the corporation for any or all of the shares of any or all of its classes or series of shares, subject to any contrary provisions in the corporation's articles or bylaws. 12:1-626 (A).

3. Because most Louisiana corporation are not participants in the Direct Registration System, most Louisiana corporations will continue to be required to issue certificates for their shares.
4. The comments explain that, in the context of non-public corporations, share certificates provide a convenient and reliable means of perfecting security interests in the underlying shares and of notifying third persons of transfer restrictions on the shares. 12:1-625, Comment (b).
5. The comments also explain that law's requirement of share certificates is a duty imposed by law on the corporation, not a defense that may be asserted by the corporation against a person who genuinely owns shares, but to whom the corporation has failed to issue the required certificate. 12:1-625, Comment (c).
6. The content of the share certificate is the same as that under current law, as the current provisions were themselves borrowed from the Model Act.
7. The signature requirements have been changed slightly, both from the Model Act (which does not specify any officers authorized to sign by default) and from current law (which allows a certificate to be signed by a so-called "manager" of the corporation). Under the new Act, the certificates must be signed by the president and secretary, or by two officers designated in the bylaws or by the board of directors. 12:1-625 (D). Facsimile signatures may be used. Id.

H. Transfer Restrictions 12:1-627

1. Essentially the same as in current law, as the current provision was itself taken from the Model Act.
2. Restrictions may be imposed for "any reasonable purpose," including
   a. Maintenance of corporation's status when the status is dependent on number or identity of its shareholders (e.g., qualification for S corporation taxation); and
   b. Preservation of exemptions under federal or state securities law (e.g., limitations on resale required under Rule 506 in offerings not limited to accredited investors).
3. The restrictions on transfer may:
   a. provide for rights of first refusal to the corporation or other persons;
   b. obligate the corporation or other persons to acquire the shares;

c. require approval of a transfer by the corporation or another person if the requirement is not manifestly unreasonable; or

d. prohibit the transfer of the share to designated persons or classes of persons, if the prohibition is not manifestly unreasonable.

4. A transfer restriction is not enforceable against persons without actual knowledge of the restriction unless it is noted conspicuously on the share certificate (or in an analogous information statement for corporations permitted to issue shares without certificates).

5. The term "share" is defined for purposes of the transfer restriction provision to include a security convertible into or carrying a right to subscribe to or acquire shares.

X. Distributions – Dividends and Share Repurchases – 12:1-640

A. Current law imposes two financial restrictions on the payment of dividends (in addition to the obvious requirement that the dividends not be contrary to restrictions in the corporation's articles):

1. Surplus – the dividend may be paid only to the extent that the net worth of the company exceeds the corporation's stated capital (in most cases, stated capital is the aggregate of the par value of all of the corporation's issued shares).

2. Insolvency – the corporation must not be insolvent and the payment of the dividend must not render the corporation insolvent. Insolvency is defined as the inability of the corporation to pay its debts as they become due in the ordinary course of business.

B. In effect, current law prohibits the payment of a dividend if the corporation is, or would be rendered, insolvent in either of the two senses that the term insolvency is used – "legal, net-worth, or balance sheet" insolvency on the one hand, or "equitable" or "cash-flow" insolvency on the other.

1. The entire par value system of corporate capital was aimed at enhancing the "net worth" insolvency test by putting a portion of the company's positive net worth off-limits for dividend purposes.

2. That portion was the amount of the company's "stated capital," usually the aggregate of the par value of the company's issued shares.

3. So, a corporation with a net worth of $10 million and a stated capital account of $8 million would be permitted to pay only $2 million in dividends (assuming that it would remain solvent in the cash flow sense). The $8 million in stated capital could not be "invaded" for purposes of paying dividends.

4. Long, long ago, when corporations actually sold their shares for their stated par values, the effect of the surplus test for dividends was to stop shareholders from taking back in dividends any of the money that they had invested in the company through their share purchases. The stated

capital served as a kind of "lock box" for the equity cushion that the shareholders had theoretically created for the protection of creditors.

a. But this was a strange form of lock box. It didn't mean that the equity cushion was really there – the shareholders' investment could easily lost in the operation of the business – it just meant that the shareholders themselves could not, through dividends, take the money back that they had put at risk for the protection of creditors.

b. Moreover, once corporations found that they could set par value at a nominal level – say one dollar or one cent per share – and then still sell the stock for a much higher price, the par value system was actually putting only a tiny portion of the shareholders' investment off-limits anyway.

c. A corporation that had a net worth of $10 million and a stated capital account of $100 could pay out all but $100 of its net worth in the form of dividends to shareholders, assuming the company would remain solvent in the cash flow sense.

d. There was no longer much difference between allowing a corporation to pay out the full amount of its net worth in dividends (assuming cash flow insolvency) and allowing it to pay out only the portion that exceeded stated capital, i.e., its "surplus."

5. Because the costs and complexities of the par value system (including the statutory accounting rules that went with it) did not seem justified by any genuine benefit to creditors, the Model Act got rid of the par value system in 1980. Had Louisiana's corporation statute been adopted in 1988 rather than 1968, it seems likely it, too, would have dropped the system. The LLC statute, adopted in 1992 did so, and employs a dual insolvency test very much like that in the Model Act.

C. Under the new Act – and setting aside for the moment the rules concerning preferred shareholders – a corporation may not make a distribution (a term that includes both dividends and share repurchases) if, after giving effect to the distribution:

1. the corporation would not be able to pay its debts as they become due in the usual course of business (12:1-640 (C) (1)); or

2. the corporation's total assets would be less than its total liabilities (12:1-640 (C) (2).

D. In effect, the corporation may not pay a dividend or repurchase its shares if, after doing so, it would be insolvent in either the cash flow or net worth sense of the term.

E. The basic difference between the current dividend restrictions and those that will take effect under the new Act is that the new Act will permit the full amount of a company's net worth to be distributed (assuming cash-flow solvency), while the current law allows only that part of net worth that exceeds stated capital.

1. Because par values are typically nominal, the resulting stated capital accounts are usually so small (say $100 or $1,000) that there will be little financial difference between the two forms of restriction.
2. The real benefit of the new approach is to eliminate the need to worry about par value and stated capital in connection with the issuance of shares and the payment of dividends.

F. Two Other Differences – the new Act's distribution rules differ from the current law in two other ways:

1. Protection Afforded to Preferred Stock:
    a. The net-worth insolvency test under the new Act ordinarily subtracts total liabilities from total assets, and allows dividends only to the extent that, after giving effect to the dividend, liabilities would not exceed assets.
    b. However, if the corporation has outstanding any shares that have preferential rights to assets in the dissolution of the corporation (commonly called "preferred shares"), then the amount that would be required to satisfy those preferential rights must be subtracted along with liabilities from the value of the corporation's assets in order to determine the amount available for distributions to any class that is junior to the class with the preferential rights.
    c. In effect, if preferred stock is outstanding, the aggregate of the liquidation preferences of the preferred shares is treated as a liability for purposes of calculating the amount available for distribution to any class of shares junior to the one holding the preferences. (This adjustment in the net worth calculation does not affect distributions to the class holding the preference, or to any class senior to that class.)
    d. Under current law, this type of restriction applies only in share repurchase transactions. 12:55 (A).
    e. Under the new Act, share repurchases and dividends are both included within the meaning of the term "distribution," so the liquidation preference restriction will apply equally to dividends and to share repurchases.
2. Timing Issues – Important in Share Repurchases
    a. Current law does not say at what time its dividend restrictions are to applied – when the dividend is authorized by the board, or when the dividend is actually paid.
    b. If payment of the dividend occurs very quickly after it is authorized, the timing question will seldom matter. The corporation's financial health is unlikely to deteriorate so seriously over the course of a few

days that a dividend that was lawful when authorized could become unlawful by the time it was actually paid.

c. But the timing issue can become important in a share repurchase transaction. A share repurchase transaction may occur in connection with the death or withdrawal from the business of a shareholder whose stake in the business is so large that the corporation may wish to pay for the repurchased shares with a promissory note.

d. The question then arises whether the dual insolvency tests are applied at some point near the beginning of the transaction – when the note is issued or the shares surrendered – or, instead, at each time that a payment on the note is made, as if each payment were itself a new distribution. Many years may pass between the initial issuance of the note and the final date for its payment. During that time, the corporation could suffer a decline in its financial affairs that would render payments on the note unlawful if the payments were treated as dividends.

e. Unfortunately for business owners, Louisiana jurisprudence to date has generally insisted that the dividend restrictions be applied at the time that each payment is made.

    (1) That means that a shareholder who sells his shares back to the corporation at a time when the corporation could lawfully pay the full amount of the purchase price in cash, but agreed to accept a promissory note, would find himself unable to enforce his note as an ordinary creditor of the corporation.

    (2) If the corporation's financial condition declined enough that it could not pay dividends, it could not lawfully pay the installments otherwise due under the terms of the note. A note that purported to be ordinary indebtedness of the corporation would effectively be treated as subordinate to the claims of the corporation's creditors and senior equity holders.

f. The new Act, like the Model Act, rejects this approach. It provides that the lawfulness of a distribution through a share repurchase is to be determined as of the earlier of:

    (1) the date that money or property is transferred or debt incurred in exchange for the repurchased shares; or

    (2) the date that the shareholder ceases to be a shareholder with respect to the repurchased shares. 12:1-640 (E) (1).

    (3) Of course, the distribution tests are to be applied after giving effect to the distribution, so the note that is issued in exchange for the repurchased shares must be taken into account in applying both the net worth and cash flow insolvency tests.

(4) But if, taking the new debt obligation into account, the corporation still would have a positive net worth and the ability to meet its debts as they become due in the usual course of business, the issuance of the note would be considered lawful as a distribution and would thereafter be treated as an ordinary debt obligation of the corporation. (See paragraph (h) below.)

g. The new Act also permits a corporation to distribute indebtedness, just as it could distribute money or property, as a dividend rather than in a repurchase transaction. When indebtedness is distributed, the lawfulness of the distribution is determined as of the date of the distribution. 12:1-640 (E) (2).

h. Indebtedness that is distributed, whether as a dividend or in a repurchase transaction, is declared to be at parity with the corporation's other general unsecured indebtedness except to the extent that the distributed indebtedness is subordinated by agreement. 12:1-640 (F).

G. Distributions in liquidation of the corporation are not subject to the distribution restrictions in 12:1-640.

1. The normal distribution rules are designed to work only in an ongoing business. They require the net worth and cash flow solvency tests to be applied after taking account of the distribution. Because a final, fully-liquidating distribution would reduce the net worth of the corporation to zero, and leave the company incapable of paying any debts not yet paid, those tests would not work as intended in connection with a liquidation.

2. Liquidating distributions are governed by Part 14, concerning dissolutions and terminations. 12:1-640 (H).

3. Part 14 provides rules under which contingent and unknown claims may be handled (and in some cases discharged), and allows the board to authorize a distribution to shareholders only after the corporation pays or makes reasonable provision to pay in accordance with the dissolution provisions all obligations owed by the corporation. 12:1-1409 (A).

H. Corporation's Reacquisition of Shares – No Treasury Shares – 12:1-631

1. Current law distinguishes between issued shares that are reacquired and cancelled (which return to the status of unissued shares) and those that are reacquired and not cancelled (which become "treasury shares").

2. The purpose of the distinction is tied to the par-value system of corporate capital used under the current statute.

a. Shares may not be "issued" for a price less than par value, paid in a lawful form of consideration. But "treasury shares" may be "disposed of" by the corporation for such consideration as may be fixed from time to time by the board.

b. Because treasury shares are treated as already-issued shares, their par value remains part of the "stated capital" account of the corporation (which restricts the corporation's ability to pay dividends) even after they are repurchased, while the cancelation of a reacquired share allows the corporation to reduce its stated capital account by the amount of the par value of the cancelled shares.

c. So, when cancelled shares are sold again, they are being "issued" and must once again be issued in accordance with the par value and form-of-consideration rules, while treasury shares, having never lost their status as issued shares (or caused any downward adjustment in stated capital) may simply be "disposed of" without complying with the "issuance" rules concerning par value and form of consideration.

3. The new Act, following the approach of the Model Act, drops the par value system of corporate capital as a requirement of law. (Corporations are permitted to use par values if they wish to do so, but those values would be relevant to the issuance of shares and the payment of dividends only to the extent that the corporation's governance documents made them so.)

4. Under the new Act, no need exists any longer to draw a distinction between shares that may be sold only in compliance with restrictive, par-value-based "issuance" rules and those that may be more freely "disposed of."

5. So, under the new Act, when a corporation reacquires its own authorized and issued shares, the reacquired shares become authorized unissued shares by operation of law.

   a. Under the new Act, a share is either issued and outstanding or it is unissued.

   b. There is no longer a middle category – the traditional "treasury" share" – that is issued but not outstanding.

6. If the articles prohibit the reissue of a share acquired by the issuing corporation, the number of authorized shares is reduced by the number of shares acquired.

XI. Limitation of Shareholder Liability – 12:1-622

A. A shareholder is not personally liable for the acts or debts of the corporation. 12:1-622 (B).

B. The Louisiana version of the Act omits two qualifications of this statement of non-liability that were included in the Model Act.

C. The first made the non-liability rule subject to contrary provisions in the articles of incorporation.

1. That reflected the fact that the Model Act permitted the articles to contain, as an optional provision, a provision that imposed personal liability on shareholders.

2. The Model Act rule that permitted that type of liability-imposing provision was omitted from the Louisiana Act to avoid shareholders' incurring this kind of personal liability inadvertently, so the recognition of the possibility of such a provision was removed from 12:1-622 (B) as well.

D. The second exception recognized that a shareholder could become personally liable because of the shareholder's own personal conduct.

1. The personal conduct exception was deleted to avoid its being used to argue that a shareholder of a closely held corporation who participated personally and actively in the management and operation of the corporation would incur personal liability based simply on the fact that the shareholder's personal conduct was causally related to damages claimed by a third person in connection with a transaction or occurrence in the corporation's operations.

2. The Louisiana comments acknowledge that a corporate shareholder may indeed incur personal liability for personal conduct that constitutes a personal tort or that causes the shareholder to become a party to a contract. However, liability is not being imposed simply because a shareholder has engaged in personal conduct in connection with the corporation's operations.

E. A purchaser from a corporation of its own shares is liable only to pay the consideration for which the shares were authorized to be issued or the amount specified in the purchaser's subscription agreement.

F. A shareholder is liable to the corporation, or to creditors of the corporation, or both, for the amount of any distribution received by the shareholder that exceeds the amount lawfully distributable to that shareholder under the statutory limitations on distributions under 12:1-640 (A). 12:1-622 C. The shareholder's liability to all claimants is limited, in the aggregate, to the excess amount received by that shareholder. Id.

1. This rule retains the existing Louisiana law on the subject, except that the two-year time limit on asserting such a claim against a shareholder is explicitly called "peremptive." 12:1-622 (D).

2. The Model Act does not impose liability on shareholders for an unlawful distribution, except indirectly, through a director's right to be indemnified by a shareholder for the shareholder's pro-rata portion of the director's liability for an unlawful distribution.

3. Current Louisiana law provides for this indemnify-the-director form of unlawful distribution liability as well, and the Model Act provision on the

subject was included as part of Louisiana's Model Act legislation. 12:1-833 (B) (2).

XII. Part 7 – Shareholders Meetings & Consents

A. Annual Meeting – 12:1-701

1. Required, as under current law: unless directors are elected by unanimous written consent in lieu of a meeting, a corporation must hold a meeting of its shareholders annually, at a time stated or fixed in accordance with the bylaws or, if not so stated or fixed, as stated or fixed in accordance with a resolution of the board.

   a. The current rule that any shareholder may call an annual meeting if shareholders meeting has been held in 18 months is retained in an modified form – the shareholder may not call the meeting directly, but may demand that the secretary do so.

   b. The secretary is then required, within 30 days of the notice of the shareholder's demand, to call the meeting at the company's principal office (or, if none in this state, its registered office), and to send the required notices of the meeting to shareholders.

2. As under current law, the annual meeting may be held inside or outside the state. The place is determined as provided in the bylaws or by board resolution. If not determined as provided in bylaws, the meeting is to be held at the corporation's principal office.

   a. Note: there is a technical error in this provision – the default rule applies if the issue is not covered in the bylaws.

   b. It should say (as it does in connection with special meetings) that the default place applies only if the issue is not covered in either the bylaws or a board resolution.

3. The notice of an annual meeting need not state the purposes of the meeting, and even if the notice does state the purposes, the meeting is not limited to those purposes. 12:1-705 (B).

4. The failure to hold an annual meeting does not affect the validity of any corporate action.

B. Special Meetings

1. Special meetings may be called by:

   a. the board;

   b. the person or persons authorized to do so by the articles or bylaws;

   c. shareholders holding at least 10% of the votes entitled to be cast on an issue proposed for consideration at the meeting.

2. Note two changes from current law:

a. president not authorized to call (absent an appropriate provision in the articles or bylaws); and

b. percentage of shareholder voting power reduced from 20% to 10% and calculated with reference to the issue to be considered at the meeting.

3. As with annual meetings, the meetings may be held inside or outside the state, as provided in the bylaws or a board resolution. In the absence of a specified location (which is more likely to occur when shareholders rather than directors are calling the meeting), the meeting is to be held at the corporation's principal office.

4. Purposes – in contrast with annual meetings, which do not require notice of purpose and are not limited to any purposes stated in the notice, the business of a special meeting is limited to the purpose or purposes described in the notice of the meeting.

C. Court-Ordered Meeting – 12:1-703

1. The district court in the parish where the corporation's principal office (or, if none in this state, its registered office) is located may order either an annual meeting or a special meeting to be held.

2. An annual meeting may be ordered if neither an annual meeting nor action by written consent in lieu of the annual meeting occurred within the earlier of six months after the end of the corporations' fiscal year or fifteen months after its last annual meeting.

   a. This annual meeting remedy overlaps with the rule retained from current law that allows a shareholder to demand that the secretary call an annual meeting if neither an annual meeting nor written consents in lieu of the meeting occurred within the preceding 18 months. 12:1-701 (D).

   b. But the decision was made deliberately to keep both provisions.

3. A special meeting may be ordered if either notice of the meeting was not provided within thirty days of a proper demand for the meeting or if the meeting was not held in accordance with the notice.

4. Any shareholder may petition the court for an order of an annual meeting and any shareholder who signed a demand for the special meeting may petition the court for an order of a special meeting.

D. Notice – 12:1-705

1. Timing, basic information – notice of the date, time, and place of each annual or special meeting of shareholders must be provided at least 10 and no more than 60 days before the meeting date.

2. Voters only – except as otherwise provided in the Act or a corporation's articles, the corporation is required to give notice only to shareholders entitled to vote at the meeting.

3. Purpose – unless otherwise required by the Act or the articles, the purpose or purposes of the meeting:

    a. need not be stated in the notice of an annual meeting (and if stated does not limit the business that may be conducted at the meeting);

    b. must be stated in the notice of a special meeting (and the business of the meeting is limited to the stated purpose or purposes 12:1-702 (D)).

4. If no record date is fixed otherwise, the record date is the day before the first notice to shareholders is effective. (Effectiveness of notices is governed by 12:1-141 & for notices to shareholders is effective when properly mailed. 12:1-141 (I) (2).)

5. Except as provided in the bylaws, if a meeting is adjourned, no new notice is required if the new date, time and place is announced at the meeting. But if a new record date is established for the adjourned meeting, a new notice must be provided.

E. Waiver of Notice

    a. As under current law, a shareholder may waive notice in writing, either before or after the meeting, and waives notice by attendance unless the shareholder, at the beginning of the meeting, objects to holding the meeting or to transacting business at the meeting. However, the new Act no longer contains the explicit statement in current law that the waiver of notice need not state the purpose of the meeting.

    b. The new Act adds a new rule about objections as to particular items of business. A shareholder who is present at the meeting waives objection to the consideration of a matter outside the purposes stated in the notice (if such a statement of purpose was required) unless the shareholder objects to considering the matter when it is presented.

    c. A shareholder attends a meeting if the shareholder is present at the meeting in person or by proxy, and an objection by a proxy has the same effect as an objection by the shareholder.

F. Record Date – 12:1-707

    1. The bylaws may fix or provide a method for fixing the record date. In the absence of such bylaws, the board may fix a record date up to 70 days before the meeting or action requiring shareholder a determination of shareholders.

    2. Recall that default record date, if not fixed by the bylaws or the board (or by court order in the case of court-ordered meetings) is the day before the first notice to shareholders is effective (typically, the date the first notice is properly mailed). 12:1-705(D); 12:1-141 (I) (2).

3. The record date is effective for any adjournment of the meeting up to 120 days, unless the board chooses to fix a new record date. If the adjournment is for more than 120 days, the board is required to fix a new record date. (In the case of a court-ordered meeting, an adjournment of more than 120 days may use either the original record date or a new one, depending on the court's order.)
4. Note that, unlike current law (12:77), the provision entitled "Record Date" in the new Act applies only to shareholders' exercising voting power, either at a meeting or through written consents. It does not apply to the determination of shareholders entitled to receive a distribution by the corporation.
    a. The record date rule for distributions is stated separately in 12:1-640 (B).
    b. Under that provision, if the board does not set a record date, the record date for a distribution (other than a share repurchase or redemption) is the date that the board authorizes the distribution.

G. Quorum – 12:1-725

1. Shareholders may take action at a meeting only if a quorum exists.
2. Unless the articles provide otherwise, a majority of the votes entitled to be cast on a matter by a given voting group constitutes a quorum.
3. Note two changes from current law:
    a. Current law allows the quorum requirement to be changed in the articles or bylaws (12:74 (B) (1)); the new Act allows changes only in the articles. 12:1-725 (A).
    b. Current law allows the quorum requirement to be reduced to as little as 25% of total voting power; the new Act authorizes only increases in the quorum and voting requirements provided by the Act, and requires any addition, change or deletion of such an increase be approved in accordance with the quorum and voting requirements then in effect, or those proposed, whichever is greater. 12:1-726.
4. Once a share is represented for any purpose at a meeting, it is deemed present for quorum purposes for remainder of the meeting and for any adjournment of the meeting unless a new record date is set, or is required to be set (i.e., the adjournment is for more than 120 days) for the adjournment.
5. Note that current law provides this type of quorum-protection rule only "until adjournment." 12:74 (B) (2).

H. Entitlement to Vote – 12:721

1. As under current law, the default rule is that each outstanding share is entitled to one vote on all matters for which a vote is taken at a shareholders' meeting. Note that this rule applies to all classes of shares,

so if the voting power of preferred shares is to be changed in some way from the all-purpose voting power of common shares, those changes must be specified in the articles.

2. Only shares are entitled to vote. 12:1-721 (A). This is a change from current law, which allows the board to confer voting rights on holders of bonds, debentures and other obligations, unless the articles provide otherwise. 12:75 (H).

3. Only "outstanding" shares are entitled to vote, thus retaining the substance of the current rule against voting by unissued and treasury shares.

4. The current rule against the voting of shares owned by a subsidiary corporation is retained in modified form.

   a. The prohibition will now apply to shares owned by all forms of subsidiaries, not just subsidiary corporations. 12:1-721 (B), (E).

   b. But the prohibition is not absolute; it applies "absent special circumstances." 12:1-721 (B).

   c. The new Act retains the substance of the existing rule against voting redeemable shares that have been called for redemption. The prohibition is triggered when the corporation mails the notice of redemption and deposits the funds needed to redeem the shares 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. 12-721 (D).

I. Permitted Procedure for Treatment of Beneficial Owner as Record Owner – 12:1-723

1. A corporation's board may establish a procedure under which a person on whose behalf shares are registered in the name of an intermediary or nominee may elect to be treated by the corporation as the record shareholder by filing with the corporation a beneficial ownership certificate.

2. This type of procedure is likely to be useful only in publicly-traded corporations, and even there has seldom been used.

J. Shareholder Proxies – 12:1-722

1. Vocabulary – The comments to the Model Act explain that the term "proxy" may be used to refer to relationship between the shareholder and the person on whom the shareholder has conferred the power to vote shares, the document used to confer this voting power, or the person who is authorized to vote on the shareholder's behalf. As used in the Model Act, and in the new Act in Louisiana, the term is used in the last sense, to refer to the person authorized to vote on a shareholder's behalf. The document through which the power is conferred is called an

"appointment form" (or, in case of an electronic appointment, an "electronic transmission of the appointment").

2. As under current law, a shareholder is entitled to vote in person or by proxy.
3. A shareholder, or the shareholder's agent, may appoint a proxy to vote or otherwise to act on the shareholder's behalf by signing an appointment form or by electronic transmission. An electronic transmission must contain or be accompanied by information from which one can determine that the shareholder or the shareholder's agent authorized the transmission.
4. The appointment of a proxy becomes effective when a signed appointment form or electronic transmission of the appointment is received by the inspector of election, the secretary, or other officer or agent of the corporation authorized to tabulate votes.
5. An appointment of a proxy is effective for 11 months unless a longer period (note: no mention of a shorter period) is expressly provided in the appointment form. This default term of 11 months is the same as under current law. But the current 3-year limitation for the term of a proxy appointment is not included in the new Act.
6. The appointment of a proxy is revocable unless
   a. the appointment form or electronic transmission states that the appointment is irrevocable; and
   b. the appointment is coupled with an interest.
7. Appointments coupled with an interest include the appointment of:
   a. A pledgee or other person having a security interest in the shares;
   b. A person who purchased or agreed to purchase the shares
   c. A creditor of the corporation that extended credit under terms requiring the appointment;
   d. An employee of the corporation whose employment contract requires the appointment; or
   e. A party to a voting agreement under 12:1-731.
8. In general, an irrevocable appointment of a proxy remains in effect after a transfer of the affected shares, and a transferee of the shares takes subject to the appointment. However, a transferee for value may revoke the appointment if the transferee did not actually know of the existence of the appointment when acquiring the shares and the existence of the irrevocable appointment was not noted conspicuously on the share certificate representing the shares (or in an appropriate information statement for uncertificated shares).

9. An irrevocable appointment is revoked when the interest with which it is coupled is extinguished. (Note, however, that this automatic revocation is subject to the same notice-to-the-corporation rule as are other forms of revocation or termination of the appointment. See paragraph 10, below.

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

11. In general, a corporation is entitled to accept the proxy's vote or other action as that of the shareholder making the appointment. This general rule is subject to any express limitations on the proxy's authority stated in the appointment form or electronic transmission, and to the rules in 12:1-724 concerning the types of signatures that the corporation may accept as those of a shareholder.

K. Corporation's Rejection and Acceptance of Votes – 12:1-724

1. Current law is silent on discrepancies between shareholder names and signatures and on the documentation required to confirm the authority of a person who purports to act for or in place of the record shareholder in some fiduciary, representative, or successor capacity.

2. The new Act provides a set of rules that essentially give the corporation considerable discretion in determining, in good faith, whether some particular signature should be recognized as that of the shareholder, or of some representative or successor of the shareholder.

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

   a. Acceptance Power – Name Corresponds: The corporation is entitled to accept a vote, consent, waiver or proxy appointment if the name signed corresponds to the name of the shareholder.

   b. Acceptance Power – Name Does Not Correspond: If the name signed does not correspond to the name of the shareholder, but purports to be that of one of the various listed representatives, fiduciaries and successors, the corporation may, acting in good faith, accept the vote, consent, waiver, or proxy appointment.

      (1) In all of the listed relationships except those in (i) and (v) below, the corporation is entitled, but not required, to request the submission of evidence acceptable to the corporation that the claimed relationship and authority exist.

(2) The following are the kinds of relationships for which a signature not corresponding to the name of the shareholder may be accepted in good faith:

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

(b) The name signed purports to be that of an administrator, executor, guardian, conservator, curator, tutor or judicially authorized representative of the shareholder;

(c) The name signed purports to be that of a receiver or trustee in bankruptcy of the shareholder;

(d) The name signed purports to be that of a pledgee or other person having a security interest in the shares, a beneficial owner, or an attorney-in-fact or representative through mandate or procuration of the shareholder; and

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

4. Required Objection & Means of Contesting the Corporation's Decision

a. The corporation's acceptance or rejection of a vote, consent, waiver or proxy appointment under 12:1-724 is conclusive unless a shareholder objects timely to the acceptance or rejection.

b. An objection is timely only if the objection is made before the end of the shareholders' meeting at which the acceptance or rejection of the item is given effect or, if the item is relevant to an action taken by written consent under 12:1-704, before the corporation incurs a legal obligation in good faith reliance on its acceptance or rejection of the item.

c. If a timely objection is made, and the corporation rejects the objection, the corporation's decision will still be treated as final unless the shareholder proves in a summary proceeding, commenced within 10 days of the corporation's notice to the shareholder of its rejection of the objection, that the corporation's acceptance or rejection of the item was incorrect.

L. Shareholder List for Meeting – 12:1-720

1. After fixing the record date for a meeting, the corporation is required to prepare an alphabetical listing of all shareholders entitled to vote at the meeting, arranged by voting group (i.e., if separate class voting is required, a list for each separate class must be included).

2. The list must be available for inspection by any shareholder two business days after the notice of the meeting is given. The list must be available at

the corporation's principal office or at a place identified in the meeting notice in the city in which the meeting is to be held.

3. The list must also be available at the meeting, and any shareholder or agent or attorney for the shareholder is entitled to inspect the list.

4. A failure to provide the list as required does not affect the validity of any action taken at the meeting, but a shareholder is entitled through a summary proceeding to seek a court order that requires the corporation to provide for the inspection or copying of the list at the corporation's expense, and to postpone the meeting until the inspection or copying is completed.

M. Conduct of Meeting – 12:1-708

1. Existing law is silent with respect to the rules governing the procedures to be followed at a shareholders' meeting. The new Act provides some useful basic rules.

2. At each meeting, a chair must preside. The chair must be appointed as provided in the bylaws or, in the absence of a relevant bylaw provision, by the board of directors.

3. The chair determines the order of business and has authority to establish rules for the conduct of the meeting.

4. Both the rules adopted for the meeting and the actual conduct of the meeting must be fair to shareholders.

5. The chair is directed by the statute to announce at the meeting when the polls close for each matter voted upon. But if no announcement is made, the polls are deemed to have closed upon the final adjournment of the meeting. After the polls are closed, no ballots, proxies, or votes (or any revocation or change in the ballots, proxies, or votes) may be accepted.

N. Inspectors of Election – 12:1-729

1. A public corporation must, and a non-public corporation may, appoint one or more inspectors of election. Each inspector is required to take and sign an oath to execute the inspector's duties faithfully, impartially, and to the best of the inspector's ability. The inspectors are required to submit a written report of their determinations. An inspector may be an officer or employee of the corporation.

2. The inspectors duties are to:

    a. Ascertain the number of shares outstanding and the voting power of each;

    b. Determine the shares represented;

    c. Determine the validity of proxies and ballots;

    d. Count all votes; and

e. Determine the result.

O. Percentage of Vote Required to Take Action – 12:1-725 (C) and 1-728

1. Directors are elected by a plurality vote, and cumulative voting is permitted only if the articles authorize it. 12:1-728 (A) & (B). These rules are the same as under current law.

2. Fundamental changes, such as amendments of the articles, mergers, share exchanges, entity conversions, and dissolution, require the approval of a majority of the votes entitled to be cast on the issue – what current law would call a majority of "voting power." E.g., 12:1-1003 (A) (3) (amendments); 12:1-1104 (5) (mergers and share exchanges).

    a. This changes current law, which requires a vote of 2/3 of shares present at a meeting to approve most fundamental changes (although a voluntary dissolution requires only a majority of voting power present, and a sale of substantially all assets by an insolvent corporation requires a vote of 2/3 of all directors).

    b. This rule also represents deliberate departure in Louisiana from the Model Act rule, which would have required approval only of a majority of the votes cast for this type of action.

3. Ordinary actions – those that fall into a default category where no other more specific rule applies – require approval of a majority of the votes cast. 12:1-725 (C).

P. Action by Written Consent – Similar to Current Law, but with Greater Detail - 12:1-704

1. Generally, the written consent provisions in the new Act contain considerably more detail than current law. This added detail arises largely from the use of written consents in connection with takeover battles and change-of-control transactions in public corporations. But the new rules may also prove useful whenever a corporation's articles allow actions by less than unanimous consent (and without board approval) or where an attempt is made to gather unanimous consents over an extended period of time.

2. Unanimous Consent

    a. Any action required or allowed to be taken at a shareholders' meeting may be taken without a meeting by means of unanimous written consent.

    b. The action must be evidenced by one or more written consents bearing the date of signature and describing the action taken, signed by all shareholders entitled to vote on the action and "delivered to the corporation" for inclusion in the minutes or filing in the corporate records.

        (1) "Deliver" is a defined term – see 12:1-140(5).

(2) The place to which communications to the corporation must be delivered is provided in 12:1-141 (C).

c. Note that current law does not require the consents to be dated. The purpose of the dating of the consents is related to the new 60-day time limitation placed on actions to be taken by unanimous consent. See subparagraph 5, below.

d. Current law also does not explicitly require the action being approved to be described in the consent, but it's difficult to see how one could consent in writing to some action without describing the action to which the consent is being provided.

3. Less Than Unanimous Consent

   a. As under current law, action by less than unanimous consent is permitted only as provided in a corporation's articles of incorporation.

   b. The articles may permit action to be taken by written consents signed by the holders of outstanding shares having not less than the minimum number of shares required to approve the action at a meeting at which all shares entitled to vote were present and voted on the action.

   c. The form and delivery requirements for the consents is the same as for unanimous consents.

4. Record Date

   a. The board may set a record date for determining the shareholders entitled to provide written consents to an action under the general rules of 12:1-707.

   b. In the absence of the board's providing a record date, the record date for an action by shareholders by written consent is:

      (1) If board action is also required (e.g., in the case of a proposed merger), the record date is the close of business on the day on which the board resolution approving the action is adopted.

      (2) If no board action is required (e.g., for an amendment of the bylaws), the record date is the first date on which a signed written consent is delivered to the corporation.

5. Time Limit & Revocations of Consents

   a. The new Act provides a 60-day time limit on the delivery of the required consents to the corporation, measured from the date on which the first consent is signed.

   b. The new Act also allows a consent to be revoked by means of a writing to that effect, delivered to the corporation before enough unrevoked written consents have been delivered to the corporation to approve the action in question.

6. Effect and Effective Date

   a. The consent has the effect of a vote taken at a meeting and may be described as such in any document.

   b. The articles, bylaws or a board resolution may provide for a reasonable delay in the effective date of actions by written consent to allow the tabulation of the consents. Otherwise, the action is effective when written consents sufficient to approve the action are delivered to the corporation.

7. Notice of Action to other Shareholders

   a. The corporation must give notice of the action taken within ten days of the delivery of sufficient consents, or the completion of the tabulation of consents if tabulation is allowed, to:

      (1) shareholders entitled to vote on the action who did not sign a consent; and

      (2) nonvoting shareholders if the action taken is one for which notice would be required to them if the action were taken at a meeting.

   b. The notice must be accompanied by the same material that would have been provided in a notice of a meeting to take the action that was approved by written consent.

XIII. Part 7 – Voting Trusts, Voting Agreements, and Unanimous Governance Agreements

A. Voting Trusts – 12:1-730

1. One or more shareholders may create a voting trust, conferring on the a trustee the right to vote or otherwise act for them, by signing an agreement that sets out the provisions of trust, and by transferring their shares to the trustee. The trust agreement may contain any provisions consistent with its purpose.

2. When a voting trust agreement is signed, the trustee is required to prepare a list of the names and addresses of all voting trust beneficial owners, and showing the number and class of shares each of them transferred to the trust, and deliver copies of the list and voting trust agreement to the corporation.

3. The voting trust becomes effective on the date that the first shares subject to the trust are registered in the trustee's name.

4. Term limits on voting trusts were recently eliminated by the Model Act, but older trusts, in which the participants may have been relying on the statutory term limits were covered by a transition provision that retained

the old limits for trusts entered into before the effective date of the change in the law.

   a. The term limits were more generous under Louisiana law than under the Model Act, but Louisiana took the same approach as the Model Act to grandfathering older voting trusts.

   b. Voting trusts that became effective before January 1, 2015, the effective date of the new Act, continue to be subject to the current Louisiana limit of an initial term of 15 years, plus one 10-year extension.

   c. Voting trusts that become effective on or after January 1, 2015 will have only the term limits provided in the voting trust agreement.

5. Much of the detail in current law about the structure of the voting trust, the issuance of voting trust certificates, and record-keeping by the voting trustee has been eliminated. Any such details are left to the terms of the voting trust agreement.

6. The rule that allowed other shareholders to join in the trust, unless the trust prohibited such new participation, has also been dropped.

B. Voting Agreements – 12:1-731

   1. The current statute is silent on voting agreements among shareholders, although the jurisprudence does treat them as enforceable to the extent that they do not interfere with the managerial power and discretion of directors.

   2. The new Act explicitly approves of voting agreements among shareholders, and provides that they are specifically enforceable (thus rejecting an old Delaware ruling to the contrary).

   3. But the language of the relevant provision is limited to agreements among shareholders that "provide for the manner in which they will vote their shares." 12:1-731.

      a. The new Act remains silent on the enforceability of shareholder agreements that purport to obligate the shareholders in ways that could interfere with the independent exercise of managerial discretion by the directors of the company.

      b. However, the Act does contain a new provision on what it calls "unanimous governance agreements" that explicitly permits shareholders to agree unanimously to governance terms that are contrary not only to traditional corporate governance principles, but also to ordinarily mandatory requirements in the Act.

C. Unanimous Governance Agreements – 12:1-732

   1. Louisiana Changes from the Model Act Approach

a. The Model Act provides broad leeway to unanimous agreements among shareholders concerning the governance of their corporations, allowing them to override even statutory provisions that would otherwise be mandatory. But it also imposes third-party notification rules in connection with such agreements similar to those that apply to share transfer restrictions, and, until recently, limited the term of such agreements to a period of ten years.

b. The Law Institute committee that worked on Louisiana's version of the Act supported the goal of extending contractual freedom to the shareholders of closely-held companies. But committee members were concerned about the absence of any clear boundaries between ordinary corporate governance documents, which should be governed by ordinary principles of corporate law, and the special form of unanimous agreement on which the Model Act conferred both special powers, and special requirements and limitations.

c. The Model Act applied its special rules to any unanimous agreement among shareholders, even if the agreement was in the form of articles or bylaws, and even if there was no indication in the agreement that the shareholders intended to trigger the special rules applicable to such unanimous agreements. Indeed, the Model Act did not give any name to this special form of agreement, referring to it only as an "agreement among shareholders that complies with this provision" and an "agreement authorized by this Section."

d. Moreover, the Model Act did not require that each shareholder's consent to this extraordinary form of agreement be evidenced in writing.

e. The Louisiana version of the Model Act provision adopts a name for the type of agreement covered by the special rules for such agreements, "unanimous governance agreement," and defines this new term in a way that is designed to prevent the inadvertent triggering of the special rules applicable to this type of agreement.

2. Unanimous Governance Agreement Defined: The term "unanimous governance agreement" means any written agreement, other than the articles of incorporation or bylaws, that satisfies all of the following requirements:

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

    b. 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

    c. States that it is a unanimous governance agreement or that it is governed by the unanimous governance section of the Act.

3. Incorporators May Execute – Incorporators or subscribers may act as shareholders with respect to a unanimous governance agreement if no shares have been issued when the agreement is made. This means, of course, that the shareholders of a corporation may be bound by a unanimous governance agreement to which they themselves did not agree. But that is true of all corporate governance provisions. And a shareholder is entitled to rescind his or her share purchase if he or she did not have knowledge of the agreement and the existence of the agreement was not noted conspicuously on the certificate for the shares purchased. (See paragraph 9, below.)

4. Other Shareholder Agreements not Affected – Agreements among shareholders that do not fit the definition of a unanimous governance agreement are not affected by 12:1-732.

5. Not Available to Public Corporation – the provisions of a unanimous governance agreement cease to be effective when a corporation becomes a public corporation. A public corporation is defined as a corporation that has shares listed on a national securities exchange or regularly traded in a market maintained by 9ne or more members of a national securities association. 12:1-140 (18A).

6. Freedom of Contract – a unanimous governance agreement is effective among the corporation and the shareholders and is to be interpreted and enforced among those persons in accordance with the principle of freedom of contract. A unanimous governance agreement is enforceable among the corporation and its shareholders even though it is inconsistent with one or more other provisions in the Act in that it does any of the following:

    a. Eliminates the board or restricts its discretion or powers;

    b. Governs the authorization or making of distributions, whether or not in proportion to ownership, subject to the limitations of 12:1-640 (the normal "double insolvency" distribution limitations);

    c. Establishes who will be the directors or officers of the corporation, or their terms of office or manner of selection or removal;

    d. Governs the exercise or division of voting power by or between the shareholder and directors, including the use of weighted voting or director proxies;

    e. Establishes the terms or 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;

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

g. 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

h. Otherwise changes, in a manner not contrary to public policy, the result that would be reached under other provisions of the Act.

7. Term – Unless otherwise provided in the unanimous government agreement, the agreement has an initial term of 20 years and may be renewed for an unlimited number of additional terms of up to 20 years by the written consent of all the shareholders at the time of the renewal. The agreement may be amended or terminated by means of the same kind of approval. The agreement continues in effect even after the expiration of its term until shareholders holding 25% of the issued shares sign and deliver written consents to terminate the agreement. The corporation is required to send notices to all shareholders of any renewal, amendment or termination of the agreement, but a failure to send the required notice does not affect the renewal, amendment or termination.

8. Interpretation of Multiple Agreements – If shareholders have approved multiple unanimous governance agreements, the agreements are, to the extent reasonable, to be construed as one agreement in which all provision are to be given effect. If conflicting provisions cannot be reconciled using that rule of construction, the more recent provision is to be treated as controlling.

9. Effect on Directors' Duties – A unanimous governance agreement that limits the discretion or powers of the board of directors relieves the directors of director liability, and imposes it instead on the persons who are given the directors' powers. A person who is subjected to this director-like responsibility is protected against liability, and is entitled to indemnification, to the same extent as a director.

10. Notice to Subsequent Shareholders & Rescission Action – The existence of a unanimous governance agreement must be noted conspicuously on the corporation's share certificates. The failure to include the required notation does not affect the validity of the agreement or any action taken pursuant to it. But a purchaser of shares who did not have knowledge of the agreement (either actual knowledge or the deemed knowledge arising from the required certificate notation) is entitled to rescind the purchase of the shares. The rescission action must be commenced within the earlier of ninety days of the discovery of the existence of the agreement or two years after the purchase of the shares.

11. Not Grounds for Veil Piercing – The existence or performance of a unanimous governance agreement does not provide grounds for imposing personal liability on a shareholder for the acts or debts of the

corporation, even if the agreement treats the corporation as if it were a partnership or results in failure to observe the corporate formalities otherwise applicable to the matters covered by the agreement.

XIV. Part 7 – Derivative Proceedings & Receiverships

A. Derivative suits are currently governed by arts. 611-16 of the Code of Civil Procedure and by jurisprudence that interprets those provisions.

1. But the truly important, and controversial, issues posed by derivative suits are not really procedural.

2. Rather, derivative actions raise substantive questions of corporate governance law about the circumstances under which a self-appointed shareholder should be permitted to override management's normal power to control corporate litigation.

B. Reflecting the substantive quality of those questions, the Model Act contains its own set of provisions on derivative proceedings. The Model Act provisions reflect developments in this area of the law over the past several decades that have been largely ignored by Louisiana courts.

1. The Model Act provisions do address some procedural aspects of derivative actions as well.

2. But the drafting committee decided to accept the Model Act approach of placing all of the distinctive rules about derivative proceedings in the corporation statute, rather than dividing them between the corporation statute and the Code of Civil Procedure.

3. Indeed, the committee imported into the new Act some of the existing procedural rules in the Code of Civil Procedure. The old rules could not be left as they were because of inconsistencies in the terminology and approaches of the two different sets of provisions.

C. Section 4 of the Model Act bill adds a new Subsection (B) to art. 611 of the Code of Civil Procedure. The new subsection exempts "derivative proceedings" (as defined in the new Act) from the derivative suit chapter of the Code of Civil Procedure, allowing them to be governed by the derivative proceeding provisions of the new Act.

1. The official comment to the new provision explains that the corporate derivative action is exempted only from the derivative action chapter, and otherwise remains subject to the provisions of the Code of Civil Procedure.

2. The derivative action chapter of the Code of Civil Procedure will continue to govern derivative actions in other forms of business entities, such as LLCs.

D. Definitions – 12:1-740

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

foreign corporation. (12:1-747 defers to the law of the foreign jurisdiction on substantive questions such as the right of management to cause the suit to be dismissed.)

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

E. Standing – 12:1-741 – Contemporaneous Shareholder and Adequate Representative

1. The plaintiff must have been a shareholder at the time of the act or omission complained of, or must have become a shareholder through transfer by operation of law.

2. The plaintiff must fairly and adequately represent the interests of the corporation in enforcing the right of the corporation.

3. Both rules retain the current law.

F. Universal Demand – 12:1-742

1. Current Code Civ. Proc. art. 615 requires the plaintiff in a derivative action to plead "with particularity" either (a) the efforts made to obtain corrective action from the board (and, if necessary, the shareholders) and the reasons for failing to get that action, or (b) the reasons for not making such an effort.

2. This provision creates what is known as a "director demand" and "shareholder demand" requirement, and creates enormous uncertainty about the circumstances under which a failure to make demand may be excused.

3. Traditionally, courts excused demand on directors on grounds of so-called "demand futility" where a majority of the board of directors had been named as defendants in the suit. The traditional rule was based on the idea that the directors were obviously not going to vote to sue themselves, so that it would be futile to ask them to do so. The existing Louisiana jurisprudence on the subject, which so far has been limited to cases involving closely-held corporations, follows this traditional view. E.g., *Smith v. Wembley Industries, Inc*., 490 So.2d 1107 (La. App. 4th Cir. 1986). The problem with this approach is that it allows the plaintiff to circumvent the demand rule simply by naming a majority of the directors of the corporation as defendants in the suit.

4. Delaware made demand futility the focal point of the battle between management and a derivative suit plaintiff in *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984), ruling that a plaintiff could not establish demand futility merely by naming a majority of a corporation's directors as defendants in the suit. Rather, the plaintiff was required to plead facts "with particularity" that were sufficient to create reasonable doubt about whether the directors were disinterested or would be protected by the

business judgment rule. No discovery was permitted prior to the plaintiff's satisfaction of this pleading standard.

5. The Aronson rule has been criticized on grounds that it requires a court to determine hypothetically – at the complaint stage of the case and without any of the evidence that might be produced through discovery – whether the directors of a corporation are facing enough prospect of personal liability in the case to disqualify them from responding disinterestedly to a demand, if the plaintiff, contrary to fact, were to make a demand on them for corrective action.
   a. The *Wembley* case, cited in paragraph 3, above, involved an effort by the defendants in the case to have a Louisiana court take the *Aronson* approach to demand futility.
   b. But the *Wembley* court, unfamiliar with the problem of strike suits against public corporations, responded almost sarcastically to the idea that any American court might actually require the plaintiff in a derivative suit to ask the defendant directors for a disinterested decision to sue themselves.
6. The Model Act, like the ALI's Principles of Corporate Governance, deals with the demand futility issue first by reducing the importance of demand, and then by abolishing futility (or any other reason) as grounds for excusing demand. Louisiana has now adopted this approach as well.
7. Under the new Act, prior written demand on the corporation for suitable action is always required as a condition to the filing of a derivative action. 12:1-742 (1).
   a. Ordinarily, a plaintiff must wait 90 days after making demand to commence the derivative proceeding.
   b. The 90-day delay in filing the suit may be excused if the corporation rejects the demand before then, or if waiting 90 days would cause irreparable injury to the corporation. But the written demand still must be made before the suit may be filed. 12:1-742 (2).
8. Like the Model Act, the new Act also eliminates the traditional requirement that demand be made first on directors and then, "if necessary," on shareholders.
   a. Instead, the demand is to be made "on the corporation."
   b. The official comments to the Model Act explain that the demand may be sent in the same way as any notice to the corporation, as provided in section 1.41 (12:1-141 in Louisiana).
   c. The Act leaves it to the management of the corporation to determine the appropriate persons within the corporation to consider and respond to the demand. Depending on the seriousness and credibility of the allegations, the demand may need to be considered by the

board of directors or one of its committees. But some demands may be so insubstantial that an appropriate officer or employee could consider and respond to the request on the corporation's behalf.

d. The separate requirement of demand on shareholders "if necessary" is eliminated altogether.

9. Under the new Act, management's ability to dismiss the suit as against the best interests of the corporation is covered by a separate section, 12:1-744. Dismissal of the suit under that section is connected to demand only if management chooses to reject demand and then moves to have the suit dismissed based on the plaintiff's failure to satisfy some special pleading requirements that are triggered by a rejection of demand. Other means of dismissal are available under 12:1-744 even if demand is not rejected, and even if demand could not be rejected in an authoritative way.

G. Petition Content – 12:1-742.1 – Similar to existing art. 615.

1. The new Act retains the substance of current Code of Civ. Proc. art. 615 concerning the allegations required in the petition in a derivative action, but:

a. Replaces the current "contemporaneous shareholder" allegation requirement with a requirement that the plaintiff allege satisfaction of the standing requirements of 12:1-741 (which provides the contemporaneous shareholder rule); and

b. Replaces the current requirement concerning demand or demand futility with a required allegation that the plaintiff has satisfied the demand requirements imposed by 12:1-742.

2. The petition must also:

a. Join as defendants both corporation and the obligor on the obligation sought to be enforced;

b. Include a prayer for judgment in favor of the corporation and against the obligor; and

c. Be verified by the affidavit of the plaintiff or his counsel.

H. Dismissal – 12:1-744

1. Management's Power to Dismiss – 12:1-744

a. A court is required to dismiss a derivative action on motion by the corporation if:

(1) a legally-adequate group of "qualified directors" or a court-appointed panel

(2) has determined in good faith, after conducting a reasonable inquiry upon which its conclusions are based, that

(3) maintenance of the derivative proceeding is not in the best interests of the corporation.

2. “Qualified Director” Definition –12:1-143 (A) (1)

a. The new Act requires judicial deference to a management decision to reject demand, or to dismiss a derivative suit, only if the decision is made either by a sufficient number of “qualified directors” or by a court-appointed panel.

b. The Act defines “qualified director” for purposes of derivative suits as a director who does not have either:

(1) A material interest in the outcome of the suit; or

(2) A material relationship with someone who has a material interest in the outcome of the suit.

c. A “material interest” is defined as an actual or potential benefit or detriment, other than one that would devolve on the corporation or the shareholders generally, that would reasonably be expected to impair the objectivity of the director’s judgment when participating in the action to be taken (in this case, making the relevant decision to reject demand or to seek dismissal of the suit).

d. A “material relationship” is defined as a familial, financial, professional, employment or other relationship that would reasonably be expected to impair the objectivity of the director’s judgment when participating in the action to be taken.

e. However, the Act follows Delaware’s lead in rejecting as disqualifying factors several types of managerial bias that are so common that they might otherwise prevent most directors from being qualified. None of the following circumstances automatically precludes a director from being a qualified director:

(1) Nomination or election of the director to the current board by any director who is not a qualified director with respect to the matter, or by any person who has a material relationship with that director, acting alone or participating with others. (The effect of this rule is to allow disqualified directors to fill vacancies on the board – arising from resignations or expansion of the board – with new, qualified directors who would then be able to cause a derivative action to be dismissed. This rule implicitly rejects the so-called “structural bias” argument against allowing defendant directors to effectively appoint their own judges by naming new directors to the board, and empowering them to make decisions about the suit as members of a new “independent litigation committee.”)

(2) Service as a director of another corporation of which a director who is not a qualified director with respect to the matter, or any

individual who has a material relationship with that director, is or was also a director.

(3) Status as a named defendant, as a director against whom action is demanded, or as a director who approved the conduct being challenged.

3. Demand Rejection – 12:1-744 (C).

   a. The rejection of demand plays only a limited role in this scheme. Demand rejection does not by itself terminate the plaintiff's ability to pursue the litigation. It merely requires the plaintiff to make some additional allegations in his petition *if* demand is rejected before the derivative proceeding is commenced. (Rejections of demand that occur after the action is commenced are not covered in any way by the new Act.)

      (1) Ordinarily, the plaintiff's making demand on the corporation provides a 90-day waiting period during which the corporation may consider and respond to the demand. Hence, management should be aware that, at least as a default matter, it has only 90 days to make appropriate inquiries and to notify the plaintiff that the corporation is rejecting the plaintiff's demand.

      (2) A court has authority to stay a proceeding for the period it deems appropriate if the corporation has commenced an inquiry into the allegations in the demand or petition. But it is not clear how a court could stay a proceeding that had not yet commenced. So, the conservative position, if demand rejection is a possibility, is to notify the plaintiff of the rejection of demand before the end of the standard 90-day period.

   b. If demand is rejected before the proceeding is commenced, the petition in the action must allege with particularity facts that establish either:

      (1) That a majority of the board did not consist of qualified directors at the time the determination was made to reject demand; or

      (2) That the requirements in 12:1-744 (A) for dismissal of the action on motion by the corporation have not been satisfied.

   c. The first of the pleading requirements may seem to suggest that the rejection of demand would be binding in some way if a majority of the directors were qualified. But the Act gives no such effect to a rejection. A rejection of demand does no more than trigger the pleading requirement itself.

      (1) The only mechanism recognized in the Act for dismissal of the suit based on the asserted best interests of the corporation is a corporation's motion to dismiss that satisfies the requirements of 12:1-744 (A). Rejections of demand do not work for that purpose.

(2) The burden of proving whether the requirements of Subsection (A) have been satisfied depends on whether a majority of the board consists of qualified directors.

(a) If a majority of the board is qualified, the plaintiff bears the burden of proving that the requirements of Subsection (A) have not been satisfied.

(b) If a majority of the board is not qualified, the corporation bears the burden of proving that the requirements of Subsection (A) have been met.

(3) The Act does not say who bears the burden of proving whether a majority of the board is qualified. But the rejection of demand does at least require the plaintiff to plead facts with particularity that establish that a majority of the board is not qualified.

4. "Best Interests" Motions to Dismiss – Requirements

a. Adequately Qualified Decision-Maker

(1) The determination to seek dismissal of a derivative proceeding as not in the best interests of the corporation must be made either by a panel of one or more individuals appointed by the court or by an adequately qualified group of directors.

(2) If the determination is made by a court-appointed panel, the plaintiff bears the burden of proving that the requirements of Subsection (A) have not been met.

(3) Despite the advantage offered on the burden of proof issue by a court-appointed panel, it seems likely that court-appointed panels are going to be rare. Corporate management will seldom wish to roll the dice on the court's selection of a panel, instead of picking its own decision-makers from among existing or new board members.

b. Subsection (B) of 12:1-744 provides two means of satisfying the "qualified directors" requirement. The vote to seek dismissal of the proceeding must consist of :

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

(2) A majority vote of a committee that consists of two or more qualified directors, where the committee was appointed by a majority vote of the qualified directors present at a meeting of the board – regardless of whether those directors constituted a quorum.

c. In effect, the board must have at least two qualified directors available to serve on the decision-making committee, and only the qualified directors of the board (perhaps just the two prospective members of the committee) may vote to appoint such a committee.

(1) The rule that permits only qualified directors to appoint a litigation committee is designed to address the structural bias argument. That argument posits that the selection of a litigation committee by directors facing liability in the lawsuit will cause the committee to be biased in favor of the defense.

(2) But recall that the definition of "qualified director" provides explicitly that a director does not automatically lose his or her qualification merely by being selected or appointed to the board by a non-qualified director. 12:1-143 (C) (1).

(3) Hence, the structural bias argument is addressed only in the selection of the committee, and not in the selection of directors to the board. Directors appointed to the board by non-qualified directors may themselves be qualified, and thus be able to appoint and serve on a litigation committee as qualified directors.

(4) Still, the rule concerning the appointment of qualified directors by non-qualified directors provides only that the means of appointment does not "automatically" disqualify the appointed directors. Other connections between the directors involved could support a reasonable conclusion that the objectivity of the appointed director in making decisions about the suit would be impaired.

d. Reasonable Inquiry

(1) The official comments to the Model Act explain that the word "inquiry," rather than "investigation," is used in the dismissal provision to suggest that the nature and depth of the corporation's consideration of the allegations made in the demand would depend upon the nature of those allegations. In some cases, the comments suggest, the knowledge of the persons conducting the inquiry may be so extensive that little additional effort would be required to draw a conclusion about the allegations.

(2) The official comment to the Louisiana version of this provision acknowledges and approves of the Model Act comment, but adds the observation, "in the case of serious allegations of misconduct against the management of a corporation, a good faith inquiry ordinarily will require the preparation of a written report, with the assistance of independent legal counsel."

e. Best Interests of Corporation

(1) The key difference between ordinary and derivative litigation involving a corporation is that derivative litigation is theoretically undertaken on behalf of the corporation itself. The corporation is

a defendant in the action in the sense that it is being forced to engage in litigation over the objections of management -- the persons usually empowered to make litigation decisions for the corporation. But the corporation is also the plaintiff in the case in the sense that it is the corporation's rights that are being enforced, and that it is the corporation that will receive the benefit of any recovery from the defendants in the case.

(2) The key question to be answered at the outset of a derivative suit, therefore, is whether the self-appointed plaintiff or the elected members of the board of directors are really the better representatives of the corporation's interests in the suit.

(a) The decision whether to pursue litigation involves considerations other than the legal merits of the case. They involve a balancing of the costs and risks of the litigation against the potential benefits available if the litigation is pursued successfully.

(b) Litigation decisions thus pose business decisions of the kind that the board of directors is entitled to make, without judicial interference, unless some reason exists to consider the board to be disqualified from making the decision. And in derivative litigation, the reason that the board may be disqualified is the possible self-interest of the directors in terminating litigation in which they, or persons with whom they have a material relationship, are the defendants.

(c) So, the really critical question is whether the corporation has enough directors that meet the definition of "qualified director" to make the controlling decision.

(3) If a majority of the board is qualified, or a committee of qualified directors has been properly appointed, they are entitled, after conducting a reasonable, good faith inquiry, to decide to dismiss even legally meritorious suits on grounds that the suit is not in the best interests of the corporation. And a court is required to defer to that decision by granting the corporation's motion to dismiss if the corporation has satisfied the qualified director and reasonable inquiry requirements for the determination that the suit is not in the best interests of the corporation.

f. Implications for Closely-Held Corporations

(1) The Model Act rules, and indeed most of the national developments in the field of derivative litigation, have developed in response to what are perceived as strike suits against publicly traded corporations – suits driven and controlled by lawyers as a means of extracting a settlement that pays them a large legal fee

for the "benefit" they confer on the corporation by pursuing the suit.

(a) The corporate benefit in these suits may consist of nothing more than some stated new commitment, perhaps with new auditing or procedural controls, to avoid the attacked bad behavior in the future.

(b) In these suits, the tension is between a board that typically consists of independent, highly experienced business persons on one side, and a self-appointed champion of shareholders on the other.

(c) The vast majority of the shareholders in these public corporation suits are purely passive investors who have little to no ability to determine whether it is the board or the plaintiff's lawyer who will really be the better representative of the corporation's interests in the suit.

(2) Derivative litigation involving closely-held corporations has little in common with the public corporation suits.

(a) Derivative suits in closely-held corporations typically involve one or two minority shareholders suing all of the majority shareholders in the majority shareholders' capacity as directors. The minority shareholders typically will have been excluded from what they view as their fair share of the financial benefits of the corporation's business, and they will be suing the majority shareholders on grounds of overcompensation and personal use of corporate assets.

(b) These types of cases pose difficult issues about the proper allocation among shareholders, some of whom work for the corporation and some of whom do not, of the financial benefits arising from the corporation's business.

(c) But, unlike public corporation suits, they do not pose a question about who is the better representative of the interests of thousands of passive shareholders. All of the shareholders will typically be named parties in these suits, and each will be working to protect his or her own interests.

(d) Moreover, the lawyers in the case will not have appointed themselves to represent a large class of passive investors. Rather, the clients will have hired the lawyers in the usual way to represent their interests in the litigation.

(3) The common-sense view represented by the current demand-futility cases in Louisiana – that the defendants in derivative actions involving closely-held corporations should not be allowed to decide whether they themselves should be sued – still seems the

correct view. But it will no longer be a view that can be attached to the demand-futility issue.

(4) Rather, it will have to be connected to the issue of "qualified" directors. As the test for a qualified director is whether the objectivity of a director's view may reasonably be considered to be impaired by his or her interests in the outcome of the litigation (either personally or for someone with whom the director has a material relationship), it seems unlikely that the directors in a typical closely-held corporation derivative suit, would be considered qualified. They are typically being sued for overcompensating themselves and their fellow directors, and they will typically histories of familial and personal relationships with most or all shareholders involved in the case.

5. Discontinuance or Settlement – 12:1-745

   a. Because derivative suits were developed by analogy to class actions, the normal rule is the derivative suits may be settled or dismissed only with court approval. This rule is designed to mitigate the potential conflict of interest between the lawyer for the class and the class members themselves. The lawyer may be willing to settle a case on terms that involve a large fee, but little benefit to class members.

   b. The new Act modifies the traditional rule by adding an exception not found in the Model Act itself: the requirement for court approval does not apply to settlements and dismissals approved unanimously by a corporation's shareholders.

   c. As the official comment to the Louisiana provision explains, if all shareholders agree personally to the terms of a settlement or dismissal, the conflicting interests that justify judicial review are not present. The parties to the litigation should be able to settle on whatever terms they consider appropriate.

   d. As a practical matter, the exception for unanimous approval is likely to be triggered only in closely-held corporations. But most derivative litigation in Louisiana involves closely-held corporations, so the exception to the normal rule is likely to apply more often than the rule itself.

6. Payment of Legal Fees and Other Litigation Expenses – 12:1-746

   a. On termination of a derivative proceeding, a court may order the corporation to pay the plaintiff's litigation expenses (and "expenses" is defined in 12:1-140(9B) to include attorney's fees) if the court finds that the proceeding resulted in a "substantial benefit" to the corporation.

b. The court may also order the plaintiff to pay any defendant's defense expenses if the court finds that the proceeding was commenced to maintained without reasonable cause or for an improper purpose.

c. The court may also order a party to pay an opposing party's expense incurred because the filing of a pleading, motion or other paper was not well grounded, after reasonable inquiry, or warranted by existing law or a good faith argument for a change in the law, and was interposed for an improper purpose, such as to cause unnecessary cost or delay.

7. Appointment of Receiver – 12:1-748

a. The district court in the parish where the registered office of the corporation is located may appoint one or more receivers for the corporation in a proceeding by a shareholder where the shareholder proves that irreparable injury to the corporation is threatened or being suffered because either:

(1) The directors are deadlocked, the shareholders are unable to break the deadlock; or

(2) The directors or those in control of the corporation are acting fraudulently.

XV. Board of Directors – Requirement of a Board; Authority, Election and Structure

A. Board Required – 12:1-801 (A): Except as provided in a unanimous governance agreement, a corporation is required to have a board of directors.

B. Authority and Powers – 12:1-801 (B): Subject to the provisions of the articles of incorporation or a unanimous governance agreement, all corporate powers must be exercised by or under the authority of the board of directors, and the business and affairs of the corporation must be managed by or under the direction and subject to the oversight of the board of directors.

1. Current law states the board's authority only direct terms – powers are vested in the board itself, and the corporation's business and affair is managed "by" the board of directors.

2. The new Act, like the Model Act, acknowledges that boards of directors often do not exercise their powers or manage the corporation directly. Rather, they cause officers, agents and employees to run the corporation's business, subject to the board's direction and oversight.

C. Qualifications, Number, Election, and Terms – 12:1-802 & 803

1. Qualifications: As under current law, the articles or bylaws may prescribe qualifications for directors. Except as required by the articles or bylaws, a director need not be a resident of Louisiana or a shareholder of the corporation.

2. Number: The new Act modifies the Model Act provision on the number of directors to retain the current rule: the number of directors is determined in the following order of priority (the higher-ranking rule controls if one exists):

   a. As fixed by or in accordance with the articles;

   b. As fixed by or in accordance with the bylaws;

   c. The number elected from time to time by the shareholders;

   d. The number of initial directors named in the articles (currently, the initial directors would be named in the initial report, but the initial report information is now made part of the articles).

3. Election & Cumulative Voting: As under current law, directors are elected by plurality vote, and shareholders are entitled to vote cumulatively only if the articles so provide. 12:1-728 (A) & (B).

4. Classified Voting: As under current law, the articles may provide for classes of shares that separately elect all or some specified number of directors. 12:1-804.

5. Default Term

   a. The basic concept that the default term for a director is one year (expressed in current 12:81 (A)) is retained in the new Act, but the rule is stated indirectly by reference to the required annual meetings of shareholders.

      (1) The terms of the initial directors expire at the first shareholder's meeting at which directors are elected.

      (2) The terms of all other directors expire at the next annual shareholders meeting (unless the articles provide for staggered elections, covered below).

   b. The effect of this approach is to put less pressure on the "holdover director" rule, i.e., that a director serves even after the expiration of the director's term until a successor is elected and qualifies, because the term itself is being measured by the holding of meetings at which the successor is elected.

      (1) So, if 15 or 16 months elapses between annual meetings, the directors' terms continue in effect until the next annual meeting, without triggering a need to resort to the holdover director rule.

      (2) The new Act does also contain a holdover director rule (12:1-805 (E)) that applies unless the articles provide otherwise or unless a bylaw that complies with a special requirement (12:1-1022) that was designed to support the effort in public corporations to permit shareholders to vote against the retention of a director (as opposed to simply voting for another candidate) in a binding way.

6. Staggered Terms and Longest Permissible Term – 12:1-805 & 806

   (a) Current law does not explicitly address staggered terms, and provides that no director may be elected to a single term longer than five years. (12:81 (A)).

   (b) Under current law, it appears that staggered terms may be provided in the articles or bylaws, provided that no single term exceeds five years.

   (c) Under the new Act, staggered terms may be provided only in the articles, and the number of staggered terms may not exceed three. So, in effect, the longest single term for which a director may be elected under the new Act is three years.

   (d) The terms of staggered directors expire at the applicable second or third annual meeting after the director's election, subject to a "vote against" bylaw under 12:1-1022 or if the articles specify a shorter term for a director who does not receive a specified vote for election.

7. Removal and Resignation 12:1-807 & 808

   a. Removal: As under current law, the shareholders may remove one or more directors with or without cause, by a majority of the votes entitled to be cast in an election of directors (what current law calls a majority of "voting power"). The Model Act would have allowed removal by a majority of the votes cast, but that rule was modified to retain the current Louisiana rule, using the Model Act terminology.

      (1) If a director was elected by a particular voting group, only the members of that voting group may participate in the vote to remove that director.

      (2) If the articles authorize cumulative voting a director may not be removed if the number of votes sufficient to elect the director under cumulative voting is voted against removal.

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

   b. Resignation - Introduction: Current law does not say how a director resigns, or when the resignation becomes effective. The new Act provides rules on the subject. The basic rules are simple and intuitive. Slightly more complex rules are provided to facilitate a practice being pushed by investor groups in public corporations, to permit shareholders to vote against the retention of a director in office.

      (1) Ordinarily, shareholders may not vote against the retention of a director. If they wish for that director to be defeated, they must

organize a campaign to vote for someone else, and have that alternative director receive sufficient votes to prevent the incumbent from being one of the directors that receive the required plurality of votes to be elected.

(2) This type of election contest in a public corporation would trigger proxy solicitation rules under federal securities law that would impose enormous compliance costs on the dissident group.

(3) So, shareholder advocates have been pressuring publicly-traded corporations to adopt provisions in their bylaws that permit shareholders simply to vote against the retention of a particular director, and that provide that each director will resign to run for re-election, but that the resignation is to be effective only when the votes cast to retain the director do not exceed the votes against retention. If a director is not retained, it creates a vacancy on the board that is filled through the appointment of a replacement director by the board.

(4) Because closely-held corporations are not subject to the proxy solicitation rules under federal securities law, the resign-to-run and vote-no rules are unlikely to serve any purpose in that setting.

c. Basic Rule: A director may resign at any time by delivering a written resignation to the board of directors, its chair, or to the secretary of the corporation. The resignation is effective on delivery unless it specifies a later effective date.

d. Special Rule – A resignation may specify an effective date determined upon the happening of an event or events (e.g., the failure to receive more votes for than against retention), and a resignation that is effective on the failure to receive a specified vote may provide that it is irrevocable.

8. Vacancies – 12:1-810

a. Unlike current law, the new Act does not specify how vacancies occur, but only how they are filled. The failure of the new Act to specify the causes of a vacancy should not matter in the obvious cases of a director's resignation or death, which obviously creates a vacancy. But the new Act does not contain the provision in current law that allows the board to "declare" vacancy in the event a director is interdicted, incapacitated, or adjudicated a bankrupt.

b. Vacancies may be filled by the shareholders or the board. If the remaining directors do not constitute a quorum, a vacancy may be filled by a majority vote of all the remaining directors.

c. A future vacancy, such as one that will arise from a resignation with a delayed effective date, may be filled before the vacancy arises, but the new director may not take office until the vacancy actually occurs.

9. Director Proxies – 12:1-812: A new, non-model provision was added to the new Act to retain the Louisiana rule that a director may vote by proxy if permitted by a corporation's articles of incorporation.
    a. Only another director may be appointed to act as a director's proxy.
    b. The appointment may be made only in a signed writing, delivered to the person who is presiding at the meeting at which the proxy is authorized to cast the vote of the absent director. A separate proxy is required for each meeting of directors, and the proxy's authority terminates at the conclusion of the meeting for which the proxy was granted.
    c. The proxy must cast the votes of the absent director in accordance with any instructions provided to the proxy by the absent director, but otherwise may cast the votes in the proxy's discretion.

D. Board Meetings

1. Generally: The board may hold regular or special meetings in or out of Louisiana. 12:1-820 (A).
2. Call: A board meeting may be called by the board chair, by the chief executive officer (regardless of the title used for that office) or by a majority of the directors.
3. Notice: Except as provided in the articles or bylaws, no notice is required of regular meetings. 12:1-822 (A). Forty-eight hours' notice of the date, time, place and purpose(s) of a special meeting is required. 12:1-822 (B).
4. Written Waiver of Notice: A director may waive notice before or after the meeting. The waiver must be in writing, signed by the waiving director, and filed in the minutes or corporate records.
5. Waiver by Presence: A director who attends or participates in a meeting waives notice.
    a. However, in a change from current law, a director may avoid waiving notice through attendance at the meeting if objects to the holding of the meeting or to the transaction of business at the meeting. And if the director's objection is to the taking up of business not within the purposes described in the notice if the director objects promptly after the item is first raised for consideration. 12:1-822 (B)
    b. A director who objects, but who thereafter participates in the meeting does not waive notice except with respect to those items that the director votes to approve. 12:1-822 (C).
6. Quorum – 12:1-824
    a. In general, a quorum consists of a majority of directors.
    b. The general rule is subject to:

        (1) Specific provisions in the Act providing for a different quorum;

(2) Provisions in the articles or bylaws that increase the number of directors required for a quorum; and

(3) Provisions in the articles or bylaws that reduce the required number, to as few as one-third of the directors.

c. The new Act adds a non-model provision that retains the substance of the current law concerning the effects of directors' leaving a meeting after a quorum has been established.

(1) If a quorum is present when a meeting is convened, but the quorum is lost through the withdrawal of one or more directors, those still present may continue to take action by the vote that would have been required had the quorum not been lost. 12:1-824 (C) (2).

(2) So, if five of nine directors were present when a meeting convened, the required majority of directors would be three. If one or two directors withdrew from the meeting, the remaining directors could continue to take action by the affirmative vote of the three of the remaining directors.

7. Vote Required – 12:1-824: If a quorum is present, the vote of the "required majority" of directors is the act of the board.

   a. Usually, the required majority is a majority of the directors present at the meeting.

   b. However, if the articles or bylaws require a greater number of votes to take a particular action, the greater number is the required majority

8. Deemed Assent for Directors Present – 12:1-824 (D): A director who is present at a meeting of the board or a committee of the board is deemed to have assented to the action taken at the meeting unless:

   a. The director objects at the beginning of the meeting or promptly upon arrival at the meeting to holding the meeting or transacting business at the meeting;

   b. The director's dissent or abstention is entered in the minutes of the meeting; or

   c. 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.

   d. The right to abstain or dissent is not available to a director who votes in favor of the action taken.

E. Action Without a Meeting – by Unanimous Written Consent – 12:1-821

1. Except to the extent that the articles or bylaws require that action be taken at a meeting, any action that the Act allows directors to take at a

meeting may be taken without a meeting if each director signs a written consent to the action and delivers it to the corporation.

2. The consents become an act of the board when one or more consents signed by all the directors are delivered to the corporation, but the consents may specify the time at which the action taken by means of the consents is to be effective.
3. A director's consent may be withdrawn by a written revocation that is signed by the director and delivered to the corporation before unrevoked consents for all directors are delivered to the corporation.
4. Action by written consent has the same effect as an action at a meeting of the board and may be described as such in any document.

F. "Force the Vote" Provisions Permitted – 12:1-826

1. In what may seem to be an odd provision, section 1-826 of the new Act authorizes a corporation to submit a matter to a vote of its shareholders even if, after approving the matter, the board determines that it no longer recommends the matter.
2. This mysterious language is designed to approve of what are known as "force the vote" provisions in merger and acquisition agreements.
3. A shareholder vote on the deal contemplated by a merger or acquisition agreement typically occurs several weeks or months after the board approves the deal and the agreement is signed.
    a. During this period between the signing of the agreement and the later shareholder vote and closing of the transaction, developments may occur that cause the board to have second thoughts.
    b. Competing offers may be forthcoming that seem superior to the one proposed in the agreement, or the perceived value of the seller's business may improve, or the prospects of the buyer (and therefore the value of any securities or deferred payments proposed in the deal) may have declined.
4. Delaware courts have ruled that the directors owe a fiduciary duty to a corporation's shareholders not to recommend that they vote to approve a transaction that they no longer consider to be in the shareholders' best interests.
5. But the acquirer may believe that it can obtain the required vote of shareholders even without the board's supporting recommendation (a majority of shareholders may prefer a large premium in hand over a slightly larger one that may, or may not, be available through an alternative deal). So, the acquirer may insist on a provision in the acquisition agreement that requires the transaction to be submitted for shareholder approval even if the board decides that it can no longer recommend it.

6. Delaware corporation law has been amended to permit this type of force-the-vote provision, and the Model Act and new Louisiana Act have essentially followed Delaware's lead.

G. Committees of the Board – 12:1-825

1. Committees Authorized: Except as otherwise provided by the Act, or a corporation's articles or bylaws, the board may create one or more committees and appoint one or more directors to serve on them.

    a. If the board appoints persons who are not directors, those persons serve in an advisory capacity only. They are not considered members of the committee for purposes of any reference in the Act to a committee or to one or more committee members.

    b. This is a non-model provision that was added in response to the observation by some of the drafting committee members that non-director officers and employees are sometimes appointed to board committees because of the assistance they may lend to the committee's work. The added rule essentially treats the non-director "members" as committee staff, and not as committee members for quorum or voting purposes.

2. Limits on Committee Authority: Unlike current law, which provides that a board committee may be given the authority to take any action that the full board might take, the new Act does not permit a board committee to do any of the following:

    a. Authorize or approve distributions, except according to a formula or method, or within limits, prescribed by the board;

    b. Approve or propose to shareholders any action that the Act requires to be approved by shareholders;

    c. Fill vacancies on the board or, except as provided in the Act, on committees of the board; or

    d. Adopt, amend, or repeal bylaws.

3. General Rule on Authority of Committees: Otherwise, as under current law, a board committee may exercise the power of the board to the extent specified by the board or in the articles or bylaws.

4. Higher Vote Required: In another change from current law, the board vote required to create and appoint members to a committee is not that required to take board action generally (a majority of directors present at a meeting with a quorum). Rather, the creation of a board committee, and the appointment of members to it, requires the approval of a majority of all directors then in office, or, if the number is greater, the number specified in the corporations' articles or bylaws.

5. Board Meeting Rules Apply: The rules governing meetings of the board and actions by written consent (12:1-820 through 824) also apply to committees of the board.

6. Vacancies and Alternate Members: The board may appoint one or more directors as alternate members to replace any absent or disqualified member during the member's absence or disqualification. Otherwise, in the event of absence or disqualification of a committee member, the remaining members of the committee present at a meeting, and not disqualified from voting, may, by unanimous vote, appoint another director to act in place of the absence or disqualified member. (The new Act does not retain the current rule that the president may fill vacancies on a committee pending action by the full board.)

7. Effect on Board's Duties: Current law provides that the appointment of a committee does not relieve directors of the responsibilities imposed on them by law. The new Act contains a similar rule, but stated a bit differently. Under the new Act, the creation of, delegation of authority to, or action by a committee does not alone constitute compliance with the standards of conduct imposed by law on a director.

XVI. Standards of Conduct, Standards of Liability, and Default Exculpation of Directors – 12:1-830-833

A. Introduction:

1. For many years, a tension has existed in corporation law between the ostensibly demanding, statutorily-described standards of conduct for directors and the far more lenient and deferential "business judgment" standards that were used by courts to determine whether a director could actually be held liable in damages for some departure by a director from the standards of conduct that were supposed to apply.

2. Current Louisiana law reflects this tension in 12:91.

   a. The original, demanding form of standards is expressed in the first part of subsection (A), which was enacted as part of the original statute in 1968. It says that directors are required to act "in good faith, and with that diligence, care, judgment, and skill which ordinary prudent men would exercise under similar circumstances in like positions."

   b. But the bulk of Section 91 now consists of a new proviso to Subsection (A), and of extra new subsections, that were added later to protect directors (and officers) from monetary liability because of a departure from the standard that the first part of Subsection (A) seemed to impose.

   c. The additional protective provisions in 12:91 were added in the mid 1990s, after a First Circuit decision read the language of subsection (A) literally, and concluded that, notwithstanding arguments about the jurisprudential business judgment rule, the statute plainly imposed a simple negligence standard of liability on directors.

(1) The corporation in the case could have protected itself by adding the exculpatory provisions authorized in RS 12:24 (C) (4).

(2) Those provisions had been added a decade earlier in response to much-criticized Delaware decision that had held the directors of a public company liable personally for breaching their duty of care in connection with a shareholder-approved sale of the company through a cash merger.

(3) But the corporation in the later Louisiana case had been formed several decades before the addition of 12:24 (C) (4), and its articles had not been amended to take advantage of the newer authorization of exculpatory provisions.

d. The Legislature responded quickly to the "simple negligence" ruling in the Louisiana case. It added new provisions to the corporation statute that limited monetary liability to cases of "gross negligence" (which was actually defined to mean recklessness), and that adopted the American Law Institute's statement of the business judgment rule.

3. The new Act, following the lead of the Model Act, deals with this longstanding tension in the law by drawing a clear distinction between the standard of conduct with which directors are supposed to comply, in 12:1-830, and separate standards of liability for the directors in 12:1-831. Under this approach, a breach of the standards of conduct in section 830 is necessary, but not sufficient by itself, for the imposition of liability on a director under section 831.

4. In addition, while the Model Act continues to permit the types of exculpatory provisions currently authorized under 12:24 (C) (4), the new Act in Louisiana takes the exculpatory approach one step further. The new Act makes the exculpatory provisions the default rule under 12:832. The exculpatory provisions will apply except to the extent provided otherwise in the corporation's articles of incorporation.

B. Standards of Conduct – 12:1-830

1. General Standard: A director is required to discharge the duties of a director "in good faith and in a manner the director reasonably believes to be in the best interests of the corporation."

2. Duty to Become Informed About Decisions: When becoming informed in connection with their decision-making function as a member of the board or a committee, directors are required to "discharge their duties with the care that a person in a like position would reasonably believe appropriate under similar circumstances."

3. Duty to Disclose Information Known to be Material: In discharging board or committee duties, a director is required to disclose or cause to be

disclosed to the other board or committee member information not already known by them that the director knows is material to the discharge of their decision-making or oversight functions.

a. Exception: Disclosure is not required to the extent that the director reasonably believes that doing so would violate a duty imposed by law, a legally-enforceable obligation of confidentiality, or a professional ethics rule.

4. Reliance Permitted: A director who does not have knowledge that makes reliance unwarranted is entitled to rely on:

   a. A committee of the board of which the director is not a member if the director reasonably believes the committee merits confidence;

   b. One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the relevant functions or provision of information or reports; and

   c. Legal counsel, public accountants, or other persons retained by the corporation as to matters involving skills or expertise the director reasonably believes are matters within the particular person's professional or expert competence or as to which the particular person merits confidence.

5. Kind of Reliance Permitted:

   a. Information: A director is entitled to rely on information, opinions, reports, or statements, including financial statements, prepared or presented by any of the persons listed under paragraph 4, above.

   b. Performance of Board Functions: In addition, a director is entitled to rely on the persons in the first two categories (i.e., a board committee or a corporate officer or employee) on the actual performance by those persons of board functions that the board has delegated to them formally, informally, or by course of conduct.

6. Standards of Liability – 12:1-831: A director may not be held liable to the corporation or its shareholders for any decision to take action or not to take action, or for any failure to take action, as a director unless the party asserting liability establishes both that (a) no statutory defenses protect against the liability and (b) that the challenged conduct consisted or was the result of one of five listed types of directorial misconduct.

   a. No Statutory Defenses: The new Act provides three types of statutory defenses against directorial liability, and the plaintiff must establish that none of them protect the director against the liability being asserted:

      (1) The default exculpatory provisions in 1-832;

      (2) A set of provisions that define and deal with director conflicting-interest transactions (1-861, 1-862, and 1-863); and

(3) A provision, 1-870, that protects a director against taking a business opportunity that may have belonged to the corporation, if the corporation disclaimed its interest in the opportunity in the same was as in a director conflicting- interest transaction.

b. Five Forms of Directorial Misconduct: Assuming that the plaintiff is able to establish that none of the listed statutory defenses apply, the plaintiff must also establish that the director's conduct consisted of or resulted from one or more of the following five kinds of misconduct:

(1) Action not in good faith;

(2) A decision that the director did not reasonably believe to be in the best interests of the corporation, or as to which the director was not informed to an extent that the director reasonably believed appropriate in the circumstances;

(3) A lack of objectivity due to the director's relationship with, or domination by, another person having a material interest in the challenged conduct that could reasonably be expected to have affected the director's judgment in a manner adverse to the corporation, unless the director establishes that the challenged conduct was reasonably believed by the director to be in the best interests of the corporation;

(4) A sustained failure of the director to devote attention to the oversight of the business and affairs of the corporation, or a failure to make an appropriate inquiry when the circumstances would alert a reasonably attentive director to the need for such an inquiry; or

(5) Receipt of a financial benefit to which the director was not entitled, or any other actionable breach of the director's duty to deal fairly with the corporation and its shareholders.

7. Burden of Proof on Loss Causation and Remedy: The person seeking to hold a director liable bears the burden of establishing that harm to the corporation has occurred, that the harm was caused by the challenged conduct, and the amount of damages or the appropriateness of any equitable relief sought.

8. Limits on Effects of 12:1-831: The rules in section 1-831 do not affect:

a. The duty to prove fairness in a director conflicting-interest transaction as provided in 12:1-863 (B) (3);

b. The fact or lack of liability of a director under another provision of the Act, such as the provision governing unlawful distributions.;

c. Any rights to which the corporation or shareholder may be entitled under another statute of this state or of the United States.

C. Protection Against Monetary Liability – 12:1-832:

1. Now the Default Rule: The new Act converts what used to be an opt-in provision, available only to the extent included in a corporation's articles of incorporation, into an opt-out provision, applicable except to the extent provided in the articles of incorporation.

2. Applies to Both Officers and Directors: The new Act retains the Louisiana approach of extending the exculpatory protections to both officers and directors. (The Model Act and Delaware extend the protections only to directors.) The drafting committee believed that the protections would be weakened substantially if they applied only to conduct in an individual's capacity as a director. In an informally managed, closely-held corporation, individuals often hold positions as both directors and officers, and often act without specifying, or even knowing, the particular capacity in which they are acting.

3. General Rule: Except as provided otherwise in the articles of incorporation, no director or officer of a corporation may be held liable to the corporation or its shareholders for money damages for any action taken, or for any failure to take action, as a director or officer.

4. Exceptions: The general rule against liability does not apply (and may not be made to apply) to liability arising from:

    a. A breach of the officer's or director's duty of loyalty to the corporation or the shareholders;

        (1) The Model Act exception for disloyalty is narrower. It applies only to the amount of an improper financial benefit received by a director.

        (2) The Louisiana comments explain that the broader exception was adopted to allow the corporation to recover all damages caused by the director's actionable disloyalty, and not merely the amount by which the director profited personally. So, for example, if an officer received a kickback for directing a transaction to a supplier that overcharged the corporation by several times the amount of the kickback, the officer could be held liable for the entire amount of the overcharge, and not merely the part that he or she received through the scheme.

    b. An intentional infliction of harm on the corporation or the shareholders;

    c. Liability imposed by 12:1-833 for an unlawful dividend; or

    d. An intentional violation of criminal law.

5. Insurance for Exceptions OK: Although the corporation may not limit or eliminate liability for conduct described by the four exceptions to the default protection provisions, the corporation purchase insurance (if available) to cover liability for that kind of conduct.

6. Rejection of Delaware Rule on High Degrees of Carelessness

    a. Taking the various exceptions to the "no liability" rule into account, the protective provisions of 12:1-832 effectively protect against carelessness (unless it results in an unlawful dividend), but not disloyalty or intentional harm or criminal behavior.

    b. Delaware has ruled that some egregious forms of carelessness may be tantamount to a violation of the director's duty of loyalty to the corporation. *Stone v. Ritter*, 911 A.2d 362 (Del. 2006).

    c. The new Act adds a non-model provision to 12:1-832 that rejects that rule. Under that provision, for purposes of 12:1-832, the duty of loyalty does not include any duty to act with any degree of care in the exercise of the director's or officer's responsibilities to the corporation or its shareholders.

XVII. Unlawful Distributions – 12:1-833

A. A director who votes for or assents to a distribution in excess of the amount that may be lawfully authorized under 12:1-1409 (governing distributions following dissolution of the corporation) or 12:1-640 (A) (i.e., all distributions other than those following dissolution) is personally liable to the corporation for the excess amount if the party asserting liability proves the director violated the standards of conduct imposed by 12:1-830.

B. A director held liable for an unlawful distribution is entitled to contribution from every other director who could be held liable, and to indemnity from each shareholder for the pro-rata portion of the unlawful distribution received by the shareholder.

C. A two-year peremptive period applies to the director's liability, measured from the date on which the compliance of the distribution with the statutory restrictions was to be measured. A one-year peremptive period applies to a director's action for contribution or indemnity, measured from the date that the director's liability was finally adjudicated.

XVIII. Officers 12:1-840 to 1-843.

A. Secretary the Only Required Officer: Unlike current law, which requires a president, secretary and treasurer, the new Act requires only one officer by name, the secretary, and actually prescribes statutory responsibilities for this named officer.

    1. The Model Act requires a person to hold a secretary's responsibilities, refers to the corporate secretary in several places in the statutes, and defines "secretary" to mean the person who holds those responsibilities. But it does not actually require that this officer be called a secretary.

    2. The Louisiana drafting committee thought it made better sense to give the standard title of "secretary" to the person to whom the statute gave the secretary's authority and duties, and to whom the statute referred as

the "secretary" of the corporation. So, the new Act requires an officer with that name. 12:1-840 (A).

B. Secretary Responsibilities: The secretary has authority and responsibility for preparing minutes of directors' and shareholders' meetings and for maintaining the records of the corporation required by 12:1-1601 (A) and (E). In addition, several other provisions authorize communications or notices to the corporation through its secretary. For example:

   1. A notice or other communication to a domestic or foreign corporation authorized to do business in this state may be delivered to the secretary at the corporation's principal office. 12:1-141 (C).

   2. An appointment of a proxy (or revocation of appointment or notice of death or incapacity of the appointing shareholder) may be delivered to the secretary. 12:1-722 (C), (E).

C. Other Officers: The board may elect or appoint other officers in a manner not inconsistent with any bylaws. An officer may appoint one or more officers if authorized to do so by the bylaws or the board. 12:1-840 (B).

D. Holding Multiple Offices: The same individual may simultaneously hold more than one office. 12:1-840 (D).

   1. Note the change from current law, which says that the same person may hold "two" of the required three offices (and thus, implicitly, not all three), but is otherwise silent about multiple offices.

   2. Note also that the new Act does not contain the rule in current law that an officer holding more than one office may not sign in more than one capacity a document or certificate that requires the signatures of two officers.

      a. The new Act, like the Model Act, generally drops those two-signature requirements. 12:1-120 (F) (to be filed, documents must be signed by "one" of the listed persons).

      b. But share certificates do still require two signatures. 12:1-625 (D).

E. Resignation and Removal – 12:1-843:

   1. Resignation: An officer may resign at any time by delivering notice to the corporation, and the resignation is effective when the notice is effective unless the notice specifies a later time.

   2. Removal: An officer may be removed, with or without cause, by the board, by the officer (or the officer's successor) who appointed the officer to be removed, or by any other officer if authorized by the bylaws or the board.

F. Contract Rights – 12:1-844

   1. As under current law, the appointment of an officer does not itself create contract rights.

2. But an officer's removal (which may occur with or without cause) does not affect any contract rights an officer may have with the corporation.

3. Similarly, an officer's resignation does not affect any contract rights the corporation may have with the officer. (The last rule makes explicit what was only implicit under earlier law.)

G. Standards of Conduct for Officers – 12:1-842

1. Unlike current law, which in most respects deals with the fiduciary duties of officers and directors in exactly the same way, the new Act follows the Model Act approach of stating the standards of conduct for directors and officers separately. The separate standards for officers do not include rules devoted to a director's decision-making and oversight functions, the duty to make disclosures to fellow directors in connection with the collective, deliberative decision-making of the board or a board committee, or the authorization of unlawful dividends.

2. The "standards of liability" that apply to directors under 12:1-831, apply to officers only to the extent they "have relevance."

3. General Standard of Conduct: An officer, when performing in that capacity, has the duty to act:

   a. In good faith;

   b. With the care that a person in a like position would reasonably exercise under similar circumstances; and

   c. In a manner the officer reasonably believes to be in the best interest of the corporation.

4. Model Act Reporting Obligation Omitted

   a. The Model Act source provision includes a subsection that requires an officer to inform the officer's superiors or other appropriate persons of any actual or probable material violation of law or breach of duty to the corporation that the officer believes has occurred or is likely to occur.

   b. The Comment to the provision explains that Louisiana rejected that subsection on grounds that it was inappropriate in the context of many of the informally-managed, closely-held corporations that dominate corporate practice in the state.

   c. The Comment explains that the deletion of the provision does not mean that no duty to provide this sort of information ever exists, but rather that the existence of the duty would turn on the general standard of conduct stated earlier in the provision.

5. Reliance: As with directors, officers who do not have information making reliance unwarranted may rely upon:

a. The performance of properly-delegated responsibilities by one or more employees of the corporation whom the officer reasonably believes to be reliable and competent in performing those responsibilities; and

b. Information, opinions, reports or statements, including financial statements, prepared by employees or outside professionals whom the officer reasonably believes to be reliable and competent in providing such information.

6. Protection:

a. The Model Act protects an officer against liability for violating the standards of conduct only by:

(1) Saying the standards must be violated before an officer may be held liable for any action or failure to act; and

(2) Applying the protective "standards of liability" applicable to directors to the extent that those standards "have relevance."

b. But recall that Louisiana extends the protections afforded by 12:1-832 (i.e., the exculpatory provisions that will apply by default beginning 1-1-15) to both officers and directors.

XIX. Indemnification and Advance for Expenses – 12:1-850 to 1-859

A. Introduction

1. Current law provides the same indemnity and advance-of-expenses rules for essentially all persons – directors, officers, employees, and agents – who are sued or subjected to other legal proceedings because of their position in the indemnifying corporation or in another corporation or entity in which the prospective indemnitee was serving at the request of the indemnifying corporation.

2. Following the Model Act lead, the new Act provides special indemnification and advance-of-expenses rules only for directors and officers. The new Act leaves the corporation free to deal with non-director, non-officer employees and agents in whatever fashion the corporation may deem appropriate, through collective bargaining agreements, employment policies and contracts, and the like.

3. The Model Act and the new Act also devote most of their attention to the indemnification and advance-of-expenses rights of directors. Greater attention is paid to directors because of the conflict-of-interest issues posed by the directors' voting to approve their own indemnification. Because the indemnity rights of non-director officers may be determined free of those conflicting interest issues, the rules concerning the indemnification of officers are more liberal than those devoted to directors.

4. As under current law, the new Act recognizes both a permissible form and a mandatory form of indemnification, if a stated standard of conduct (or success in the litigation) is met. It also authorizes the advance payment of litigation expenses before it is determined whether the required standard of conduct has been met. But the advances are made subject to a requirement of repayment if it is ultimately determined that the required standard for indemnification has not been met.

B. Mandatory Indemnification – Directors and Officers – 12:1-852 & 1-856 (C)

1. Current law requires a corporation to indemnify any director, officer, employee or agent for expenses incurred in the defense of a corporation-related proceeding against the person "to the extent that" the affected person is "successful on the merits or otherwise" in defending the proceeding.

2. The new Act requires indemnification only of directors and officers (not employees and agents), and only if the director or officer has been "wholly successful" on the merits or otherwise in defending the proceeding.

   a. Note that an agent (or "mandatary") is entitled to recover losses suffered as a result of a mandate if the mandatary is not at fault. See Civ. Code art. 3013. So, the law of mandate may substitute in some situations for the loss of the current corporate provision that extends the benefits of the "mandatory indemnification" rule to employees and agents.

   b. The "wholly successful" phrase is a deliberate Model Act change in the law. It is designed to avoid the result reached in an older Delaware decision that interpreted the current phrase ("to the extent successful") to require the indemnification of a corporate director who was convicted on several criminal counts for the expenses incurred in defending successfully against some of the counts with which he was charged.

   c. Note that the new "wholly successful" standard applies only to indemnification that is opposed by the corporation's board of directors. It does not affect the board's ability to provide permissible indemnification if it wishes to do so and if the standard of conduct for that form of indemnity is satisfied.

C. Permissible – 12:1-851

1. Default Standard of Conduct: A corporation may indemnify a director under the default statutory rules if the director conducted himself or herself in good faith and reasonably believed:

   a. In the case of conduct in an official capacity, that the conduct was in the best interests of the corporation; or

b. In all other cases, that the conduct was at least not opposed to the best interests of the corporation.

c. In a criminal proceeding, the director must have had no reasonable cause to believe that his conduct was unlawful.

(1) Technical amendments made by the legislative staff make it appear that this rule about criminal proceedings is an alternative to the satisfaction of the more general requirements in (a) or (b), but this is supposed to be an additional requirement that applies in a criminal case on top of the requirement of satisfying either (a) or (b).

(2) I expect to draft some technical amendments to take care of those types of problems.

2. Other Standards: The director may also be indemnified under the standards established under the articles of incorporation (subject to rules in 12:1-202 (B) (5) against indemnifying for such things as disloyalty or intentional criminal conduct or harm to the corporation) or for conduct covered by the exculpatory rule in 12:1-832 (subject to any rejection or limitation of that rule in the articles).

3. Special Rule for Employee Benefit Plans:

a. The Problem:

(1) Directors who are serving in a managerial capacity for an employee benefit plan may be faced with difficult choices between the interests of plan participants and the interests of the employer corporation that asked the director to serve on the plan's management body.

(2) These types of plans may hold shares or other securities issued by the employer corporation. If the employer corporation begins to suffer setbacks in its business, the value of those securities is likely to decline.

(3) The best interests of the plan beneficiaries may call for the employer securities to be sold. But the sale of those securities may not be in the best interests of the employer corporation, as those sales may trigger or contribute to a decline in the prices of those securities.

b. The Solution:

(1) The principal reason for the second of the standards of conduct for permissible indemnification (that the conduct not be opposed to the indemnifying corporation's best interests) is to allow directors serving in the management of subsidiary or affiliated corporations to act in the best interests of the subsidiary or affiliate without the director's losing his or her eligibility for indemnification by the

indemnifying corporation (typically, the ultimate parent company). The director need only believe that the conduct is not opposed to the best interests of the indemnifying corporation.

(2) But that standard may not be enough by itself to address the conflicts that arise when the best interests of employee benefit plan participants call for a sale of employer corporation securities that may, indeed, be opposed to the best interests of the employer corporation.

(3) The Act resolves that problem through a special statutory rule. That rule deems conduct that is reasonably believed to be in the best interests of plan participants to satisfy the requirement that the conduct not be opposed to the best interests of the indemnifying corporation.

4. Adverse Result Not Determinative: As under current law, the conclusion of a proceeding by a judgment, order, settlement, or conviction is not enough by itself to establish that the required standard of conduct has not been met.

5. Special Limits on Permissible Indemnification:

   a. Derivative Suits – When the relevant proceeding is one by or in the right of the corporation, a director may be indemnified only for the expenses of defending the litigation, and not for the amounts paid under a settlement or judgment in the suit.

      (1) This changes current law, which allows settlements in amounts determined by the board not to exceed the costs of litigating the proceeding to conclusion.

      (2) Although the statute does not use the term derivative suit in stating the "expenses only" limitation, that is the situation in which the limitation is most likely to apply.

         (a) Recall that this special rule applies in the case of permissible indemnification.

         (b) It is highly unlikely that management would decide first to sue a director and then to indemnify the director for the amount that the corporation was entitled to recover from the director as a result of winning the suit.

         (c) But a shareholder may pursue a derivative action over management's objection. That is when management may wish to indemnify a director in ways that the special rule prohibits.

         (d) It is also conceivable that a change in control of the corporation could lead to this type of result – a director is sued at the behest of one board, but then is indemnified by another.

b. Improper Financial Benefit: a corporation may not indemnify a director for any proceeding with respect to conduct for which the director was adjudged liable on the basis of receiving a financial benefit to which he or she was not entitled.

c. Both of the limitations on indemnification under this paragraph (5) are subject to the power of a court to order indemnification if it finds it fair and reasonable to do so. 12:1-854 (A) (3) (a).

6. Who Decides Whether Standard has been Met – 12:1-855: A corporation may indemnify a director under the permissible indemnity rules only if a determination is made in the particular proceeding that the required standard of conduct has been met. (In the case of mandatory indemnification, indemnification is required if the director is wholly successful, on the merits or otherwise, so the entitlement to indemnification is established by the outcome of the proceeding itself.)

   a. The required determination must be made by one of the following:

      (1) A majority vote of all of the qualified directors if the corporation has at least two qualified directors, or by a majority of a committee of qualified directors appointed by such a vote.

      (2) Special legal counsel selected by the vote described in (1) above or, if the corporation has fewer than two qualified directors, by the full board (including the non-qualified directors) in the usual way.

      (3) By the shareholders, except that shares owned by or voted under the control of a non-qualified director may not be voted.

   b. Separate rule for authorization:

      (1) The fact that the standard of conduct for indemnification has been satisfied does not mean that the indemnification has actually been authorized by the board.

      (2) The new Act provides that the authorization for the indemnification is to be made in the same way as the determination about the standard of conduct unless the board has fewer than two qualified directors or the determination is made by special legal counsel. In those cases, the authorization is to be made by those entitled to select legal counsel.

      (3) In effect, the full board (including the non-qualified directors) is permitted to authorize the indemnification if the board has fewer than two qualified directors.

D. Advancement of Expenses – 12:1-853

1. A corporation is permitted to advance funds to pay or reimburse expenses incurred by a director in connection with a corporation-

connected proceeding, before the final disposition of the proceeding, if the director delivers both of the following to the corporation:

a. A written affirmation of the director's good faith belief that the relevant standard of conduct for indemnification has been met by the director or that the proceeding involves conduct for which the directors is exculpated by 12:1-832. (This changes current law, which does not require any affirmation about compliance with the standard of conduct or exculpatory provisions.)

b. A written undertaking to repay the advanced funds if the director is not entitled to mandatory indemnification and is ultimately determined not to have met the required standard of conduct for permissible indemnification.

   (1) This undertaking must be an unlimited general obligation of the director.

   (2) But the undertaking need not be secured, and may be accepted by the corporation without reference to the financial ability of the director to make the repayment.

2. The authorization of the advancement of expenses must be made in much the same way as a determination whether a director has met the required standard of conduct for permissible indemnification:

   a. By a majority vote of all qualified directors, if at least two directors are qualified (or by a committee selected by those qualified directors), or by the full board in the usual way if at least two directors are not qualified; or

   b. By the shareholders (but without allowing shares owned by or voted under the control of a non-qualified director to vote).

E. Departure from Statutory Rules – 12:1-857 & 858

1. Limitations: a corporation's articles may limit any of the rights to indemnification or advancement of expenses provided by the Act.

2. Advance Obligations:

   a. A corporation may obligate itself in advance of an act or omission giving rise to a proceeding to provide indemnification or advancement of expenses for the proceeding as permitted by the Act.

   b. The advance obligation may be provided through a provision in the articles or bylaws, a board resolution, or a contract approved by the board or the shareholders.

   c. The advance obligation satisfies the requirement that the indemnification or advance be authorized (assuming the required standard of conduct is met for indemnification or the required written affirmation and undertaking are provided for an advance).

d. Except as specifically provided otherwise, a provision that obligates the corporation to provide indemnification to the fullest extent provided by law also obligates the corporation to advance expenses to the fullest extent permitted by law.

e. Unless provided specifically to the contrary, an advance obligation for indemnification or advancement of expenses does not obligate the corporation to indemnify or advance expenses to a director of a predecessor corporation pertaining to conduct with respect to the predecessor. But the advance-commitment obligations of the predecessor corporation may become obligations of the surviving corporation through the effects of a merger.

f. An advance obligation in effect at the time of an act or omission may not be eliminated or impaired with respect to that act or omission by an amendment or provision adopted after the act or omission, unless the advance obligation provision explicitly authorized that kind of retroactive elimination or impairment.

3. Insurance – 12:1-857:

a. A corporation may purchase and maintain insurance against liability arising from a person's status as an officer or director regardless of whether the corporation could indemnify or advance expenses for the conduct covered by the insurance.

b. A current provision that applies this exceptional rule to "self-insurance" has been eliminated.

c. Of course, a corporation may continue to self-insure its indemnity and advancement-of-expense risks. But it may not circumvent the statutory restrictions on indemnification and advancement of expenses by calling its extra-statutory arrangement "self-insurance."

F. Where Statutory Rules Do Not Apply: The statutory provisions on indemnification and advancement of expenses do not limit a corporation's ability to indemnify or advance expenses for an employee or agent, or to pay or reimburse the expenses of a director or officer in connection with appearing as a witness in a proceeding to which the director or officer is not a party. 12:1-858 (E) & (F).

G. Statutory Rules Exclusive – 12:1-859: A corporation may indemnify or advance expenses to a director or officer only as permitted by the Subpart on indemnification.

XX. Director Conflicting Interest Transactions

A. Introduction:

1. Current law contains a provision, RS 12:84, that addresses so-called "self-dealing" transactions between a corporation and one or more of its officers or directors (or with entities in which the officers or directors

hold a managerial or financial position). Section 84 is based on a provision that had been adopted in Delaware and by the Model Business Corporation Act shortly before the current Louisiana Business Corporation Law was enacted in 1968.

2. This provision was designed to override a common law rule that made self-dealing transactions between a corporation and one or more of its directors automatically voidable at the option of the corporation.

3. For that reason, § 84 provides that a self-dealing transaction is not void or voidable if at least one of three disjunctive requirements is satisfied:

   a. after full disclosure of the relevant facts, the transaction is approved in good faith by a vote of directors sufficient to authorize the transaction without counting the votes of the interested directors;

   b. after full disclosure of the relevant facts, the shareholders in good faith approve the transaction (despite the lack of any reference to not counting the votes of interested shareholders, the jurisprudence holds that interested shareholder votes may not be counted for purposes of satisfying this second test); or

   c. the transaction is fair to the corporation at the time that it is authorized, ratified or approved by the board, a board committee or the shareholders

4. Competing with the statutory rule is a jurisprudential rule that requires the person who is engaged in the self-dealing to prove the inherent fairness of the transaction under rigorous judicial scrutiny.

5. Louisiana courts have used the jurisprudential rule, not the statutory rule, to resolve most self-dealing issues. And Delaware has ruled both that compliance with the statute does not validate a transaction, and that failure to satisfy the statute does not invalidate a transaction.

6. Hence, it's not clear just what compliance (or noncompliance) with the statute is supposed to do for directors who engage in transactions with their own corporations. Compliance probably helps some. But a director who holds a conflicting interest in a corporate transaction takes the risk that he may be unable to convince a judge or jury, viewing a transaction in hindsight, that the transaction was fair to the corporation at the outset.

7. The new Act, like the Model Act, replaces the "not automatically voidable" approach of current law with a set of rules that is designed, first, to limit the transactions that may be attacked on grounds of a director's conflicting interest and, second, to provide a reliable means of protecting a conflicting interest transaction from later attack – if appropriate disclosures are made and appropriate approvals are obtained – on grounds of the conflict of interest.

B. Definition of "Director's Conflicting Interest Transaction" – 12:1-860 (1).

1. A director’s conflicting interest transaction is one that corporation or an entity controlled by the corporation effects or proposes, in which the director:
   a. Is a party;
   b. Knows that he or she has a material financial interest; or
   c. Knows that a related person:
      (1) is a party; or
      (2) has a material financial interest.
2. The knowledge of the director is to be determined “at the relevant time,” meaning that time at which the corporation or its controlled entity becomes legally obligated to consummate the transaction or, if the directors’ action required to protect the transaction from attack is undertaken, at the time of that action. Note that a transaction cannot be a “director’s conflicting interest transaction” if the director is not a party and does not have actual knowledge of both the transaction and of his or her (or a related party’s) material financial interest in the transaction at this relevant time.
3. “Material financial interest” means a financial interest in the transaction that would reasonably be expected to impair the objectivity of the director’s judgment when participating in action on the authorization of the transaction. The Official Comments to the Model Act explain that the term “financial” interest is used to reject the idea that a transaction between the corporation and some other entity (such as the director’s alma mater) with which a director might have some emotional connection could be considered a “director’s conflicting interest transaction.
4. “Related person” is defined to include a specific list of relationships, such as spouses, certain family, step-family, or in-law relationships, and entities controlled by the director or by an employer of the director, or in which the director holds listed managerial positions.
   a. The Model Act does not include any “catch-all” residual category for other types of relationships, providing greater certainty (but also a potential loophole) concerning the relationships that might trigger concern about the objectivity of a director’s judgment in approving the transaction.
   b. Louisiana’s version of the Act does add such a residual category. A person is a “related person” to a director if the director has a “material relationship” with that person.
   c. “Material relationship is defined in 12:1-143 (B) to mean any form of relationship that would reasonably be expected to impair the

objectivity of the director's judgment when participating in the action to be taken.

d. This residual category does sacrifice some of the greater predictability and certainty of the Model Act approach, and may also be used to undercut the function of the "financial" part of the "material financial interest" portion of the definition of a director's conflicting interest transaction.

e. But it does close potential loopholes. The example cited in the Louisiana comments is a person with whom a director was having an adulterous affair. Under the Model Act, an adulterous lover's financial stake in a transaction would not cause the transaction to be treated as a conflicting interest transaction for the director.

C. Transaction Protected if not a Director's Conflicting Interest Transaction – 12:1-861(A): The interest of a director in a corporate transaction does not provide grounds for any form of judicial relief, remedy, or damages in favor of the corporation or a shareholder if the transaction does not meet the definition of a "director's conflicting interest transaction.

D. Transaction Protected Despite Conflicting Interest – 12:1-861 (B)

1. If a transaction does meet the definition of a director's conflicting interest transaction, the interest of a director in the transaction still does not provide grounds for equitable relief, damages or other sanctions against the director in favor of a shareholder or the corporation if:

a. The form of director approval required by 12:1-862 was provided at any time;

b. The form of shareholder approval required by 12:1-863 was provided at any time; or

c. The transaction, judged according to the circumstances at the "relevant time" is established to have been fair to the corporation.

d. A transaction is "fair to the corporation" if the transaction as a whole was beneficial to the corporation, taking into appropriate account whether it was fair in terms of the director's dealings with the corporation and comparable to what might have been obtainable in an arm's length transaction, given the consideration paid or received by the corporation. 12:1-860 (6).

E. Director and Shareholder Approval Requirements – 12:1-862 & 863.

1. Similarities in Director and Shareholder Approvals: Although the requirements for the kind of director and shareholder approval that will protect a conflicting interest transaction are covered in two separate sections, both sections require some version of essentially two things:

a. Disclosure to the voting directors or shareholders, to the extent not already known, of both:

(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 a director fee of such conflicting interest would reasonably believe to be material in deciding whether to proceed with the transaction; and

b. Approval of the transaction strictly by "qualified" directors or shareholders, i.e., directors or shareholders who are neither themselves parties or holders of a material financial interest in the transaction, nor related persons of those who are parties or hold such a material financial interest.

(1) In both types of approval, the normal quorum requirement is relaxed to require only a majority of the qualified directors or shares. 12:1-862 (C) & 863 (D).

(2) In both cases, approval requires a majority of the votes cast by those that are "qualified," i.e., nonconflicted.

(3) The quorum requirement is relaxed only for purposes of getting the required "qualified" approval to protect the transaction from attack on grounds of the director's conflicting interest.

(4) If the quorum or vote of the qualified directors or shareholders would be insufficient to approve the transaction under the normal rules for the authorization of such a transaction (without regard to the conflicting interest issue), that normal authorization is also required. Non-qualified directors or shareholders may participate in that vote. 12:1-862 (D) & 863 (F).

2. Differences in Director and Shareholder Approval Requirements:

a. Minimum of Two Qualified Directors; All Committee Members Must be Qualified

(1) In the case of the director-approval procedure, at least two qualified directors must vote to approve the transaction; and

(2) If the approval is provided by a committee of the board, all members of the committee must be qualified.

b. Disclosure Modification in Director-Approval Procedure:

(1) In the case of director approval, the requirements for the disclosure of information is subject to an exception that is designed to deal with the possible conflict between the director's normal duty of disclosure and the professional, legal or ethical duty the director may owe to a related person not to disclose that information.

(2) For example, a director on corporation A's board may also serve as a director for unaffiliated corporation B, and corporations A and B may be considering a transaction between one another. The

director's relationship with the two corporations will cause the transaction between the two companies to be treated as a conflicting interest transaction for the director with respect to both corporations. But the director may owe a duty to one or both corporations not to disclose every material thing he knows about the transaction to the other corporation.

(3) In that case, where it is strictly the related person's involvement or financial interest in the transaction that creates the conflicting interest for the director (and not the interests of the director personally), the director-approval provision allows the director not to provide disclosure to the extent that the director reasonably believes that doing so would violate a duty imposed under law, a legally enforceable obligation of confidentiality or a professional ethics rule.

(4) The nondisclosure is permitted only if the director does disclose:

  (a) all required information not covered by the relevant duty of confidentiality;

  (b) the existence and nature of the director's conflicting interest; and

  (c) the nature of the conflicted director's duty not to disclose the confidential information.

(5) This limited exception to the ordinary disclosure requirements does not apply where shareholders, rather than directors, are taking action on a conflicting interest transaction.

  (a) The Official Comments to the Model Act state that the difference in approach is intentional. Because shareholders (especially those in public companies) are unable to engage in a collegial discussion to explore and fully understand the nature of the confidentiality duty and the implications of the withheld information, the Act does not permit a conflicted director to obtain the benefits of shareholder approval of the transaction unless the director discloses all of the required information.

  (b) The Comments suggest that, in the context of a closely held corporation, some benefit might be obtained by getting shareholder approval in accordance with all the normal requirements except for the withholding of information as permitted in the case of a director approval of the transaction.

  (c) That type of approval still would not by itself trigger the statutory protection afforded by a true, fully-compliant shareholder approval. But the Comment suggests that "a court could attach significance to a favorable shareholder vote in evaluating the fairness of the transaction to the corporation.

c. Required Absence of Conflicted Director in Director-Approval Procedure

(1) In a director-approval procedure, the qualified directors must deliberate and vote outside the presence and without the participation of any other director (i.e., any non-qualified director).

(2) Note that the Official Comments require disclosures by the conflicted directors, and even a quizzing of a director who is withholding some information on grounds that he owes duties of confidentiality to a related person in the transaction.

(3) So, the requirement that the directors deliberate outside the presence of the conflicted directors does not mean that the conflicted directors may not engage in discussions about the transaction with the qualified directors.

(4) Rather, the requirement of deliberation and voting outside the presence and without the participation of the conflicted directors appears designed to require such a process following the conclusion of any discussions about the transaction between the conflicted and qualified directors.

(5) This separate and private deliberation and voting is not required as part of the process for shareholder approval of a conflicting interest transaction.

d. Required Disclosure of Non-qualified Shares in Shareholder Procedure

(1) If shareholder approval of conflicting interest transaction is sought, a conflicted director is required to disclose in writing to the secretary (or other officer or agent authorized to tabulate votes) the number of shares that the director knows are not qualified and the identity of the holders of those shares. 12:1-863 (B).

(2) "Qualified" shares means all shares entitled to be voted other than those that the tabulator of the votes either knows is notified by a conflicted director not to be qualified. 12:1-863 (C) (2).

(3) If a director fails to comply with the obligation to provide written notice of the non-qualified shares, but the shareholder approval complies in all other respects with the requirement for shareholder approval of a conflicting interest transaction and the director establishes that the failure was not intended to influence, and did not influence, the vote, then the court may take such

action, and give such effect to the shareholder vote, as the court considers appropriate in the circumstances. 12:1-863 (E)

XXI. Business Opportunities – 12:1-870

A. The new Act adopts the Model Act approach to business opportunities (sometimes called "corporate opportunities") without any change.

B. The new Act does not attempt to define a business opportunity, but it provides a mechanism through which the corporation may disclaim any interest in the opportunity in essentially the same way that qualified directors or shareholders may approve a conflicting interest transaction. 12:1-870 (A).

C. The major difference between the business opportunity and conflicting interest approval requirements is that the conflicting interest approval may be given at any time, either before or after the transaction in question is consummated, while the corporation's disclaiming an interest in a business opportunity must occur before the director becomes legally obligated respecting the opportunity. 12:1-670 (A); Model Act Official Comment 1.

D. Except for the requirement of prior disclaimer,

1. The procedure for director approval of the disclaimer is the same as for a conflicting interest transaction. 12:1-670 (A) (1)

2. The procedure for shareholder approval of the disclaimer is also the same, except that, instead of making the "required disclosure" to the shareholders, the director is required to disclose to those acting on behalf of the corporation all material facts concerning the opportunity that are then known to the director. 12:1-870 (A) (2).

E. If the corporation properly disclaims an interest in the business opportunity, the director's taking advantage of the opportunity may not be the subject of any form of relief, or give rise to an award of damages or other sanctions against the director, in a proceeding by a shareholder or by or in the right of the corporation, on the ground that the opportunity should have first been offered to the corporation. 12:1-870 (A).

F. A director's failure to utilize the procedures made available for the corporation to disclaim its interest in the opportunity does not create any inference that the opportunity should have been first presented to the corporation, or alter the burden of proof otherwise applicable to establish that the director breached a duty to the corporation. 12:1-870 (B).

XXII. Amendment of Articles of Incorporation – 12:1-1001–1009.

A. In General: A corporation may amend its articles of incorporation at any time to add or change a provision that is required or permitted to be included in the articles on the effective date of the amendment, or to delete a provision that need not be contained in the articles. 12:1-1001 (A).

B. Shareholders Have No Vested Rights in Terms of Articles – 12:1-1001 (B): A shareholder of the corporation does not have a vested property right resulting from any provision in the articles.

C. No Retroactive Effects as to Corporate Proceedings or Third Party Rights – 12:1-1009: An amendment of the articles 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.

D. Duration Amendment:

  1. An amendment that extends the duration of the corporation may be adopted even after the duration expires unless:

     a. Articles of termination or a certificate of termination has been filed and the existence of the corporation has not been reinstated;

     b. Articles of dissolution have been delivered to the secretary of state and not revoked; or

     c. A judgment ordering dissolution has become final. 12:1-1001 (C).

  2. Retroactive Effect: A duration-extending amendment is adopted and given effect as if the duration had not expired. 12:1-1001 (D).

E. Amendment Procedure – Required Approval

  1. Before Shares are Issued – 12:1-1002: If the corporation has issued no shares, an amendment of the articles may be adopted by the board, or by the incorporators if no board has been named.

  2. By the Board Alone – 12:1-1005: Except as otherwise provided in the articles, an amendment of the articles may be adopted by the board (without any shareholder vote) to do any of the following:

     a. To classify or reclassify unissued shares or to establish the terms of unissued shares as authorized in articles by a so-called "blank" shares provision under 12:1-602 (A) or (B).

     b. If the corporation has only one class of shares outstanding:

        (1) To change each issued and unissued share into a greater number of whole shares (i.e., to split the stock); or

        (2) To increase the number of authorized shares as needed to issue a share dividend.

     c. To reflect a reduction in authorized shares when the corporation has reacquired its shares and the articles prohibit the reissue of the acquired shares; and if all of the shares of a class have been reacquired when such a provision prohibits reissue, to delete that class of shares.

d. To delete the “initial report” type information from the articles – the initial directors, and, if appropriate change forms have been filed, the initial registered agent, initial registered office, and initial principal office.

e. To change the corporation’s name by adding, deleting, or changing a geographical attribution for the name, or by substituting one of the corporation designations or abbreviations for another (e.g., Inc. for Corp.).

f. To extend the corporation’s duration if it was incorporated when a limited duration was required.

g. To restate the articles to consolidate all amendments into a single document (and without any new amendment that would require shareholder approval). 12:1-1007 (A) & (B).

3. To Carry Out A Bankruptcy (or other federal law) Reorganization – 12:1-1008:

   a. A corporation’s articles may be amended without board or shareholder approval to carry out a plan of reorganization ordered or decreed by a court of competent jurisdiction under the authority of a law of the United States.

4. By Shareholders – 12:1-1003 (B): Except as provided in paragraphs (1) – (3) above, amendments of the articles must be adopted by the shareholders.

   a. The Model Act would require the board of directors to adopt an amendment, and to make a recommendation to shareholders concerning the amendment, before submitting the amendment to shareholders for their approval.

   b. Current Louisiana law does not require prior board approval for an amendment of the articles by shareholders. 12:31. And, in the context of closely held corporations, the Louisiana drafting committee did not see a need to have the same controlling persons approve an amendment twice, once in their capacity as directors, and once again, after recommending it to themselves, in their capacity as shareholders.

   c. So, the new Act adopts the Model Act approach only for a public corporation, defined in 12:1-140 (18A) to mean a corporation with shares listed on a national securities exchange or regularly traded in a market maintained by one or more members of a national securities association.

   d. The committee recognized that some corporations would fall in between a truly public corporation and the kind of closely-held firm that the committee had in mind in suggesting that board approval in closely-held firm would do little but introduce pointless extra paperwork into the process.

(1) But in those cases, in which the board of a non-public company might be elected by a fairly large number of passive-investor shareholders, the committee believed the practical necessities associated with drafting and proposing an amendment to the articles would almost always result in prior board action, even in the absence of a legal requirement to that effect.

(2) And if shareholders were somehow capable of calling a meeting and of obtaining the required votes to amend the articles, either without the board or over its objection, the committee believed that the shareholders should prevail.

5. In a Non-Public Corporation – 12:1-1003 (A):

   a. If a corporation has issued shares, but is not a public corporation, an amendment of the articles must be approved by shareholders, either in a meeting or by written consent.

   b. If the amendment is to be approved at a meeting:

      (1) The corporation must notify each shareholder, whether or not entitled to vote, of the meeting, and the notice must state the purpose of the meeting and include or be accompanied by a copy of the proposed amendment.

      (2) Unless the articles require a greater vote, the amendment must be approved by a majority of the shares entitled to vote on the amendment.

      (3) If any class or series of shares is entitled to vote as a separate voting group on the amendment, the amendment must also be approved by a majority of the shares of each group entitled to vote on the amendment as a separate voting group.

      (4) Note that the approval level required – a majority of shares entitled to vote – is a change from current law, which requires 2/3 of the shares entitled to vote that are present in person or by proxy at the meeting.

         (a) This is an increase for a meeting with a bare majority quorum – 2/3 of just over 50% is just over 33 1/3%.

         (b) But is a decrease from the old number in a meeting at which most or all shares are present.

         (c) The Louisiana committee rejected the Model Act rule, which would have permitted an amendment by a majority of the votes cast at a meeting at which a majority of shares were present, meaning.

(d) That would have meant that just over 25% of the shares could approve an amendment in a meeting with a bare majority quorum, and even fewer than 25% of the shares could approve the amendment if some of the shares represented at the meeting abstained from voting.

c. If the amendment is to be approved by written consent, the approval process is governed by 12:1-704.

(1) Because all shareholders, both voting and nonvoting, are entitled to notice of a proposed amendment of the articles of incorporation, if the amendment is approved by written consent, the corporation must give the nonvoting shareholders notice of the amendment not more than 10 days after written consents sufficient to approve the action have been delivered to the corporation (or after a tabulation date approved by the board). 12:1-704 (E).

(2) If the articles permit action by less than unanimous written consent, and an amendment is approved by less than unanimous written consent, the same kind of notice, by the same deadline, must be sent to the nonconsenting shareholders entitled to vote on the amendment. 12:1-704 (F).

(3) The notices sent under paragraphs (1) & (2) must reasonably describe the action taken and be accompanied by the same material (in this case, a copy of the amendment) that would have been required to be sent to such shareholders had the action been considered at a meeting. 12:1-704 (E) & (F).

d. In a Public Corporation – 12:1-1003 (B).

(1) The shareholder approval process is the same as in a non-public corporation. But it must be preceded by the following board action.

(2) The board must adopt the amendment, and submit it to the shareholders for their approval.

(3) The board must also transmit to the shareholders a recommendation that they approve the amendment unless the board determines that because of conflicts of interests or other special circumstances it should not make a recommendation, in which case the board must transmit to shareholders a basis for its determination.

e. When Separate Class Voting Required – 12:1-1004:

(1) If a corporation has more than one class of shares, the holders of an outstanding class or series of shares is entitled to vote as a separate voting group if a proposed amendment would have the effect of doing any of eight things that may be summarized as

changing the terms applicable to that class of shares, either directly or through some exchange or reclassification of the shares, or the creation or an increase in the rights of a class of shares that is senior in distribution rights to the class of shares whose voting rights is being determined.

(2) If an amendment would affect more than one class or series of shares in the same or a substantially similar way, the holders of all of those classes or series are treated as a single voting group.

(3) Shares are entitled to class voting rights as provided in 12:1-1004 even if the articles of incorporation provide that the shares are nonvoting shares.

6. Amendment Procedure – Articles of Amendment – 12:1-1006: After an amendment of the articles of incorporation has been adopted as required, the corporation must deliver to the secretary of state for filing articles of amendment. The articles of amendment must include the text of the amendment, or the information required by 12:1-120 (L)(5) concerning facts ascertainable outside the articles of incorporation.

XXIII. Adoption and Amendment of Bylaws

A. Adopt or Amend

1. Section 2.06 (a) of the Model Act requires the incorporators or initial board of directors to adopt initial bylaws for the corporation as part of the incorporation process. Accordingly, Chapter 10 of the Model Act deals strictly with the amendment or repeal of bylaws.

2. The corresponding section of the new Act in Louisiana merely authorizes the board to adopt bylaws. 12:1-206 (A). To avoid any suggestion that the bylaws, if any, must be adopted during the incorporation process, the board's authority to adopt bylaws is repeated outside Part 2, in Part 10, dealing with the amendment of the bylaws, in 12:1-1020 (B).

B. Shareholders' Power to Amend: Shareholders may amend or repeal the corporation's bylaws. 12:1-1020 (A).

C. Board of Director's Power to Amend: The board of directors may adopt, amend or repeal the bylaws unless:

1. the shareholders, in amending, repealing, or adopting a bylaw expressly provide that the board of directors may not amend, repeal, or reinstate that bylaw; or

2. the power to amend or repeal the bylaws is reserved exclusively to shareholders in whole or in part by:

a. the articles of incorporation;

b. 12:1-1021, concerning bylaws that increase the quorum or voting requirement for the board of directors; or

c. 12:1-1022, concerning a special procedure in public corporations for shareholders to vote against the retention of a director

D. Increases in Quorum or Voting Requirements for Board – 12:1-1021:

1. A board-adopted bylaw that increases the quorum or voting requirements of the board of directors may be amended or repealed by the board or shareholders.

2. A shareholder-adopted bylaw of that kind may be amended or repealed only by the shareholders, unless the bylaw provides otherwise, and the bylaw may provide that it may be amended or repealed only by a specified vote of either the shareholders or the board of directors.

3. Action by a board to amend or repeal a bylaw that changes the quorum or voting requirement for the board must meet the same quorum requirement and be adopted by the same vote required to take action under quorum and voting requirement then in effect or proposed for adoption, whichever is greater.

E. Public Corporation "Vote Against" Bylaws –12:1-1022.

1. Ordinarily, shareholders are entitled to vote in the election of directors only in favor of their chosen candidates. They are not entitled to vote against a director. The only way to defeat a disfavored director is to vote in favor of other candidates so they receive enough votes to displace the disfavored director as one of the successful director candidates.

2. The new Act, like the Model Act, permits the bylaws of a public corporation to create a mechanism under which shareholders are entitled to vote against a disfavored director, and through that mechanism, to force a director out of office if the director receives more votes against his reelection than in favor of it.

XXIV. Mergers, Business Combinations, Domestications and Conversions

A. Introduction

1. Traditionally, corporation statutes provided for essentially three types of business combination transactions: mergers, consolidations and sales of substantially all assets.

2. Modern law has added a variety of other, similar transactions to accomplish legal or business objectives that used to be accomplished through some type of merger transaction.

a. A 100% acquisition of another corporation's shares (turning the acquisition target into a wholly owned subsidiary) could be carried out through a reverse triangular merger. But a new form of transaction, called a share exchange, was devised to support the same business and legal result, but without the need to create a new acquisition subsidiary (one of the three corporations in the "triangular" structure of the transaction).

b. Similarly, if a corporation wished to change its state of incorporation, it could create a new shell corporation in the target state, and then merge the existing corporation into the new corporation, having the new corporation survive. A new type of transaction, called a "domestication" may now be used in many states to accomplish the same thing. And, once again, the need to create a new shell corporation is eliminated.

c. If a corporation wished to convert from a corporation into a partnership or LLC, it could create a new shell partnership or LLC, merge itself into the new entity, and have the new entity survive the merger transaction. In modern law, a new type of transaction, called an entity conversion, can be used in many states to accomplish the same result.

3. On the other hand, one of the older types of transaction, the consolidation, is almost never used. Business combination transactions will usually be designed to preserve the various licenses and contracts held by the target company, as some of those licenses and contracts may be considered "personal" or non-assignable for some reason. Hence, the transaction is structured so that the entity with the non-transferable assets survives. But, in a consolidation, none of the companies in existence before the transaction survives. Rather, all of them are extinguished, and a brand-new company "results" from the consolidation. That result is seldom desired, so consolidations are almost never used. The Model Act (and the new Act) in Louisiana no longer cover consolidations as a distinct form of transaction. Rather, it is treated as a type of merger in which a new entity comes into being under the terms of the plan of merger.

4. The Model Act scatters its various business combination, domestication and conversion transactions – and the appraisal rights (called "dissenters' rights under current Louisiana law) – across four different chapters:

   a. Chapter 11 on Merger and Share Exchange;

   b. Chapter 12 on Sale of Substantially All Assets;

   c. Chapter 13 on Appraisal Rights; and

   d. Chapter 9 on all of the other, more recently-invented merger-like transactions:

      (1) Domestication

      (2) Nonprofit Conversion

      (3) Foreign Nonprofit Domestication and Conversion; and

      (4) Entity Conversion.

5. Appraisal Rights, of course, are not a form of transaction, but rather a remedy available to shareholders as essentially a withdrawal mechanism

(at fair value paid in cash) in connection with some of the corporate transactions covered in Chapters 9, 11 and12.

6. Among the transactions themselves, all must be authorized in essentially the same way. They differ only in the result they produce.

7. For that reason, this outline will first differentiate among the transactions in terms of the effects they produce. The outline will then turn to the basic approval and filing procedures that the transactions have in common with one another.

B. Merger: in a merger one or more existing corporations or other "eligible entities" (i.e., non-corporate business entities) combine into a single surviving firm. All but one of the combining firms is extinguished, and the assets and liabilities of all of the combining firms are owned or owed by the surviving entity. 12:1-1107 (A).

C. Share Exchange: All of the shares of one or more classes of shares is exchanged for whatever consideration is specified in the plan of merger. In most cases, the shares to be acquired will be the common shares of an acquisition target, which results in the target company's becoming a wholly-owned subsidiary of the other party to the transaction. Unlike a merger, a share exchange does not create or extinguish the existence or juridical personality of any of the parties to the transaction. 12:1-1107 (B).

D. Sale of Substantially All Assets: A corporation sells all or substantially all of its assets to another entity for some agreed consideration. (In theory, the assets could be sold to an individual, but that virtually never happens as a practical matter – the buyer is not going to want to operate the acquired business as a sole proprietor.)

1. Like the share exchange, a sale of assets has no direct effect on the juridical personalities of the parties, although the selling corporation may choose to dissolve and wind up its affairs after the asset sale. (But it may also stay in existence and reinvest the proceeds of the sale into a new business or, if it received other assets in exchange for the sold assets, to utilize those assets in new business operations.)

2. Obviously, corporations sell assets all the time without triggering any obligation to go through a merger-like authorization process, and without triggering any right on the part of dissatisfied shareholders to assert appraisal rights.

3. Unlike other merger-like transactions, considerable uncertainty can exist whether a sale of asset transaction really does require merger-like procedures, or can be carried out in the usual way by corporate management.

4. Under the new Act, a sale of assets triggers the special approval provisions and appraisal rights only if it is outside a list of excepted transactions, including transactions in the ordinary course of business,

and if the sale would leave the corporation without a significant continuing business activity. If the corporation retains a business activity that represents at least 25% of its assets and of either revenues or pre-tax income from continuing operations for the preceding fiscal year, the corporation is conclusively presumed to have retained a significant continuing business activity. 12:1-1202 (A).

E. Domestication is a transaction through which a corporation changes its state of incorporation. And, despite the name, the domestication can be either incoming (a foreign corporation becomes a Louisiana corporation) or a outgoing (a Louisiana corporation becomes a foreign corporation).

   1. Like a merger, a domestication has its effects at the level of the entity – changing the juridical entity in some way – but, unlike a merger, a domestication involves only one corporation, and does not result in the termination of any juridical personality.

   2. Indeed, when the domestication takes effect, the affected corporation is deemed to be the very same corporation as before, just one that has changed its state of incorporation.

   3. Indeed, the chief difference between a domestication and a merger into a new shell entity in the target state lies precisely in the fact that a merger extinguishes the existence of the "old" corporation while a domestication is viewed as the old corporation continuing to exist, simply in a different state of incorporation. 12:1-924 (A) (6).

F. Nonprofit Conversion is a transaction through which a domestic business corporation becomes a domestic or foreign nonprofit corporation. As with the domestication, the theory is that the corporate personality of the corporation engaged in the transaction is not extinguished and replaced by that of a new corporation, but rather that the old business corporation continues in existence, with the same juridical personality after the transaction as before, but as a nonprofit rather than business corporation. Note that the nonprofit conversion transaction cannot be used to convert a nonprofit corporation into a business corporation. 12:1-934 (A) (6).

G. Foreign Nonprofit Domestication and Conversion is similar to the Nonprofit Conversion described in the preceding paragraph, except that the initiating corporation in the Foreign Nonprofit Conversion and Domestication is a foreign, rather than domestic, business corporation, and the transaction combines the effect of both a nonprofit conversion and a domestication, so that the foreign business corporation becomes a domestic nonprofit corporation. Once again, the legal theory is that the domestic nonprofit corporation that emerges from the transaction has the same juridical personality as the foreign business corporation that initiated the transaction. 12:1-942 (A) (6).

H. Entity Conversion

1. The Model Act limits entity conversion transactions to those in which a domestic business corporation is either the converting or converted entity.
2. Current Louisiana law permits the conversion of domestic business corporations into domestic unincorporated entities, and the conversion of domestic unincorporated entities either into a domestic business corporation or into another form of domestic unincorporated entity.
3. The new Act combines the rules governing the procedures for both sets of transactions, those covered by the Model Act and those covered by existing Louisiana law, and places them all into the Entity Conversion provisions in Subpart E of Part 9 of the new Act. The former domestic conversion rules that govern the continuation of licenses for the converted entities, and a provision concerning the filing of short-period tax returns for the pre-conversion entity, are retained as R.S. 12:1601-1604.
4. As combined, an Entity Conversion under the new Act is a transaction by which:
   a. A domestic corporation may become a domestic or foreign unincorporated entity (such as a partnership or LLC) 12:1-950 (A) &(B);
   b. A domestic unincorporated entity may become a domestic business corporation or another form of domestic business entity 12:1-950 (C); or
   c. A foreign unincorporated entity may become a domestic business corporation. 12:1-950 (D).
5. As with a Domestication or Nonprofit Conversion, the juridical personality of the converted entity is deemed to be the same as that of the converting entity. 12:1-955 (A) (7).

I. Procedures

1. All of the various forms of business combination and conversion transactions require that the plan for the transaction first be adopted by the board of directors (and under the law applicable to unincorporated entities, by the appropriate managerial body, if any) and then submitted for approval to the shareholders (or other owners in an unincorporated entity).
   a. An exception exists for so-called "short form mergers," in which 90%-or-greater subsidiary corporations are merging with the parent or with one another. In those cases, the transaction may be approved without a vote of the board or shareholders of the subsidiary and, in some cases, without a vote of the parent company shareholders.

b. The new Act, like the Model Act, also modifies the traditional rule that required the shareholders of all parties to a merger (except for the subsidiary shareholders in a short form merger) to vote on the transaction, and that required only the shareholders relinquishing their shares in a share exchange to vote. Under the new Act, the shareholders of a corporation that is a party to a merger or share exchange are entitled to vote on a merger or share exchange unless:

   (1) The corporation will survive the merger or share exchange;

   (2) Its articles of incorporation will not be amended, except in ways that the board is entitled to amend the articles without a shareholder vote under 12:1-1005;

   (3) Each shareholder of the corporation whose shares were outstanding before the merger will hold the same number of shares, with identical preferences, limitations, and relative rights after the merger or share exchange; and

   (4) The issuance in the merger or share exchange of shares or other securities convertible into or rights exercisable for shares does not require a vote under 12:1-621 (F) (i.e., if those shares or rights would comprise more than 20% of the voting power of the shares outstanding immediately before the transaction).

c. In a share exchange, each class or series of shares to be acquired is entitled to vote as a separate voting group.

d. In a sale of substantially all assets, only the shareholders of the selling corporation are entitled to vote.

e. In all cases in which the board is submitting a plan to shareholders, the usual Model Act requirement that the board make a recommendation to the shareholders applies. The recommendation must be made or, if because of conflicts of interest or other special circumstances, the board determines that the recommendation should not be made, the board must inform the shareholders of the basis for its "no recommendation" determination.

2. As with other "fundamental" votes, the Model Act would permit approval by a majority of the votes cast at a meeting at which a majority of voting power quorum was present. But the Louisiana version of the Act requires approval by a majority of the votes entitled to be cast on the transaction.

3. Separate approval by separate voting groups is required if the transaction would have an effect that would otherwise trigger that type of separate voting.

4. If the transaction involves a foreign entity, the foreign law must approve the type of transaction being carried out, and the foreign entity must comply with the procedures required for such a transaction by the applicable foreign law.

5. If the entity that emerges from the transaction is to be a foreign entity, the domestic corporation that is participating in the transaction (which is about to become a foreign entity) is required to deliver to the secretary of state for filing articles of charter surrender. Those articles take effect as provided under the general rules in 12:1-123, and would likely be delivered in advance with a delayed effective date and time that coordinated with the consummation of the transaction that would cause the entity to become a foreign entity.

6. Unless the plan for a transaction provides otherwise, the transaction may be abandoned by the board of directors even after it is approved by shareholders, without the need to obtain a shareholder vote on the abandonment. If the transaction is abandoned after articles for the transaction have been delivered for filing to the secretary of state (with a delayed effective date, obviously), a statement stating that the transaction has been abandoned must be delivered for filing to the secretary of state before the effective date of the transaction. Upon filing of that statement, the transaction is deemed abandoned, and does not become effective.

7. If the transaction is "outgoing," meaning that a foreign corporation is taking the place of a Louisiana corporation, the foreign corporation remains obligated to pay any appraisal rights provided by Louisiana law; remains subject to the personal jurisdiction of Louisiana courts for purposes of enforcing those rights, and may be served in accordance with the law applicable to service of process on such a foreign entity.

XXV. Appraisal Rights

A. Introduction

1. "Appraisal rights" is the term in the new Act for what existing law calls "dissenters' rights."

2. The basic idea is the same: a shareholder who objects to the terms of certain transactions, such as mergers, is entitled, if the statutory procedures for the exercise of the rights are followed, to require the corporation to buy all of the objecting shareholder's shares for their fair value, paid in cash.

3. Traditionally, the procedures required for the assertion of appraisal rights were tricky, and favored the corporation.

4. And traditional valuation methodologies tended to undervalue the corporation as a whole and then, in a closely held corporation, to impose marketability and minority discount on the already undervalued corporate value figures.

5. The Model Act is designed to make the procedures less tricky and more favorable to the shareholder seeking appraisal, and its definition of "fair value" requires that appropriate valuation methodologies be used, and explicitly rejects minority and marketability discounts.

6. On the other hand the Model Act also rejects the idea that appraisal rights should be available in transactions in which the objecting shareholder:

   a. Is not being forced by the terms of the transaction to exchange his or her shares for something else; or

   b. Even if an exchange is required, the shares being exchanged are publicly-traded securities, and they are being exchanged in an arms-length transaction for cash or other publicly-traded securities.

B. Entitlement – 12:1-1302

1. Generally: A shareholder is entitled to assert appraisal rights in connection with the following corporate actions:

   a. A merger to which the corporation is a party if the shareholder is being forced to exchange existing shares and is either entitled to vote or is not entitled to vote because the merger is a short form merger;

   b. A share exchange to which the corporation is a party and in which the shareholder's shares will be exchanged;

   c. A sale of substantially all assets unless the terms of the transaction as approved by shareholders require the distribution to shareholders of the corporation's net assets (in excess of amounts reserved to pay creditors) within one year after the shareholder's approval of the transaction;

   d. A so-called "reverse stock split" in which the articles are amended to reduce the number of shares, leaving the shareholder with a fraction of a share that the corporation is obligated or entitled to repurchase;

   e. Any other merger, share exchange, disposition of assets or amendment of the articles, to the extent provided by the articles of incorporation, bylaws, or resolution of the board;

   f. A domestication in which the shareholder does not receive shares in the foreign corporation resulting from the transaction that have terms as favorable to the shareholder in all material respects and represent at least the same portion of the voting power as the shares held by the shareholder before the domestication;

   g. A nonprofit conversion;

   h. A conversion of the corporation into an unincorporated entity.

2. Market Out Exception: The right of a shareholder to assert appraisal rights in the foregoing transactions (except for items (e) and (g)) is eliminated with respect to shares that are publicly traded (as provided in the Act) if:

   a. The transaction is not an "interested transaction" as defined, and

   b. The shares are to be exchanged in the transaction for cash or other publicly-traded securities or, in the case of a disposition of corporate assets, the net assets of the corporation, after allowance for the payment of creditors, are to be distributed within one year.

C. Procedure 12:1-1320 – 1326

1. Notice – 12:1-1320

a. The first step in the appraisal process requires the corporation to provide notice to the shareholders of their right to exercise appraisal rights, and that gives them a summary of the steps to be taken to do so.

b. The notice must be provided as part of the notice of the meeting at which the shareholders are to vote on the transaction.

c. The notice must state that the corporation has determined that appraisal rights are, are not, or may be available in connection with the transaction.

d. If the corporation concludes that appraisal rights are or may be available, the Model Act requires nothing more than a statement to that effect in the notice, but requires that the notice be accompanied by a copy of the entire appraisal rights chapter.

e. The Louisiana committee did not believe that a copy of the very complicated statute would be helpful to most shareholders. So, the Louisiana version of the Act requires the inclusion of a statutorily-specified statement that apprises the shareholder of the critical things that the shareholder must do, and not do, to protect the appraisal rights (e.g., provide notice of the intention to assert the rights and not to vote in favor of the transaction), and explains that a form for the assertion of the rights, along with a copy of the appraisal rights provisions of the Act, will be sent later.

f. The exact language of the required notice depends on the nature of the shareholder action to be taken – whether a vote at a meeting, an action by written consent that has not yet been obtained, or an action for which sufficient written consents has already been obtained.

2. Shareholder Notice; No Approval – 12:1321

a. If shareholder action on a transaction is to be taken at a meeting, the shareholder must deliver written notice to the corporation before the vote is taken that the shareholder intends to assert appraisal rights.

b. In addition, the shareholder must not vote, or cause or permit to be voted, any shares of the relevant class or series in favor of the action.

c. If shareholder action is to be obtained by written consent, the shareholder must not sign a consent in favor of the transaction for any share in the relevant class or series of shares.

3. Corporation's Provision of Appraisal Notice and Form – 12:1-1322

a. The corporation is required to send an appraisal notice and form to all shareholders who have complied with the requirements of 12:1-1321 concerning notice and no approval. In a short form merger, the parent must send the form and notice to all record shareholders who may be entitled to assert appraisal rights.

b. The notice must say where the form must be sent and where and by what date the certificates for the shares must be deposited. The deadline for the shareholder's submission of the form and the deposit of the share certificates may not be fewer than 40 nor more than 60 days after the date of the notice to the shareholders concerning the form. The notice must also state a deadline for a withdrawal of the shareholder's assertion of appraisal rights.

c. The notice must state the corporation's estimate of the fair value of the shares.

d. The notice must be accompanied by a copy of Part 13 of the Act.

4. Shareholder's Submission of Form and Deposit of Certificates – 12:1-1323: To "perfect" a shareholder's right to appraisal, the shareholder must submit the form and deposit the certificates for the shares for which appraisal is sought by the deadlines stated in the corporation's notice to the shareholder.

5. Corporation's Payment – 12:1324

   a. Under current law, a shareholder who assert dissenters' rights receives no payment from the corporation until the litigation over his rights is won.

   b. One of the major innovations in the Model Act (and in the new Louisiana Act) is the requirement that the corporation pay to the shareholder in cash the amount that the corporation estimated to be the fair value of the relevant shares in the corporation's required notice to the shareholder under 12:1-1322.

   c. The only exception to this rules is for so-called after-acquired shares, i.e., shares that were purchased after the announcement of the transaction with respect to which the appraisal rights are being asserted. 12:1-1325. Purchasing shares with the intention to assert appraisal rights is viewed as form of champerty, and so is excepted from the normal "pay the undisputed amount up front" requirement.

   d. But the corporation is permitted to exercise this right only if it included in its appraisal form a requirement that the shareholder state when the shares were acquired.

   e. The Model Act requires this question in all its forms. But because after-acquired shares is a serious issue only where an active trading market exists for a corporation's shares, the Louisiana committee dropped this item as a mandatory requirement in all forms, and allows the corporation to decide whether to include it.

6. Shareholder's Notice of Dissatisfaction – 12:1-1326

   a. A shareholder who is dissatisfied with the amount of the corporation's payment (i.e., the payment of the amount that the corporation estimated to be fair), and wishes to obtain a judicial appraisal, must give written notice to the corporation of the shareholder's dissatisfaction and estimate of fair value within 30 days of the corporation's payment (or estimate of value in case of after-acquired shares).

7. Corporation's Obligation to File Valuation Suit – 12:1-1330

   a. In another major innovation in traditional dissenters' rights procedures, the new Act, like the Model Act, no longer makes the shareholder responsible for initiating the judicial appraisal action.

   b. Instead, the corporation is required, within 60 days of receiving the shareholder(s) notice(s) of dissatisfaction, to commence the valuation proceeding.

   c. The proceeding is to be commenced in the district court in the parish where the corporation's principal office or, if none in this state, its registered office, is located. If the responsible corporation is a foreign corporation (e.g., the foreign corporation survived a merger with a Louisiana corporation), the proceeding is to be commenced in the parish where the Louisiana corporation had the relevant office at the time of the transaction that gave rise to the appraisal rights.

   d. The corporation must make all shareholders whose appraisal demands remain unsettled, whether or not residents of Louisiana, parties to the action, and all parties must be served with a copy of the petition. Nonresidents may be served as provided by law.

   e. The jurisdiction of the court in which the valuation action is filed is exclusive.

   f. The court may appoint an appraiser, who is treated as an expert witness subject to examination and cross-examination by the corporation and the shareholders.

   g. The shareholders are entitled to judgment for the difference between the amount already paid by the corporation and the fair value found by the court (or in the case of after-acquired shares for which no prior payment was made, the full amount of the fair value), plus interest.

8. Court Costs and Expenses – 12:1-1331

   a. Court costs, including the reasonable compensation and expenses of any court-appointed appraiser are to be assessed against the corporation unless the court finds it equitable to assess costs against some or all shareholders who acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided by Part 13 of the Act.

b. Other litigation expenses may be assessed as the court deems equitable:

(1) Against the corporation and in favor of some or all shareholders if the court finds the corporation did not substantially comply with its notification and payment obligations under the statute (described by reference to particular statutory provisions); and

(2) Against either party on grounds of behavior that is arbitrary, vexatious or not in good faith with respect to the rights provided by Part 13 of the Act.

9. Exclusivity – 12:1-1340

a. The legality of a proposed or completed corporate action described in 12:1-1302 (i.e., an action giving rise to appraisal rights) may not be contested, nor may the action be enjoined, in any proceeding commenced by a shareholder after the shareholders have approved the action.

b. The appraisal rights provided to a shareholder are the exclusive remedy available to a shareholder in connection with an action for which appraisal rights are made available if the requirement of advance written notice of the shareholder's intention to assert appraisal rights under 12:1-1321 either does not apply to the transaction or is waived by the corporation.

c. The preceding two restriction do not apply of a corporate action that is:

(1) Not authorized and approved in accordance with:

(a) The applicable provisions of Part 9, 10, 11, or 12 of the Act; or

(b) The corporation's articles of incorporation or bylaws; or

(2) Approved by less than unanimous written consent of the voting shareholders pursuant to 12:1-704 (governing actions by less than unanimous written consent) and

(a) The challenge to the action is brought by a shareholder who did not consent and as to whom notice of the approval of the corporate action was not effective at least ten days before the corporation action was effected; and

(b) The proceeding challenging the action is commenced within ten days after notice of the approval of the corporate action is effective as to the shareholder bringing the proceeding.

d. The rules in section 12:1-1340 also do not affect any right of a shareholder that is provided by the terms of the corporate action itself if the shareholder does not assert, or loses the right to enforce, appraisal rights under Part 13.

XXVI. Dissolution and Termination

A. Introduction—Current Law

1. Under current law, a dissolution may be initiated by the vote of shareholders, by court order, or, if the corporation is not doing business, owes no debts and owns immovable property, by affidavit.

2. The dissolution by affidavit is virtually always a bad idea. It results in the imposition of personal liability on the shareholders of the corporation for any debts owed by the dissolved corporation. Of course, if the representations in the affidavit are correct – that the corporation owes no debts – that should not pose a problem. But the affidavit may be incorrect, even if honestly executed.

3. Involuntary liquidations (by court order) are almost unheard of for a corporation still engaged in business, although, in theory, involuntary dissolutions are permitted if "beneficial to the shareholders" or in some cases of deadlock.

4. A voluntary or court-ordered dissolution results in a transfer of managerial power from the board of directors to a liquidator, appointed by the shareholders in a voluntary dissolution and by the court in a court-ordered or court-supervised dissolution. The liquidator is empowered and obligated to wind up the affairs of the corporation. If the liquidator follows the correct procedures, claims not asserted in accordance with the time limits imposed by the statute are perempted.

5. After the liquidator completes the winding up of the corporation's affairs, by collecting all its assets and distributing to creditors and then to shareholders in order of their priorities of payment, the liquidator (or the court in a court-supervised liquidation) is expected to file a certificate (or order) of dissolution with the secretary of state, who then, after getting some "no unpaid amounts owed" certificates from two or three different state agencies, issues a certificate of dissolution. This last certificate of dissolution terminates the corporation's existence.

6. In practice, unless some need exists to perempt some unknown or contingent claims, the formal dissolution process is seldom used. And, because of the personal liability problem, the dissolution by affidavit is used mainly by those who lack a complete understanding of the risks of taking that approach, and of the alternative means available to achieve the same goal.

7. Ordinarily, when a corporation wishes to go out of existence, its management simply pays the amounts owed to creditors, distributes the rest to the shareholders, and then stops filing annual reports.

8. The failure to file the annual report for three consecutive years will cause the secretary of state to revoke the charter, thus ending the corporation's existence without all of the risk and expense associated with the other means of dissolution.

9. Moreover, if the charter is revoked, it may be reinstated with retroactive effect for a three year period following the revocation, providing a fallback measure of protection if some asset or debt was overlooked in the informal winding up of the corporation's affairs.

B. Introduction – Model Act Approach

1. The Model Act simplifies the dissolution process by leaving the regular corporate management rules in place during the winding up of the corporation's affairs. The effect of initiating the dissolution process is simply to change the object of the corporation from ongoing operations to a winding up of the corporation's affairs.

2. Indeed, the Model Act never actually ends the existence of the dissolved corporation. The corporation continues to exist perpetually.

3. The Model act provides rules, similar to those in current law, under which the corporation may utilize a process to require its creditors to assert their claims by a stated deadline, and to bar those claims if the deadlines are not met.

4. The Model Act also adds a new provision that allows a corporation to deal with contingent claims through a judicial proceeding in which a sum is set aside for the payment of those claims. If the procedure is utilized, the corporation's obligations to the contingent claimants are satisfied.

C. Introduction – The New Act in Louisiana

1. The Louisiana committee accepted the approach of the Model Act in most respects.

   a. The winding up of a dissolved corporation's affairs is conducted by or under the supervision of the board, not a liquidator as under current law (although a liquidator may be appointed under some circumstances).

   b. The corporation's existence continues perpetually for purposes of owning any assets or owing any debts that were missed in the winding up of the dissolved corporation's affairs.

2. But the new Louisiana Act rejects the idea that the dissolved corporation may continue to be governed by the same rules both during its active liquidation phase and for the perpetual period following the completion of that process. After the liquidation process is completed, it is obvious

that shareholders will no longer be electing directors, that directors and officers will no longer be serving, and the corporation will no longer be filing annual reports or maintaining a registered agent.

3. It made sense to the committee to continue to vest undiscovered assets and liabilities in the dissolved corporation itself (rather than to vest them in a liquidator who will eventually will die or become incapable of serving), but otherwise to permit (and, practically speaking, to require) that the corporation's existence be terminated for all other purposes.

4. But instead of applying normal governance rules to handle after-discovered assets or liabilities of the terminated-but-still-existing-for-this-purpose corporation (rules that plainly will be ignored in reality), the Louisiana committee decided to deal with after-discovered assets and liabilities in two ways:

    a. By extending the three-year reinstatement provision now available only in cases of charter revocation to all forms of corporate termination; and

    b. By authorizing the appointment of a liquidator for the terminated corporation if reinstatement is not desired or available.

5. So, the Louisiana version of the Act adds a subpart on termination that is not part of the Model Act.

6. A dissolution of the corporation begins the process of winding up the corporation, but the corporation remains in existence and is subject to the same governance rules as before, except for the change in the object of management from operations to the winding up of the corporation's affairs.

7. When that process is completed, the new subpart on termination allows the corporation to deliver to the secretary of state for filing articles of termination. When the secretary of state files those articles, the corporation's existence is terminated, subject to a few exceptions –mainly the continued existence of the corporation for purposes of owning assets and owing debts.

8. What used to be called a charter revocation is now called an administrative termination. But the grace period for filing annual reports has been reduced from three years to 90 days. As a result, a corporation that has completed its dissolution and then fails to file articles of termination is likely to be terminated a few months after the first anniversary of its last annual report.

9. A simplified form of termination, similar to the current dissolution by affidavit is provided, but the personal liability of shareholders who use that form of termination is eliminated.

D. Voluntary Dissolution – By Board and Shareholders – 12:1-1402

1. Board Proposal and Recommendation Required: Unlike current law, which allows a dissolution to be authorized by shareholders without any prior action by the board, the new Act requires that the board propose a dissolution to the shareholders for their approval. The board must also recommend the dissolution unless it determines that because of conflicts of interest or other special circumstances it should not make a recommendation. It if makes such a determination, the basis for the determination must be communicated to the shareholders.
2. The board may condition its submission of the dissolution proposal on any basis.
3. The corporation must notify all shareholders, whether or not entitled to vote, of the shareholders' meeting at which the dissolution is to be considered, and the notice of the meeting must state that one of the purposes of the meeting is to consider dissolution of the corporation.
4. Unless the articles of incorporation, or the terms of the proposal for dissolution, require a greater vote or a vote by voting groups, the proposal for dissolution requires the approval of a majority of the shares entitled to vote on it.

E. Articles of Dissolution – 12:1-1403

1. At any time after dissolution is authorized, the corporation may dissolve by delivering to the secretary of state for filing articles of dissolution.
2. The articles of dissolution must name the corporation, state the date that dissolution was authorized, and state that the dissolution was authorized by the shareholders as required by the Act and by the corporation's articles of incorporation.
3. The corporate is dissolved when the articles of dissolution take effect, which is governed by the general rules in 12:1-123 on the time that fined documents take effect – typically the date and time of filing unless the document specifies a later effective time.
4. The term "dissolved corporation" means a corporation whose articles of dissolution have become effective, and includes a successor entity to which the remaining assets of the corporation are transferred subject to liabilities for purposes of liquidation.
5. The new Act changes current law on the necessity of obtaining "no amount owed" certificates from the Department of Revenue, the Department of Environmental Quality, and the administrator of the Louisiana Employment Security law.
    a. Under current law, those "no amount owed" certificates are sought after a corporation's liquidation has been completed and it is seeking to obtain the final certificate of dissolution that causes the existence of the corporation to be terminated.

b. The wait for those certificates may delay the issuance of the final certificate of dissolution for many months, making impossible for the business owner to know when the corporation's existence actually will end. And, despite the problems they cause for business owners, the current certificate rules provide notice to the agencies of the corporation's dissolution only after it is too late to do much good – after the liquidation of the corporation, and the distribution of all of its assets, has already been completed.

c. The new Act converts the old certificate-from-the-agencies requirement at the end of the liquidation process into a simple requirement that the agencies be notified at the beginning of the process.

d. Under the new Act, when a corporation files articles of dissolution, the secretary of state is required simply to deliver a notice of the filings to the three state agencies. It is then left to the agencies to decide what, if anything, to do to collect any amounts owed to the agencies by the dissolved corporation.

F. Effect of Dissolution – 12:1-1405

1. 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. 12:1-1405 (A)

2. The winding up and liquidation of the corporation includes (12:1405 (A)):

   a. Collecting its assets;

   b. Disposing of its properties that will not be distributed in kind to its shareholders;

   c. Discharging or making reasonable provision for discharging its liabilities;

   d. Distributing its remaining property among its shareholders according to their interests; and

   e. Every other act necessary to wind up and liquidate its business and affairs.

3. The new Act contains a list of things that a dissolution does not do, but they are easy to infer from the basic rule. Everything about the corporation stays the same, except for the change in the object of its management and operations.

4. The Louisiana committee added the following additional rules to the Model provisions on the effects of dissolution:

   a. The limitation on the business of the dissolved corporation does not:

(1) Require the corporation to discontinue operations in any part of its business that the corporation plans to sell as a going concern in connection with the winding up and liquidation of the corporation's affairs; or

(2) Affect any right acquired by a third person before the third person knows or has reason to know that the corporation is dissolved.

b. The filing of articles of dissolution by a corporation does not by itself give a third person knowledge or reason to know that the corporation is dissolved.

c. The Code of Civil Procedure articles on the participation in litigation of a dissolved corporation, which were designed to deal with a "dissolved" corporation in the sense of a corporation that no longer had any legal existence, were said not to apply to a dissolved corporation that had not been terminated. A dissolved and unterminated corporation was stated to be the proper party plaintiff or defendant under arts. 690 and 739 of the Code of Civil Procedure. A terminated corporation was said to be governed by 12:1-1443.

G. Board Responsible for Winding Up – 12:1-1409

1. The board of directors is responsible for winding up and liquidating the business and affairs of the corporation as contemplated by 12:1-1405 (A). The board may authorize a distribution to shareholders only after the corporation pays, or makes reasonable provision to pay, all obligations owed by the corporation as contemplated by 12:1405 (A).

2. Directors of dissolved corporation are not liable for breaching their duty under paragraph (1) above with respect to claims that are discharged under any of the three provisions applicable to the barring or satisfaction of claims against a dissolved corporation, i.e., 12:1-1406, 1407, and 1408.

H. Perempting and Satisfying Claims – 12:1-1406, 1407 & 1408

1. The new Act contains three provisions under which claims against a dissolved corporation may be perempted or satisfied:

   a. 12:1-1406, concerning written notice to known claimants;

   b. 12:1-1407, concerning published notice for unknown claimants; and

   c. 12:1-1408, concerning a court-approved provision of security for the payment of contingent, unknown and post-dissolution claims

2. Known Claims – 12:1-1406

   a. A dissolved corporation may dispose of known claims by sending a written notice to each known claimant that:

   (1) Informs the claimant that the corporation is dissolved;

   (2) Describes the information that must be included in a claim;

(3) Provides a mailing address to which the claim may be sent;

(4) States the deadline, which must be at least 120 days after the effective date of the written notice, by which the dissolved corporation must receive the claim; and

(5) States that the claim will be extinguished by peremption if not received by the deadline.

b. A claim is perempted if either:

(1) A claimant who was given the required written notice does not deliver the claim to the corporation by the stated deadline; or

(2) A claimant whose claim was rejected by the corporation does not commence a proceeding to enforce the claim by the deadline stated in the rejection notice, which must be at least 90 days after the effective date of the rejection notice.

c. The rules in 12:1-1406 do not apply to a contingent claim or a claim based on an event that occurs after the effective date of the dissolution.

3. All Claims not Earlier Perempted – 12:1-1407

a. A dissolved corporation may publish notice of its dissolution and request that persons with claims against the dissolved corporation present them in accordance with the notice. The notice must:

(1) Be published one time in a newspaper of general circulation in the parish where the dissolved corporation's principal office or, if none in this state, its registered office, is or was last located.

(2) Describe the information that must be included in a claim and provide a mailing address where the claim may be sent;

(3) State that a claim against the dissolved corporation will be extinguished by peremption unless a proceeding to enforce the claim is commenced within three years after the publication of the notice.

b. If a corporation publishes the notice as required, then any claim not earlier perempted by 12:1406 will be perempted unless the claimant commences a proceeding to enforce the claim by within three years after the publication of the notice.

c. 12:1-1407 applies to all claims, including contingent liabilities and claims based on an event occurring after the effective date of the dissolution.

4. Enforcement of Claims Not Perempted – 12:1-1407 (D).

a. A claim that is not perempted by 12:1406 or 1407 may be enforced against:

(1) The dissolved corporation, to the extent of its undistributed assets; or

(2) A shareholder of the dissolved corporation to the extent of the shareholder's pro rata share of the claim or the corporate assets distributed to the shareholder in liquidation, whichever is less.

(a) The total amount for which a shareholder may be held liable for all claims may not exceed the total amount of the assets distributed to the shareholder.

(b) Claims otherwise permissible under this provision may not be brought if covered by a court-approved security arrangement under 12:1-1408.

5. Court-Approved Security – 12:1-1408

a. If a dissolved corporation has published a notice that complies with 12:1-1407, it may file an application with the district court in the parish in which the corporation's principal office, or if none in this state, its registered office is located, for a determination of the amount and kind of security to be provided for the payment of contingent, unknown and post-dissolution claims. Provision need not be made for any claim that is or is reasonably anticipated to be perempted by the three-year period in 12:1-1407.

b. The dissolved corporation must give notice of the filing of the application to each contingent claimant whose claim is shown on the records of the dissolved corporation.

c. The court is required to appoint an attorney at law to represent all claimants whose identities or whereabouts are unknown, as if the claimants were absentee defendants under Code of Civ. Proc. art. 5091. The reasonable fees and expenses of the appointed attorney, including all reasonable expert witness fees, must be paid by the dissolved corporation.

d. Provision by the dissolved corporation of security in the amount and form ordered by the court under 12:1-1408 satisfies the dissolved corporation's obligations with respect to contingent claims, unknown claims, and claims that are based on an event occurring after the effective date of the dissolution. Those claims may not be enforced against a shareholder who received assets in liquidation.

I. Revocation of Dissolution – 12:1-1404

1. A corporation that is not terminated may revoke its dissolution within 120 days of the effective date of the dissolution.

2. The revocation must be authorized in the same manner as the dissolution unless the authorization of the dissolution permitted the board to revoke the dissolution by itself, without a vote of shareholders.

3. After the revocation is authorized, the corporation may deliver to the secretary of state for filing articles of revocation of dissolution.

4. When those articles become effective (under the same 12:1-123 rules as other filed documents), the dissolution of the corporation is revoked, with retroactive effect, and the corporation may resume its normal operations as if the dissolution had not occurred.

J. Judicial Dissolution and Court-Supervised Dissolution

1. Grounds – 12:1-1430: A district court may dissolve a corporation:

   a. In a proceeding by the attorney general on grounds that:

      (1) The corporation obtained its articles of incorporation by fraud; or

      (2) The corporation has continued to exceed or abuse the authority conferred on it by law.

   b. In a proceeding by a shareholder on grounds that:

      (1) The directors are deadlocked, 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;

      (2) The shareholders are deadlocked 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

      (3) The corporation has abandoned its business and has failed within a reasonable time to liquidate and distribute its assets and dissolve.

   c. In a proceeding by a creditor on grounds that:

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

      (2) The corporation is insolvent and has admitted in writing that the creditor's claim is due and owing.

   d. In a proceeding by the corporation, or by shareholders of shares with at least 25% of the voting power in the corporation, to have the corporation's voluntary dissolution continued under court supervision. (This provision was added by the Louisiana committee to the Model Act to retain the comparable provision in current law.)

2. Judgment of Dissolution – 12:1-1433

   a. If, after a hearing, the court determines that grounds exist for judicial dissolution, the court may enter a judgment dissolving the corporation, and the clerk of court is required to deliver a certified copy of the judgment to the secretary of state, who must file it.

b. After entering the judgment of dissolution, the court shall direct the winding up and liquidation of the corporation's business and affairs in accordance with 12:1-1405, and the notification of claimants in accordance with 12:1-1406 and 1407.

c. A court may appoint a receiver to manage, or a liquidator to wind up the affairs, of the corporation. 12:1-1432.

3. General Dissolution Rules Applicable in Judicial Dissolution 12:1-1410: Sections 12:1-1405 through 1409 (i.e., the general rules on the winding up of the dissolved corporation's affairs and on the peremption satisfaction of claims against the dissolved corporation) apply to a dissolved corporation, regardless of whether the dissolution is voluntary or judicial.

4. Election to Purchase in Lieu of Dissolution – 12:1-1434

   a. In a proceeding by a shareholder to dissolve the corporation on grounds of a deadlock among the directors or shareholders, the corporation or, if it fails to elect, one or more shareholders may elect to purchase all of the shares owned by the petitioning shareholder at the fair value of the shares.

   b. The election to purchase must be filed within 90 days after the filing of the petition for dissolution, unless the court extends the period or the shareholders of the corporation agree to a longer period. Once made, the election to purchase is irrevocable unless the court determines that it is equitable to set aside or modify the election.

XXVII. Shareholder Oppression – 12:1-1435, 1436, 1437 & 1438.

A. Introduction

1. Under the Model Act, the problem of shareholder oppression, and of fraud and illegality as well, was handled in the same way as deadlock: A corporation accused by a shareholder of oppression, fraud, or illegality faced judicial dissolution unless an irrevocable election to buy out the plaintiff shareholders was made within 90 days of the filing of the suit.

2. The Louisiana committee eliminated fraud and illegality as independent grounds for either dissolution or a buyout in a shareholder suit, being concerned about treating isolated occurrences of wrongdoing as grounds for dissolution or buyout.

3. Most members of the Louisiana committee did support the provision of a remedy for oppression. But the committee was concerned by the lack of any definition for the term. And the committee did not believe, regardless of the definition, that the management of a corporation should be forced, within 90 days of the filing of a suit alleging oppression, either to concede

the plaintiff's entitlement to a remedy (by electing to buy out the dissident shareholder) or to take the risk that the corporation might be forced to dissolve.

4. For that reason, the Louisiana committee drafted four entirely new provisions that define oppression, and then provide a remedy for it.
5. In effect, the Louisiana version of the Act reverses the order of remedies for oppression, from a dissolution unless management or other shareholders elect quickly to buy out the complaining shareholder, to a buyout of the complaining shareholder unless the corporation chooses to dissolve before final judgment in the suit.

B. Oppression Defined – 12:1-1435 (B)

1. A corporation engages in oppression of a shareholder if the corporation's distribution, compensation, governance, and other practices, considered as a whole over an appropriate period of time, are plainly incompatible with a genuine effort on the part of the corporation to deal fairly and in good faith with the shareholder.
2. The following factors are relevant in assessing the fairness and good faith of the corporation's practices:
   a. The conduct of the shareholder alleging oppression; and
   b. The treatment that a reasonable shareholder would consider fair under the circumstances, considering the reasonable expectations of all shareholders in the corporation.
3. Conduct that is consistent with the good faith performance of an agreement among all shareholders is presumed not to be oppressive.
4. Extensive comments are provided to explain the deliberate effort to utilize language that would allow oppression cases from other jurisdictions to be considered in determining the meaning of that term as used in the Louisiana statute, as well as some of the reasoning and features in those cases that the Louisiana definition was designed to reject.
5. The comments also explain the decision to drop the Model Act language that required a plaintiff shareholder to prove that the "directors or those in control" of the corporation were the persons engaged in oppressive conduct. Comment (e) acknowledges that oppression is unlikely to occur without the complicity of a corporation's directors or other controlling persons, but says that the deliberate choice was made not to require the plaintiff in the case to prove which particular participants in corporate management were responsible for the oppression that occurred.

C. Buyout Remedy and Procedure – 12:1-1435

1. The basic principle of the oppression provisions is stated in 12:1-1435 (A): If a corporation engages in oppression of a shareholder, the

shareholder may withdraw from the corporation and require the corporation to buy all of the shareholder's shares at their fair value.

a. "Fair value" is defined in the same way as under the appraisal provisions of the statute, except that the relevant time for the valuation is the date of the shareholder's notice that he or she is withdrawing on grounds of oppression (rather than the date of the merger or other appraisal-triggering transaction). 12:1-1435 (C).

b. The effect of using the same definition is to eliminate discounting for the minority status of the shares, or for any difficulty with the marketability of the shares, and to require a valuation of the corporation using customary and current valuation concepts and techniques generally employee for similar businesses in the context of the transaction requiring appraisal. 12:1-1301 (4).

2. A shareholder initiates the oppression procedure by giving written notice to the corporation that the shareholder is withdrawing from the corporation on grounds of oppression.

3. When the notice becomes effective (under the rules on notices provided by 12:1-141) it operates as an offer by the shareholder, irrevocable for 60 days, to sell all of his or her shares to the corporation at their fair value. The notice need not specify the price that the shareholder proposes as the fair value, but if the notice does specify a price, it is part of the shareholder's offer.

4. The corporation may accept the shareholder's offer any time during the 60 days that the offer is irrevocable by giving the shareholder written notice of the acceptance. If the offer included a price, the acceptance operates as an acceptance of both the offer to sell and of the price (and thus concludes a contract of sale) unless the notice of acceptance states that is an acceptance only of the offer to sell, but not the price. In that case, the notice operates only as an acceptance of the shareholder's offer to sell the shares at their fair value, to be determined later.

5. The corporation's acceptance of the shareholder's offer does not operate as an admission or as evidence that the corporation engaged in oppression of the shareholder.

6. If the corporation accepts both the offer to sell and the price, a contract of sale of the shares at that price, payable in cash. The contract includes the warranties of a seller of investment securities under the UCC, and imposes an obligation on the seller to deliver any certificate for the shares or an affidavit to the effect that the certificate for the shares has been lost, stolen or destroyed. The seller owes indemnity to the corporation if a lost or stolen certificate for the purchased shares is later presented to the corporation in a way that requires the corporation to honor the certificate.

7. If this kind of contract of sale is formed, the shareholder's ownership of the shares is terminated immediately, and all that is left are the parties' rights and obligations under the contract of sale. Either party may file an action to enforce the contract if it has not been performed within thirty days after the effective date of the notice of acceptance.
8. The corporation's purchase of the shares is subject to the rules on a corporation's reacquisition of its shares under 12:1-631 and to the limitations on distributions imposed by 12:-640.
9. If the corporation does not accept the shareholder's offer, the shareholder may file an ordinary proceeding against the corporation in district court to enforce the shareholder's right to withdraw. A judgment in the action that recognizes the right of the shareholder to withdraw is a partial judgment under Code of Civ. Proc. art. 1915 (B).
10. The valuation of the shares is handled in a separate, summary proceeding under 12:1-1436.

D. Valuation Proceeding – 12:1-1436

1. A valuation proceeding under 12:1-1436 may become available in two different ways:
    a. The corporation accepts the withdrawing shareholders offer to sell, but the resulting agreement to sell does not contain a price. The price may be missing either because the shareholder did not propose one or because the corporation declined to accept the shareholder's proposed price.
    b. The corporation did not accept the shareholder's offer to sell, but a judgment was issued in a proceeding under 12:1-1435 (G) that recognized the shareholder's right to withdraw.
2. In either case, the statute provides a 60-day period during which the parties may attempt to negotiate the price for the shares. If the offer to sell was accepted, the 60-day delay is imposed by permitting a valuation proceeding to be commenced only during the one-year period following the 60-day delay. If the shareholder's right to sell was recognized by a judgment, the delay is provided by a mandatory 60-day stay in the proceeding.
3. The valuation of the shares is determined in a summary proceeding.
4. At the conclusion of the trial, the court is required to render one of two alternative judgments:
    a. The "default" judgment is one that is rendered
        (1) In favor of the shareholder and against the corporation for the fair value of the shareholder's shares; and
        (2) In favor of the corporation and against the shareholder

(a) Terminating the shareholder's ownership of shares in the corporation; and

(b) Ordering the shareholder to deliver to the corporation within 30 days after the judgment any certificate issued by the corporation for the shares or an affidavit that the certificate has been lost, stolen or destroyed.

b. An alternative form of judgment is available that allows the corporation to pay for the shares through an unsecured promissory note, with a term of up to 10 years, if the corporation has proved in the proceeding that an immediate payment of the full value of the shares either would violate the distribution restrictions imposed by 12:1-640, or would cause undue harm to the corporation or its creditors.

E. When Oppression Remedy Not Available

1. The remedy for shareholder oppression is not available for the shareholder of a corporation that, on the effective date of a shareholder's notice of withdrawal, has shares that are "covered securities" under two subsections of the Securities Act of 1933, namely, §18 (b) (1) (A) or (B) (essentially, publicly traded securities). 12:1-1435 (K).

2. The shareholders of a corporation may waive the oppression remedy by unanimous written consent.

   a. The waiver remains in effect for fifteen years after the last written consent is delivered to the corporation, or for any shorter period stated in the waiver to which the shareholders consent. 12:1-1435 (J) (1).

   b. The waiver must be noted on each share certificate in the same way as the existence of a unanimous governance agreement, and the failure to include the notation is treated in the same was a failure to note a UGA (i.e., the failure allows the buyer to rescind the purchase, but does not affect the enforceability of the waiver).

3. Except as permitted in the waiver provision, a shareholder's oppression remedy may not be diminished.

F. Withdrawal Remedy Exclusive – 12:1-1435 (L): Without limiting any remedy available on other grounds, the shareholder's right to withdraw as provided in 12:1-1435 & 1436 is a shareholder's exclusive remedy for oppression.

G. Stay of Duplicative Proceeding – 12:1437

1. On motion by the corporation, a court must stay a duplicative proceeding by a shareholder who has given a notice of withdrawal to the corporation.

2. A "duplicative proceeding" is any proceeding in which a shareholder, or his own behalf or as a representative of the corporation, alleges a cause of action against the corporation, or against a director, officer, agent,

employee, or controlling person of the corporation, on grounds of a breach of duty owed by that person to the corporation or to the shareholder in the shareholder's capacity as a shareholder.

3. A court is required to lift the stay on motion by a shareholder when a judgment denying the shareholder's right to withdraw becomes final and definitive.

H. Conversion of Oppression Proceeding Into Court-Supervised Dissolution – 12:1-1438

1. A corporation may by contradictory motion convert a withdrawal or valuation proceeding under 12:1435 or 1436 into a proceeding for a court-supervised dissolution, if the dissolution is approved as required for a voluntary dissolution (i.e., by the board and a majority of share voting power).

2. If the court finds that the dissolution has been authorized as required, then it must:

    a. Render a judgment dissolving the corporation;

    b. Dismiss the withdrawal or valuation proceeding;

    c. Make the complaining shareholder in the dismissed action a party to the court-supervised dissolution proceeding; and

    d. Appoint a liquidator or order the corporation to submit to the court for its approval a plan of liquidation, and such interim and final reports on the liquidation as the court may consider necessary to protect the interests of the complaining shareholder.

3. A motion to convert the proceeding into a court-supervised dissolution may be filed at any time before final judgment is rendered.

4. If a corporation dissolves or terminates while a withdrawal or valuation proceeding is pending, but does not file a motion to convert the proceeding as described above, the complaining shareholder may by contradictory motion seek to convert the withdrawal or valuation proceeding into a court-supervised dissolution. If the court finds the conversion is necessary for the protection of the complaining shareholder, then it must grant the motion and take the same steps as in a corporation-sponsored motion to convert the proceedings into a court-supervised dissolution.

XXVIII. Termination and Reinstatement – 12:1-1440 – 1445

A. A corporation's existence may be terminated either by the filing of articles of termination by the corporation, or a certificate of termination by the secretary of state (the certificate of termination takes the place of a charter revocation under current law).

B. Articles of termination may be filed either after the completion of a dissolved corporation's liquidation and winding up, or through a simplified form of termination that takes the place of the dissolution-by-affidavit under current law.

C. Ordinary Articles of Termination – 12:1-1440

1. When a dissolved corporation's board of directors (or a liquidator of the corporation if one has been appointed and is still serving at the relevant time) determines that the corporation has completed the winding up of its business and affairs, the board or liquidator may cause the corporation to deliver to the secretary of state for filing articles of termination that state:

   a. The name of the corporation;

   b. The date of its dissolution;

   c. Whether its dissolution was voluntary or judicial;

   d. That the corporation has paid or made reasonable provision for the payment of all of its liabilities; and

   e. That the net assets of the corporation remaining after winding up have been distributed to the shareholders.

2. If the articles of termination are signed by a liquidator, the articles must have attached or appended to them a certified copy of the court order that authorizes the liquidator to wind up the affairs of the corporation.

3. If the articles are signed under the authority of the board, they are signed in the same way as other documents that are filed with the secretary of state, under the rules in 12:1-120.

D. Simplified Articles of Termination – 12:1-1441

1. The provision on the simplified articles of termination combines a simplified mechanism for dissolution under the Model Act (which is provided for a corporation that has not issued shares) with the dissolution by affidavit available under current Louisiana law, in 12:141.1.

2. The simplified articles of termination may be utilized if a corporation:

   a. Does not owe any debts;

   b. Does not own any immovable property; and

   c. Has not issued shares or is not doing business.

3. If the corporation has not issued shares, the simplified termination may be authorized by a majority of the initial directors or, if no initial directors are name in the articles of incorporation, by a majority of the incorporators.

4. If the corporation has issued shares, the simplified termination must be authorized as provided in 12:1-1402, concerning a voluntary dissolution

(i.e., by the board and a majority in voting power of the shares) or by the unanimous written consent of the shareholders.

5. After the termination is authorized, the corporation may deliver to the secretary of state for filing articles of termination that state:
    a. The name of the corporation
    b. That no debt of the corporation remains unpaid;
    c. That the corporation owns no immovable property;
    d. That the corporation has not issued shares or is not doing business;
    e. That the net assets of the corporation remaining after winding up have been distributed to the shareholders, if shares were issued; and
    f. That the termination was authorized as required by 12:1-1441 (B).

E. Administrative Termination – 12:1442

1. The secretary of state is required to terminate the existence of a corporation if, according to the records of the secretary of state, the corporation has failed for ninety consecutive days:
    a. To maintain a registered agent and registered office as required by 12:1-501; or
    b. To file an annual report as required by 12:1-1621.
2. Note that the grace period for annual reports has been reduced from three years to 90 days (actually, 90 days, plus the 30-day notice period described in the next paragraph). The purpose of the reduction is to encourage the filing of the annual report annually, rather than tri-annually.
3. The secretary of state is required to give the corporation 30 days' written notice of the secretary's intention to terminate the corporation's existence. The secretary is required not to terminate the corporation's existence if the grounds for termination are eliminated before the end of the 30-day period.
4. The secretary of state terminates a corporation's existence under 12:1-1442 by filing a certificate of termination that states the grounds for termination. The secretary of state is required to serve a copy of the certificate of termination on the corporation in accordance with 12:1-504.

F. Effective Date and Effects of Termination – 12:1443

1. A corporation's termination becomes effective when articles or a certificate of termination are filed.
2. The effects of the filing of the articles or certificate of termination are not affected by any error in the articles or the certificate, but the error may

justify reinstatement of the corporation or the appointment of a liquidator.

3. When the existence of the corporation terminates, the corporation's juridical personality ends except for any of the following purposes:

   a. Reserving the corporation's name as provided in 12:402 (C) (the corporation's name is preserved as unavailable for use by other corporations for a period of three years, so that the name is available to the terminated corporation if it is reinstated during the three-year reinstatement period);

   b. Concluding any proceeding to which the corporation is a party at the time of its termination; and

   c. Continuing to own any undistributed corporate assets and to owe any undischarged corporate obligations or liabilities.

4. The corporation's termination does not:

   a. Extinguish any claim against the corporation;

   b. Abate any proceeding to which the corporation is a party;

   c. Cause any obligation or liability of the corporation to become the obligation or liability of any of the corporation's current or former shareholders, directors, officers, employees or agents; or

   d. Cause any undistributed asset of the corporation to become the property of any of the corporation's current or former shareholders, directors, officers, employees or agents.

5. A terminated corporation's juridical personality, and the authority of a person acting on the corporation's behalf as its legal counsel or managerial representative continues for purposes of a proceeding to which the corporation is a party at the time of its termination, but subject to the power of an authorized representative of a reinstated corporation, or of a liquidator appointed under 12:1-1445, to change the identity or authority of the legal counsel or managerial representative.

6. The existence of a terminated corporation may be reinstated as provided in 12:1-1444, and a liquidator may be appointed for the terminated corporation as provided in 12:1-1445.

G. Reinstatement – 12:1-1444

   1. A terminated corporation may be reinstated for three years after the effective date of its termination unless the corporation was judicially dissolved.

   2. If the termination followed a voluntary dissolution that was approved by shareholders, the reinstatement must be authorized by the same vote of shareholders that was required to approve the dissolution, by the persons who were shareholders at the time of the dissolution.

a. The same shareholders are required to elect a board of directors for the reinstated corporation.

b. That board is then required to elect officers for the reinstated corporation.

3. If the termination was an administrative termination, the reinstatement may be approved by:

   a. A director or officer listed in the corporation's last annual report before its termination; or

   b. A director of the corporation elected by the shareholders of the corporation after the last annual report, regardless of whether the director was elected before or after the administrative termination.

   c. The purpose of allowing reinstatement by the later-elected director is to address a situation in which the officers and directors named in the last annual report – which in many closely-held corporations may be just one or two persons – are no longer available to sign the articles of reinstatement.

4. The corporation seeks reinstatement by filing articles of reinstatement.

5. In addition to the fee for filing the articles of reinstatement, the corporation must also pay the fee for the filing of an annual report for each year between the time of its last annual report and the filing of the articles of reinstatement.

6. When the secretary of state files the articles of reinstatement, the existence of the terminated corporation is reinstated retroactively, and the corporation continues to exist as if the termination had not occurred.

7. If the administrative termination occurred because of an error in the records of the secretary of state not caused by the corporation, the secretary is required to file a certificate of reinstatement that states that the certificate of termination was filed in error and that the corporation is reinstated with retroactive effect, as if the termination had never occurred.

H. Appointment of a Liquidator – 12:1445

1. On application of any interested party, a district court may, ex parte or on such notice as the court may order, appoint a liquidator to act on behalf of a terminated corporation with respect to any of its undistributed assets or undischarged claims or interests.

2. The court's appointment of the liquidator is governed by 12:1-1432, as if the liquidator were being appointed to conduct a dissolution of the corporation under court supervision.

3. The costs and expenses of the liquidator must be paid by the party seeking the appointment, subject to reimbursement from any

undistributed assets of the corporation or the proceeds of their disposition.

XXIX. Foreign Corporations – Part 15

A. The Model Act deals with the qualification of foreign business corporations in its Chapter 15.

B. The Model Act does not deal with the qualification of foreign nonprofit corporations.

C. Because existing Chapter 3 of Title 12 already deals with the qualification of both forms of corporation, Chapter 15 of the Model Act was deleted from the Louisiana version of the Act, and existing Chapter 3 was retained.

XXX. Records and Reports – Part 16

A. Required Records – 12:1-1601 (A) – (C)

1. A corporation is required to keep as permanent records:

   a. Minutes of all meetings of shareholders and directors;

   b. A record of all actions taken by shareholders or directors without a meeting (i.e., actions by written consent); and

   c. A record of all actions taken by a committee of the board in place of the board or on behalf of the corporation.

2. A corporation is also required:

   a. To maintain appropriate accounting records; and

   b. To maintain a record of its shareholders in a form that permits preparation of a list of the names and addresses of all shareholders, in alphabetical order by class of shares, showing the number and class of shares held by each.

B. Form of Records: The corporation's records must be kept in the form of a document, including an electronic record, or in another form capable of conversion into paper form within a reasonable time. 12:1-1601 (D).

C. Required Records at Principle Office, Available for Shareholder Inspection – 12:1601 (E):

1. A corporation is required to keep a copy of certain documents, including its governance documents and records of shareholder meetings and written consents, at its principal office.

2. The significance of the listing of the documents in 12:1601 (E) is that those documents are available for inspection and copying by any shareholder, regardless of the number of shares owned. 12:1-1602 (A).

3. Those inspection rights are distinct from the right to inspect "any and all" records of the corporation, which is restricted to 5%-or-greater shareholders under 12:1-1602 (C).

D. Inspection of Records by Shareholders – 12:1-1602 – 1604.

1. For purposes of record inspection rights under 12:1-1602, the term "shareholder" includes both record and beneficial shareholders (and a strangely-worded type of owner called an "unrestricted voting trust beneficial owner" – meaning a voting trust participant whose record inspection rights would not be inconsistent with the terms of the voting trust). 12:1602 (F); 12:1-140 (27 (A).

2. Three types of Inspections:

   a. Governance Documents and Shareholder Action Records: The records listed in 12:1-1601 (E) (e.g., articles, bylaws, unanimous governance agreements, shareholder meeting minutes and written consents) may be inspected and copied by any shareholder, during regular business hours at the corporation's principal office, if the shareholder gives the corporation a signed written notice of the shareholder's demand to do so at least five business days before the date on which the shareholder wishes to inspect and copy the records.

   b. Meeting Materials for Post-Notice Record Shareholder: 12:1601 (B) contains a complicated rule for an unlikely situation: a shareholder's meeting in which the record date for notice of the meeting is earlier than the record date for voting at the meeting. In that case, a record shareholder entitled to vote at the meeting, but who was not a record shareholder for purposes of the notice, is entitled on request to obtain from the corporation a copy of the notice and any other information provided by the corporation to shareholders in connection with the meeting.

   c. Any and All Records:

      (1) The Model Act, unlike current Louisiana law, does not contain an "any and all records" inspection provision for 5% or greater shareholders.

      (2) A new subsection was added to the Louisiana version of the Act to retain that feature of current law.

      (3) However, the current rule that requires 25% or greater ownership for a competitor who wishes to exercise those inspection rights was dropped.

         (a) The drafting committee did not believe that the dangers posed by a competitor's inspection of "any and all" corporation records was addressed in any fashion by the number of shares owned by the competitor.

         (b) The committee believed that the requirement of a "proper purpose" for the inspection, coupled with the power of a court to deny inspection rights with respect to confidential information, would be sufficient to protect a corporation against the improper use of inspection rights to obtain a competitive advantage.

(4) The new Act permits a shareholder of at least 5% of any class of the issued shares of the corporation for at least the preceding six months to inspect and copy "any and all" records of the corporation.

(a) Multiple shareholders who together own 5% or more of the shares may aggregate their percentages of ownership together in demanding the inspection.

(b) The inspection must be conducted during regular business hours at a reasonable location specified by the corporation.

(c) The shareholder is required to give the corporation a signed written notice of the demand for inspection at least five business days before the date on which the shareholder wishes to inspect and copy the records.

(d) The shareholder's demand for inspection must be made in good faith and for a proper purpose, and must describe with reasonable particularity the shareholder's purpose and the records that the shareholder wishes to inspect.

(e) The records that the shareholder wishes to insect must be directly connected with the shareholder's purpose.

3. Records Inspection Rights May Not Be Limited: 12:1-1601 (E): The rights of inspection granted by 12:1-1601 to a shareholder may not be limited or abolished by provision in the articles of incorporation, bylaws, unanimous governance agreement or any other agreement.

4. Inspection Rights Do Not Affect Discovery or Shareholder Meeting Records – 12:1601 (F) (1): The record inspection rights and limitations provided by 12:1601 do not affect:

   a. The right of a shareholder to inspect records as a party to litigation with the corporation; or

   b. The right of a shareholder to inspect shareholder lists and other meeting-related information under 12:1-720.

5. Agent or Attorney May Inspect on Shareholder's Behalf – 12:1-1603 (A): A shareholder's agent or attorney has the same inspection and copying rights as the shareholder represented.

6. Rights to Copies; Expenses - 12:1-1603 (B), (D):

   a. The right to copy includes the right to receive copies by xerographic or other means, including copies through electronic transmission if electronic transmission is available and requested by the shareholder.

b. The corporation may impose a reasonable charge to cover the costs of labor and material for copies of any documents requested by the shareholder.

7. Court Enforcement of Inspection Rights – 12:1-1604

a. If a corporation does not within reasonable time allow the shareholder to exercise the inspection rights provided by 12:1-1602, the district court in the parish where the corporation's principal office or, if none in this state, its registered office is located may by summary proceeding order the inspection and copying demanded.

b. If the court orders the inspection and copying of the records demanded, it must also order the corporation to pay the shareholder the expenses (which includes attorney's fees) incurred to obtain the order unless the corporation refused the inspection in good faith because it had a reasonable basis for doubt about the right of the shareholder to inspect the records demanded.

c. If the court determines that the shareholder is entitled to inspect the records under Subsection (A) of 1602 (i.e., the provision covering governance documents and shareholder meeting records), the court is required to order the corporation to provide copies of the demanded records at the corporation's expense.

d. If the court orders inspection and copying it may impose reasonable restrictions on the use or distribution of the records by the demanding shareholder.

E. Inspection of Records by Directors – 12:1-1605

1. Current law does not provide for the inspection of corporate records by directors.

2. The new Act provides that a director is entitled to inspect and copy the books, records and documents of the corporation at any reasonable time, and to enforce those rights in much the same way as a shareholder.

3. But the director is entitled to inspect the records only to the extent the inspection is reasonably related to the performance of the director's duties as a director, and not for any other purpose or in any manner that would violate any duty to the corporation.

4. If a court orders the corporation to provide the director inspection rights, it may include provisions in the order that protect the corporation from undue burden or expense, and that prohibit the director from using the information obtained in a manner that would violate a duty to the corporation.

F. Suspension of Notices to Missing Shareholders – 12:1-1606

1. Unlike current law, the new allows a corporation to suspend the sending of otherwise-required notices to a shareholder if:

a. Notices to the shareholder of two consecutive annual meetings and all notices of meetings during the period between the two consecutive annual meetings have been sent to the shareholder at the address for the shareholder as shown on the records of the corporation and have been returned as undeliverable or could not be delivered; or

b. All, but not less than two, payments of dividends on securities during a 12-month period, or two consecutive payments on securities during a period of more than 12 months, have been sent in the same way and been found undeliverable in the same way as for the notices in (a) above.

2. If the affected shareholder delivers written notice to the corporation that sets forth the shareholder's then-current address, the requirements for notice to that shareholder are reinstated.

G. Financial Statements – 12:1-1620

1. Introduction:

a. The Model Act requires a corporation to send certain listed annual financial statements to shareholders. Model Act § 16.20 (A).

b. Current Louisiana law requires the corporation to send certain listed financial statements on request once each calendar year, and describes those financial statements a bit differently than the more modern terminology used in the Model Act. 12:102 (B).

c. The drafting committee utilized the Model Act listing of the financial statements, and the rules relating to the nature of the statements (e.g., whether they had to be audited), but retained the current Louisiana rule that requires the statements to be sent only on request.

2. Entitlement to Report on Request: Under the new Act, once each calendar year, a shareholder is entitled to obtain a report of financial information from the corporation. To obtain the report, the shareholder must give written notice of the request for the financial report to the corporation, and specify a mailing or electronic address to which the report may be sent. The corporation is required to provide the report promptly after receiving the shareholder's notice. 12:1-1620 (A).

3. Content of Financial Report – 12:1620 (B):

a. A financial report must contain the following financial statements:

(1) A balance sheet;

(2) An income statement;

(3) A statement of changes in shareholders' equity unless that information appears elsewhere in the financial statements provided; and

(4) If ordinarily prepared by the corporation, a statement of cash flows.

b. The financial statements may be consolidated or combined statements of the corporation and one or more of its subsidiaries, as appropriate, for the last fiscal year ended at least four months before the effective date of the shareholder's notice.

c. If the corporation's financial statements are prepared for the corporation on the basis of generally accepted accounting principles, the statements provided to the shareholder must also be prepared on that basis.

d. If the statements are reported upon by a public accountant, the accountant's report must be delivered as part of the financial report.

4. Exception For a Public Corporation – 12:1-1620 (D): A public corporation may fulfill its responsibilities to provide financial statements by making the statements available in any manner permitted by the applicable rules and regulations of the United States Securities and Exchange Commission. A public corporation that provides financial statements in that way is not required to deliver a report of financial information as required by 12:1620 (A).

XXXI. Annual Reports – 12:1-1621

A. Timing:

1. The Model Act requires the filing of an annual report in the first quarter of each calendar year.

2. The new Act retains the current timing requirement that the reports be filed on or before the anniversary of the date that the corporation was incorporated.

B. Content: The annual report must set forth:

1. The name of the corporation;

2. The address of its registered office;

3. The name and address of its registered agent;

4. The address of its principal office;

5. The names and business addresses of its directors and principal officers; and the total number of issued shares, itemized by class and series, if any, within each class.

C. Dissolved Corporation Must Continue to File:

1. Recall that a dissolved corporation differs from an undissolved corporation only in the object of its management: to wind up and liquidate the business and affairs of the corporation (rather than to carry on an ongoing business or operation). All of the normal managerial rules

continue to apply, and the corporation continues to be the proper party plaintiff or defendant in an action brought by or against the corporation.

2. For that reason, a dissolved corporation is required to file annual reports until the existence of the corporation is terminated.

3. Under the newer, shorter 90-day grace period, a dissolved corporation that fails to file an annual report within the required time period will have its existence terminated by the secretary of state.

XXXII. Reporting Obligation of Corporation Contracting with State – 12:1-1622

A. Current law requires corporations that contract with the state to file a statement acknowledging that fact, and disclosing the names and addresses of all persons or corporate entities who hold an ownership interest or voting power of 5% or more. The current requirement is stated as part of 12:25, as if the statement were connected in some way with the process of incorporating a new corporation.

B. The new Act retains the substance of the existing requirement, but moves it from the incorporation provision of the statute to Part 16, concerning records and reports.

C. The new provision, 12:1622, drops the word "corporate" from the phrase "persons or corporate entities," as the provision appears designed to require disclosure regardless of the form the entity may take. (Indeed, under the new Act, the word "person" is defined broadly enough to include entities also, but the older terminology was retained to avoid any suggestion that ownership by any entity would not need to be reported.)

XXXIII. Transition – 12:1-1701 – 1703

A. The new Act will apply to all domestic corporations in existence on its effective date that were incorporated under Louisiana law for a purpose or purposes for which a corporation could be formed under the new Act, which will become Chapter 1 of Title 12. 12:1-1701.

1. In effect, the new Act will apply only to business corporations, and not to insurance or banking corporations, for example, as those are not the types of corporations that may be formed under Chapter 1 of Title 12.

2. Because professional corporations (such as professional medical corporations and professional law corporations) are themselves specialized forms of Chapter 1 business corporations, the new Act will apply to those corporations as well.

B. The new Act does not apply to foreign corporations except where express reference is made to foreign corporations (as, for example, in the case of business combinations or conversions involving foreign corporations).

C. Savings Provision – 12:1-1703: Except as stated in (D) below, the repeal of a statute by the new Act (i.e., the repeal of existing Chapter 1) 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; or

4. An 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.

D. If the new Act reduces a penalty or punishment, and that penalty or punishment has not yet been imposed, the penalty or punishment is to be imposed under the new Act.

E. E-SIGN Conflict: If any provision in the Act is deemed to modify, limit, or supersede the provision in E-SIGN (the federal law concerning electronic communications and signatures in transactions), the provisions of the new Act are to control to the maximum extent allowed by E-SIGN.