6 Corporate Operating and Maintenance Issues

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I. INTRODUCTION

A. [6.1] Scope of Chapter

Corporations are "persons" created by virtue of laws, and most of the laws in Illinois that govern corporations can be found in the Business Corporation Act of 1983 (BCA), 805 ILCS 5/1.01, *et seq.* As statutory persons, corporations can engage in the same types of activities as human persons, such as obtaining rights to occupy real estate, acquiring and selling assets, and purchasing and selling services. Corporate "persons," however, must take more complex steps in order to accomplish these activities, and they must document these activities in a different (and usually more complex) manner than humans.

This chapter addresses the types of documentation that are often helpful when a corporation takes such customary and relatively frequent actions as holding meetings of shareholders or directors, taking action by written consent of shareholders or directors, paying a dividend, and amending its articles of incorporation. This chapter also addresses actions that a corporation may take very rarely, such as merging or consolidating with another corporation or its own subsidiary; purchasing, selling, leasing, or exchanging its stock or assets; or dissolving. Corporations must also file annual and other reports with the Secretary of State and pay certain fees, franchise taxes, and other charges in order to maintain their good standing as corporations; those are also discussed here.

Other chapters of this handbook cover the formation of Illinois business corporations (Chapters 1, 2, and 4), certain tax aspects of business corporations (Chapters 2, 7, and 9), and issues concerning fiduciary duties of directors, officers, and shareholders (Chapter 3). Chapter 7 addresses operating issues for S corporations, and Chapter 8 discusses professional and medical corporations.

This chapter does not address the operating aspects of corporations and other entities that are regulated by specific statutes by virtue of their business purpose or the nature of their activities. These entities include railroads; public utilities; financial corporations such as banks, trust companies, savings and loan associations, small loan companies, and similar institutions; insurance corporations; and not-for-profit corporations.

B. [6.2] Relevant State and Federal Agencies

The Office of the Illinois Secretary of State administers the Business Corporation Act of 1983 and is the governmental agency primarily concerned with the operating aspects discussed in this chapter. 805 ILCS 5/1.05. Illinois business corporations are also regulated by the Internal Revenue Service, the Illinois Department of Revenue, the U.S. Securities and Exchange Commission (SEC), and the Secretary of State's Securities Department, among others. Note that the Secretary of State's Office also administers the Illinois Securities Law of 1953, 815 ILCS 5/1, *et seq.* Corporations whose businesses involve regulated industries (*e.g.,* architecture, medicine, engineering, surveying, and law) or whose activities fall within the ambit of other regulations (*e.g.,* federal or state securities law) also must comply with regulations of the governmental agencies that regulate their corresponding businesses and activities. Discussion of these specialized federal and state

regulations is outside the scope of this chapter. However, it is vitally important that counsel understand which regulations are applicable to a client's corporation and business activities when providing advice on day-to-day operational and maintenance issues.

II. REPORTS, FORMS, FEES, AND BASIC ORGANIZATIONAL DOCUMENTS

A. [6.3] Corporate Formalities Generally — The Corporate Veil

Counsel should consider using the filing of all corporate reports, and the preparation of all types of corporate organizational and operating documents, as opportunities to remind the corporate client of its need to follow corporate formalities. Among other things, the requirement to follow corporate formalities means that shareholders and directors must meet (or act by written consent) at least annually to elect directors and officers. See generally 805 ILCS 5/7.05, 5/8.05, 5/8.10(c). In addition, counsel periodically should remind corporate clients of the need to document other major corporate decisions (*e.g.,* loan transactions, material purchases and sales outside the ordinary course, and other significant transactions) with resolutions adopted by the directors or shareholders, as applicable.

The benefits of limited liability that flow from the corporate form are contingent on several criteria, including adherence to corporate formalities. The court's opinion in *People v. V & M Industries, Inc.,* 298 Ill.App.3d 733, 700 N.E.2d 746, 233 Ill.Dec. 218 (5th Dist. 1998), provides a good illustration of the importance of observing corporate formalities. In *V & M,* the court held the president and 98-percent shareholder of a corporation personally liable for obligations of the corporation. The court noted eight factors that were relevant in determining whether to disregard a corporate entity, with no single factor being determinative. Two of these factors were "the failure to observe corporate formalities" and "the absence of corporate records." 700 N.E.2d at 751. In discussing its conclusions, the *V & M* court noted that "[w]hile articles of incorporation and annual reports were filed with the Secretary of State, the record confirms that corporate formalities were regularly overlooked." 700 N.E.2d at 751 – 752. Counsel may find this opinion to be a useful tool for getting clients to focus on the need for annual "housekeeping" with respect to corporate formalities. See also 7 Charles W. Murdock, BUSINESS ORGANIZATIONS §8.17 (2d ed. 2010, Supp. 2019) (Vol. 7 of the ILLINOIS PRACTICE SERIES) (Murdock, BUSINESS ORGANIZATIONS). However, the Seventh Circuit somewhat diminished the usefulness of *V & M* as a means for lawyers to scare their corporate clients into completing consents or minutes for annual meetings of directors and shareholders when, in *Browning-Ferris Industries of Illinois, Inc. v. Ter Maat,* 195 F.3d 953, 960 – 961 (7th Cir. 1999), the court stated:

> **There is no evidence that [**the corporations**] failed to comply with the legal requirements for operating in the corporate form, except with regard to keeping minutes of their corporate meetings — not a failure significant enough to warrant forfeiture of limited liability, given that penalties should be proportioned to the gravity of the misconduct being penalized.**

In spite of the Seventh Circuit's language, however, Illinois courts continue to look at adherence to corporate formalities (or the lack thereof) in deciding whether to pierce the corporate veil. For a

case in which disregard for corporate formalities (including minutes of meetings, adoption of resolutions for major financial actions such as loans to and from shareholders, etc.) supported the court's decision to pierce the veil and hold an individual officer personally liable (even though he was not a shareholder), *see Fontana v. TLD Builders, Inc.,* 362 Ill.App.3d 491, 840 N.E.2d 767, 781, 298 Ill.Dec. 654 (2d Dist. 2005).

Commentators have suggested that the importance of keeping complete and detailed corporate minutes (and doing so in a timely fashion) has grown in light of two Delaware court decisions. See Cullen M. "Mike" Godfrey, In re The Walt Disney Company Derivative Litigation: *A New Standard for Corporate Minutes,* 17 Bus.L. Today, No. 6, 47 (July/Aug. 2008). In *In re Walt Disney Company Derivative Litigation,* 906 A.2d 27 (Del. 2006), the Delaware Supreme Court examined whether the compensation committee and the full board of the Walt Disney Company breached their duties of care in approving a compensation package for a new company president. Although the court admitted parol evidence to support claims by the defendants about the extent of deliberation and the level of information shared with directors, the court noted at several points that the documentation of board and committee meetings was not what it should be. 906 A.2d at 39 – 41, 56 – 57.

And in *In re Netsmart Technologies, Inc. Shareholders Litigation,* 924 A.2d 171 (Del.Chan. 2007), the Delaware Chancery Court took a similarly dim view of a corporate board whose practices on minute keeping and approval were somewhat lax. The court noted with dismay that after the shareholders' litigation had commenced, the special committee of the board met and, in one session, approved formal minutes for ten meetings that occurred over the preceding four months, stating that the "tardy, omnibus consideration of meeting minutes is, to state the obvious, not confidence-inspiring, especially when considered along with the total absence of minutes for [another board meeting in that time period] and the lack of clarity whether the Special Committee ever met to approve [an important decision relating to the merger transaction at issue]." 924 A.2d at 191.

While decisions concerning the Delaware General Corporation Law are not binding on Illinois corporations, the preeminence of the Delaware courts in addressing issues of corporate law means that these precedents are instructive for Illinois corporations and Illinois counsel. Although the level of scrutiny of corporate records is certainly more intense for a public company than for a small, closely held one, the issues of burden of proof on important points like director duty of care suggest that these findings should be considered carefully by lawyers advising Illinois corporations.

B. [6.4] Reports and Forms

The Business Corporation Act of 1983 requires filing reports and paying fees with respect to many corporate transactions. The reports required to be filed and the fees, franchise taxes, and other charges that must be paid, as well as their bases of computation, are set forth in Articles 14 and 15 of the BCA, respectively. The Secretary of State has prepared a schedule of corporate forms and fees to assist in the preparation of the forms and the computation of the appropriate fees, and this schedule is available at the Secretary of State's website at www.cyberdriveillinois.com/publications/business_services/home.html. Each form provided by the Secretary of State is identified by a form number (set forth in the upper left-hand corner the form) that corresponds to

the section of the BCA to which the form relates. Under §15.95 of the BCA, the Secretary of State's Office in Springfield is authorized to provide certain expedited services (same day or within 24 hours of request) pursuant to a special fee schedule. 805 ILCS 5/15.95. Importantly, simply making a filing electronically does not constitute a request to expedite. See 805 ILCS 5/15.95(d).

Copies of the forms issued by the Secretary of State and confirmation of the amount of fees due in connection with these forms can be obtained by calling either the Springfield or Chicago Office of the Secretary of State or from the Secretary of State's website, www.cyberdriveillinois.com/departments/business_services/home.html. The addresses and telephone numbers of these offices are

Secretary of State
Department of Business Services
501 S. 2nd St., Rm. 350
Springfield, IL 62756
217-782-6961

Secretary of State
Department of Business Services
69 W. Washington St., Ste. 1240
Chicago, IL 60602
312-793-3380

Although the Secretary of State's Office continues to provide paper copies of forms and filing fee information upon request, the website is the most efficient source for current forms and filing fee information.

Most fees may be paid by corporate or personal check and should be made payable to the "Secretary of State." Filing fees for incorporating a new corporation, qualifying a foreign corporation in Illinois, or reinstating a dissolved corporation, however, must be paid by certified check, cashier's check, money order, or Illinois attorney's check. The Secretary of State will not accept for filing any document from a foreign or domestic corporation until all fees have been paid in connection with the document or while the corporation is in default in the payment of any fee of any kind to the Secretary of State. 805 ILCS 5/15.85(a). In addition, §15.85(a) states that the Secretary of State shall not accept any filing from a corporation that is in default in filing any return or payment of any assessment of tax, penalty, or interest with the Secretary of State's Office or the Illinois Department of Revenue.

The Secretary of State accepts electronic filings for some corporate filings. For example, for-profit corporations may file the following electronically: articles of incorporation, annual reports (in most cases), amendments to their articles of incorporation that only change the corporation's name, assumed name applications, assumed name renewals, and reports of a change in registered agent. Note that the Secretary of State charges an additional fee for electronic filings and that payment may be made by credit card or wire transfer. Nonprofit corporations and limited liability companies similarly may make some (but not all) of their filings electronically. Practitioners should consult the Secretary of State's website, www.cyberdriveillinois.com/departments/business_services/home.html, for the most current information on forms, filing fees, and the availability of electronic filing for any particular form.

If more than one copy of a form must be filed, the BCA specifies that only one originally executed form must be submitted. Any true copy of the original may be used (*e.g.,* signed original,

carbon copy, or photocopy) as the other copies. 805 ILCS 5/1.10(e)(1). The requirements for execution, acknowledgment, and filing of forms with the Secretary of State can be found in §1.10 of the BCA. As of January 1, 2011, the State of Illinois eliminated the historic requirement of recording with the local recorder's office for virtually all corporate filings. See P.A. 96-1121.

Section 1.15(a) of the BCA allows a fairly simple statement of correction to be filed if any instrument filed with the Secretary of State contains any misstatement of fact, typographical error, error of transcription, or any other defect or was executed defectively or erroneously. Certain substantive changes are not permitted to be accomplished by a statement of correction; these are listed in §1.15(e), and for the most part, they concern transactions and matters for which specific forms exist, such as amendments to the articles of incorporation. A statement of correction may provide the grounds for a refund or an adjustment of an assessment. 805 ILCS 5/1.15(g). A refund or adjustment must be claimed in a separate petition for refund filed within three years of payment of the disputed amount. 805 ILCS 5/1.17(a). The Secretary of State's Office prepared Form BCA-1.17, Petition for Refund or Review, available at www.cyberdriveillinois.com/publications/pdf_publications/bca117.pdf, for this purpose. The Secretary of State has complete discretion in evaluating all requests for refunds.

C. [6.5] Annual Report

Each foreign and domestic corporation is required to file an annual report and pay a $75 filing fee to the Secretary of State. 805 ILCS 5/14.05, 5/15.10(*o*). A corporation is required to file an annual report within 60 days preceding the first day of the anniversary month of the corporation's incorporation. 805 ILCS 5/14.10. See §§1.80(n) and 1.80(*o*) of the Business Corporation Act of 1983 for definitions of "anniversary" and "anniversary month." A principal purpose of this report is to enable the Secretary of State to verify the calculation of (and obtain payment of) the corporation's annual franchise tax. This tax is computed on the paid-in capital, as set forth in the annual report. See 805 ILCS 5/14.05(h).

Corporations can select from alternative methods for calculating their annual franchise tax amount. They can either elect to pay based on (1) 100 percent of their paid-in capital, (2) the assumption that all of the corporation's property is located in Illinois and 100 percent of its business is transacted at or from places of business in Illinois, or (3) the calculation of an allocation factor that examines the proportion of the corporation's gross assets and gross amount of business conducted within and without the State of Illinois. See Form BCA 14.05, Domestic Corporation Annual Report, available at www.cyberdriveillinois.com/publications/pdf_publications/bca1405d.pdf. Section 1.80 of the BCA offers a definition to clarify the meaning of the term "gross amount of business" as used in this calculation (and as used in the corresponding calculation for foreign corporations qualifying to do business in Illinois): the term means "gross receipts, from whatever source derived." See 805 ILCS 5/1.80(y).

Section 14.01 of the BCA allows corporations to make a one-time irrevocable election to establish an extended filing month for annual reporting purposes. Form BCA-14.01, Statement of Election to Establish an Extended Filing Month, available at www.cyberdriveillinois.com/publications/pdf_publications/bca1401.pdf, was created for this purpose. This procedure has been

established for a corporation whose anniversary month too closely follows the end of its fiscal year. It is designed to allow qualifying corporations additional time to gather the information required by the annual report.

Only corporations that meet the following three tests are permitted to establish an extended filing month:

1. The corporation must have reported less than 100 percent of its paid-in capital represented in Illinois on its last annual report.

2. The corporation's fiscal year end may not fall within the two months preceding its anniversary month.

3. The extended filing month may not be more than nine months after the corporation's fiscal year end. 805 ILCS 5/14.01(a).

At the time the extended filing month is established, the corporation must file an interim annual report, and then, within 60 days of the extended filing month, the corporation must file a final transitional annual report. 805 ILCS 5/14.01(c), 5/14.01(d).

P.A. 101-9 (eff. June 5, 2019) amended several portions of the BCA, including §§15.35 and 15.65 (addressing the annual franchise taxes payable by domestic and foreign corporations, respectively). Starting on January 1, 2020 and running through December 31, 2023, the first $30 in liability is exempt from the annual franchise tax, and that amount increases each year to $1,000 (for 2021), then $10,000 (for 2022), and $100,000 (for 2023). No franchise taxes shall be payable for 2024 and 2025. New clause (f) of these sections states: "This Section is repealed on December 31, 2025." 805 ILCS 5/15.35(f), 5/15.65(f). Thus, Illinois will no longer have an annual corporate franchise tax beginning in 2024. As of the publication date of this chapter, officials at the Secretary of State's office were still working on implementation of this new rule. At one point, legislators were considering accelerating the schedule noted above and moving to zero franchise tax as of January 1, 2020 (see Illinois H.B. 3270, 101st Gen.Assem., introduced February 15, 2019, which has languished in the Rules Committee for over a year). At this juncture, it seems unlikely the above implementation schedule will be revised, but practitioners are encouraged to monitor this issue closely to see if further revisions to the statute or corresponding forms are forthcoming.

This repeal has been a long time coming. Starting in October 1873 (only a year after Illinois implemented the annual corporate franchise tax), commentators began criticizing the tax as unfair, unduly complex, and not likely to yield significant revenue. See Taxpayers' Federation of Illinois, 66 Tax Facts, No. 5, 3 (Nov./Dec. 2013). In recent years, as the number of states using this model has dropped, the criticism (on those same points) has mounted. See 66 Tax Facts, No. 5, at 4 – 8.

A corporation may not use its annual report to report a change in its registered agent or its registered office; these changes must be reported by filing Form BCA 5.10/5.20, Statement of Change of Registered Agent and/or Registered Office, available at www.cyberdriveillinois.com/publications/pdf_publications/bca510.pdf. 805 ILCS 5/5.10(b), 5/5.20(a).

Sections 2.10(b)(1) and 14.05(d) of the BCA, which required that the annual report list the residential addresses of the corporation's officers and directors, were amended by P.A. 92-33 (eff. July 1, 2001) to require business addresses to be listed for these individuals instead. P.A. 93-59 (eff. July 1, 2003) subsequently amended these same sections to remove the term "business." Sections 2.10(b)(1) and 14.05(d) now simply require addresses for these individuals. Some individuals who serve as officers and directors are reluctant to disclose their residential addresses in a public filing such as an annual report. Thus, counsel may want to use the corporation's address for all officers and directors. Prudence would suggest at least confirming this decision with the individuals involved.

A corporation that has failed to file its annual reports and pay the corresponding taxes and fees may not maintain any civil action until that default has been remedied. See 805 ILCS 5/15.85.

D. [6.6] Report of Issuance of Shares and Other Reports

Article 14 ("Reports") and Article 15 ("Fees, Franchise Taxes and Charges") of the Business Corporation Act of 1983 provide for a once-a-year reporting framework for changes in numbers of shares and paid-in capital. For these changes, a corporation will be permitted to file Form BCA 14.30, Cumulative Report of Changes in Issued Shares and Paid-in Capital, available at www.cyberdriveillinois.com/publications/pdf_publications/bca1430.pdf, with the corporation's annual report. See 805 ILCS 5/14.30(a). This once-a-year reporting schedule is not available to a corporation that is the surviving corporation in a statutory merger or the new corporation in a consolidation during the preceding year, and these changes must be reported promptly following the corresponding transactions. 805 ILCS 5/14.35.

Once a year, the Secretary of State sends each corporation a partially completed annual report form. Concurrently with the completion of that annual filing (and concurrently with any intervening merger, consolidation, or amendment of articles of incorporation), the corporation must also file Form BCA 14.30 if the corporation has experienced changes in the number of its issued shares or the amount of its paid-in capital. See 805 ILCS 5/14.30.

The definition of "paid-in capital" in §1.80(j) of the BCA allows a corporation to reduce its paid-in capital by the sums spent in the acquisition and cancellation of its own shares. A corporation may reduce its paid-in capital by "the paid-in capital represented by shares acquired and cancelled by the corporation as permitted by law, to the extent of the cost from the paid-in capital of the reacquired and cancelled shares or a lesser amount as may be elected by the corporation." 805 ILCS 5/9.20(a)(1). See also 805 ILCS 5/9.05(d). Unless otherwise specified in the articles of incorporation, the canceled shares constitute authorized but unissued shares. See *id.*

The definition of "paid-in capital" in §1.80(j) of the BCA is noteworthy because it is different from the one often used by accountants and business people in their parlance. As a result, counsel must often translate figures received from these individuals before using them to complete the annual report. This is often the case in situations in which a corporation wishes to adjust its paid-in capital downward. While there may be several approaches and theories by which to achieve this result under accounting theories, the BCA permits paid-in capital to be reduced only by repurchasing and canceling shares, paying dividends on preferred shares, making distributions as

liquidating dividends, or making these reductions pursuant to an approved reorganization in bankruptcy that specifically authorizes the reductions. See 805 ILCS 5/9.05, 5/9.20(a). In addition, BCA §9.20(f) states that in the case of a vertical merger (*i.e.,* the merger of a parent and its subsidiary corporation), the paid-in capital of the subsidiary may be eliminated if either (1) the subsidiary was created, totally funded, and wholly owned by the parent or (2) the amount of the parent's investment in the subsidiary was equal to or exceeded the subsidiary's paid-in capital.

The statute contains little detailed guidance on completing this calculation of paid-in capital and how it is to be altered in the case of share issuances or repurchases. However, the instructions to Form BCA 1.35, Allocation Factor Interrogatories, available at www.cyberdriveillinois.com/publications/pdf_publications/bca135.pdf, contain helpful explanations of the terms used here. The basis for calculating the annual franchise tax is provided in 805 ILCS 5/15.40. The relevant filing fees and the annual franchise tax are to be paid by each corporation at the time it files its annual report.

In any event, when a corporation repurchases its own shares, those shares constitute treasury shares under the BCA, until they are reissued or canceled. 805 ILCS 5/9.05(b). However, the BCA adopts a concept of share cancellation that, at least to this author, is counterintuitive. The corporation may cancel any treasury shares by action of its board of directors. 805 ILCS 5/9.05(d). And, indeed, the board of directors must cancel those treasury shares if it wants to report a decrease in paid-in capital (and obtain a corresponding reduction in franchise tax) in connection with the share repurchase. See 805 ILCS 5/9.05(c). Further, the BCA notes that a corporation's articles of incorporation may provide that any cancellation of shares like this will also operate to reduce the number of authorized shares, and if the articles so provide, the board must promptly file a corresponding amendment to the articles in connection with any share reduction. See *id.* If the articles of incorporation are silent on this point, then cancellation of repurchased shares simply operates to convert them from treasury shares to authorized but unissued shares, a distinction that is probably irrelevant to any nonpublic company. But despite being "canceled," those shares may be reissued by the corporation.

A corporation that is the survivor in a statutory merger or is the new corporation in a consolidation during a given year must file a report of those changes on Form BCA-14.35, Report Following Merger or Consolidation, available at www.cyberdriveillinois.com/publications/pdf_publications/bca1435.pdf, within 60 days of the effective date of the event. 805 ILCS 5/14.35(a). This report contains information that enables the Secretary of State to verify the proper amount of fees and franchise taxes payable by the corporation.

As noted in §6.5 above, June 2019 saw Illinois begin the process of dismantling its annual corporate franchise tax. P.A. 101-9 (eff. June 5, 2019) added language to §14.30 to indicate that these reports of changes in issued shares or paid-in capital will be eliminated beginning January 1, 2024, presumably because the paid-in capital component of those forms was used only for calculating the annual franchise tax. See 805 ILCS 14.30(a). As of the date of this publication, the Illinois regulators were still in the process of implementing new forms and rules to address these changes. Practitioners should remain alert to further revisions.

E. [6.7] Penalties

Section 16.05 of the Business Corporation Act of 1983 lists the penalties that a corporation must pay if it fails to file a required report. Other penalties for failing to comply with the BCA are also set forth in §16.05, as well as in §16.10 of the BCA. Because the penalties for failure to file certain reports are calculated at a percentage of the applicable license fees and franchise taxes for each calendar month or part thereof that the report is late, corporations are advised to file reports within the prescribed time periods.

Certain penalties for late payment of license fees and franchise taxes have been designated by the Secretary of State as "interest" under §16.05. The theory here is that this designation will help corporations argue that the interest portions of these payments may be deducted from income for federal income tax purposes.

A seven-year statute of limitations for any tax, fee, penalty, or interest imposed by the BCA is set forth in 805 ILCS 5/15.90(a). The statute of limitations does not apply to cases involving fraud or attempts to evade taxes. *Id.*

In June 2019, a previous amnesty program for these franchise taxes (circa 2008) was reopened for a period between October 1, 2019, and November 15, 2019, and it applied to franchise taxes payable for any period ending between March 15, 2008, and June 30, 2019. See 805 ILCS 8/5-10.

F. [6.8] Basic Organizational Documents

The basic documents that govern a corporation's operations are its articles of incorporation, its bylaws, and the minutes and consents that document the actions of its shareholders and directors. A discussion of the drafting of articles of incorporation and bylaws is found in Chapter 4 of this handbook. Counsel should consult (or be familiar with) the articles of incorporation and the bylaws of any corporation when preparing any of the documents described in this chapter. The articles of incorporation, for example, will determine whether a corporation has different classes of stock that require special dividend resolutions or different voting rules for the election of directors. The articles will also contain guidance on whether special supermajority rules will apply to votes on certain major corporate transactions. The bylaws will contain operating rules on such points as the size of the board of directors, what constitutes a quorum, and the notice required for meetings of shareholders and directors.

An attorney preparing any of the documents described in this chapter should also consult at least the recent volumes of the corporation's minute book to confirm that no preexisting resolutions are in conflict with the resolutions and documents being prepared. Further, counsel should review the corporate minute books (and perhaps other corporate records, if needed) to determine whether there are shareholders' buy-sell agreements, voting trust agreements, or any stock pledges that give voting rights to third parties. All of these may have a bearing on what types of documents might be needed to accomplish specific tasks and what terms they should contain.

G. [6.9] Assumed Corporate Name

A domestic corporation or a foreign corporation may wish to use one or more assumed corporate names in Illinois. The Business Corporation Act of 1983 permits the filing of Form BCA-4.15/4.20, Application to Adopt, Change or Cancel an Assumed Corporate Name, available at www.cyberdriveillinois.com/publications/business_services/dfc.html, if the name complies with the requirements set forth in 805 ILCS 5/4.05(a)(2) – 5/4.05(a)(6). 805 ILCS 5/4.15. The assumed corporate name need not contain the corporation suffix. *Id.* Before using an assumed name, the name may be reserved with the Secretary of State by filing Form BCA 4.10, Application for Reservation of Name, available at www.cyberdriveillinois.com/publications/pdf_publications bca410.pdf, together with the filing fee. 805 ILCS 5/4.10. An assumed name may be changed or canceled by filing another Form BCA 4.15/4.20 and paying the filing fee. Assumed corporate names may be used for up to five years and then may be renewed in years evenly divisible by five. 805 ILCS 5/4.15(d). The Secretary of State's Office cross-references corporate names and corporate assumed names with the names and assumed names used by limited liability companies. Thus, if a corporation wishes to adopt an assumed name, the assumed corporate name must be distinguishable not only from any other corporate name or assumed name used by any corporation incorporated or qualified to do business in Illinois, but also from the name or assumed name of any LLC organized or qualified to do business in Illinois. See 805 ILCS 5/4.05(a)(3).

In what now seems to be an artifact from a happier, more hopeful time, P.A. 96-7 (eff. Apr. 3, 2009) was adopted to amend both the provisions of the BCA concerning acceptable names for corporations and the provisions concerning acceptable assumed names to prohibit Illinois companies from using any name or assumed name that included a host of words and phrases associated with the Chicago bid for the 2016 Olympic Games (including "Olympic," "Olympiad," etc.). See former 805 ILCS 5/4.05(a)(9); 805 ILCS 5/4.15. P.A. 96-7 included a provision stating that it would become inoperable as of December 1, 2009, if Chicago was not selected as the host city for the 2016 Olympic Games. This chapter of history was closed with finality when the entire §4.05(a)(9) was removed by P.A. 700-173, effective January 1, 2019. See 805 ILCS 5/4.05.

Counsel should warn corporate clients that having a valid corporate name or a valid assumed name filing in Illinois will not ensure that a corporation has an absolutely exclusive right to use the name. If a corporation has significant value associated with its name or its assumed name, counsel should advise the corporation to consider applying for trademark, trade name, and other types of intellectual property protection for the name and its use.

Counsel should emphasize to clients the need to register any assumed names that are used by a corporation even if these assumed names are only slightly different from the corporation's actual name. The cost of failing to do so may be personal liability of shareholders, officers, or directors. In *Hoskins Chevrolet, Inc. v. Hochberg,* 294 Ill.App.3d 550, 691 N.E.2d 28, 229 Ill.Dec. 92 (1st Dist. 1998), the appellate court held that the president of an Illinois corporation was personally liable for an obligation that was incurred under an unregistered assumed name on the theory that there was no corporate entity registered to use the assumed name and therefore the president was deemed to have been conducting business personally under the assumed name. In *Hoskins Chevrolet,* the assumed name and the actual name of the corporation were fairly close ("Diamond Auto Body & Repair, Inc." and "Diamond Auto Construction"), and the defendant argued that the

plaintiff necessarily understood that the obligation undertaken under the latter assumed name was really a corporate obligation of the entity with the former corporate name. The court nonetheless found the president personally liable on the theory that the president was deemed to be doing business as a sole proprietorship when he used the assumed name since there was no other corporate entity to whom the assumed name could be attributed according to the records of the Illinois Secretary of State. 691 N.E.2d at 31 – 32.

Section 3.25(a) of the BCA specifically prohibits persons from adopting assumed or fictitious business names that would cause them to engage in a practice called "locale misrepresentation." 805 ILCS 5/3.25(a). Although the statute applies to all "persons," it seems to be aimed primarily at nonpublic foreign corporations that are doing business in Illinois because these are the only entities for which the statute lists specific penalties for commission of the offense of locale misrepresentation. See the discussion in §6.77 below.

H. [6.10] Common Filing Mistakes

The Secretary of State's Office will reject any form submitted for filing if the form is incorrectly completed or if it is missing any required information. Thus, counsel is advised to review each filing carefully before submitting it, especially if the corresponding transaction has any time sensitivity.

The Secretary of State's Office has outlined a number of the most common reasons that filings under the Business Corporation Act of 1983 are rejected in a helpful brochure entitled *A Guide for Organizing Domestic Corporations* (Mar. 2020), which is available at www.cyberdriveillinois.com/publications/pdf_publications/c179.pdf. The reasons include the following: (1) the filing is incomplete; (2) the filing fee, taxes, or penalties are not included in the correct amount; (3) names have not been typed or printed below signatures; (4) an incorrect number of documents has been submitted; and (5) outdated forms are submitted. As to the last point, as noted in §6.4 above, counsel is advised to use the Secretary of State's website to obtain current forms when and as needed rather than obtaining and stockpiling paper copies of blank forms. Forms on the website are consistently up to date. In addition to these general reasons for rejection of forms, the Secretary of State's guide reviews common reasons for rejection of specific forms, such as articles of incorporation and name reservations.

Because many forms are now stored on microfilm at the state and county levels, the Secretary of State has begun requiring that forms be completed and signed in black ink. Forms have been rejected because they were signed in blue ink, so this requirement can be material, especially when time is of the essence for a particular filing or when the parties wish to have the form accepted by the Secretary of State and declared effective as of a specific filing deadline.

III. SHAREHOLDERS' MEETINGS

A. [6.11] General Scope

Sections 6.12 – 6.33 below are concerned with shareholders' meetings and the procedures for obtaining shareholder approval of certain corporate actions when necessary. They deal with the

requirements for convening a valid meeting of the shareholders and the procedure for calling and giving notice of the meeting. Also covered are procedures for voting, whether in person or by proxy, as well as methods for obtaining approval without a meeting and for correcting defects in the call or notice that might invalidate a meeting.

The Corporate Laws Committee and Corporate Governance Committee of the American Bar Association's Business Law Section have published a short book entitled HANDBOOK FOR THE CONDUCT OF SHAREHOLDERS' MEETINGS (2d ed. 2010). It provides a useful summary of such important procedural steps as opening the meeting, powers of the chair, shareholder participation, voting, and concluding the meeting. The book also contains additional samples of many of the forms included in this chapter, as well as other forms relating to shareholders' meetings.

B. [6.12] Need for Shareholders' Meetings

Ultimately, a corporation is controlled by its shareholders. This power is exercised through a board of directors elected by the shareholders except when law, the corporation's articles of incorporation, or the corporation's bylaws require shareholder approval of certain specific actions. The shareholders' power to elect directors and to take direct action in corporate affairs may be exercised at a formal meeting of the shareholders that meets the requirements of applicable law, the corporation's bylaws, and its articles of incorporation. If a corporation has numerous shareholders or if it has shareholders who are not regularly involved in the corporation's business operations, the board of directors should consider holding at least one formal meeting of the shareholders each year to elect directors and transact other appropriate business (as opposed to taking this action by written consent, which might be more workable and appropriate for corporations with a small number of shareholders who are more involved in the business).

Special meetings of the shareholders may be held when deemed necessary and may be called by the president, the board of directors, the holders of not less than one fifth of all shares entitled to vote on the matter for which the meeting is called, or such other officers or persons as may be provided in the articles of incorporation or bylaws. 805 ILCS 5/7.05. However, failure to hold the annual meeting at the time designated in the bylaws does not cause the dissolution of the corporation, and neither does it affect the validity of corporate action. *Id.*

Shareholders' meetings may also be conducted using conference telephone, electronic transmission, the Internet, remote communication, or other means of interactive technology. *Id.* See §6.19 below. Shareholders may also act by written consent in lieu of holding a meeting unless otherwise provided in the articles of incorporation. 805 ILCS 5/7.10(a). See §6.28 below.

C. [6.13] Call and Notice

Meetings must be properly called, and all shareholders entitled to receive notice of a meeting and to vote at a meeting must be given proper notice. Special meetings may be called only by persons specifically authorized by statute or the bylaws to do so. 805 ILCS 5/7.05. For a notice to be proper, it must contain the time, place, and, with respect to special meetings, the purpose of the meeting, and it must be delivered to the shareholders within a statutorily defined time period before

the meeting. See 805 ILCS 5/7.15. To determine which shareholders are entitled to notice of a meeting, counsel should consult the Business Corporation Act of 1983 and the articles of incorporation to determine whether they impose special notice requirements. Absent any special limitations, all shareholders of record as of the relevant record date should receive notice of all meetings of shareholders. The board of directors may set the corresponding record date for determining who receives notice, again subject to the limitations, if any, contained in the BCA and the articles of incorporation. 805 ILCS 5/7.25.

D. [6.14] Quorum and Vote Requirements

A majority of the outstanding shares entitled to vote on a matter at a meeting present in person or by proxy constitutes a quorum for the transaction of business unless a different number is required by statute or the articles of incorporation. However, a quorum may not be less than one third of the outstanding shares entitled to vote. 805 ILCS 5/7.60.

A majority of the votes constituting a quorum is required for the shareholders at a meeting to approve or take any action except as otherwise provided by statute or the articles of incorporation. *Id.* See 805 ILCS 5/7.85 for the vote required for certain business combinations. Thus, Illinois law accords with the minority view that a shareholder can break a quorum and halt the transaction of business at a shareholders' meeting by withdrawing from the meeting (if the shareholder owns a sufficient number of shares). See 805 ILCS 5/7.60. The majority of states take the view that once a quorum has been established, it cannot be broken by a shareholder withdrawing from the meeting. The rationale for the majority view is well established: it prevents a shareholder from manipulating the outcome of a meeting if he or she is unhappy with the way it is proceeding. This manipulation is seen as thwarting the will of the shareholders. See generally Corporate Laws Committee and Corporate Governance Committee, ABA Business Law Section, HANDBOOK FOR THE CONDUCT OF SHAREHOLDERS' MEETINGS, pp. 45 – 49 (2d ed. 2010). One rationale for the Illinois view could be that it avoids the possibility that a shareholder will be disenfranchised and that a minority of shareholders will take action in the face of a shareholder's unavoidable withdrawal from a meeting (due to, for example, health or schedule conflicts).

E. [6.15] Inspectors of Election

Inspectors of election determine the presence in person or by proxy of the necessary quorum, determine the validity of proxies, and conduct and certify the results of all voting. In cases involving corporations with numerous shareholders and those that anticipate contested votes or that use written ballots, the directors often appoint inspectors for a meeting at the time the meeting is set, and the bylaws may expressly permit the appointment of inspectors at this time.

If a corporation's bylaws do not provide for appointment of inspectors or if no inspectors have been appointed pursuant to such a provision, the chair of the meeting may, and upon the request of any shareholder must, appoint one or more inspectors. 805 ILCS 5/7.35.

F. [6.16] Voting Rights of Shareholders; Voting by Proxy; Other Shareholder Rights

On matters other than the election of directors, each outstanding share is entitled to one vote on each matter submitted to a vote unless the articles of incorporation expand, limit, or eliminate

the right. 805 ILCS 5/7.40(a). The articles of incorporation may limit or deny the voting power of the shares of any class as long as there remains at least one class of the corporation's stock that has voting rights. 805 ILCS 5/7.40(b). If the articles of incorporation provide for more or less than one vote per share on any matter, every reference in the Business Corporation Act of 1983 to a majority or other proportion of the *shares* is deemed to be a reference to a majority (or other proportion) of the *votes* of the shares. 805 ILCS 5/7.40(d).

A shareholder may also attend a meeting by proxy, granting another person the right to participate in the business and voting of the meeting in the shareholder's name. 805 ILCS 5/7.50(a). The requirements for valid proxies are discussed in §§6.29 – 6.33 below.

One or more shareholders may create a voting trust in order to confer on one or more trustees the right to vote or otherwise represent their shares by entering into a written voting trust agreement that specifies the terms and conditions of the arrangement. 805 ILCS 5/7.65(a). The BCA provides for some limitations on these voting trust agreements. For example, they may be perpetual or for a fixed period of time or may expire upon the occurrence of a stated condition or conditions. However, in the absence of any explicit statement of duration, a voting trust terminates ten years after it first becomes effective. *Id.* Also, the rule against perpetuities does not apply to any voting trust created in accordance with this section, and every such voting trust agreement may be specifically enforced using principles of equity. 805 ILCS 5/7.65(c), 5/7.65(d). The shareholders entering into a voting trust agreement must deposit a counterpart of the agreement with the corporation's registered office. 805 ILCS 5/7.65(b).

Practitioners should note that the BCA's provisions on voting trusts were amended effective January 1, 2000, by P.A. 91-527, and the amendments adopted at that time (most notably, that voting trusts can be perpetual) apply only to voting trusts created or amended after the effective date of the amendments. See 805 ILCS 5/7.65(e).

Any shareholder of record may, upon written request and with a proper purpose, inspect and make copies of the corporation's books and records, minutes, and shareholder records, and the corporation must make them available subject to reasonable restrictions as to time and manner. 805 ILCS 5/7.75(b). A person who does not have a proper purpose, who has improperly used information previously acquired, or who has within the past two years sold or offered for sale any corporation's shareholder list may be denied the right to inspect the corporation records. 805 ILCS 5/7.75(d).

BCA §7.05 seems to have clarified that any shareholder entitled to vote at a meeting of shareholders does have a right to attend the meeting, but that this right is subject to (1) space limitations in the room where the meeting is held, (2) the corporation's bylaws and other applicable rules governing the conduct of the meeting, and (3) the power of the chair of the meeting to regulate the orderly conduct of the meeting. Because there are so many strong policy arguments in favor of permitting shareholders to attend shareholder meetings, this provision suggests that if the chair at a shareholders' meeting wishes to eject a shareholder, he or she should consult with counsel and make certain that the transcript or minutes of the meeting reflect clearly that the reason for the ejection was one of the three listed in the statute.

G. [6.17] Election of Directors; Cumulative Voting; Staggered Board

Every Illinois corporation must have a board of directors to manage its business and affairs. 805 ILCS 5/8.05(a). The board shall consist of one or more members (805 ILCS 5/8.10(a)), and it is elected by the shareholders. See generally 805 ILCS 5/8.10.

In closely held corporations, the selection of candidates for election to the board of directors is usually an informal process, and often the shareholders (or some subgroup of them) are automatically slated or nominated for election to the board. Further, shareholders in closely held corporations often enter into shareholders' agreements (or "buy-sell agreements") or other voting arrangements concerning the election of directors, to ensure that each shareholder or shareholder group is adequately represented on the board. If no such arrangements have been made and if selection of directors is a difficult or politically sensitive process for the shareholders and officers of the corporation, counsel may wish to suggest that the corporation adopt a formal process for nominations to the board. This may include formation of a nominating committee of shareholders or directors or implementation of some other procedure to obtain a variety of nominees representing various shareholder groups. Creating a more formal nominating process may also be a convenient mechanism to begin to implement some of the corporate governance safeguards that are currently receiving favorable attention from regulators and others. See §6.38 below.

Cumulative voting for directors is a method to increase the ability of minority shareholders to elect representatives to the board of directors. A system of cumulative voting permits each shareholder to cast a number of votes equal to the number of directors to be elected multiplied by the number of shares held. For example, if 5 directors are to be elected and a shareholder has 10 shares, that shareholder will be able to cast 50 votes for any one candidate or may split those 50 votes among the 5 candidates.

Illinois corporations incorporated before January 1, 1982, were required to give their shareholders the right to have cumulative voting in elections for directors. All corporations incorporated after that date may deny or limit this right by so providing in the articles of incorporation, but in the absence of any explicit limitation or denial in the articles of incorporation, the shareholders are deemed to have the right to cumulate their votes in elections for directors. 805 ILCS 5/7.40(b). Thus, counsel must review the articles of incorporation of any corporation before preparing documents concerning the election of directors to determine whether cumulative voting is applicable.

The one exception to the general rule on cumulative voting for directors occurs in the context of filling vacancies on the board of directors caused by death, retirement, removal, or an increase in the size of the board. Vacancies may be filled by the shareholders at an annual or special meeting, at which, presumably, cumulative voting would apply unless otherwise provided in the articles of incorporation. In addition, the bylaws may provide a different method for filling vacancies by shareholder or director action. Absent such a provision, the directors may always fill the vacancy. 805 ILCS 5/8.30. Any appointment by the directors to fill the vacancy would necessarily circumvent the cumulative voting system. However, the Business Corporation Act of 1983 limits this circumvention of the shareholders' cumulative voting process by providing that replacement

directors elected by the shareholders will serve for the balance of the term for which they are elected, but replacement directors who are appointed by the board, whether pursuant to a bylaw provision or simply pursuant to §8.30, serve only until the next meeting of shareholders at which directors are to be elected. *Id.*

For a fuller discussion of cumulative voting, including an example of how to calculate what vote is required to elect a director in a situation involving cumulative voting, see William Sardell, ENCYCLOPEDIA OF CORPORATE MEETINGS, MINUTES, AND RESOLUTIONS, pp. 55 – 57 (3d ed. 1986) (Sardell). See also 7 Charles W. Murdock, BUSINESS ORGANIZATIONS §9.14 (2d ed. 2010, Supp. 2019) (Vol. 7 of the ILLINOIS PRACTICE SERIES).

The BCA also permits corporations to provide for a staggered board of directors, by including appropriate provisions in their articles of incorporation or bylaws, if the board consists of six or more members. See 805 ILCS 5/8.10(e). In a staggered board, the directors are divided into either two or three equal (or nearly equal) classes, and one class is elected each year for two or three successive years. Corporations whose stock is publicly traded sometimes adopt staggered boards in order to insulate themselves from rapid takeover attempts; even if a hostile acquirer were able to purchase a clear majority of outstanding shares, the acquirer would have to continue to deal for two or three years after the acquisition with board members from the former management regime, who would, presumably, be hostile to the acquirer and friendly to former management. Smaller, nonpublic corporations have sometimes adopted staggered boards as well to ensure some continuity in the makeup of the board.

Because of several historical disputes about prohibitions on cumulative voting and classified boards in the 1933 Business Corporation Act, the Illinois Constitution of 1870, and the Illinois Constitution of 1970, there is some question about whether Illinois corporations that were incorporated prior to 1971 can have either cumulative voting or classified boards. Commentators (and the Illinois Supreme Court, in dicta) have indicated that a pre-1971 corporation might be able to waive cumulative voting or adopt a classified board, or both, by a unanimous shareholder vote, but the arguments are somewhat rarefied. Counsel faced with a pre-1971 corporation should evaluate issues relating to cumulative voting and classified boards carefully. *See Roanoke Agency, Inc. v. Edgar,* 101 Ill.2d 315, 461 N.E.2d 1365, 78 Ill.Dec. 258 (1984); James M. Van Vliet Jr., *The New Illinois Business Corporation Act Needs More Work,* 61 Chi.-Kent L.Rev. 1 (1985) (Van Vliet). However, because both Roanoke and the Van Vliet article arose just as the Illinois legislature was amending the relevant section of the BCA, it is arguable that the prior thinking on the need for a unanimous vote to repeal cumulative voting in a pre-1971 corporation is in need of revision. But see Van Vliet, p. 24 ("Although the Illinois Supreme Court [in *Roanoke*] expressly refused to say that its decision would be the same under the provisions in New BCA section 7.40(c) . . . until a different interpretation is indicated to be appropriate by the Illinois courts, it seems prudent to view section 7.40(c) as if the *Roanoke* decision applies." [Footnote omitted.]). In any event, in the case of a pre-1971 corporation, counsel should also consult with the Secretary of State's Office. In a blind call just before publication of this article, the Illinois Secretary of State's Office said that such an amendment (to repeal cumulative voting in a pre-1971 corporation) would require only a two-thirds shareholder vote (unless otherwise specified in the articles of incorporation), as long as dissenters' rights were given. Presumably that analysis rests on the combined effect of the current language of BCA §§7.40(c) and 11.65(a)(3)(iii). See 805 ILCS 5/7.40(c), 5/11.65(a)(3)(iii).

Whatever the reason behind it, if a corporation has adopted a staggered board of directors or if a corporation is considering adopting a staggered board, counsel must consider the effect of this structure on voting for election of directors. For example, although cumulative voting generally helps minority shareholders get a voice on the board of directors, a staggered board undercuts this power by allowing the majority to concentrate their votes on a smaller number of directors in each election.

S.B. 76, 101st Gen.Assem., was introduced in 2019 and at the time of publication it remains under consideration by the Committee on Assignments (to which it was referred in March 2019). It would require that each publicly held corporation having a principal address in Illinois shall have at least one female member on its board of directors by December 31, 2020. The bill also provides that, depending on the size of the corporation's board, that number might be required to increase to two or three by December 31, 2022. Fines for failure to comply with this requirement could be up to $300,000 for each year the corporation is not in compliance.

H. [6.18] Time and Place of Shareholders' Meetings

In the case of annual meetings, unless the bylaws specify the date, time, and place of the annual shareholders' meeting, the directors may do so, and they may specify any place of their choosing inside or outside the State of Illinois. 805 ILCS 5/7.05. If the bylaws and the directors fail to specify a location for the meeting, it is to be held at the corporation's registered office in Illinois. It is common practice (and a good idea) for the bylaws to leave these matters to the discretion of the directors by, for example, specifying a time and place for the annual meeting but permitting the board to change these specifications. The board may decide to hold the annual meeting on a different day than that specified in the bylaws, and doing so will neither affect the validity of any action taken at the meeting nor cause a dissolution of the corporation. *Id.* The notice for the annual shareholders' meeting need not specify more than the date, time, and place of the meeting.

In the case of special meetings of shareholders, the directors must set the date, time, and place of the meeting, consistent with the notice requirements of the Business Corporation Act of 1983 and relevant bylaw provisions, if any. In addition to the items required for notice of an annual meeting (*i.e.,* time, date, and place of the meeting), notice of a special meeting of shareholders must also specify the purpose for which the meeting has been called. 805 ILCS 5/7.15.

For any meeting, whether annual or special, the directors must determine who the corporation's shareholders are and which of them are entitled to receive notice of the meeting and to vote. The bylaws may provide that the transfer books should be closed for a certain period preceding the meeting, thus setting the meeting's record date, or they may state that the board of directors may set a record date to make this determination. 805 ILCS 5/7.25.

Those persons acquiring shares after the date set for closure of the transfer books (the record date) will not be entitled to vote these shares at the meeting. In the absence of a bylaw provision setting the record date or a board resolution doing so, BCA §7.25 provides that the record date shall be deemed to be the date on which the notice of meeting is mailed or, when determining the record date for payment of a dividend, the date on which the board adopted the resolution declaring the dividend. See §6.57 below.

In any case, the record date for voting rights at a shareholders' meeting may not be more than 60 days nor less than 10 days or, in the case of a merger or consolidation, less than 20 days before the meeting. 805 ILCS 5/7.25. Once the record date for a meeting has been set and has occurred, the individual having charge of the corporation's stock transfer records must compile a list of the shareholders entitled to vote at the meeting, arranged in alphabetical order, with each shareholder's address and the number of shares held by each, and this list must be kept on file at the corporation's registered office for 10 days prior to the meeting. 805 ILCS 5/7.30. The shareholder list must be open for inspection by any interested shareholder, and it must also be produced and kept open during the time that the meeting in question is conducted. *Id.*

In the case of an annual meeting of shareholders, the board should decide exactly what business is to be transacted at the meeting in addition to the election of directors, which should be on the agenda for each annual meeting. By contrast, the business to be transacted at a special meeting shall be as set forth in the call of the meeting. See 805 ILCS 5/7.15. In either case, the purposes of a meeting may determine who is entitled to vote or the procedures to be followed in voting. If, for example, a corporation has multiple classes of stock, certain shares will be entitled to vote as a class on certain types of proposals (generally, ones that directly affect the rights or privileges of that class of shares vis-à-vis the rest of the corporation's shares). See 805 ILCS 5/10.25. Similarly, a shareholders' agreement may provide special contractual (as opposed to statutory) voting rights for some shareholders.

The board of directors should also determine whether it will be necessary to solicit proxies from those shareholders who will not attend the meeting. The board might need to solicit proxies if it is unsure whether a quorum will be present or if it wants to try to verify that the outcome of a particular vote is certain prior to the meeting date. If so, the secretary of the corporation should be directed to include a reference to the proxy in the notices for the meeting sent to the shareholders and to mail proxy forms along with the notices. The contents of any proxy solicitation for a vote by shareholders of a publicly held company are regulated by the federal securities laws. See §§6.29 – 6.33 below. However, even corporations whose shares are closely held by few individuals should consider following the proxy guidelines of the Securities and Exchange Commission, at least in some modified fashion, as a way to establish that full and fair disclosure was provided before proxies were solicited from shareholders.

Whether a corporation is public or private, its board of directors may wish to review all proxy solicitation materials closely in order to satisfy their fiduciary duty to all shareholders.

I. [6.19] Electronic Meetings of Shareholders

The Business Corporation Act of 1983 provides that unless otherwise provided in the articles of incorporation or bylaws, shareholders may participate in, and act at, any meeting of shareholders through the use of conference telephones or interactive technology, including without limitation electronic transmissions, Internet usage, or other means of remote communications. 805 ILCS 5/7.05. However, some commentators have argued that simply viewing a shareholder meeting online without any capacity for interaction does not qualify as attending the meeting for purposes of quorum or voting determinations. See Michael D. Goldman and Eileen M. Filliben, *Corporate Governance: Current Trends and Likely Developments for the Twenty-First Century,* 25 Del.J.Corp.L. 683, 694 (2000).

Although the BCA permits electronic meetings without specific permission in the articles or bylaws, counsel may wish to suggest that a corporation include specific permissive language on this topic in its bylaws or articles of incorporation. This language would help shareholders have clear and accurate expectations about what types of participation in meetings are open to them, and it could also help the corporation provide some limits and structures regarding how this electronic participation will occur. For example, if the corporation plans to use only certain types of electronic communications (*e.g.,* a specific "chat room" format at a specific address on the Internet for shareholder meetings), it might be prudent to include a description of this specific format in the bylaws so that shareholders are not confused about whether other e-mail communications with one another or with management rise to the level of a formal shareholder meeting.

In this vein, the bylaws could also specifically provide that e-mail notice of a shareholders' meeting would be deemed sufficient, and they could also include a procedure for the corporation to use to determine whether a particular e-mail address was valid. Similarly, the bylaws could explicitly permit electronic communications for purposes of shareholder action without a meeting. If the bylaws include such a provision, they should also include provisions describing how a corporation may verify the authenticity of "signatures" on e-mails from shareholders.

Some corporations that expect to conduct meetings by video conference on a regular basis have amended their bylaws to specify that agendas will be posted at all video conference sites and that all votes during a video conference will be conducted by roll call. Similar bylaw provisions may be useful in connection with other types of remote electronic meeting formats. Counsel should consult with corporate clients to understand the likelihood and nature of various remote meeting formats and then consider drafting provisions for the articles of incorporation or bylaws to address the specific aspects of these formats. Similarly, counsel may wish to suggest that the bylaws or articles specifically prohibit electronic communications devices other than those specifically authorized if the limitations of these devices are such that meaningful participation would be impossible. Commentators are not currently reporting significant use of electronic meeting and voting technology for shareholder meetings, possibly as a result of concerns about the security of online voting and the limitations on the ability of a corporation to authenticate an electronic vote. See generally Jessica M. Natale, *Exploring Virtual Legal Presence: The Present and the Promise,* 1 J. High Tech.L. 157, 170 (2002). But in light of the speed with which technology advances, counsel should begin considering these types of provisions because they will certainly become of great practical significance in the near future.

J. [6.20] Directors' Resolution Authorizing Annual Shareholders' Meeting

The directors of a corporation will need to make a number of preparations and take several formal actions in connection with all annual meetings of shareholders and most special meetings of shareholders. Some of those are described in connection with the discussion of directors' meetings contained in §§6.34 – 6.52 below. In connection with an annual meeting of shareholders, the directors should issue a call of the meeting, authorize the sending of notice, and establish the record date. If proxies are to be solicited, the board should authorize the solicitation and approve the forms of the proxy solicitation materials.

Section 6.93 below contains a sample form designed primarily for use by the board of directors to call the annual shareholders' meeting that contains resolutions pertaining to this meeting. Board action may also be necessary when a special meeting is called, whether by the board or by another party. For example, the board may be given the option in the call to set the exact date of the meeting, or it may be necessary to establish a record date or to take other action pertaining to the meeting or the procedures to be followed in convening it. In these instances, this sample form should be modified to fit the particular circumstances of the meeting.

K. [6.21] Call of Special Meeting

Section 6.94 below contains a sample form that may be used by authorized persons to call a special meeting of the shareholders of a corporation. The call should be directed to the person charged with giving notice of such a meeting to the shareholders (often the secretary of the corporation). In the case of meetings called by persons other than the board of directors, the bylaws will usually designate an officer, such as the president or the secretary, to be responsible for receiving calls for meetings and issuing notices. If the board of directors did not issue the call, the persons calling the meeting should provide a copy of the call to the board of directors as well.

Special meetings may be called by the president of the corporation, by the board of directors, or by the holders of not less than one fifth of the outstanding shares entitled to vote on the matter for which the meeting is called. The articles of incorporation or bylaws of the corporation may allow additional persons to call meetings. 805 ILCS 5/7.05.

L. [6.22] Notice of Meeting

Section 6.95 below contains a sample form that may be used to give each shareholder the notice of meeting required by law and may be used for annual or special meetings. A copy of the notice should be delivered to each shareholder within the time period allowed by law and required in the articles of incorporation or bylaws of the corporation. The original of the notice, signed by the officer responsible for its issuance, should be filed in the corporation's minute book immediately preceding the minutes of the meeting to which it relates. The corporation's secretary should consider making it a regular practice to file the original of the notice in the minute book as this will enable the corporation to introduce the notice into evidence as a business record should it later be claimed that notice was not given or was in some manner defective. See §115-5 of the Code of Criminal Procedure of 1963, 725 ILCS 5/115-5.

The notice may be issued by or at the direction of the president, secretary, or other officer or person calling the meeting. 805 ILCS 5/7.15. The authorized person need give notice only to those shareholders entitled to receive it as determined by the establishment of a record date under the bylaws or by resolution of the board of directors.

A meeting has not been legally convened unless valid written notice has preceded it. The corporation's articles of incorporation or bylaws may set the time period preceding the meeting during which the notice must be given in order to be valid, but these provisions must be consistent with the parameters established by the Business Corporation Act of 1983. The BCA requires that notice be given not less than 10 days or, in the case of mergers and certain other types of

transactions, not less than 20 days and not more than 60 days prior to the meeting date. *Id.* Notice is deemed to be delivered to a shareholder when it is either given to the shareholder personally or deposited in the United States mail, postage prepaid, addressed to the shareholder at the shareholder's address as it appears in the records of the corporation. The notice must contain the date, time, place, and, in the case of special meetings, the purpose of the meeting. *Id.*

If proxies will be solicited, the notice may include a statement urging those shareholders who will not attend the meeting in person to sign and return a proxy form along with the proxy form itself. See §§6.29 – 6.33 below for a discussion of proxy solicitations.

If a record date has been set for those shareholders entitled to notice and to vote at the meeting, the record date should also be provided in the notice. This information will help shareholders determine whether they are eligible to vote.

In general, the BCA does not require that a notice for an annual meeting state its purposes, but the articles of incorporation or bylaws may introduce such a requirement. See 805 ILCS 5/7.15. However, there are several types of significant transactions (notably, mergers and consolidations) that must be approved by shareholders, and when calling a meeting for the shareholders to consider approving these types of transactions, the notice of the meeting must state the meeting's purpose even if the vote on the transaction is to be taken at an annual meeting. See 805 ILCS 5/11.15. Thus, to avoid possible challenges, it is always best to state the purposes of an annual meeting even if the only business to be transacted is the election of directors.

M. [6.23] Waiver of Notice

As noted in §6.22 above, in order for a meeting to be duly convened and for actions taken at a meeting to be valid, timely written notice of the meeting must be given to each shareholder of record entitled to vote. See 805 ILCS 5/7.15. However, every shareholder has the right to waive the right to proper notice, whether the waiver is made before or after the meeting. 805 ILCS 5/7.20. To ensure that actions taken at a meeting are valid, the corporation must obtain a waiver from any shareholder who did not receive notice of the meeting within the proper time requirements and who was entitled to such notice and any shareholder who received a notice that did not contain the required information. If it is necessary to convene a meeting quickly with insufficient time to issue proper notice, all of the shareholders must sign a written waiver. As a precaution, many corporations with relatively few shareholders routinely have all shareholders sign a waiver of notice in connection with every meeting of shareholders even if notice was given correctly. This practice eliminates the possibility that some irregularity in the notice might be raised later as a means to invalidate the actions taken at the meeting.

A shareholder's attendance at a meeting constitutes a waiver of proper notice for the meeting unless the shareholder attends solely for the purpose of objecting at the beginning of the meeting to the transaction of any business because of the lack of proper notice. *Id.*

A waiver of notice should clearly identify the meeting to which it applies. Specifying the purposes of the meeting in the notice as well as any waiver protects against a later assertion that the person signing the waiver was misled or not informed as to the actions to be taken at the meeting.

Signed waivers should be filed in the corporate minute book preceding the minutes of the meeting to which they pertain. This procedure, although not required, is recommended as a means of establishing as a part of a business record that proper notice was either given or waived. Such a record would be admissible as evidence should it ever be claimed that notice was not properly given. See 725 ILCS 5/115-5. See also §8-1204 of the Code of Civil Procedure, 735 ILCS 5/8-1204.

Section 6.96 below contains a sample form that may be used when it is necessary to obtain a waiver of notice from any particular shareholder or from all shareholders. Each shareholder should be asked to sign a counterpart of this form.

N. [6.24] Agenda for Annual Shareholders' Meeting

If a corporation has only a few shareholders and plans to address only standard housekeeping matters (*e.g.,* election of officers) at its annual meeting, it may be possible to keep the annual meeting relatively simple and unstructured, and the officers may choose to forgo a written agenda for the meeting. However, if a corporation is planning on taking significant action (*e.g.,* a merger or sale of significant assets) at its annual shareholders' meeting, if a dispute among shareholders is pending or threatened, or if the number of shareholders is large, this informality can be problematic. In these cases, circulating a written agenda will help management retain control of the meeting and will serve as a reminder of the proper actions to be taken at the meeting. A sample form of a simple agenda that could be distributed to shareholders at the start of the meeting is found in §6.97 below.

O. [6.25] Conduct of Annual Shareholders' Meeting

For corporations with few shareholders, the formality of a meeting of shareholders may seem unnecessary, and a script for a formal meeting may seem ridiculous. In many cases, the shareholders may just act by written consent in these circumstances. See §6.12 above. However, even among the smallest and most congenial of shareholder groups, significant transactions or periods of tense shareholder relations may dictate that an actual, formal meeting of shareholders be conducted to ensure that each shareholder has an opportunity to participate in a full discussion of corporate affairs. In these cases, counsel should be prepared to guide the officers through a process of conducting a formal shareholders' meeting. Counsel should encourage management and shareholders to view this process not just as legalistic jargon and bewildering rules of order but rather as a process that enables a group of shareholders to move through discussion and resolution of complex or controversial issues in an orderly fashion.

There are a number of excellent guides to the conduct of shareholders' meetings, including Corporate Laws Committee and Corporate Governance Committee, ABA Business Law Section, HANDBOOK FOR THE CONDUCT OF SHAREHOLDERS' MEETINGS (2d ed. 2010), and William Sardell, ENCYCLOPEDIA OF CORPORATE MEETINGS, MINUTES, AND RESOLUTIONS (3d ed. 1986). The Committee on Corporate Laws of the ABA Section of Business Law has also prepared an excellent discussion of these types of meetings in MANAGING CLOSELY HELD CORPORATIONS: A LEGAL GUIDEBOOK, pp. 23 – 27 (2003), reprinted in 58 Bus.Law. 1073, 1094 – 1097 (2003).

Even if counsel anticipates that the shareholders of a particular corporation usually will take action by written consent, counsel should review the bylaws and articles of the corporation to determine what restrictions, if any, these documents may place on the conduct of an actual meeting. Similarly, some basic procedures should be considered for inclusion in the bylaws of all corporations to facilitate shareholder meetings. For example, counsel should consider including a provision stating that the president of the corporation (or some other person designated by the board of directors) shall serve as the chair of all shareholder meetings. The substantive law concerning the power to appoint and remove the chair of shareholder meetings is not well developed, and specifying these rules in the bylaws in advance will lessen the chances of disruption of a meeting. See HANDBOOK FOR THE CONDUCT OF SHAREHOLDERS' MEETINGS, p. 63.

Scripts of shareholder meetings are also commonly used, particularly for corporations whose stock is publicly traded or otherwise held by a large number of shareholders. A sample script for an annual meeting is included in §6.83 below, along with optional sections found in §§6.84 – 6.88 for use in dealing with disruptive shareholder behavior. Section 6.89 below contains a response to a shareholder nomination of additional nominees, and §6.90 contains a response to a shareholder motion. Scripts not only provide a guide for the conduct of the meeting but also allow the chair of the meeting to make certain that all of the proper steps have been taken to ensure valid corporate action by the shareholders. If a script is to be used, management often attempts to locate shareholders in advance of the meeting who will take the various scripted parts for purposes of making the motions that are planned or anticipated to be necessary to accomplish the meeting's purpose. If management identifies these shareholders in advance, they should be given copies of the script or should be informed as to their assigned roles.

P. [6.26] Certificate of Inspectors of Election

As noted in §6.15 above, the corporation's bylaws may specify how inspectors of election are appointed and when they are needed. If management does not anticipate that voting will be by ballot, inspectors may not be needed. The shareholders may, by law, request that inspectors be appointed. See 805 ILCS 5/7.35. In any event, management and corporate counsel should be prepared to deal with inspectors of election at any shareholders' meeting. In general, it is advisable to appoint two inspectors for each meeting so that they can work together to tally the ballots more quickly and accurately than could a single inspector working alone.

If inspectors are appointed, they should certify the results of all voting, and the originals of their certified statements should be included with the corporate records for the corresponding meeting. Section 6.98 below contains a sample form for use with these certifications.

Q. [6.27] Minutes of Shareholders' Meeting

Every corporation must maintain records of the proceedings of its shareholders. 805 ILCS 5/7.75(a). Aside from this broad requirement, there is no statutory guidance for the form or content of these records, although it is customary that minutes of each meeting be kept in a corporate minute book. The bylaws of the corporation usually specify that it is the duty of the secretary to prepare and keep the minutes of shareholder, director, and committee meetings.

Because minutes are usually the only record of the activities at a meeting, they should be as detailed and complete as possible. All the proceedings of the meeting, not just resolutions, should be included. Further, the minutes of a meeting should note resolutions that were proposed but rejected by the shareholders, as well as those accepted. The minutes should note the votes for and against each proposal. Also, the minutes should recite the authority under which the meeting was called, and they should include a confirming statement indicating that all proper procedures were followed in convening the meeting. Properly prepared and maintained as a business record, the minutes may serve as evidence of the truth of the matters stated within them. 725 ILCS 5/115-5.

Matters submitted to the shareholders for their approval should take the form of resolutions on which the shareholders vote. These resolutions are subject to the same rules of drafting as are resolutions submitted to the board of directors. See §§6.46 – 6.51 below for a discussion of resolution formats and drafting generally.

In some cases, resolutions concerning the same matter, such as some types of mergers, will require both shareholder and director approval. If resolutions on the same topic will be approved by the directors and the shareholders, then the resolutions presented to the shareholders should have the same wording as the corresponding resolutions approved at the board level. This practice avoids the possibility of confusion over whether the shareholders and directors meant to approve the same transaction.

If the officers of the corporation are fairly confident that there will be no dissent at the meeting to any proposal put forward, as is frequently the case with corporations with small numbers of shareholders, it is possible to prepare minutes in advance (with blanks for the attendance, voting results, and the like). The chair can then follow the draft minutes as an informal script in conducting the meeting.

Note that the sample form for the minutes of a shareholders' meeting in §6.99 below assumes that the chair will *not* ask for a second to each motion before debate or voting on the motion. The device of requiring a second before discussion of a motion is borrowed from rules of parliamentary procedure and seems to have found widespread acceptance and use in the conduct of corporate shareholders' meetings. One premise of parliamentary procedure is that all participants in the meeting have one vote and that the efficiency requirements of the group dictate that the meeting should not be bogged down discussing matters that are of interest to only one voting member. See generally Henry M. Robert et al., ROBERT'S RULES OF ORDER NEWLY REVISED §4, p. 35 (11th ed. 2011) (ROBERT'S RULES).

Some commentators have noted that this premise means that parliamentary procedure really is not applicable to the conduct of shareholders' meetings on this particular issue because a single shareholder (in contrast to a member of a parliamentary body) may own shares representing a significant percentage of the outstanding shares. Thus, if a shareholder who owns a significant number of the outstanding shares wants to raise a motion, the motion is necessarily in order, regardless of whether any other shareholder agrees that the motion is worthy of debate. Further, the shareholder could easily evade the requirement of a second simply by giving a proxy for one or two of his or her shares to some ally, who would be certain to second whatever motion the shareholder proposed. Therefore, many commentators feel that no seconds should be required for

motions raised at shareholder meetings. See generally Eric G. Orlinsky, *Conduct Unbecoming a Stockholder? Only a Few Cases Guide the Governance of Directors' and Stockholders' Meetings,* 8 Bus.L. Today, No. 1, 20, 22 (Jan./Feb. 1999). Interestingly, while the first edition of the ABA handbook on this topic contained a lengthy defense of the argument that parliamentary procedure (including requirements for a second) should not apply to shareholders' meetings (see Committee on Corporate Governance, ABA Section of Business Law, HANDBOOK FOR THE CONDUCT OF SHAREHOLDERS' MEETINGS §4.02, pp. 30 – 31 (1st ed. 2000)), that discussion was removed from the 2010 second edition and replaced with a simple statement that when conducting a meeting, the chair should strive for fairness and that, unless otherwise provided in the bylaws, the proceedings should be governed by ROBERT'S RULES or a similar manual of parliamentary procedure. See Corporate Laws Committee and Corporate Governance Committee, ABA Business Law Section, HANDBOOK FOR THE CONDUCT OF SHAREHOLDERS' MEETINGS, pp. 61 – 65 (2d ed. 2010).

Nonetheless, the custom of asking for a second for motions at shareholder meetings persists throughout corporate America. Although the device has been dispensed with in the sample minutes in §6.99 below, the reflexive action of the officer leading the meeting may end up reinserting it almost subconsciously. If counsel and the client elect to dispense with the requirement of a second, both should consider how they might respond if a shareholder with only a single share were to attempt to monopolize the meeting by making a series of motions that no other shareholder supported. The possibility or likelihood of such an event will help determine how seriously to assess this risk.

R. [6.28] Shareholders' Action by Written Consent

Unless otherwise provided in the articles of incorporation, any action required or permitted to be taken at a meeting of shareholders may be taken without a meeting or a vote by means of a written consent. This action may be taken if a consent in writing is signed by all of the shareholders entitled to vote with respect to the subject matter of the action or the holders of outstanding shares having not less than the minimum number of shares necessary to authorize the action. 805 ILCS 5/7.10(a). If the latter procedure is used, all shareholders entitled to vote on the matter must receive five days' prior written notice of the subject matter of the consent, and following the execution of the consent, all shareholders who did not sign it must be given prompt written notice of the taking of the action. *Id.* These consents must be filed in the corporation's minute book. This latter procedure may not be used in the case of a shareholder vote to dissolve the corporation voluntarily, and any written consent to take such an action must be signed by all of the shareholders of the corporation who are entitled to vote on dissolution. 805 ILCS 5/12.10. Similarly, the shareholders may not act by written consent if the articles of incorporation require a meeting. See 805 ILCS 5/7.10(a). For a discussion of some issues for consideration in drafting resolutions, see §§6.46 – 6.51 below.

Section 6.100 below contains a sample form of a shareholders' action by written consent. This form should be modified if less than all the shareholders, but at least the statutory minimum, consent to the action and notice is given to the other shareholders pursuant to §7.10 of the Business Corporation Act of 1983. If less than all the shareholders sign a written consent, the secretary of

the corporation should prepare an affidavit of mailing similar to the one included with the notice of meeting in §6.95 below to provide a written record that the corporation complied with the requirements of BCA §7.10.

S. [6.29] Solicitation of Proxies Generally; Proxies for Public Companies

Any shareholder entitled to vote at any meeting of the shareholders or entitled to participate in an action by written consent may authorize another person to act for the shareholder by proxy. 805 ILCS 5/7.50(a). Shares represented at a meeting by proxy are counted as present at the meeting. 805 ILCS 5/7.60.

A shareholder may appoint a proxy to vote or otherwise act for the shareholder by delivering a valid appointment form to the person so appointed or to a proxy solicitation firm or a similar agent. 805 ILCS 5/7.50(a). Historically, proxies were required to be executed in writing, but the Business Corporation Act of 1983 has eased this requirement in order to accommodate proxies that are transmitted by telegram, cablegram, or other means of electronic transmission. As long as the inspectors of election or other corporate representatives can determine that the transmission was authorized by the shareholder, the proxy is valid. Similarly, a copy, facsimile, or other reliable reproduction may be substituted or used in lieu of the original. *Id.*

Inspectors of election who are faced with these nontraditional (but increasingly common) forms of proxies should keep some form of record indicating the information on which they relied in determining that each proxy was authorized by the corresponding shareholder. See generally 805 ILCS 5/7.50(a)(2).

The proxy should set out the name or names of the authorized holder or holders and should specify its duration. If the proxy is to be valid only at a specific meeting, the proxy should identify the meeting by reciting its date, time, and location. If there are any limitations imposed on the proxy holder's power to act, these limitations should also be indicated in the proxy instrument. Absent statutory provisions to the contrary, the bylaws should prescribe reasonable requirements governing the execution and use of proxies in connection with the provision of the BCA that states that the bylaws may contain provisions that regulate and manage the affairs of the corporation. See 805 ILCS 5/2.25. A proxy remains valid and in force for the period specified in the instrument or until its revocation. However, unless the proxy provides for a longer duration, no proxy is valid after 11 months following its execution. 805 ILCS 5/7.50(b). A proxy can be irrevocable, provided it is coupled with an interest in the shares themselves or in the corporation generally. See 7 Charles W. Murdock, BUSINESS ORGANIZATIONS §9.6 (2d ed. 2010, Supp. 2019) (Vol. 7 of the ILLINOIS PRACTICE SERIES).

Corporations that are subject to the Securities Exchange Act of 1934 (1934 Act), ch. 404, 48 Stat. 881, will find in this Act and its corresponding regulations a lengthy set of rules and guidelines discussing what information must be included in a proxy solicitation by management and how management must proceed in soliciting proxies. See generally 15 U.S.C. §78n.

Among other things, the regulations promulgated under the 1934 Act require that a ballot-type proxy must be used, and it must indicate in boldfaced type the party on whose behalf it is being

solicited. 17 C.F.R. §§240.14a-4(a), 240.14a-4(b). A ballot-type proxy may grant discretionary power to management to vote as it sees fit on particular issues as long as the proxy form clearly indicates in boldfaced type how it intends to vote the shares and, if directors are also to be elected, as long as the shareholder is allowed to withhold authority to vote for the election of directors. 17 C.F.R. §240.14a-4(b). The proxy form must clearly identify each matter or group of related matters that will be acted on at the meeting. 17 C.F.R. §240.14a-4(a).

In addition to the requirement of the use of a ballot-type proxy, a proxy solicitation relating to securities registered with the Securities and Exchange Commission must be accompanied or preceded by the issuance of a detailed proxy statement to those shareholders solicited. 17 C.F.R. §240.14a-3(a). If the solicitation is made on behalf of the management and relates to an annual meeting at which directors are to be elected, each proxy statement must also be accompanied by an annual report containing certain information. 17 C.F.R. §240.14a-3(b). Multiple copies of the various filings, including the proxy solicitation, proxy statement, and annual report, must be filed at various times with the SEC. See 17 C.F.R. §§240.14a-3(c), 240.14a-6.

Before preparation of a proxy for a public company, counsel should examine closely the SEC rules and regulations governing proxies and the procedure for their solicitation. Examples of numerous types of SEC filings (including proxy statements) may be obtained from corporations whose securities are registered with the SEC or from any number of search services that will search the SEC files for proxy statements of a particular type. Copies of filings may also be obtained from the SEC's website at www.sec.gov/edgar/searchedgar/companysearch.html.

Even if the corporation is not subject to the proxy rules of the 1934 Act, management and counsel are advised to consult these rules. All corporations, regardless of whether they are registered with the SEC, are subject to the antifraud provisions of federal and state securities laws. Although preparing a full-fledged proxy statement might be an excessive step to obtain the benefits of a safe harbor, these proxy rules do provide an idea of the types of issues that might be disclosed in the interest of full and fair dissemination of information. Section 7.55 of the Business Corporation Act of 1983 prohibits the solicitation of proxies using false or misleading information or using statements that omit to state material facts, and this provision applies to both public and private corporations. Thus, full disclosure of all relevant information is a critical part of all proxy solicitations. See generally Murdock, BUSINESS ORGANIZATIONS §9.6.

If management is soliciting proxies, copies of all proxy forms and solicitation materials should be included in the corporate minute book with the other records from the corresponding shareholders' meeting.

1. [6.30] Ballot-Type Proxy

Section 6.101 below contains a sample form of a ballot-type proxy designed for use by management in the solicitation of proxies when it is desired that the shareholder be given the option of dictating how the shareholder's shares are to be voted on particular proposals. The form illustrates a proxy solicitation for an annual meeting at which directors will be elected and other business transacted. It may be modified to reflect the actual business to be transacted or proposals to be voted on at a particular meeting.

2. [6.31] General Proxy for Specific Meeting or Period of Time

Section 6.102 below contains a sample form of proxy granting the proxy holder full voting power over the subject shares for a stated period of time or for a specific meeting. It is designed for use on a shareholder's own initiative. It is also a good form for corporations to use if shareholders ask for a form of proxy that will be acceptable when presented at a meeting. The form includes a recital of the number of shares owned by the shareholder granting the proxy, which is a useful way for the corporation to verify that its stock records agree with those of the shareholder granting the proxy. If the vote will be close, it may be critical to know exactly how many shares are represented by the proxy, and it is imprudent to rely on the shareholder's statement of shareholdings without cross-checking the holdings in the corporation's records.

Both prior to and at each shareholders' meeting at which proxies are expected, management should assign at least one individual (perhaps working jointly with one of the corporation's lawyers) to review all proxies for acceptability. In addition to confirming that the persons signing them were shareholders as of the record date, the proxy review team should confirm the number of shares represented by each proxy by looking at the corporation's stock records, and they should also confirm that the proxies are correctly signed. Each proxy must be signed by the shareholder exactly as that person's name appears in the corporate records. Thus, for example, proxies for shares held in joint tenancy should be signed by both joint tenants.

3. [6.32] Proxy with Limitation on Authority or for Particular Purpose

Section 6.103 below contains a sample form of a proxy designed for use when it is desired that the proxy holder have less than full authority to act in place of the shareholder. This is accomplished either by granting to the proxy holder authority to vote only on certain matters or by specifically excluding certain matters from the proxy holder's authority. The form presents both alternatives in a proxy granting authority for a particular meeting, but both could be used as well in any proxy to be valid for a period of time.

Nothing in the statutory language allowing proxies requires that the shareholder give up all power over the voting of shares. See 805 ILCS 5/7.50. A proxy granting less than full authority, if otherwise validly executed and exercised, is legal and binding on the shareholder, the proxy holder, and the corporation. The rules for executing and using a limited proxy are the same as those for a general proxy.

4. [6.33] Revocation of Proxy

Any proxy, even one that by its terms purports to be irrevocable, may be revoked at any time unless it specifically states conspicuously that it is irrevocable and is coupled with an interest in the shares to which it applies. 805 ILCS 5/7.50(c), 5/7.50(e). A proxy that is coupled with a general interest in the corporation is irrevocable unless otherwise stated on its face. 805 ILCS 5/7.50(c).

The Business Corporation Act of 1983 defines the concept of a proxy being "coupled with an interest," by way of example and without limitation, to include situations in which the proxy holder

is a pledgee, a person who purchased or agreed to purchase the corresponding shares, or a party to a voting agreement. *Id.* Because of the BCA's nonlimiting language, common-law concepts of what constitutes being coupled with an interest are instructive here.

A classic example of a proxy coupled with an interest arises in a situation in which a seller sells stock in a corporation to a purchaser during the period between the record date and the date of the shareholders' meeting on a particular question. The purchaser will not be reflected on the records of the corporation as a shareholder for purposes of voting eligibility. But if the seller has given a proxy to the purchaser and if the proxy clearly states that it is irrevocable and coupled with an interest, the irrevocability of this proxy will generally be upheld because the proxy holder (*i.e.,* the purchaser of the underlying shares) has in fact obtained an interest in the underlying shares by virtue of purchasing them and presumably has bargained for the proxy to vote these shares as part of the stock purchase negotiation. Proxies may also be irrevocable if coupled with an interest in the corporation. One example of such an interest is a lender who extends a loan on the condition that she be given a proxy. See generally 7 Charles W. Murdock, BUSINESS ORGANIZATIONS §9.6 (2d ed. 2010, Supp. 2019) (Vol. 7 of the ILLINOIS PRACTICE SERIES). In general, the common-law principles of what constitutes being coupled with an interest for these purposes suggest that the following requirements must be met:

a. The proxy holder must have parted with value, incurred liability, or assumed obligations.

b. These actions must have been at the request of the proxy grantor or with his or her consent.

c. The proxy holder must look to the exercise of the proxy power as a means of reimbursement, indemnity, or protection. See 5 William Meade Fletcher, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS §2062 (2010).

Section 6.104 below contains a sample form that may be used by a shareholder to revoke a previously granted proxy. This form is one way that a shareholder may revoke a proxy after it has been signed and delivered to the corporation. The shareholder may also revoke any proxy by signing a subsequently dated proxy and delivering a copy of it to the corporation or by attending the relevant meeting and voting in person. 805 ILCS 5/7.50(b). The sample form may be modified to revoke only part of the authority previously granted the proxy holder by clearly specifying the authority that has been revoked and the authority that remains in force. The revocation will not be effective until notice of it has been given to the corporation; therefore, an executed copy of this form should be filed with the secretary of the corporation.

IV. DIRECTORS' MEETINGS

A. [6.34] General Scope

Sections 6.35 – 6.52 below address issues concerning directors and directors' meetings. Specifically, these sections discuss the procedures by which directors perform their duties and fulfill their corporate responsibilities and how directors may take necessary action at a meeting, by

written consent or through a committee of the board. These sections also discuss calling and conducting a meeting of the board and the transaction of business at such a meeting, as well as the adoption of resolutions by unanimous written consent. Relevant forms are included in §§6.105 – 114 below.

Counsel should advise their corporate clients on the types of corporate actions that must be approved by the directors. As noted in §6.8 above, counsel must consult the articles of incorporation and bylaws of a corporation in preparing any of the documents described in this chapter because they may place limits on the power and authority of the directors or may establish certain procedures that the directors must follow. The Business Corporation Act of 1983 also contains some basic limitations on the power of directors as well as important governing rules, and counsel should take these into account as well when assisting in documenting any directors' action. For example, §9.10 of the BCA limits the ability of directors to declare dividends, while §8.10 discusses the number, election, and resignation of directors, and §8.35 addresses the removal of directors. 805 ILCS 5/9.10, 5/8.10, 5/8.35.

Illinois courts have voided important transactional documents (such as leases and promissory notes) because those documents were not approved by the board of directors. *See generally Fritzsche v. LaPlante,* 399 Ill.App.3d 507, 927 N.E.2d 218, 339 Ill.Dec. 677 (2d Dist. 2010). In *Fritzsche,* the court concluded that "officers have no apparent authority to make unusual or extraordinary contracts on behalf of a corporation." 927 N.E.2d at 228.

B. [6.35] Directors' Meetings; Quorum; Written Consents; Electronic Meetings

The board of directors may act at formal meetings at which a quorum is present. See 805 ILCS 5/8.15(a). The requirements for a quorum are spelled out in §8.15(b) and may be modified by the articles of incorporation or bylaws of the corporation. Directors may participate in a meeting through the use of a conference telephone or other communications equipment by which all persons participating in the meeting can hear each other. 805 ILCS 5/8.15(d). Also, unless the articles of incorporation or bylaws specifically prohibit it, the board may act without a formal meeting if all members consent to this action in writing. 805 ILCS 5/8.45(a). The bylaws generally provide important operating rules for directors' meetings, such as who shall act as chair of the meetings, who may call meetings, and the like. Note that P.A. 90-421 (eff. Jan. 1, 1998) amended 805 ILCS 5/8.60(a) to provide that both the presence and the vote of a director with a conflict of interest may be counted in the vote on the transaction in which the director has the conflict, as long as the director meets the burden of proving that the transaction is fair to the corporation if the transaction is ever challenged. See 7 Charles W. Murdock, BUSINESS ORGANIZATIONS §11.12 (2d ed. 2010, Supp. 2019) (Vol. 7 of the ILLINOIS PRACTICE SERIES).

The Business Corporation Act of 1983 provides that directors, like shareholders, may act by certain remote communications, although the provision governing these methods for directors' meetings is not as broad as the counterpart for shareholders' meetings. See 805 ILCS 5/8.15(d) ("conference telephone or other communications equipment by means of which all persons participating in the meeting can hear each other"), as compared to 805 ILCS 5/7.05. See also §6.19 above. Some commentators have taken the position that directors can conduct their meetings by varied electronic means but with the proviso that directors must be able to hear one another and

participate. Thus, for example, a meeting conducted exclusively in an e-mail chat room might not satisfy the requirement of §8.15(d). If, however, all board members had audio equipment attached to their computers, true dialogue could probably occur, and the requirements of the statute would appear to be satisfied. See Michael D. Goldman and Eileen M. Filliben, *Corporate Governance: Current Trends and Likely Developments for the Twenty-First Century,* 25 Del.J.Corp.L. 683, 695 (2000).

Because of the fiduciary duties that directors owe to the corporations they serve, directors are required to make fully informed decisions on all corporate matters brought before them. This basic proposition has been held to mean that directors cannot vote by proxy and cannot contractually agree to vote a certain way in advance of a board meeting. To do either would rob the director of his or her ability to make a decision based on the facts and circumstances as they exist at the time the decision is made. See generally Eric G. Orlinsky, *Conduct Unbecoming a Stockholder?, Only a Few Cases Guide the Governance of Directors' and Stockholders' Meetings,* 8 Bus.L. Today, No. 1, 20, 22 – 23 (Jan./Feb. 1999). See also Committee on Corporate Laws, ABA Section of Business Law, MANAGING CLOSELY HELD CORPORATIONS: A LEGAL GUIDEBOOK, pp. 17 – 20, 35 – 37 (2003), reprinted in 58 Bus.Law. 1073, 1091, 1102 (2003); 2 William Meade Fletcher, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS §427 (2010).

C. [6.36] Legal Authority of Directors

Section 8.05(a) of the Business Corporation Act of 1983 provides that each corporation shall have a board of directors and that the board of directors shall manage the business and affairs of the corporation. 805 ILCS 5/8.05(a). This authority may be limited by provisions in the articles of incorporation or bylaws and may not exceed the powers granted to the corporation by law. The articles of incorporation or bylaws may also require that directors meet additional eligibility qualifications. 805 ILCS 5/8.05(b).

If the articles of incorporation or bylaws so provide, the board of directors may create one or more committees to manage the business of the corporation and may appoint directors to serve on these committees. 805 ILCS 5/8.40(a). Each committee of the board of directors must have one or more members. *Id.* Each committee may exercise all of the authority of the board of directors under §8.05, subject to any restriction in the articles of incorporation or bylaws of the corporation, except that certain actions may not be delegated by the board of directors to any committee. 805 ILCS 5/8.40(c). These exceptions include certain types of dividends, amendments of the bylaws, and other material actions. One of the types of actions that a board may not delegate to a committee is the authorization or approval of the issuance or sale of the corporation's shares. 805 ILCS 5/8.40(c)(8). Notwithstanding this prohibition, a board may direct a committee to fix the specific terms of the issuance or sale of stock, including pricing terms or the designations and relative rights of a series of shares, as long as the full board has already approved the maximum number of shares to be issued pursuant to this delegated authority. A board committee may also take action to fix the price and number of shares to be allocated to particular employees under an employee benefit plan. *Id.*

The creation and delegation of authority to any committee does not relieve the full board of directors of responsibility for the duties imposed on it by law. Therefore, the board of directors should actively oversee the work of any committees created by the board.

D. [6.37] Duties of Directors

Directors must act for the benefit of the corporation and all of its shareholders, not for the benefit of themselves or for any subgroup or faction of shareholders. They may not profit individually from their positions as directors. Directors are in a fiduciary relationship with the corporation and are obligated to exercise the utmost fairness and good faith in dealing with it. This duty of loyalty is imposed on all directors, and they are liable to the corporation and its shareholders for any loss resulting from a violation of their fiduciary duty. See generally Chapter 3 of this handbook; Committee on Corporate Laws, ABA Section of Business Law, MANAGING CLOSELY HELD CORPORATIONS: A LEGAL GUIDEBOOK, pp. 33 – 43 (2003), reprinted in 58 Bus.Law. 1073, 1101 – 1108 (2003). Notwithstanding their high fiduciary duty of loyalty, directors may be party to transactions involving the corporation if the basic standards of 805 ILCS 5/8.60 are met. See generally MANAGING CLOSELY HELD CORPORATIONS, pp. 37 – 42, reprinted in 58 Bus.Law. at 1103 – 1107.

Thus, if a transaction is fair to the corporation at the time it is approved, the fact that one of the corporation's directors is involved in it will not be grounds for invalidating the transaction or the director's vote on it. 805 ILCS 5/8.60(a). However, the interested director or anyone else asserting that the transaction is valid has the burden of proving that all material facts were known to the board or the committee that approved the transaction or that all material facts were known to the shareholders and they ratified the transaction. *Id.* See §6.51 below for a discussion of approval of transactions involving interested directors.

This duty of loyalty means that a director must disclose any conflict of interest between the director and the corporation and seek approval from disinterested directors or shareholders before engaging in any transaction that involves a conflict of interest. See generally MANAGING CLOSELY HELD CORPORATIONS, pp. 37 – 39, reprinted in 58 Bus.Law. at 1104; Charles W. Murdock, BUSINESS ORGANIZATIONS (West 2d ed. 2010, Supp. 2019) (Vols. 7 and 8 of the ILLINOIS PRACTICE SERIES). Similarly, the director's duty of loyalty means that he or she may not profit personally from any business opportunity that rightfully belongs to the corporation unless he or she has first presented the opportunity to the corporation and a disinterested group of directors has disclaimed interest in the opportunity. See generally MANAGING CLOSELY HELD CORPORATIONS, *supra.*

In addition to the board's duty of loyalty (*i.e.,* the fiduciary duty not to act in their own interests at the expense of the corporation), directors must also satisfy a duty of care in their dealings on behalf of the corporation. That is, they must act within the limits of authorized corporate powers and maintain a certain standard of care in the performance of their responsibilities. Thus, for example, directors must exercise appropriate diligence in making decisions and overseeing management of the corporation. This diligence translates into concrete steps such as regular attendance at board meetings, obtaining and reviewing full and accurate information about the business and affairs of the corporation (as well as any specific transactions that require board approval), and inquiring into events and circumstances that reasonable businesspersons would question. See generally MANAGING CLOSELY HELD CORPORATIONS, pp. 35 – 37, reprinted in 58 Bus.Law. at 1102 – 1103. See also 8 Charles W. Murdock, BUSINESS ORGANIZATIONS, Chs. 13 (Duty of Care), 14 (Duty of Loyalty) (2d ed. 2010, Supp. 2019) (Vol. 8 of the ILLINOIS PRACTICE SERIES).

The Model Business Corporation Act's language suggests that a director's duty of care requires the director to act in good faith in a manner that the director reasonably believes to be in the best interests of the corporation, using the care that a person in a like position would reasonably believe appropriate under the circumstances. See Committee on Corporate Laws, ABA Section of Business Law, CORPORATE DIRECTOR'S GUIDEBOOK, pp. 16 – 21 (5th ed. 2007).

If the board of directors is found to have satisfied the basic fiduciary duties of care and loyalty, then Illinois courts will accord great deference to the board's decisions even if these decisions can be found to be objectively wrong in hindsight. This rule, the so-called "business-judgment rule," states that directors are elected by the shareholders because of the directors' business capabilities and judgment, and, thus, in the absence of a clear dereliction of duty on the part of the directors, courts will not second-guess the board's decision. Generally, Illinois courts will not interfere with the honest business judgment of the board absent a showing of fraud, illegality, or conflict of interest or a failure to meet the duty of care that rises to the level of gross negligence. See generally 8 Charles W. Murdock, BUSINESS ORGANIZATIONS §13.2 (2d ed. 2010, Supp. 2019) (Vol. 8 of the ILLINOIS PRACTICE SERIES). See also MANAGING CLOSELY HELD CORPORATIONS, pp. 11 – 23, reprinted in 58 Bus.Law. at 1102 – 1104. See also CORPORATE DIRECTOR'S GUIDEBOOK, *supra.* Another good discussion of the business-judgment rule can be found in William Sardell, ENCYCLOPEDIA OF CORPORATE MEETINGS, MINUTES, AND RESOLUTIONS, pp. 290 – 297 (3d ed. 1986).

Section 8.85 of the Business Corporation Act of 1983 allows the board of directors, committees of the board, and individual directors and officers, in considering the best long-term and short-term interests of the corporation, to take into account the effects of any action, including an action involving a change or potential change in control, on employees, suppliers, customers, or communities in which the corporation or its subsidiaries are located and all other pertinent factors. However, the language of §8.85 is permissive only and not mandatory, and directors who place the interests of nonshareholders ahead of those of their shareholders run the risk of being challenged in court on their priorities by disgruntled shareholders.

Some commentators have argued that the language of §8.85 effectively means that the foremost fiduciary duty of directors is now to serve the best interests of some ill-defined entity called the "corporation" that includes within its ambit the interests of its employees and the community in which its facilities are located, as well as other nebulous concerns that are not specified in the statute. See Thomas J. Bamonte, *The Meaning of the "Corporate Constituency" Provision of the Illinois Business Corporation Act,* 27 Loy.U.Chi.L.J. 1, 23 (1995). However, this argument is somewhat undercut by the fact that although §8.85 does *permit* directors to consider these other constituencies, it does not give these nonshareholder constituencies any remedy. Only the corporation or its shareholders suing derivatively have standing to sue for a breach of any duty on behalf of the corporation. 27 Loy.U.Chi.L.J. at 22. Thus, many critics view §8.85 as "just another management entrenchment device foisted on shareholders by state legislatures held captive by powerful local companies." *Id.*

As noted in §6.3 above, some courts have started looking more closely and more critically at corporate records like board minutes and committee minutes as evidence of whether the directors have met their duties of due care.

E. [6.38] Corporate Governance and Conflicts of Interest

In the wake of the Sarbanes-Oxley Act of 2002, Pub.L. No. 107-204, 116 Stat. 745, corporations whose stock is publicly traded have become highly sensitized to issues concerning corporate governance and conflicts of interest. Many of the Act's requirements seem to apply solely to public companies. However, these issues regularly arise in the daily corporate affairs of smaller, closely held corporations as well. A few of the Act's requirements are explicitly applicable to nonpublic companies, such as the criminal penalties for retaliation taken against whistleblowers who provide truthful information to law enforcement officers relating to federal offenses involving auditing or accounting matters. See, *e.g.,* Daniel E. Toomey and Tamara M. McNulty, *Sarbanes-Oxley: How It Will Affect Contractors and Sureties,* 23 Construction Law. 32, 33 (Winter 2003) (Toomey).

Other requirements from the Sarbanes-Oxley regimen are becoming applicable to closely held companies through enforcement mechanisms other than the Securities and Exchange Commission. For example, §302 of the Act requires a chief executive officer or a chief financial officer of a company to certify personally that the company's financial statements are true, correct, and complete. 15 U.S.C. §7241(a). Some private companies are finding that their commercial lenders are implementing similar certification rules in their loan agreements. Similarly, the Act requires that a company disclose the membership and financial expertise of the directors who serve on its audit committee. 15 U.S.C. §7265(a). Some companies are also finding that directors' and officers' liability insurers are stepping up their scrutiny of these types of internal controls and corporate governance, even among their nonpublic clients. See generally Toomey, *supra.*

Counsel should become familiar with some of the basic requirements of Sarbanes-Oxley and should discuss these requirements with corporate clients as a useful set of best practices. While not all of the requirements may be feasible or applicable to every small corporation, it is likely that the standards embodied in the Act will continue to trickle down into nonpublic corporations. Thus, all boards of directors should consider adopting board policies on avoiding conflicts of interest, including limitations or absolute bans on personal loans to executives, something Sarbanes-Oxley bans outright for public companies (see Tim Sullivan, *Corporate Lawyering in the Wake of Sarbanes-Oxley,* 149 Chi.D.L.Bull., No. 82, 26 (Apr. 26, 2003)), formation of audit committees, and creation of hotlines or other mechanisms for ensuring that employee complaints about audit- and finance-related problems at the company are addressed promptly and confidentially. The policies of public companies (which are accessible in their public filings on the SEC's website at www.sec.gov/edgar/searchedgar/companysearch.html) can provide helpful examples of the issues to consider.

F. [6.39] Liabilities of Directors Under §8.65 of the Business Corporation Act of 1983

Section 8.65(a) of the Business Corporation Act of 1983 imposes liability on the directors of a corporation in three situations, which is in addition to any other liabilities imposed on them by other applicable laws. 805 ILCS 5/8.65. First, §8.65(a)(1) imposes liability on directors who vote for or assent to any distribution to shareholders prohibited by 805 ILCS 5/9.10 by making these

directors jointly and severally liable to the corporation for the amount of the distribution. Section 9.10(c) prohibits any distribution to shareholders if, after giving it effect, the corporation would be insolvent or the net assets of the corporation would be less than zero or less than the maximum amount payable at the time of distribution to shareholders having preferential rights in liquidation if the corporation were then to be liquidated.

To give the directors reassurance that the restrictions of §9.10 have been met, the preamble to any resolution authorizing a distribution to shareholders should recite facts sufficient to show that the restrictions of §9.10 have not been violated. In addition, the preamble to the resolution should identify the financial reports relied on and should set forth the applicable calculations. 805 ILCS 5/8.65(c). If possible, the relevant financial reports should be attached as exhibits to the minutes or written consent in which the action was taken.

Also, an individual director will not be liable for any distribution of assets to shareholders in excess of the amount authorized by §9.10 if the director's support for this action was the result of a good-faith reliance on financial statements of the corporation represented to be correct by the corporation's president or by the officer having charge of its books of account. *Id.* Directors may also rely on the corporation's audited financial statements in these cases. *Id.*

Second, §8.65(a)(2) imposes liability on directors who fail to take reasonable steps to cause the notice required by 805 ILCS 5/12.75, regarding known claims against a dissolved corporation, to be sent to persons who have claims against the dissolved corporation by making those directors jointly and severally liable to those claimants for all loss and damage caused by the failure to give the notice. To protect themselves in such a situation, directors must carefully supervise the persons sending the notification required by §12.75. Ideally, the directors should (1) require regular reports, which then should be noted in the minutes of the directors' meetings; (2) maintain original documentation relating to the dissolution process, as well as affidavits of persons involved in the process, which again are attached to the corresponding directors' meeting minutes or consents; and (3) generally oversee the persons involved in the dissolution process.

Third, §8.65(a)(3) imposes liability on directors of a corporation if they fail to ensure that no business of the corporation is carried on after it has filed articles of dissolution with the Secretary of State, other than actions necessary for the winding up of the affairs of the corporation. Failure to do so may subject the directors to joint and several liability to the creditors of the corporation for all debts and liabilities of the corporation incurred in so carrying on the business. The statute does clarify that directors will not be subject to this liability if either (1) the dissolution was voluntary and has been revoked by the corporation or its directors or incorporators pursuant to 805 ILCS 5/12.25 or (2) the dissolution was administrative and the Secretary of State has accepted the corporation's application for reinstatement pursuant to 805 ILCS 5/12.45(c). See 805 ILCS 5/8.65(a)(3).

In determining the liability of any director for actions taken by the board, each director present at the meeting at which the action was taken is conclusively deemed to have concurred in the action unless the director's dissent is entered in the minutes of the meeting or unless the director files a written dissent to the action with the secretary of the meeting before the adjournment thereof or forwards the dissent by registered or certified mail to the secretary of the corporation immediately

after the adjournment of the meeting. Directors who vote for any corporate action may not thereafter file a dissent to it. 805 ILCS 5/8.65(b). Happily, a revision to the BCA has clarified that if the dissolved corporation is later reinstated, the directors are not personally liable for actions taken during the period of dissolution. See §6.71 below.

G. [6.40] Indemnification and Insurance

A corporation may indemnify a director against any liability to a third party resulting from the performance of the director's duties on behalf of the corporation or for service rendered at the request of the corporation as a director, officer, employee, or agent of another entity if the director acted in good faith and in a manner reasonably believed to be in or not opposed to the best interests of the corporation and if, with respect to any criminal action or proceeding, the director had no reason to believe the conduct was unlawful. 805 ILCS 5/8.75(a).

With respect to suits brought by or in the right of the corporation itself, the standard for indemnification is slightly different. In this case, a corporation may indemnify a director against any liability to the corporation resulting from the performance of the director's duties on behalf of the corporation or for service at the request of the corporation as a director, officer, employee, or agent of another entity if the director acted in good faith and in a manner reasonably believed to be in or not opposed to the best interests of the corporation, provided, however, that no indemnification shall be made with respect to any claim as to which the director has been adjudged to have been liable to the corporation unless and to the extent the court in which the action was brought shall determine that despite the determination of liability and in view of all the circumstances, indemnification is still appropriate. 805 ILCS 5/8.75(b).

A present or former director who is successful in the defense of an action described in §8.75(a) or §8.75(b) shall be indemnified against reasonable expenses incurred by him or her if the director acted in good faith and in a manner he or she reasonably believed to be in or not opposed to the best interests of the corporation. See 805 ILCS 5/8.75(c). This wording leaves open the possibility that a corporation might refuse to indemnify a director who was successful in defending a third-party charge but who nonetheless intentionally acted in bad faith in a manner opposed to the best interests of the corporation. The corporation may also purchase and maintain insurance on behalf of its directors to cover any potential liabilities, regardless of whether it would have the power to indemnify them against any such liability. 805 ILCS 5/8.75(g).

Any director who is found liable for taking a particular corporate action is entitled to contribution from the other directors who voted for or assented to the action, and a director who is found liable for an improper distribution of assets to shareholders is entitled to contribution from the shareholders who knowingly accepted or received the distribution in proportion to the amounts received by them. 805 ILCS 5/8.65(d).

These provisions of the Business Corporation Act of 1983 also apply to indemnification of present and former officers, employees, and agents of the corporation for liability resulting from performance of their duties for or on behalf of the corporation. See 805 ILCS 5/8.75(a) – 5/8.75(c). However, the mandatory indemnifications of §8.75(c) apply only to present or former directors, officers, and employees. Presumably, this means that the indemnification of present or former

agents of the corporation is always optional even if they successfully defend themselves and can prove that they acted in good faith. Corporations are always free to commit themselves by contract to indemnify any officer, director, employee, or agent as long as the contract is consistent with the provisions of §8.75.

If the corporation does, in fact, indemnify or advance expenses to a director or officer in any action by or in the right of the corporation pursuant to §8.75(b), this fact must be reported in writing to the shareholders with or before the notice of the next shareholders' meeting. See 805 ILCS 5/8.75(h). No such requirement is included with regard to any such indemnification to employees or agents.

A change to §8.75 in 2007 clarified a procedural point for directors' meetings involving a vote on indemnification of a director with a conflict of interest. As amended, §8.75(d) clarifies that a board's determination to provide indemnification pursuant to §8.75(a) or §8.75(b) is made by a majority vote of disinterested directors (even though less than a quorum) or a vote of a committee of disinterested directors (even though less than a quorum) appointed by a majority vote of the directors. This language certainly emphasizes the importance of having only disinterested directors on any committee making these decisions.

H. Forms for Directors' Meetings and Written Consents

1. [6.41] Call of Meeting

Section 6.105 below sets forth a sample form to be used by the person authorized to call either a regular or a special meeting of a board of directors. The "call" is simply an order that the meeting be held and is not a substitute for notice if the latter is required to be given. The call is customarily made in writing and entered together with a copy of the notice given for the meeting in the corporation's minute book immediately preceding the minutes of the meeting. The call should be delivered to the person responsible for giving notice of meetings, allowing a sufficient amount of time for this person to prepare and deliver the notice.

There is no statutory requirement as to who must call a meeting or the amount of notice required. These matters are left to the bylaws of the corporation. 805 ILCS 5/8.25. The bylaws will commonly authorize the board of directors or, in the case of a special meeting, the president or a specified number of directors to call a meeting and will specify the number of days by which the notice must precede the meeting. Often, the bylaws will also specify where board meetings may be held. If a formal call of a meeting is issued, it is a good idea to place a copy of it in the corporate record book, immediately preceding the minutes for the meeting.

2. [6.42] Notice of Meeting

The bylaws of a corporation will usually specify the time and place for regular meetings of the board of directors. Each director must be given notice of a meeting as the articles of incorporation or bylaws may prescribe. If the bylaws set a specific date, time, and place for regular meetings, it is possible to dispense with formal notice of regular meetings since the discussion in the bylaws,

which, presumably, are reviewed by directors when they are elected, would constitute adequate notice. Nevertheless, it is good policy to send some type of written notice as a reminder. Special meetings, by their nature, are convened at irregular intervals, and notice of them must be given unless waived by the directors. See 805 ILCS 5/8.25.

The sample form of notice of a meeting of the board of directors in §6.106 below is used by the officer, often the secretary, charged by the bylaws with giving notice of the meeting. The notice should be delivered, either in person or by mail, to each director of the corporation, subject to any notice requirements set forth in the articles of incorporation or bylaws.

The notice should inform the director of the date, time, and place of the meeting. The place of the meeting, unless the articles of incorporation or bylaws require otherwise, may be anywhere inside or outside the state of Illinois. 805 ILCS 5/8.20. It is not required that the purpose of either a regular or a special meeting or the business to be transacted be recited in the notice. 805 ILCS 5/8.25. However, it is good practice to notify the directors of the purpose or business to be considered so that they have an opportunity to prepare for the meeting and thereby expedite corporate action. This is especially true if a complex corporate transaction, such as a merger or a purchase or sale of material assets, is being presented for approval by the directors.

The ability to prove that the directors satisfied their duties under the business-judgment rule often relies heavily on the advance notice given to the directors and the length of time they were given to consider the transaction. See Committee on Corporate Laws, ABA Section of Business Law, MANAGING CLOSELY HELD CORPORATIONS: A LEGAL GUIDEBOOK, pp. 35 – 36 (2003), reprinted in 58 Bus.Law. 1073, 1102 (2003); 8 Charles W. Murdock, BUSINESS ORGANIZATIONS §13.4 (2d ed. 2010, Supp. 2019) (Vol. 8 of the ILLINOIS PRACTICE SERIES). Thus, in complex matters it is common to provide an agenda for the meeting as well as copies of relevant agreements (or drafts) and background materials as enclosures with the notice of the meeting at which they will be discussed.

As a matter of standard procedure, the officer in charge of giving notice of directors' meetings, immediately after serving the notice, should prepare a written declaration that notice has been served. This declaration should be attached to the original copy of the notice of meeting and placed in the minute book of the corporation immediately preceding the minutes of the meeting to which it applies. Although such a declaration is not required by statute, it may prove useful should any director later dispute the fact that this notice was given. It would be admissible evidence as a business record made in the ordinary course of business. 725 ILCS 5/115-5.

3. [6.43] Waiver of Notice

Each director must be given notice of a meeting in the manner prescribed in the articles of incorporation or bylaws unless the director waives this requirement. 805 ILCS 5/8.25. If proper notice has not been given and this requirement has not been waived, the meeting has not been duly convened, and any actions taken at it will be invalid unless they are later ratified by the directors.

Notice of a meeting may be waived in writing at any time, either before or after the meeting. Attendance of a director at any meeting constitutes a waiver of notice of the meeting except when the director attends a meeting for the express purpose of objecting to the transaction of any business because the meeting was not lawfully called or convened. *Id.*

Section 6.107 below contains a sample form of a waiver of notice of a meeting of a board of directors. This form should be used when directors are waiving notice of a meeting. A counterpart of the waiver form should be signed by each director who is waiving the right to notice, and all of these forms should be filed in the minute book of the corporation together with the minutes of the meeting to which the waiver applies.

4. [6.44] Minutes of Directors' Meetings

Section 6.108 below contains a sample form that can be used to record the minutes of directors' meetings. This form probably presents the necessary information in sufficient detail to meet the needs of most corporations. When the minutes of directors' meetings are properly prepared and regularly maintained in the minute book of the corporation, they serve not only as a guide to the actions considered and taken by the directors but also as evidence that these actions or resolutions were adopted according to proper procedures. They also provide crucial evidence that corporate formalities were observed and, thus, that the corporation's "corporate veil" will provide a limitation on the liability of its shareholders, officers, and directors for corporate obligations. See generally 7 Charles W. Murdock, BUSINESS ORGANIZATIONS §8.9 (2d ed. 2010, Supp. 2019) (Vol. 7 of the ILLINOIS PRACTICE SERIES). See §6.3 above. By reciting facts about the length of directors' deliberations and debate on important corporate transactions, the minutes can also provide important evidence that the directors satisfied their fiduciary duty by following the business-judgment rule.

Minutes of the proceedings of the board of directors, committees of the board, and the shareholders must be kept by every corporation. 805 ILCS 5/7.75(a). These are generally maintained in a minute book, usually a loose-leaf binder, in chronological order. The original copies of the call of the meeting, the notice given (and waivers thereof, if applicable), and a declaration that the notice was properly served should be filed in the minute book along with the minutes of each meeting.

There are no specific statutory requirements as to the contents of the minutes. As a general rule, minutes should record what was done at a meeting and not simply recite what was said by the participants. See Henry M. Robert et al., ROBERT'S RULES OF ORDER NEWLY REVISED §48, pp. 468 – 471 (11th ed. 2011). When kept as a business record made in the ordinary course of business, the minutes may be valuable evidence for the corporation that a disputed action was properly considered and adopted by the board of directors. See 725 ILCS 5/115-5. For this reason, the minutes should be drafted to contain a recitation of every element necessary for valid corporate action. They should indicate the nature of the meeting, the person who called it, the fact that it was properly noticed, the attendance of a quorum, and the names of those attending. All matters brought up before the meeting and whatever action was taken on each should be set forth in enough detail for a reader to be able to judge the meaning and propriety of the board's action. Some commentators have argued that no second should be required for a motion at a board meeting, just as they argue

no second is necessary for a motion at a shareholders' meeting. See Eric G. Orlinsky, *Conduct Unbecoming a Stockholder?, Only a Few Cases Guide the Governance of Directors' and Stockholders' Meetings,* 8 Bus.L. Today, No. 1, 20, 23 – 24 (Jan./Feb. 1999). See §6.27 above. However, the logic for such an argument is slightly different in the context of a directors' meeting.

The concept of "one participant, one vote" that underlies the parliamentary procedure requirement for a second and that admittedly does not necessarily apply in the shareholder context does apply to meetings of directors. Thus, the initial premise behind the idea of requiring a second to all motions to avoid wasting time on matters of interest to only one member (who holds only one vote) could arguably apply to a directors' meeting. However, the fiduciary duties that directors owe to a corporation and their potential liability for failure to satisfy these duties suggest that they must be treated somewhat differently than standard members of a parliamentary body. Further, the Business Corporation Act of 1983's insistence that directors be able to hear one another and speak to one another during their meetings (see the discussion of 805 ILCS 5/8.15(d) in §6.35 above) suggests that each member's voice is of great importance to the deliberations of the body. Thus, requiring a second might deprive a director of his or her opportunity to attempt to satisfy this fiduciary duty by bringing an important motion to the board's attention simply because the other directors were unaware of its substance and this director would not be able to explain it for want of a second.

As noted in the sample form in §6.108 below, it is optional to have the chair of the meeting sign the minutes as well to indicate agreement that they correctly reflect the events that occurred. Including such an approval can be particularly useful if the meeting addressed issues or decisions that were contested or that were of unusual significance because the approval provides additional evidence of the accuracy of the minutes on these points.

The minutes of the meeting should also reflect presentations made by directors or other persons invited to appear before the board even if no resolution is proposed or adopted. In addition, a list of materials distributed to the directors, if any, should be set forth in the minutes, and copies should be included with the minutes or the written consent to which they relate, if at all possible. These copies can then become important evidence of what was considered by the directors and what forms of documents were actually approved.

For corporate actions that are to be taken at a directors' meeting and that are known in advance, it is helpful for the director proposing the action to prepare a resolution in advance in conjunction with the corporate secretary. This procedure ensures that the proposed resolution is drafted to state accurately the action requested of the board, that the other directors are able to review the precise resolution being proposed and thereby reduce the chance of misunderstanding, and that the secretary of the meeting is able to record accurately the resolution presented. If changes are made to the proposed resolution at the meeting, the secretary can make them on a copy of the draft resolution distributed at the meeting and, if the resolution is approved by the board, insert it in the minutes of the meeting.

5. [6.45] Directors' Action by Written Consent

The directors or, if applicable, a committee of the directors may take action without a meeting by unanimous written consent unless specifically prohibited from doing so by the articles of incorporation or bylaws. 805 ILCS 5/8.45(a). If directors act by written consent, the consent or counterparts must be signed by all directors entitled to vote or all the members of any committee of the board of directors entitled to vote. *Id.* An action taken by written consent is effective when all the directors have approved the consent unless the consent specifies a different (presumably later) effective date. 805 ILCS 5/8.45(b). The statute does not permit action to be taken by written consent of less than all of the members of the board of directors. See 805 ILCS 5/8.45(a).

The sample form for the directors' consent to action without a meeting in §6.109 below can be used for a resolution adopted without a meeting by the unanimous written consent of the directors. When drafting a written consent, unless all directors are readily accessible, counsel should consider adding a resolution that specifically authorizes the execution of the consent in counterparts so that copies of the consent may be sent to all directors simultaneously for execution, rather than taking the time to have the directors circulate a single original among themselves for signature. Such a resolution may take the following form:

FURTHER RESOLVED, that this Written Consent may be executed in one or more counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument.

I. [6.46] Directors' Resolutions

In addition to the directors' resolutions discussed in §§6.47 – 6.51 below, §6.20 above discusses a form of directors' resolution addressing issues relating to the annual shareholders' meeting. See §6.93 below for a sample form of this resolution.

1. [6.47] Form of Resolution

Section 6.110 below contains a sample form of resolution that serves as a template for drafting any resolution of the board of directors or shareholders. No statute defines resolutions or prescribes a form for resolutions. Examples of a suitable form for resolutions may be found in Henry M. Robert et al., ROBERT'S RULES OF ORDER NEWLY REVISED §10, p. 105 (11th ed. 2011). Other samples of forms of resolutions are found in §§6.112 – 6.117 below. Some commentators have argued that certain rules of parliamentary procedure that are embodied in ROBERT'S RULES, such as the requirement for a second, are inappropriate for shareholder and director meetings. See §§6.27 and 6.44 above. However, ROBERT'S RULES can still be a helpful guide for such ancillary matters as the clear and consistent wording of resolutions.

According to ROBERT'S RULES, resolutions should begin with the words "Resolved, That . . ."; the use of periods within the body of a resolution should be avoided, and when periods are necessary, the resolution should be divided into a series of resolutions, commencing the second and all subsequent resolutions with the words "Further Resolved, That . . ." and ending with a

period or semicolon, with the next-to-last resolution in the series being followed by the word "and." ROBERT'S RULES, pp. 105 – 108. An alternative method of reciting a series of related resolutions is to set them forth as a series of separate resolutions numbered with Arabic numerals (*i.e.,* 1, 2, etc.).

When it is required or desired that the reasons for the adoption of a resolution be recited in the minutes of the meeting, they are usually stated in a preamble to the resolution. Periods should not be used in the preamble, and each reason given should be set forth in a separate clause or paragraph commencing with the word "Whereas" and ending with a comma or semicolon followed by the word "and," except for the last clause, which should end with the phrase "Now therefore be it." *Id.*

A preamble is not necessary if it would merely repeat matters stated in the body of the resolution. Whether a preamble should be included depends on the particular circumstances surrounding the adoption as well as the actual language used in the resolution. Therefore, the presence or absence of a preamble in a particular form of resolution set forth in this chapter should not be interpreted as meaning that one is or is not needed. The sample form of resolution in §6.110 below is a variation on the form of resolution suggested by ROBERT'S RULES.

Both to respect corporate formalities and to provide clear direction and protection to officers and directors who are being instructed to act by the board of directors, all resolutions should be precise and clearly worded. Drafters of resolutions should consider all possible ancillary documents and actions and try to list as many of these as possible. Thus, for example, resolutions authorizing the sale of a piece of real estate should not only identify the real estate and the sale price (or a narrow range of approved sale prices), but additional resolutions should address specifically whether corporate officers are authorized to negotiate any terms of sale, whether they may execute and deliver a deed and related documents, and whether they may purchase title insurance and provide affidavits in connection with the transaction.

In preparing resolutions to authorize or approve a specific transaction or agreement, counsel should also consider adding a "catchall" resolution to approve additional types of related documents as well as a resolution ratifying prior actions taken consistent with the primary authorizing resolution. These resolutions may not be appropriate in all circumstances. If, for example, a board of directors wished to exercise direct and complete supervisory control over all discrete aspects of a transaction, they would not wish to authorize more than one step of the transaction at a time. Similarly, if the board of directors was not in agreement as to the wisdom of the transaction or the best way in which to complete it, it would not be appropriate for them to include a blanket approval of the ancillary documents and transactions, in whatever form they may take. However, in cases in which this broad approval is consistent with the intentions of the board of directors, it can be helpful to include resolutions to this effect to avoid the need to return to the board of directors later for additional, separate approvals of each minor ancillary document and delivery. These types of broad resolutions can take the following form:

FURTHER RESOLVED, that the officers of the Corporation, and each of them, be, and each of them hereby is, authorized, empowered, and directed, in the name and on behalf of the Corporation, to execute and deliver all documents and to do or to cause to be done any

and all such acts, including the payment of necessary fees and expenses, as such officers may deem necessary or desirable in order to carry out the intent and purposes of the foregoing resolutions; and

FURTHER RESOLVED, that all actions heretofore taken and all documents heretofore executed and delivered by the officers of the Corporation in furtherance of the foregoing resolutions be, and they hereby are, ratified, confirmed, and approved in all respects.

2. [6.48] Certificate of Adoption of Resolution

The sample form set forth in §6.111 below is a certificate that may be used by the secretary or an assistant secretary in certifying resolutions of the board of directors. It is common business practice for parties entering into a contract or transacting any major item of business with a corporation to request for their files a certified copy of the resolution authorizing the corporation to enter into the contract or transact the business. This sample form, with appropriate revisions, can also be used to certify adoption of shareholder resolutions.

Papers, entries, and records of a corporation may be proved in evidence by a certified copy executed by the secretary or other keeper of the corporate records. 735 ILCS 5/8-1204.

3. [6.49] Resolution Electing Officers and Establishing Salary

The Business Corporation Act of 1983 does not require that a corporation have any particular officers other than those specified in the corporation's bylaws, and the bylaws typically will list the corporation's officers and describe what actions they are authorized to take absent more specific direction from the board of directors. However, the BCA does require that a corporation have at least one officer (generally referred to as the secretary) with authority to certify the bylaws, resolutions of shareholders and directors, and other documents of the corporation as true and correct copies. 805 ILCS 5/8.50.

Officers are elected by the board of directors to hold office until their successors are chosen and take office. Assistant officers and agents of the corporation may also be elected in the discretion of the board of directors. In the absence of a contrary bylaw provision, the BCA permits any two or more offices to be held by the same person. In addition to implied authority recognized by common law, the officers elected or appointed by the board of directors may be given express authority by resolution of the board, but this express authority cannot be inconsistent with the express authority granted by the bylaws or the implied authority granted by applicable common law. *Id.* Section 6.112 below contains a sample form of a resolution electing officers and setting an annual salary for each. Alternatively, the board may set salaries separately from the annual election of officers.

Election or appointment of an officer or an agent does not of itself create contract rights. Therefore, unless they have a separate employment contract with the corporation, officers serve at the pleasure of the board and may be removed with or without cause. See 805 ILCS 5/8.55. If an officer is granted an employment contract, this contract should be approved by the board of directors.

4. [6.50] Resolution Approving Contract

As discussed in §6.47 above, whenever a specific contract is authorized, the board of directors should also consider providing additional authority to complete ancillary transactions and documents relating to the contract if this is appropriate under the circumstances. Section 6.113 below contains a sample form of a general resolution approving a contract.

5. [6.51] Resolution Approving Contract with Interested Director

The fact that a director of the corporation is directly or indirectly a party to a transaction with the corporation does not invalidate the transaction if the transaction is fair to the corporation. 805 ILCS 5/8.60(a). Fairness must be proved by the person asserting the validity of the transaction. The burden of proof shifts to the person attacking the transaction if the transaction is approved by the disinterested members of the board of directors, a committee thereof, or the shareholders. In obtaining approval, the material facts of the transaction and the relevant director's interest or relationship must be disclosed or known to the body approving the transaction, and the transaction must be authorized by a majority of the directors. *Id.*

Since its amendment by P.A. 90-421 (eff. Jan. 1, 1998), §8.60(a) of the Business Corporation Act of 1983 has provided that in a board vote on a transaction in which a director has an interest, the interested director may vote on the transaction and his or her presence may be counted for purposes of determining whether a quorum is present. However, if this director wishes to shift the burden of proof as to the fairness of the transaction, he or she should abstain from the vote, and the disinterested directors should approve the transaction. In the latter case, it may be useful to have the minutes reflect that the interested director abstained from the vote. Depending on the circumstances and the influence that the interested director may have over other directors, it may be prudent to have the interested director abstain from the discussion of the transaction as well and even to leave the room for all or a portion of the discussion. If the interested director does choose to abstain or leave the meeting, the minutes should reflect this fact. See also §6.37 above. Section 6.114 below contains a sample form of a directors' resolution approving a contract with an interested director.

J. [6.52] Advisory Directors

Some corporations find it useful to invite one or more individuals to serve as advisory directors. These individuals are sometimes called associate directors, honorary directors, or directors emeriti. These individuals are not voting members of the board of directors and are not typically elected by shareholders. Rather, they are individuals selected by the board or management to provide additional expertise to the board. See, *e.g.,* Committee on Corporate Laws, ABA Section of Business Law, MANAGING CLOSELY HELD CORPORATIONS: A LEGAL GUIDEBOOK, pp. 29 – 30 (2003), reprinted in 58 Bus.Law. 1073, 1098 – 1099 (2003). Community banks in particular have found this mechanism quite useful. They appoint advisory directors from communities in which they have branches, but to which they have no other community ties. Companies also use advisory directors as a means to expand the expertise represented at board meetings without expanding the size of their boards. Additionally, some closely held companies

find advisory directors a useful way to begin broadening their contacts as one step in the process of succession planning. See Sandra Swanson, *Groom, Hype Your Successor,* 27 Crain's Chi.Bus., No. 32, SB2 (Aug. 9, 2004).

There are risks to an individual agreeing to serve as an advisory director, so counsel should advise a corporation to check the coverage of its directors and officers liability insurance policy before extending an invitation to a possible advisory director. Further, the actual directors of the corporation should be alerted to the need to monitor the role and responsibilities of the advisory director to make sure that the advisory director does not end up having policy-making authority for which the actual directors might have liability. Also, the corporation's board of directors should formulate a clear policy on advisory directors before adding them to the board. Such a policy should include a discussion of qualifications, removal, term limits, and expectations for attendance and should clearly indicate that the advisory director does not have a vote or policy-making authority on the board or any committee.

V. AMENDMENT OF ARTICLES OF INCORPORATION

A. [6.53] Reasons for Amending Articles of Incorporation

One or more times during its existence, a corporation may wish to amend its articles of incorporation. Activities that would require such an amendment include the following: changing the corporation's name; changing the corporation's stated purpose or the duration of its existence; changing the number of authorized shares or the par value of those shares; changing the classifications of shares or their corresponding rights and obligations and creating preemptive rights (for corporations incorporated after January 1, 1982) or eliminating these rights; or eliminating cumulative voting for directors (for corporations incorporated after January 1, 1982) or (for corporations of later vintage) granting cumulative voting rights. See, *e.g.,* 805 ILCS 5/7.40(b). See also §6.17 above.

In addition, for administrative convenience, corporations that have previously adopted numerous amendments to their articles of incorporation may consider filing an amended and restated set of articles that simply culls the current, active provisions of the articles of incorporation from the initial filing and all of the amendments and then restates only those currently active provisions. Such a restatement makes it easier and usually less expensive to obtain a certified copy of the articles of incorporation because the Secretary of State needs to provide only a copy of the restated articles and does not need to provide copies of all of the prior filings dating back to incorporation, thus lowering the per-page fee that the Secretary of State's Office charges for providing certified documents. Section 10.30(a) of the Business Corporation Act of 1983 permits such a restatement and allows subsequent new amendments to be made to the restatement.

Section 10.05(a) of the BCA provides that amendments to the articles of incorporation may contain only such provisions as are required or permitted in original articles of incorporation at the time of amendment. However, the articles as amended may omit the names and addresses of the initial directors, and the name and address of the initial registered agent may be omitted if the corporation has previously changed its registered agent by means of an appropriate filing with the Secretary of State. *Id.*

Counsel should regularly review the articles of incorporation of a client corporation to confirm that the provisions remain applicable and that they accurately reflect the corporation's situation. For example, if a corporation's original articles of incorporation provided for a corporate existence of a limited duration and if the corporation now wishes to extend the duration of its existence or make it perpetual, an amendment to the articles of incorporation would be in order. The BCA permits a corporation whose period of duration has expired to file an amendment to revive its articles of incorporation and extend the period of corporation duration, including making the duration perpetual, at any time within five years after the date of expiration. 805 ILCS 5/10.05(b).

Similarly, if a corporation's original purpose no longer reflects the nature of its activities, it should amend this portion of its articles of incorporation. With respect to the statement of corporate purpose, it is now possible (and, indeed, recommended) to include in the purpose clause a broad statement that the corporation intends to engage in "the transaction of any or all lawful businesses for which corporations may be incorporated under [the Illinois Business Corporation Act, as amended]." See 805 ILCS 5/2.10(a)(2). If this language is included in the articles of incorporation, and as long as a corporation's activities are within those permitted by the BCA, no further changes in the purpose clause will be necessary. Note that corporations conducting business on certain regulated professions and industries may need to comply with additional rules here, and these rules may dictate what must be stated in the corporate purpose clauses. For example, corporations wishing to practice architecture must include language in the purpose clause of their articles of incorporation stating that the corporation is authorized to provide architectural services. See 68 Ill.Admin. Code §1150.80(a)(1)(B). See also 225 ILCS 305/21.

B. [6.54] Adoption and Approval

In most cases, amendments to the articles of incorporation must be approved by a majority of the directors and then submitted to a vote at a meeting of shareholders. 805 ILCS 5/10.20. The shareholders must then approve the amendment by the affirmative vote of at least two thirds of the votes of the shares entitled to vote on the amendment. 805 ILCS 5/10.20(c). The articles of incorporation may supersede the two-thirds requirement by substituting a larger or smaller vote requirement, but the articles must require at least a majority vote of the shareholders for amendment of the articles. 805 ILCS 5/10.20(d). Further, the shareholder approval requirements are different if the amendment would have a material impact on a particular class of shares of the corporation. The list of the types of amendments that are deemed to have a material impact is found at 805 ILCS 5/10.25 and includes amendments that would increase or decrease the aggregate number of authorized shares of the class in question or would change the designations, preferences, qualifications, limitations, restrictions, or special or relative rights of the shares of the class. These types of amendments must be approved by the affirmative vote of two thirds of the votes of the shares of each class that would be affected by the amendment, as well as by the affirmative vote of two thirds of the total votes of the shares entitled to vote on the amendment. 805 ILCS 5/10.20(c). Again, pursuant to §10.20(d), the articles of incorporation may vary these two-thirds vote requirements but may not decrease the required vote below a simple majority.

The shareholders' vote on an amendment to the articles of incorporation may take place at either an annual or a special meeting. 805 ILCS 5/10.20(a). In either case, the notice of the meeting

must include the proposed amendment or a summary of the changes to be effected thereby. 805 ILCS 5/10.20(b). The notice must be delivered not less than 10 nor more than 60 days before the meeting. 805 ILCS 5/7.15.

In a few instances, amendments to the articles of incorporation may be approved by action of a majority of the corporation's directors or, if directors have not been named or elected, a majority of the incorporators without the need to obtain shareholder approval. Thus, for example, no shareholder approval is needed if the corporation has not issued shares. 805 ILCS 5/10.10. If shares have been issued, then the directors still may adopt certain limited types of amendments to the articles without obtaining shareholder approval. These types of amendments include removing the names and addresses of the original directors or the original registered agent, changing the par value or reflecting a share split as long as no class or series of shares is adversely affected, or changing the corporate name by switching "corporation," "incorporated," "company," or "limited" for its abbreviation or vice versa. The complete list of the types of amendments that may be approved by the directors without obtaining shareholder approval is included in 805 ILCS 5/10.15.

C. [6.55] Preparing and Filing Articles of Amendment

After obtaining all of the required approvals from incorporators, directors, and shareholders, as applicable, counsel should file Form BCA 10.30, Articles of Amendment, available at www.cyberdriveillinois.com/publications/pdf_publications/bca1030.pdf, with the Secretary of State along with the corresponding filing fee. Counsel may submit a draft of the proposed Form BCA 10.30 to the Corporations Division of the Secretary of State's Department of Business Services for an informal, "preclearance" approval. Although this may not be necessary for fairly routine amendments, preclearance is often a good idea for amendments that will be making complex revisions, such as those affecting the designations and preferences of stock, or amendments that will need to be filed and effective as of a specific date. This latter group would include those that relate to a merger or other transaction with a specific, scheduled closing date.

Counsel should draft the articles of amendment and the underlying resolutions of the directors and shareholders carefully and accurately to reduce the chances that the articles of amendment will be rejected by the Secretary of State. For example, when new classes of stock are being created, the corresponding designations and preferences should be fully and precisely described. The number of authorized shares should be consistent with the number on the last report filed with the Secretary of State, and all changes in this number that are being adopted in the amendment should be reflected accurately in the post-amendment statement of authorized shares.

If the articles are accepted for filing, the Secretary of State will return one true copy of the articles of amendment. 805 ILCS 5/1.10(e)(3)(iv). A corporation that fails to file any document as required by the Business Corporation Act of 1983 is subject to the penalty provisions of 805 ILCS 5/16.05(i). Practitioners of a certain vintage will need to keep reminding themselves that effective January 1, 2011, the recording requirement for articles of amendment (and for most other corporate filings) was eliminated. See P.A. 96-1121.

The amendment becomes effective and the articles of incorporation are deemed to be amended accordingly as of the later of the date of the filing of the articles of amendment with the Secretary of State or the time established in the articles of amendment, which may not be more than 30 days after the filing of the articles of amendment with the Secretary of State. 805 ILCS 5/10.35(a).

Pursuant to the amendment of the BCA by P.A. 92-33 (eff. July 1, 2001), the Secretary of State is not required to issue separate certificates for amendments to articles of incorporation or, indeed, for numerous other types of transactions, such as mergers. Rather, the form filed by the corporation, such as, for example, the articles of amendment in this case, becomes the evidence of the effectiveness of the filing when stamped by the Secretary of State's Office, and the date on which this filing is made with the Secretary of State becomes the effective date. See, *e.g.,* 805 ILCS 5/10.35(a), 5/10.35(d). Each amendment that affects the amount of paid-in capital shall be deemed a report under the BCA, and no further report need be made with respect to this change in the amount of paid-in capital. 805 ILCS 5/10.35(e).

The filing fee for filing articles of amendment is $50 unless the amendment is a restatement of the articles of incorporation, in which case the fee is $150. 805 ILCS 5/15.10(b).

VI. DIVIDENDS

A. [6.56] In General

The Business Corporation Act of 1983 does not define "dividend." However, the term is generally defined as a distribution of cash, property, or scrip by a corporation to its shareholders to be distributed pro rata among the shares outstanding. Although dividends can be declared as a means of making a liquidation distribution of assets to shareholders, this chapter does not address these types of dividends and, instead, focuses on dividends that are distributions of profits of ongoing corporations.

Section 9.10(a) of the BCA provides that subject to certain restrictions, the board of directors may authorize and the corporation may make distributions to its shareholders, subject to the provisions of the articles of incorporation, which would, for example, discuss whether certain classes of stock had a preference in receiving dividends. 805 ILCS 5/9.10(a). No dividend may be declared if, after giving it effect, the corporation would be insolvent or its net assets would be less than zero or less than the maximum amount payable at the time of distribution to shareholders having preferential rights in liquidation if the corporation were then to be liquidated. 805 ILCS 5/9.10(c). Dividends are usually paid in cash out of the corporation's earned surplus or, subject to the preceding limitations, paid-in capital.

Directors of the corporation who vote for or assent to any distribution of assets of the corporation that is prohibited by §9.10 are jointly and severally liable to the corporation for the amount of the distribution. 805 ILCS 5/8.65(a)(1). However, a director will not be liable for a distribution of assets to the shareholders of a corporation in excess of the amount authorized by §9.10 if the director relied and acted in good faith in reliance "on financial statements prepared on

the basis of accounting practices and principles that are reasonable in the circumstances or on a fair valuation or other method that is reasonable under the circumstances." See 805 ILCS 5/9.10(d). See §6.39 above.

Although arguably consistent with the preceding statement, the BCA elsewhere offers a slightly different description of a safe harbor available to directors who declare dividends in excess of the limitations of §9.10. Section 8.65(c) of the BCA shields a director from liability for declaring dividends that violate §9.10 if the director relied on a balance sheet and profit and loss statement of the corporation represented to the director to be correct by the president or the officer of the corporation having charge of its books of account or certified by an independent public or certified public accountant to reflect fairly the financial condition of the corporation. The director also will have no liability if the director, acting in good faith, based a determination of the amount available for the dividend or distribution on calculations that valued the corporation's assets at their book value.

In light of these provisions of the BCA, before declaring a dividend, the directors should review complete and current financial statements to be able to discharge their obligation to act in good faith in the declaration of a dividend. The directors should also be familiar with the articles of incorporation so that they can evaluate whether there are any classes of stock with preferential or cumulative dividend rights that need to be addressed in connection with a dividend declaration.

B. [6.57] Declaration of Dividends

Dividends are declared by the board of directors, and in general, no formal resolution of the board is required unless a statute, a charter, or the bylaws of the corporation so specify. See William Sardell, ENCYCLOPEDIA OF CORPORATE MEETINGS, MINUTES, AND RESOLUTIONS, p. 737 (3d ed. 1986). One notable exception to this rule is described in §6.60 below. However, counsel should recommend to the corporate client that the directors should make any declaration of a dividend by means of a formal resolution so that the corporation's records on its dividends as contained in the minute book are accurate and complete. The board resolution should name the period of operations to which the dividend relates, and it should specify the record date as of which shareholders of record will be determined for purposes of deciding who is entitled to receive the dividend. In order to help establish the directors' due diligence in investigating the validity of the dividend under 805 ILCS 5/9.10, it is also advisable to add to the resolution some form of recital of the financial records and documents that the directors examined before approving the dividend.

Dividends are always payable as of the date of the adoption of the resolution or some future date named in the resolution. 805 ILCS 5/7.25 provides that the board may "fix *in advance* a date as the record date for any . . . determination of shareholders" entitled to receive payment of any dividend. [Emphasis added.] If the board fails to fix a record date, then §7.25 provides that "the date on which the resolution of the board of directors declaring such dividend is adopted . . . shall be the record date for such determination of shareholders." *Id.*

This provision of the Business Corporation Act of 1983 is usually interpreted to mean that directors cannot pay dividends based on a record date that preceded the date of declaration of the dividend. One concern with such a process could be that it might permit directors to declare

dividends that would benefit individuals who were no longer shareholders of the company as of the date of the dividend declaration, and thus the dividend might represent a form of disguised compensation to the former shareholders. Because of these and other potential abuses, dividends may not be paid on a record date that precedes the date on which the dividend declaration resolution was adopted.

Any board resolution approving a dividend may also set a payment or distribution date for the dividend; if this information is to be approved by the directors, they should be advised to set this date sufficiently later in time to permit the officers of the corporation to arrange for payment or distribution of the dividend on the date. In the case of a cash dividend, the resolution should state the amount of the dividend in terms of dollars and cents per share. Resolutions approving in-kind dividends should be similarly clear about what will be distributed to the shareholders and how it will be allocated on a pro rata basis among the shareholders.

Corporations listed on recognized stock exchanges are required by the rules of these exchanges to notify the stock exchange and certain financial news services of the declaration of a dividend immediately.

Dividends are generally irrevocable once they have been declared, and the corporation is viewed as being indebted to each shareholder for the amount of the shareholder's portion of the total dividend. *See generally Ford v. Ford Manufacturing Co.,* 222 Ill.App. 76, 82 – 83 (1st Dist. 1921). See also 13 I.L.P. *Corporations* §122 (2013). However, there are three situations in which the directors may revoke a previously declared dividend: (1) if payment of the dividend would impair the capital of the corporation; (2) if the declaration of the dividend has not yet been made public and no funds have been set aside for the payment of the dividend; or (3) if the corporation has experienced some major, unexpected loss that makes it imprudent to pay the dividend and if no funds have been set aside from which to pay the dividend. See Sardell, pp. 796 – 797.

C. Forms of Dividend Declaration

1. [6.58] Cash Dividends

The simplest form of dividend distribution is a cash dividend. Section 6.115 below contains a sample form of a directors' resolution for a declaration of a cash dividend out of earned surplus.

2. [6.59] Property Dividends

Although 805 ILCS 5/9.10 also permits the payment of dividends in property, these are not as common as cash dividends. For purposes of income taxes assessed against shareholders, a dividend of property is taxable in much the same way as a dividend of cash. See §§316(a) and 317(a) of the Internal Revenue Code, 26 U.S.C. §§316(a) and 317(a). One possible reason for the rarity of property dividends is that they are difficult to arrange because all shareholders must receive equal pro rata shares of the property being distributed, and many types of property are not easily divided into numerous parts, or if they are, they are of nominal value to the average shareholder.

Section 6.116 below contains a sample form of a declaration of a property dividend in which the property is assumed to be shares of stock of a third-party corporation that are owned by the corporation that is declaring the dividend.

3. [6.60] Stock Dividends and Stock Splits

The board of directors may declare dividends payable in shares of stock of the corporation. Stock splits are a similar type of distribution, and there are two varieties of stock splits. In a split-up, the board declares that each outstanding share of stock is automatically split into a greater number of shares, and in a reverse split (sometimes called a split-down), a number of shares are combined into a smaller number of shares. The names of these types of distributions often include an indication of how many shares are being distributed. Thus, if three shares of stock are being distributed for each share outstanding on the record date, the distribution might be called a "three-for-one stock split."

A two-for-one stock split looks very much like a 100-percent stock dividend because, in both cases, each shareholder ends up with the same total equity but twice as many shares as before. However, the two types of distributions have very different effects on the capital of the corporation. In a stock dividend, surplus must be transferred to the capital stock account to provide for the additional shares being issued. In a stock split, by contrast, no adjustments are made to the total amounts of capital stock and surplus on the corporation's balance sheet. See William Sardell, ENCYCLOPEDIA OF CORPORATE MEETINGS, MINUTES, AND RESOLUTIONS, pp. 778 – 779 (3d ed. 1986).

If a stock dividend is declared as to shares having a par value, the shares should be issued at the par value thereof, and at the time the dividend is declared, an amount of surplus equal to the aggregate par value of the shares to be issued as a dividend should be transferred to paid-in capital.

If the payment of a stock dividend is to be in no-par shares, the board of directors should fix the value at which these shares shall be issued. At the same time, the directors should also authorize the transfer to paid-in capital of an amount of surplus equal to the aggregate value they have fixed for the shares to be distributed. All of these actions should be taken by resolution at the time the dividend is declared.

There are several business reasons for a corporation to declare stock dividends and stock splits. For example, a corporation may have a large amount of surplus and good current earnings, but it may need all of its cash for the growth of its business. Accordingly, if management feels a need to make some type of distribution to shareholders (perhaps in response to shareholder comments) and if management feels that an in-kind dividend of the corporation's stock would be perceived as valuable by the shareholders, management may decide that it is desirable to issue a stock dividend and to transfer part of the earned surplus to paid-in surplus in connection with the stock dividend. All of these justifications for stock splits and stock dividends are less applicable to corporations whose stock is closely held and thus is not very liquid.

The issuance of a stock dividend does not change the ownership interests of the corporation since the stock dividend is issued proportionately and each shareholder retains the same

proportionate interest in the corporation. However, if the stock has a ready market, some investors may perceive value in a stock dividend because it increases the ease with which they may sell some or all of their share of the stock dividend to realize some cash with respect to the investment while still retaining some equity interest in the corporation.

A stock split would accomplish some of the same goals in terms of increasing shareholders' ability to sell less than all of their shares, but no alteration of the corporation's surplus accounts would result.

Shareholders feel no federal income tax effect at the time of declaration of either a stock dividend or a stock split because in both cases they do not end up with anything more or less than they started with. Internal Revenue Code §305(a) supports this conclusion, providing that gross income does not include the amount of a distribution of the stock of a corporation or rights to acquire this stock made by the corporation to its shareholders with respect to its stock. This rule does not apply (and the stock dividend or stock split may have immediate tax consequences to the shareholder) if the shareholders have the election to take stock or property or if the distribution is made in discharge of preference dividends. See generally 26 U.S.C. §305(b).

However, once a stock dividend or stock split is received, the shareholder's cost basis in the stock changes because the original basis must now be spread out over the number of shares owned after the stock dividend or stock split. Thus, shareholders are subject to future tax consequences as a result of stock dividends and stock splits.

Stock splits and stock dividends both involve issuance of additional shares of stock of the corporation. 805 ILCS 5/6.25 generally requires board action to set the consideration to be received in exchange for shares being issued, and it specifically mentions stock dividends and stock splits as transactions requiring board authorization. Thus, the general rule that no formal board resolution is required for dividends (see §6.57 above) does not apply to stock splits and stock dividends.

If a board wishes to declare either a stock dividend or a stock split, counsel should check the articles of incorporation and the most recent annual report of the corporation to confirm that it has sufficient authorized but unissued shares to complete the dividend or the stock split. If the corporation does not have sufficient authorized but unissued shares, then the directors and shareholders would need to amend the capitalization provisions of its articles of incorporation before the board could declare the dividend. See §§6.53 – 6.55 above regarding amendments of the articles of incorporation.

Section 6.117 below contains a sample form of a directors' resolution declaring a stock dividend.

VII. CONSOLIDATIONS, MERGERS, SHARE EXCHANGES, ASSET SALES, AND BASIC CONTRACTING

A. [6.61] Types of Corporate Consolidations

There are various ways to combine two or more corporations, including the traditional statutory merger as well as other forms of corporate reorganizations. A statutory merger provides for the combination of two or more corporations by the transfer of all of the property of the non-surviving corporation or corporations to the surviving corporation under a statutory procedure. See generally 805 ILCS 5/11.50. A consolidation essentially involves the formation of a new corporation by combining two or more constituent corporations, again under a statutory procedure. See 805 ILCS 5/11.05. The Business Corporation Act of 1983 also includes the concept of a share exchange, in which the acquired corporation remains in existence and only the ownership of its shares is changed after the requisite shareholder vote. See 805 ILCS 5/11.10.

Generally, the most important considerations in any merger or reorganization are the tax effects. Most mergers are done on a tax-free basis under §368(a)(1) of the Internal Revenue Code of 1986. 26 U.S.C. §368(a)(1)(A). Code §368(a)(1)(A) defines a tax-free "reorganization" to include a statutory merger or consolidation. Similarly, Code §368(a)(1)(B) includes a tax-free acquisition of stock of another corporation in exchange for stock of the acquiring corporation (commonly called a "stock-for-stock transaction") within the definition of a "reorganization." Code §368(a)(1)(D) provides that the acquisition of substantially all of the assets of one corporation by the acquiring corporation (commonly known as a "stock-for-assets transaction") is also considered a tax-free reorganization under the Code. In all of these cases, the Code imposes additional requirements that must be met for the transaction to qualify as a §368 reorganization.

B. [6.62] Procedure for Consolidations, Mergers, and Share Exchanges and the Effects Thereof

The procedures for a merger, consolidation, and share exchange are set forth in Article 11 of the Business Corporation Act of 1983. In order for two corporations to merge or consolidate or complete a share exchange, their respective boards of directors must adopt resolutions approving the plan of merger, consolidation, or exchange.

In the case of a merger or consolidation, the plan must contain, among other things, the names of the constituent corporations, the name of the survivor corporation, the terms and conditions of the proposed combination and the mode of carrying them into effect, the manner and basis of converting the shares of the constituent corporations into shares of the surviving corporation, a statement of any changes in the articles of incorporation of the surviving corporation or a statement of the new articles in their entirety, and any other provisions that may be necessary or desirable. See 805 ILCS 5/11.05. Similarly, a plan of exchange must include the names of the corporation whose shares will be acquired and the name of the acquiring corporation, the terms and conditions of the exchange, and the manner and basis of exchanging shares. 805 ILCS 5/11.10.

Resolutions approving mergers, consolidations, and share exchanges should be carefully tailored to the particular transaction, and they will generally need to recite many of the specific

terms. Section 6.91 below contains a sample form of resolutions that a board of directors might adopt to approve a simple merger agreement, but this form should not be used in any particular transaction without significant alteration to fit the specific terms of the transaction. This sample is greatly simplified, and most mergers involving cash payments to shareholders would require board resolutions approving appointment of an exchange agent and certain related points. Section 6.92 below contains a sample form of a simple plan of merger, relating to the sample transaction described in the resolutions in §6.91 below. Again, practitioners are urged to make significant revisions to this form in order to make it fit a particular transaction.

After the directors approve the merger, consolidation, or exchange, they must call a shareholders' meeting and submit the plan to the shareholders for approval. See 805 ILCS 5/11.15. The BCA requires that the shareholders must approve the plan by a two-thirds vote of the shares entitled to vote on the plan unless class voting is required, but this approval requirement may be changed by the articles of incorporation to any vote that is not less than a majority. 805 ILCS 5/11.20(a), 5/11.20(b). If the plan is approved by the directors and shareholders of all constituent corporations, then counsel should prepare Form BCA 11.25, Articles of Merger, Consolidation or Exchange, available at www.cyberdriveillinois.com/publications/pdf_publications/bca1125.pdf, for filing with the Secretary of State. The articles of merger or consolidation should be prepared in duplicate and signed by all constituent corporations, and they should contain the information required on the form, as described in 805 ILCS 5/11.25. The effective date of the merger, consolidation, or exchange is the date on which the articles of merger, consolidation, or exchange are accepted for filing by the Secretary of State unless the plan provides for a later effective date, which may not be more than 30 days after the filing. 805 ILCS 5/11.40.

If the client requires that the merger be effective on a particular date, counsel is advised to submit a draft of the articles of merger to the Secretary of State for an informal preclearance review. This reduces the risk that a filing date will be lost due to a rejected form.

The BCA provides variations on these procedures for several specific types of combination transactions. Thus, for example, 805 ILCS 5/11.30(a) provides that if a parent corporation owns at least 90 percent of the shares of its subsidiary corporation, the two may merge without obtaining any shareholder approval. Mergers and conversions of banking entities are discussed in §§11.31 and 11.32 of the BCA, although numerous additional regulatory requirements for these types of transactions are found in the Illinois Banking Act, 205 ILCS 5/1, *et seq.,* and the Corporate Fiduciary Act, 205 ILCS 620/1-1, *et seq.*

Similarly, the approval of the shareholders of the acquiring entity is not required in some circumstances. Thus, for example, no vote need be obtained from shareholders of a corporation that is participating in a merger if the merger will not alter the corporation's articles of incorporation, the merger will not make any change in the preferences, designations, and other rights of the shareholders, and the dilution of the interests of the shareholders in the surviving corporation will be below certain thresholds. 805 ILCS 5/11.20(c).

Slight variations on these procedures apply to mergers, consolidations, and share exchanges that involve domestic corporations and foreign corporations, not-for-profit corporations, or limited liability companies. See 805 ILCS 5/11.35, 5/11.37, 5/11.39. In all cases, however, the basic effects of the merger, consolidation, or exchange, as discussed in 805 ILCS 5/11.50, remain the same.

The most important effect of a merger or consolidation is that the separate existence of each constituent corporation other than the survivor ceases and the surviving corporation takes on all rights, privileges, immunities, and powers and is subject to all duties and liabilities of the constituent corporations. See 805 ILCS 5/11.50(a)(2), 5/11.50(a)(3). Other effects of a merger or consolidation, which flow, for the most part, from the preceding effects, also are set forth in §11.50.

A share exchange, by contrast, does not involve any termination of existence of any constituent corporation, and the constituent corporations continue to exist (albeit in the new relationship of "parent" and "subsidiary"). However, some of the effects relating to the conversion or exchange of shares (discussed in BCA §§11.50(b) and 11.50(c)) will apply equally in mergers, consolidations, and share exchanges.

C. [6.63] Securities Law Requirements

Mergers, consolidations, and share exchanges generally involve some securities law issues because shares are being sold or issued in most variations of these transactions. Thus, the general antifraud rules of federal and state securities laws will apply (see 15 U.S.C. §77q; 815 ILCS 5/12), and the constituent corporations must make certain that all directors and shareholders have been given full and accurate information about the transaction before they are asked to vote on it. If one or more of the constituent corporations is publicly held or its securities are otherwise subject to the registration requirements of federal and state securities laws, additional filings and compliance guidelines will be applicable. For further discussion of the Illinois Securities Act of 1953 and the federal securities laws, see BUSINESS LAW: MISCELLANEOUS OPERATING ISSUES (IICLE®, 2017).

D. [6.64] Rights of Dissenting Shareholders

Pursuant to §11.65 of the Business Corporation Act of 1983, a shareholder may dissent from certain types of corporate transactions and obtain payment for shares in lieu of participating in the transaction. These transactions include certain mergers, consolidations, and share exchanges; sale, lease, or exchange of all or substantially all of the corporation's assets if done outside the ordinary course of the corporation's business; amendments of the articles of incorporation that materially and adversely affect the dissenter's shares; and any other corporate action from which shareholders are entitled to dissent pursuant to specific provisions of the corporation's articles of incorporation, bylaws, or directors' resolutions. 805 ILCS 5/11.65(a). Dissenters must generally dissent as to all shares they own, but §11.65(c) provides for a very limited exception to this rule.

If the transaction from which the shareholder wishes to dissent is to be approved by the shareholders, §11.70(a) of the BCA requires a dissenting shareholder to file written objections with the corporation at or before the shareholder meeting. Also, the shareholder may not vote in favor of the plan, although abstention, as opposed to voting against it, is allowed. *Id.* If the transaction does not require shareholder approval, the directors must give notice of the action to the shareholders under either 805 ILCS 5/11.30 or 5/7.10 and set out the procedure for dissenting. 805 ILCS 5/11.70(b). If, prior to or concurrently with this notice, the corporation provides the shareholders with all material information with respect to the transaction, shareholders may then exercise dissenters' rights only if they deliver a written demand to the corporation within 30 days of the mailing of the notice. *Id.*

If the corporate action giving rise to the dissenters' rights is to be approved at a meeting of shareholders and if, prior to the meeting, the corporation has furnished shareholders with all material information concerning the transaction, a shareholder may assert dissenters' rights only after delivering a demand for payment for shares to the corporation before the vote is taken. The shareholder may not then vote in favor of the proposed action. 805 ILCS 5/11.70(a). If the action giving rise to dissenters' rights is to be approved by the shareholders by written consent and if, prior to or concurrently with the notice of the consent, the corporation provides shareholders with all material information, the shareholder must assert dissenters' rights within 30 days of the corporation's mailing of the notice of the consent. 805 ILCS 5/11.70(b).

The BCA sets out a procedure by which the corporation must respond to a written notice of exercise of dissenters' rights, and this procedure includes delivery by the corporation of its written opinion of how best to calculate the fair value of the dissenters' shares. 805 ILCS 5/11.70(c). The corporation must also deliver a number of specific financial statements and reports for the dissenters' review. The procedures for public companies are slightly different because of the availability of a public market for the shares. *Id.*

If the corporation and a dissenting shareholder agree on the fair market value of the dissenter's shares prior to consummation of the transaction, then upon consummation, the corporation shall pay the fair value of the shares to the dissenter when the dissenter's stock certificates are transmitted to the corporation. 805 ILCS 5/11.70(d). If the dissenter does not agree with the corporation's fair value calculation, the dissenter has 30 days from delivery of the corporation's fair value document in which to deliver an alternative calculation. 805 ILCS 5/11.70(e). If the dissenter and the corporation cannot agree on the fair value within 60 days of the delivery of the shareholder's fair value calculation, the corporation must either pay for the dissenter's shares based on the dissenter's fair value calculation or else file a petition in any circuit court in Illinois asking the court to determine the fair value. 805 ILCS 5/11.70(f). The BCA also specifically provides the court with several additional remedies and options for resolving some specific issues in these types of cases. See 805 ILCS 5/11.70(f) – 5/11.70(i).

Pursuant to 805 ILCS 5/9.05(b), when a corporation does eventually purchase shares from a dissenting shareholder, they become treasury shares until they are canceled pursuant to 805 ILCS 5/9.05(d).

BCA §11.70 includes a definition of "fair value" that states that, with respect to a dissenter's shares, the term means the value of the shares "immediately before the consummation of the corporate action to which the dissenter objects excluding any appreciation or depreciation in anticipation of the corporate action, unless exclusion would be inequitable." 805 ILCS 5/11.70(j)(1). The statute also clarifies that determinations of fair value for these purposes should not take into account any discount for minority status or (absent extraordinary circumstances) lack of marketability. *Id.* This language in §11.70(j) means that Illinois is one of the growing number of states that reject minority and marketability discounts. Commentators argue that these kinds of discounts are inappropriate in a buyout transaction of the type contemplated by §11.70 because the very provisions of §11.70 effectively force a buyout of the shares (thus making the shares marketable) and because a minority discount is arguably inappropriate when the buyer of the

minority block is the issuing corporation. See generally Charles W. Murdock, *Squeeze-outs, Freeze-outs and Discounts: Why Is Illinois in the Minority in Protecting Shareholder Interests?,* 35 Loy.U.Chi.L.J. 737, 759 – 760 (2004). Illinois courts have provided some further guidance on the practical meaning of the term "fair value" in various contexts. *See, e.g., Brynwood Co. v. Schweisberger,* 393 Ill.App.3d 339, 913 N.E.2d 150, 162 – 164, 332 Ill.Dec. 555 (2d Dist. 2009).

E. [6.65] Business Combinations with Interested Shareholders

The Business Corporation Act of 1983 contains restrictions on business combinations between certain Illinois corporations and interested shareholders, providing that corporations may not engage in business transactions with any interested shareholder for a period of three years after the shareholder became an interested shareholder unless certain special approval procedures are followed. 805 ILCS 5/11.75(a). The BCA defines relevant terms (*e.g.,* "corporation," "interested shareholder," "business combination," etc.) and lists several exceptions to the general prohibition. See 805 ILCS 5/11.75(c).

For purposes of §11.75, an "interested shareholder" is defined as any shareholder who owns at least 15 percent of the voting shares of the corporation or is an affiliate or associate of the corporation. 805 ILCS 5/11.75(c)(6). "Business combination" is broadly defined to include mergers, consolidations, sales of assets, and other transactions that result in benefits to the interested shareholders that are in excess of their proportionate ownership interest in the corporation. 805 ILCS 5/11.75(c)(3).

The definition of the term "corporation," as used in §11.75, means that it applies only to Illinois corporations whose securities are registered under §12 of the Securities Exchange Act of 1934, 15 U.S.C. §78*l*, or are otherwise subject to §15(d) of the 1934 Act, 15 U.S.C. §78*o*(d). 805 ILCS 5/11.75(c)(5)(A). Further, this definition covers only corporations that (1) have their principal place of business in Illinois or own assets in Illinois worth at least $1 million and (2) have 2,000 or more Illinois residents as shareholders or have more than ten percent of their shares owned by Illinois residents or more than ten percent of their shareholders resident in Illinois. 805 ILCS 5/11.75(c)(5).

Corporations not automatically subject to §11.75 of the BCA may elect to be bound by it by amending their articles of incorporation, and corporations may also exempt themselves from coverage of §11.75 by means of a shareholder vote. In either case, however, the BCA provides specific procedures to follow and, in some cases, imposes limitations on when the election becomes effective. See 805 ILCS 5/11.75(b). This provision is part of Illinois' collection of antitakeover statutes. See §6.67 below.

F. [6.66] Asset Sale Transactions

An alternative to a merger or other combination of two corporations is the sale by one corporation of all of its assets to another corporation. The end result is that the assets and operations of the two entities are combined. However, in an asset sale, the corporate shell of the selling entity remains in place, the selling entity remains independent of the purchaser, and the shareholders of the selling entity remain as such, with their ownership interests in this corporation unchanged. But after all of the seller corporation's assets have been sold or leased, the seller's shareholders effectively become owners of a pool of cash or an income stream and not of a going concern.

The merger filings and reports discussed in §6.62 above do not apply to a sale of assets. However, some of the approval procedures are similar. Thus, for example, if the corporation agrees to the sale, lease, exchange, mortgage, pledge, or other disposition of all or substantially all of its assets in the ordinary course of its business, this action will normally require the approval of only the directors of the corporation. 805 ILCS 5/11.55. However, if these events are proposed outside the ordinary course of the corporation's business, the directors must approve the transaction and then submit it to the shareholders for ratification before it can be completed, following a procedure very similar to that required for mergers. 805 ILCS 5/11.60(a).

G. [6.67] Antitakeover Statute and Fair-Price Statute

The Business Corporation Act of 1983 contains several provisions that are designed to provide boards of directors of target companies with additional weapons to fend off hostile takeover bids. 805 ILCS 5/7.85 contains the Illinois version of the fair-price provision. This provision applies only to public companies and to privately held companies that have specifically included a provision in their articles of incorporation stating that they elect to be subject to §7.85. See 805 ILCS 5/7.85A. In addition, public companies may elect not to be subject to §7.85 if they follow the specified opt-out provisions. See 805 ILCS 5/7.85A(1) – 5/7.85A(3). Essentially, the fair-price provision states that certain types of business combinations, like mergers between a corporation and one of its interested shareholders, must be approved by a vote of 80 percent of the outstanding shares and a majority of the votes held by disinterested shareholders. See 805 ILCS 5/7.85B. The provision defines an "interested shareholder" as, among other things, (1) a shareholder owning 15 percent or more of the corporation's stock or (2) an affiliate of the corporation that at any time in the past 3 years owned 15 percent or more of the corporation's stock. 805 ILCS 5/7.85D(2). A person who has made a tender offer or exchange offer for the corporation's shares shall not be deemed to own any of the shares tendered until the tendered shares have been accepted for purchase or exchange. 805 ILCS 5/7.85D(3)(b). Further, the holder of a revocable proxy in a proxy contest involving a solicitation to ten or more persons is not deemed to be the owner of the shares to which the proxies relate. *Id.*

The supermajority provision of §7.85 may be avoided if the transaction is approved by the disinterested directors. See 805 ILCS 5/7.85C, 5/7.85E. A "disinterested director" is defined as one who "(a) is neither the interested shareholder nor an affiliate or associate of the interested shareholder; (b) was a member of the board of directors prior to the time that the interested shareholder became an interested shareholder or was a director of the corporation before January 1, 1997, or was recommended to succeed a disinterested director by a majority of the disinterested directors then in office; and (c) was not nominated for election as a director by the interested shareholder or any affiliate or associate of the interested shareholder." 805 ILCS 5/7.85D(7). The supermajority provisions may also be avoided if the price is "fair" as provided for in §7.85C.

Target company boards are given another weapon with which to fend off hostile acquirers in the form of the BCA's provisions on authorized shares, which allow the creation of so-called "poison pill" or rights plans. See 805 ILCS 5/6.05.

Another defensive provision for potential target companies is found in 805 ILCS 5/11.75, the business combination statute. This provision precludes certain designated business combinations, such as mergers, between a corporation and one of its interested shareholders from occurring within three years following the date on which the shareholder became "interested." 805 ILCS 5/11.75(a). As in §7.85 of the BCA, §11.75(c)(6) defines an "interested shareholder" in terms of ownership of 15 percent or more of the corporation's shares. Section 11.75 has been described as an attempt to avoid some of the abuses that can arise in partial tender offers (as opposed to "any and all" tender offers). See Business Corporation Act, p. 18 (Charles W. Murdock, Office of Illinois Secretary of State, 2003). Section 11.75 effectively precludes the offeror in a partial tender offer from obtaining access to the assets of the target for three years. Partial tender offers are sometimes thought to arise more frequently when the acquirer has insufficient funding or when the acquirer otherwise intends simply to liquidate the target as quickly as possible. Thus, this provision is thought to deter these types of tender offers, presumably because they are thought to be less desirable as a matter of policy. The business combination statute applies only to public companies that have not otherwise opted out of its provisions. See 805 ILCS 5/11.75(b) and additional discussion in §6.65 above.

H. [6.68] Basic Contracting

In advising corporate clients (and their officers and directors) on basic contracting matters, counsel should alert them to the importance of signing contracts, correspondence, and other documents correctly. When signing on behalf of the corporation, the signature block should read as follows:

[ABC COMPANY, INC.]

By: _____
Name: **John Smith**
Title: **President**

Failure to include the corporate name and the title or capacity of the individual signing can expose the individual to personal liability for obligations relating to the document he or she signed, or at the very least make it very hard for the individual later to argue that the signed document is really an obligation of the corporation.

VIII. DISSOLUTION

A. [6.69] Purposes

Typically, the term "liquidation" means the process of terminating a corporation's business activities, assembling its assets, paying its debts and liabilities, and distributing any excess to the shareholders. A corporation may decide to liquidate because its business has decreased or because its owners wish to operate in a different form, such as a partnership or a proprietorship. Corporations may wish to liquidate one of their wholly owned subsidiaries for a number of operational or administrative reasons.

B. [6.70] Dissolution Procedures

A corporation may be dissolved by its incorporators if initial directors were not named in the articles or have not been elected, or it may be dissolved by a majority of the directors if they have already been named or elected but only if all of the following are true: (1) no shares have been issued; (2) all payments made to the corporation as subscriptions for shares (if any have been received) have been returned (net of necessary expenses); (3) no debts of the corporation remain unpaid; and (4) notice of the election to dissolve has been given to the incorporators or directors, as the case may be, not less than three days before the articles of dissolution are executed. 805 ILCS 5/12.05.

If shares have already been issued, then, pursuant to 805 ILCS 5/12.10, a corporation may be dissolved by the unanimous written consent of all of the shareholders without any action on the part of the directors. Alternatively, holders of at least one fifth of the votes of the shares entitled to vote on dissolution may propose dissolution to the directors. 805 ILCS 5/12.15(a). The directors must then, within one year, consider the proposal and present it to the shareholders. If the directors support dissolution or if they vote for dissolution on their own initiative without receiving any prompting from shareholders, their resolution and their notice to the shareholders would include their recommendation to dissolve. *Id.* In order for the dissolution to be effective, the shareholders must approve it by a vote of two thirds of the votes of the shares entitled to vote on dissolution or such other vote as required by the articles of incorporation, which can in no event be less than a majority. See 805 ILCS 5/12.15(c), 5/12.15(d).

After dissolution has been approved by one of the above methods, the corporation must prepare and file Form BCA 12.20, Articles of Dissolution, available at www.cyberdriveillinois.com/publications/pdf_publications/bca1220.pdf. 805 ILCS 5/12.20(a). This form, which is fairly self-explanatory, must be filed in duplicate, and it must contain a statement of the aggregate number of issued shares itemized by classes and series, a statement of the amount of paid-in capital, and such additional information as is necessary for the Secretary of State to determine unpaid fees and franchise taxes. The dissolution is effective upon the filing of the articles of dissolution by the Secretary of State. 805 ILCS 5/12.20(c).

C. [6.71] Involuntary Dissolution

Corporations may be dissolved involuntarily either through administrative action by the Secretary of State pursuant to 805 ILCS 5/12.35 or by judicial dissolution pursuant to 805 ILCS 5/12.50.

The Secretary of State may administratively dissolve a corporation if it fails to file its annual report or final transition annual report and pay its franchise tax before the first day of its anniversary month. See 805 ILCS 5/12.35(a). For corporations that have established an extended anniversary month pursuant to 805 ILCS 5/14.01, the deadline for the annual report is the extended filing month of the corporation for the year in which this annual report becomes due and the franchise tax becomes payable. 805 ILCS 5/12.35(a). The Secretary of State may also dissolve a corporation if it fails to file any other report before the expiration of the corresponding filing period prescribed

by the Business Corporation Act of 1983 or if the corporation fails to appoint and maintain a registered agent. 805 ILCS 5/12.35(b), 5/12.35(e). The Secretary of State may also administratively dissolve a corporation if it fails to pay any fees, franchise taxes, or charges required by the BCA or if the corporation has misrepresented any material matter in any application, report, affidavit, or other document filed pursuant to the BCA. 805 ILCS 5/12.35(c), 5/12.35(d). Since the penalties involved for failing to file reports with the Secretary of State may be severe (see generally 805 ILCS 5/16.05), many attorneys routinely serve as registered agents for their corporate clients in order to lessen the chances of inadvertently missing a filing deadline.

Some corporations that are running out of funds or that wish to shut down an inactive subsidiary may be tempted simply to stop filing annual reports and paying franchise taxes and to let the Secretary of State's Office save them the trouble of filing formal dissolution papers by administratively dissolving the entity. While this approach is certainly economical in terms of filing fees and the amount of time that business people and lawyers need to spend in implementing it, counsel should caution corporate clients about the disadvantages of using administrative dissolution as a means to end the life of a corporation or a subsidiary that is no longer needed.

Whenever a company is administratively dissolved, it spends some amount of time in a state of bad standing with the Secretary of State's Office. After the due date for the annual report and franchise tax has passed, the corporation ceases to be in good standing with the Secretary of State's Office. Yet it will take several weeks or months before the Secretary of State's Office declares the entity administratively dissolved. Among other things, the Secretary of State usually writes to tardy companies and generously offers them a certain additional period of time to pay the past-due amounts, file the past-due form, and regain good standing. While this approach is certainly helpful to companies that have inadvertently missed the annual filing deadlines, it also means that companies are not administratively dissolved immediately after they miss a filing. If a company took this approach to dissolving one of its subsidiaries, then during the period of bad standing, the parent company might find itself in default of covenants in a loan agreement, a lease, or another agreement with a lengthy term that requires it to keep itself and all subsidiaries in good standing.

Further, until the corporation is administratively dissolved, the five-year statute of limitations for many post-dissolution claims against the corporation and its officers and directors (see 805 ILCS 5/12.80) has not begun running. Thus, if a corporation elects to let itself lapse into dissolution by administrative dissolution, it is permitting the Secretary of State's Office to determine when this statute begins running. If the business has not been a success, its officers and directors should probably be interested in terminating as many of their trailing liabilities as possible as quickly as possible. The dissolution-by-inaction model of ending a corporation's existence does not effectively accomplish this result.

Counsel should also urge clients not to be cavalier about letting companies be administratively dissolved because of important liability concerns. When a corporation is administratively dissolved and later reinstated, it is true that the corporate existence is deemed to have been reinstated, without interruption, from the date of issuance of the certificate of dissolution, and the corporation continues its existence as if the certificate of administrative dissolution had not been issued. See 805 ILCS 5/12.45(d). However, historically the liability shield provided to directors and shareholders by the corporate entity did not necessarily relate back. Until 2015, §12.45(d) was

silent on that issue, and Illinois courts had imposed liability on directors during a period of administrative dissolution, even if the corporation was later reinstated. *See, e.g., Chicago Title & Trust Co. v. Brooklyn Bagel Boys, Inc.,* 222 Ill.App.3d 413, 584 N.E.2d 142, 164 Ill.Dec. 930 (1st Dist. 1991) (citing §8.65(a), which holds directors personally liable for liabilities incurred in corporation's name after filing of administrative dissolution by Secretary of State, and holding directors liable); *Department of Revenue v. Semenek,* 194 Ill.App.3d 616, 551 N.E.2d 314, 141 Ill.Dec. 321 (1st Dist. 1990) (holding operators of business liable for Retailer's Occupation Tax Act tax obligations arising during period of dissolution).

At least one Illinois court made a distinction between officers and directors in the context of liability to third parties for post-dissolution activities. In *Board of Trustees of Automobile Mechanics' Local No. 701 Union & Industry Pension Fund v. Moroni,* 905 F.Supp.2d 846 (N.D.Ill. 2012), the court clarified that *Brooklyn Bagel Boys, supra,* did not stand for the proposition that post-dissolution liability extended to corporate officers, and the court in *Moroni* concluded by confirming that such liability would extend only to directors.

These holdings were affirmed in dicta in a case that reached the opposite result in examining personal liability of members and managers of a limited liability company for activities purportedly taken by them on behalf of the LLC following administrative dissolution. *See Puleo v. Topel,* 368 Ill.App.3d 63, 856 N.E.2d 1152, 1154 – 1155, 306 Ill.Dec. 57 (1st Dist. 2006) (distinguishing language of §§10-10 and 25-7 of Limited Liability Company Act (LLCA), 805 ILCS 180/10-10 and 180/25-7, from language of §3.20 of Business Corporation Act, 805 ILCS 5/3.20, and finding that although member or manager of LLC might be liable to LLC for actions purportedly taken on behalf of LLC when it had been administratively dissolved, member or manager would not be liable individually to third parties or other members or managers).

In a move that gladdened inattentive corporations (and eliminated one of the tools used by persnickety counsel to inspire good record keeping by corporate clients), the General Assembly clarified this point. P.A. 98-776 (eff. Jan. 1, 2015) amended the BCA to provide that if a corporation is administratively dissolved but later reinstated pursuant to §12.45, the directors shall not be liable under §8.65 for activities during the period of dissolution. See 805 ILCS 5/12.45(e). The same Public Act also clarified that the liability protection in this situation extends to shareholders and officers as well. *Id.* P.A. 98-776 made similar revisions to the General Not For Profit Corporation Act of 1986, the LLCA, and the Uniform Limited Partnership Act (2001). These added protections took effect on P.A. 98-776's effective date, January 1, 2015. See the discussion in §6.39 above concerning the statutory exception to this liability found in 805 ILCS 5/8.65(a)(3). See also 805 ILCS 5/12.45(d), 5/12.45(e).

A circuit court may dissolve a corporation in an action by the Attorney General if the corporation obtains its incorporation through fraud, exceeds the authority conferred by law, or fails to answer interrogatories as required by the BCA. 805 ILCS 5/12.50(a)(1).

A court may also dissolve a corporation in an action by a shareholder if the directors are deadlocked, the shareholders are unable to break the deadlock, and either irreparable injury to the corporation is incurred or threatened or the business of the corporation can no longer be conducted

to the general advantage of its shareholders. 805 ILCS 5/12.55(a), 5/12.55(b)(3), 5/12.56(a), 5/12.56(b)(12). Similarly, the shareholders may ask a court to dissolve the corporation if the directors have acted in an illegal, oppressive, or fraudulent manner with respect to the petitioning shareholders or if the corporation's assets are being wasted or misapplied. 805 ILCS 5/12.55(a), 5/12.55(b)(3), 5/12.56(a), 5/12.56(b)(12). See §6.82 below regarding shareholder remedies under §12.56.

A creditor may also obtain dissolution in a court proceeding if execution on a judgment has been returned unsatisfied and the corporation is insolvent or if the corporation has admitted in writing that the creditor's claim is due and the corporation is insolvent. 805 ILCS 5/12.50(a)(2). Finally, a corporation may seek dissolution under court supervision because the corporation can no longer be conducted for the advantage of its shareholders. 805 ILCS 5/12.50(a)(3).

If a court orders dissolution after a hearing, the court may enter an order dissolving the corporation, and a court clerk will certify a copy of the order and furnish it to the Secretary of State, who shall file the order. 805 ILCS 5/12.65(a). After the entry of an order of dissolution, the court will direct the dissolution of the corporation in accordance with 805 ILCS 5/12.30 and will notify known claimants in accordance with 805 ILCS 5/12.75. 805 ILCS 5/12.65(b).

D. [6.72] Effect of Dissolution

Dissolution of a corporation terminates its existence, and thereafter, the activities of the corporation must be limited to collecting assets, disposing of the assets, taking steps to bar claims of known claimants, discharging or otherwise making provision for discharge of liabilities, distributing assets in kind to shareholders, and otherwise winding up and liquidating its business and affairs. 805 ILCS 5/12.30(a).

If no special steps are taken to bar claims of known claimants, these claims will survive dissolution for a period of five years, and during this five-year period, creditors and claimants may continue to pursue civil remedies against the dissolved corporation, its directors, and its shareholders for any right or claim the creditor or claimant had prior to the dissolution. 805 ILCS 5/12.80.

Dissolving corporations also have the option of barring any known claims against them by following the procedures of 805 ILCS 5/12.75. Section 12.75(b) requires the dissolved corporation to give notice to any known claimants that their claims must be filed within the time period set forth in the notice, which cannot be less than 120 days from dissolution, and that their claims will be barred if not filed before the deadline. The notice must be sent within 60 days of the effective date of the dissolution, and if a claimant files a claim on or before the deadline specified in the notice, the dissolved corporation must either pay the claim or reject the claim in whole or in part and advise the claimant that the claim will be barred unless the claimant files suit within 90 days of the date of the rejection notice. 805 ILCS 5/12.75(b), 5/12.75(c). This procedure does not apply to (1) contingent liabilities or claims arising after the effective date of the dissolution, such as products liability claims that arise after the date of dissolution, (2) claims arising from the failure of the dissolved corporation to pay any tax or penalty or interest related to any tax or penalty, and (3) claims arising out of violations of the criminal law. 805 ILCS 5/12.75(d), 5/12.75(e).

Directors who fail to take reasonable steps to comply with §12.75 may face personal liability to any claimants who did not receive the required notice and whose claims were not paid by the corporation as part of its winding down. 805 ILCS 5/8.65(a)(2). See §6.39 above. Counsel should alert directors to this risk when counseling them on the dissolution of a corporation and the liquidation of its affairs.

After payment or settlement of all of the corporation's claims and liabilities, the remaining assets may be distributed to shareholders in proportion to their share holdings. 805 ILCS 5/12.30(a)(4). Again, §8.65(a)(3) of the Business Corporation Act of 1983 imposes liability on directors if they fail to ensure that, other than liquidation-related activities, no business of the corporation is carried on after it has filed articles of dissolution with the Secretary of State.

Dissolution of a corporation does not automatically transfer title to its assets, prevent the transfer of securities, effect any changes in the management of the corporation, or prevent suit by or against the corporation in its corporate name. It also does not suspend a proceeding pending against the corporation on the date of dissolution. 805 ILCS 5/12.30(c).

When a corporation has been dissolved, whether administratively or voluntarily, counsel should alert clients to the importance of following corporate formalities and limiting the corporation's activities throughout the entire dissolution process. As noted in §6.39 above, §8.65(a)(3) of the BCA specifically subjects directors to joint and several liability to creditors of a corporation if the corporation carries on business after dissolution to any extent other than what is necessary for the winding up of the corporation's affairs. See 805 ILCS 5/8.65. The court in *Board of Trustees of Automobile Mechanics' Local No. 701 Union & Industry Pension Fund v. Moroni,* 905 F.Supp.2d 846 (N.D.Ill. 2012), affirmed this liability and also found that, consistent with the plain language of the statute, liability would be imposed only on directors and not officers. But see the discussion in §6.39 above concerning the statutory exception to this liability found in 805 ILCS 5/8.65(a)(3) in the case in which the dissolution has been revoked and the corporation reinstated.

E. [6.73] Post-Dissolution Survival of Actions by and Against Dissolved Corporations

The filing of articles of dissolution for a corporation does not eliminate or impair any remedy available to or against the corporation, its directors, or its shareholders for any right, civil claim, or civil liability existing or incurred before the dissolution. However, an action or other proceeding on a claim, whether brought by or against the dissolved corporation, must be commenced within five years after the date of the dissolution, or the claim will be barred absent the exercise of equitable or other discretion by a court of competent jurisdiction. 805 ILCS 5/12.80. The limitations of the five-year survival period do not apply to criminal prosecutions, which claims survive indefinitely, subject to relevant statutes of limitation, if any. 805 ILCS 5/12.85.

F. [6.74] Revocation of Dissolution

If a corporation has not begun to distribute its assets or has not commenced a proceeding for court supervision of its winding up under 805 ILCS 5/12.50(a)(3), it may revoke its dissolution within 60 days of the effective date of the dissolution. 805 ILCS 5/12.25(a). The corporation's board of directors or, if shares have not been issued or initial directors have not been designated,

its incorporators may revoke the dissolution without shareholder action. 805 ILCS 5/12.25(b). To accomplish the revocation, the corporation must file Form BCA 12.25, Articles of Revocation of Dissolution, available at www.cyberdriveillinois.com/publications/pdf_publications/bca1225.pdf, with the Secretary of State, and the revocation is effective as of the date of this filing and relates back to the date of dissolution. 805 ILCS 5/12.25(c), 5/12.25(e). The corporation may then continue to carry on business as if dissolution had never occurred. 805 ILCS 5/12.25(e).

In the case of a corporation that has been administratively dissolved, the corporation shall be reinstated by the Secretary of State if the corporation files an application for reinstatement and all past-due reports and if the corporation pays all past-due fees, franchise taxes, and penalties then due and payable. 805 ILCS 5/12.45(a). Historically, the corporation's right to demand reinstatement expired five years after administrative dissolution. However, the five-year limit was removed from §12.45 and other corresponding provisions of the Business Corporation Act of 1983. Nonetheless, counsel should still advise corporate clients to act quickly to reinstate administratively dissolved corporations (or, better still, to avoid administrative dissolution entirely). BCA §12.43 preserves at least part of the spirit of the old five-year limitation by providing that the Secretary of State will not allow another corporation or limited liability company to use the name of a domestic corporation that has been administratively dissolved until three years after the administrative dissolution of the domestic corporation. Thus, a corporation that waits too long to reinstate following an administrative dissolution loses any ability to ensure that it has the right to use its former corporate name.

IX. ADDITIONAL OPERATING ISSUES

A. [6.75] Acquisition by a Corporation of Its Own Shares

If a corporation decides to purchase its own stock, it must determine whether the purposes of the purchase are lawful, and if so, the corporation must also be assured that the manner and method of purchase are also lawful.

In connection with a corporation's purchase of its own shares, the rights and obligations owed by a corporation to its own shareholders, both those who intend to sell to the corporation as well as those who will retain their stock, must be considered. Depending on the situation, a corporation's acquisition of its own shares may impose burdens on either or both groups of shareholders. Further, the corporation should consult any loan agreements or other arrangements with creditors to determine whether the share repurchase will create problems in these agreements or relationships.

Section 9.05(a) of the Business Corporation Act of 1983 expressly provides that a corporation has the power to acquire its own shares subject to the limitations of 805 ILCS 5/9.10. 805 ILCS 5/9.05(a). Section 9.05(b) of the BCA provides that if a corporation acquires its own shares, the shares constitute treasury shares until canceled pursuant to §9.05(d) of the Act. Section 9.05(d) states that the board of directors may cancel by resolution any treasury shares and that when treasury shares are canceled, they "shall constitute authorized but unissued shares unless the articles of incorporation provide that the shares shall not be reissued, in which case the number of authorized shares shall be reduced by the number of shares cancelled." 805 ILCS 5/9.05(d).

Depending on the timing of the acquisition of its shares, the corporation must file a report of the acquisition in accordance with either §14.25 or §14.30 of the BCA. If the corporation reduces by acquisition the number of issued shares, the corporation must file a statement of cancellation as set forth in §9.05(c) of the BCA. Upon filing this statement, paid-in capital of the corporation is reduced by the part of the paid-in capital that at the time of cancellation was represented by the shares so canceled, and the canceled shares are deemed to be authorized but unissued. 805 ILCS 5/9.05(c). A corporation may be limited in its ability to cancel any of its own shares that it has repurchased (thus reducing its paid-in capital) if, for example, it has granted the selling shareholder a lien on the repurchased shares. Counsel should consult the relevant stock repurchase agreements in such a case before advising the corporation to cancel the repurchased shares. See §6.6 above concerning phase-out of this reporting requirement in connection with the state's current plan to eliminate the annual corporate franchise tax between the date of this publication and the end of 2023.

BCA §§9.05(c) and 9.20(a) state that shares repurchased by a corporation may be canceled automatically and the number of authorized shares reduced accordingly but only if the articles of incorporation so specify. In that event, the statement of cancellation also operates as an amendment to the articles of incorporation to reduce the number of authorized shares, and the corporation's paid-in capital is reduced by the amount of paid-in capital represented by the canceled shares (or such lesser amount as is elected by the corporation).

Section 302 of the Internal Revenue Code states that if a corporation redeems its stock from a shareholder, the transaction will often be treated as a distribution made in exchange for stock (*i.e.,* capital gains treatment is possible for the shareholder). 26 U.S.C. §302(a). If, however, the redemption does not fall within one of four safe harbors in Code §302(b), then the proceeds of the redemption are treated as if they were dividends paid to the shareholder whose shares were redeemed (*i.e.,* no capital gains treatment). The four safe harbors of §302(b) are (1) immediately after the redemption, the shareholder owns less than 50 percent of all classes of stock entitled to vote, and the redemption is "substantially disproportionate" with respect to the shareholder; (2) all stock owned by the shareholder is being redeemed; (3) the redemption is "not essentially equivalent to a dividend" (a term that is not well defined in rulings by the Internal Revenue Service); and (4) the redemption is made from a noncorporate shareholder in partial liquidation of the corporation.

If a shareholder wishes to take advantage of the second safe harbor (redemption of all the shareholder's shares), the shareholder will need to be certain that he or she is not disqualified from doing so by virtue of the family attribution rules of Code §318. Section 318(a) states that if a shareholder's family members continue to own stock in the corporation after the shareholder's shares are redeemed, the shares owned by the shareholder's family members will be attributed to the shareholder, and the shareholder will not be deemed to have sold all of his or her shares. Additional provisions of §318, Revenue Rulings, and Treasury Regulations provide some further guidance and delineate certain conditions under which a shareholder may avoid some of the family attribution rules. See, *e.g.,* 26 U.S.C. §302(c); Rev.Rul. 71-426, 1971-2 Cum.Bull. 173; 26 C.F.R. §§1.302-4(a), 1.302-4(c). See generally Joseph M. Doloboff et al., 767 T.M., *Redemptions.*

B. [6.76] Share Certificates and Share Transfers

No stock certificate may be issued until each share to be represented in the certificate has been fully paid. 805 ILCS 5/6.35. Once this requirement has been met, the bylaws or the directors usually charge one corporate officer with the task of issuing stock certificates and maintaining stock records for the corporation.

For corporations whose stock is publicly traded, the requirements for what information and provisions must be included on the form of the stock certificate will be dictated by the requirements of any stock exchanges on which the corporation is listed or is to be listed. For both public and private corporations, additional requirements for the format of the stock certificate will be found in the corporation's bylaws and articles of incorporation and the Business Corporation Act of 1983.

Section 6.35 of the BCA provides that the shares of the corporation shall either be represented by certificates or be uncertificated shares. If certificates are issued, §6.35 requires that they be signed by appropriate corporate officers, which may be facsimile signatures, and the certificates may be sealed with the seal of the corporation.

If a corporation is authorized to issue shares of more than one class, each stock certificate it issues must have set forth on the back of the certificate a full summary or statement of all the designations, preferences, qualifications, limitations, restrictions, and special or relative rights of the shares of each class authorized to be issued and, if the corporation is authorized to issue any preferred or special class in series, the variations in the relative rights and preferences between the shares of each such series, as far as they have been fixed and determined, and the authority of the board of directors to fix and determine the relative rights and preferences of subsequent series. Instead of setting forth this statement on the stock certificate, the face or back of the certificate may simply state that such a statement will be furnished by the corporation to any shareholder upon request and without charge. 805 ILCS 5/6.35.

Section 6.35 also requires that the stock certificate state (1) the fact that the corporation is organized under the laws of Illinois, (2) the name of the person to whom it is issued, and (3) the number and class of shares and the designation of the series, if any, that the certificate represents.

If the shares represented by the certificate are subject to a shareholders' buy-sell agreement or some other restriction on transfer that is not included in the articles of incorporation, it is prudent to add a reference to this agreement on the stock certificate so that any subsequent holder of the certificate may not claim to have taken possession of it without knowledge of the restriction. Such a statement might be worded as follows:

The shares of stock represented by this certificate are subject to and transferable only upon compliance with the terms and conditions of the Agreement among certain shareholders of the Corporation, dated as of [date**], a copy of which is on file in the office of the Corporation and available for inspection.**

The provisions of 805 ILCS 5/6.55 illustrate the wisdom of including discussions of these types of restrictions on the stock certificate. Section 6.55(a) provides that a written restriction on transfer

or registration of transfer of a security may be enforced against a holder of the restricted securities and its successors or transferees, but only if the restriction is of a type that is permitted by §6.55 and if the restriction is noted conspicuously on the share certificate. However, shareholders with actual knowledge of a restriction at the time they became shareholders are always bound by this restriction, regardless of whether it is stated on their stock certificates. *Id.*

Unless the securities represented by the certificate are registered under state and federal securities laws, it is also prudent to include a legend on the certificate that refers to the limitations on transfer of non-registered shares contained in these securities laws. Such a legend might state:

These securities have not been registered under the Securities Act of 1933. They may not be sold or offered for sale in the absence of an effective registration statement as to the securities under that Act, or an opinion from counsel satisfactory to the Corporation that such registration is not required.

Many closely held corporations act as their own stock transfer agents. Whether a corporation keeps its own transfer records or hires an outside service provider to handle that task, 805 ILCS 5/7.75(a) requires the corporation to keep a record of its shareholders, giving the names and addresses of all shareholders and the number and the class of shares held by each. If a corporation decides to act as its own agent, it must perform these transfer agent tasks in compliance with the Business Corporation Act of 1983 and other applicable statutes, including Article 8 of the Uniform Commercial Code, 810 ILCS 5/8-101, *et seq.,* which contains much of the Illinois law pertaining to the transfer of securities. The corporation must also comply with state and federal securities laws in this regard.

C. [6.77] Foreign Corporations

Corporations organized for profit in other jurisdictions may procure from the Illinois Secretary of State authority to transact business in this state. 805 ILCS 5/13.05. Certain types of foreign corporations, however, are not eligible to procure this authority from the Secretary of State. These types of corporations are listed in §13.05 and include banks, insurance companies, surety companies, and others, most of which are regulated by other provisions of Illinois law.

The Business Corporation Act of 1983 explicitly prohibits foreign corporations from transacting business in Illinois until they have qualified to do business in the state by securing authority. *Id.* Failure to qualify means that the foreign corporation will not have certain rights that are otherwise available to corporations, such as the right to maintain a civil action in an Illinois state court or the right to maintain a civil action in any court, state or federal, in the state on a claim relating to the corporation's transaction of business in Illinois. 805 ILCS 5/13.70(a). The BCA includes a list of some types of Illinois-based activities that will not, in and of themselves, constitute the transaction of business in Illinois, such as holding meetings of the board of directors or maintaining bank accounts. See 805 ILCS 5/13.75. Note that §13.75 no longer includes in this list creating or acquiring indebtedness, mortgages, and security interests in real or personal property. This suggests that foreign corporations engaged in these activities in Illinois might prudently consider applying for authority.

While no foreign corporation may transact any business in Illinois that an Illinois corporation is not permitted to transact, the BCA does not regulate the organization or internal affairs of a foreign corporation. 805 ILCS 5/13.10. The procedure by which foreign corporations may apply for authority is set forth in 805 ILCS 5/13.15.

A foreign corporation obtains authority to transact business in Illinois by filing an application for authority, and this authority exists from the date the form is accepted for filing by the Secretary of State. 805 ILCS 5/13.15(a), 5/13.15(c). The long-standing requirement that a foreign corporation list the residential addresses of its directors and officers in its initial application for qualification and its subsequent annual reports has been removed (*i.e.,* business addresses are acceptable). See 805 ILCS 5/13.15(a)(7).

If a foreign corporation is admitted to transact business in Illinois and it later changes its name to one under which authority would not have been granted (presumably because the name does not qualify under the standards of 805 ILCS 5/4.05), the corporation's authority is suspended until it changes its name or adopts an assumed name. 805 ILCS 5/13.25. Amendment of a foreign corporation's articles of incorporation or participation in a statutory merger in which it is the surviving corporation requires that a certified copy of the amendment or articles of merger, as applicable, be filed with the Secretary of State. 805 ILCS 5/13.30, 5/13.35. See §6.9 above for reassurance, sadly gained, that words and phrases like "Olympic" are once again acceptable for corporations doing business in Illinois.

Foreign corporations are prohibited from committing the offense of "locale misrepresentation." 805 ILCS 5/3.25(a) defines this practice as "advertis[ing] or caus[ing] to be listed in a telephone directory an assumed or fictitious business name that intentionally misrepresents where the business is actually located or operating or falsely states that the business is located or operating in the area covered by the telephone directory." The statute does not apply to public companies incorporated in other states with gross annual revenues in excess of $100 million. 805 ILCS 5/3.25(b). The statute also does not apply to telephone service providers or publishers of telephone directories unless they commit these practices on their own behalf. 805 ILCS 5/3.25(a). Penalties for violations can range from $501 to $1,000, and each day in which a foreign corporation continues any such practice counts as a separate violation for purposes of these fines. 805 ILCS 5/3.25(c). Thus, foreign corporations are prohibited from using assumed or fictitious names that intentionally misrepresent the geographic origin or location of the corporation within Illinois. 805 ILCS 5/4.15(g).

If a foreign corporation ceases to transact business in the state, it may withdraw its authority by following the procedures set forth in 805 ILCS 5/13.45. In addition, the Secretary of State may revoke a foreign corporation's authority for the reasons set forth in 805 ILCS 5/13.50. This authority, once revoked, may be reinstated. 805 ILCS 5/13.60.

Corporations that stop doing business in the state are often tempted simply to stop filing annual reports and to let the Secretary of State revoke their authority administratively, rather than taking the extra step of filing the application for withdrawal. Counsel should remind such a corporation that there are certain advantages to following the formal procedure. For example, the corporation may be a party to a credit agreement or some other significant contract that states that the

corporation is in default if it fails to maintain its good standing in all states in which it was qualified as of the date of the contract. In this case, the informal "withdrawal by inaction" option could place the corporation in default under this contract because under the inaction option, for a certain period of time before the Secretary of State formally revokes the corporation's authority, the corporation may technically be considered out of good standing in the state. See §6.71 above.

As noted above, a foreign corporation transacting business in the state is not permitted to maintain civil actions in any court of the state unless and until it has obtained authority from the Illinois Secretary of State. 805 ILCS 5/13.70(a). To obtain authority in such circumstances, a foreign corporation must pay all fees, franchise taxes, penalties, and other charges that would have been imposed had it properly applied for and received authority at the time it first started doing business in Illinois. 805 ILCS 5/13.70(c). In addition, the corporation is liable for a penalty of either ten percent of the amount owed to the Secretary of State or $200 plus $5 per month for each month it transacted business without authority, whichever is greater. *Id.* H.B. 3270, 101st Gen.Assem. (introduced February 15, 2019) provides that these fees would increase to $500 and $25, respectively.

D. [6.78] Shareholder Agreements

Section 7.71(a) of the Business Corporation Act of 1983 states that shareholders may unanimously agree in writing on matters concerning management of a corporation as long as no fraud or injury to the public or creditors is present and as long as no clearly prohibitory statutory language is violated by the agreement. Shareholders must have actual knowledge of these agreements at the time they become shareholders or they must have signed them for the agreements to be binding on them. 805 ILCS 5/7.71(b). These agreements are specifically enforceable in accordance with principles of equity. 805 ILCS 5/7.71(d).

Typically, these types of agreements are used by corporations with small groups of shareholders to help provide stability among the shareholder group. Often, they restrict transfer of shares and include provisions giving the corporation or other shareholders rights of first refusal to purchase a shareholder's shares before the shareholder is permitted to offer them for sale to third parties. These agreements can also serve as mechanisms for planning for transition of ownership by requiring the corporation to purchase life insurance on one or more shareholders and then requiring that the corporation use the proceeds of the insurance to purchase the stock of a deceased shareholder from the estate.

As noted in §6.76 above, if a shareholders' agreement has been signed, it is prudent to make reference to this agreement on all stock certificates owned by shareholders who are bound by that agreement.

Chapter 5 of this handbook provides a detailed discussion of shareholders' agreements.

E. [6.79] Resignations and Removals

If directors or officers serve a complete term and are simply not reelected at an annual meeting of shareholders or directors (as the case may be), no formal resignation is necessary. If a director

or officer ends his or her term early, whether voluntarily or in connection with another transaction (*e.g.,* a merger or stock sale), the individual should tender a written resignation. By doing so, the corporation will have a clear record to be placed in the corporate minute book to indicate the time at which the director or officer ceased to hold office. The director or officer will also have a clear record of when he or she ceased to hold office, which might be useful in determining whether any fiduciary duties continue to apply to him or her.

1. [6.80] Resignations of Directors and Officers

A resignation of a director or officer need state only the date as of which the individual is resigning and the offices and directorships from which he or she is resigning. 805 ILCS 5/8.10(g) specifies that a resignation of a director is effective when given unless the notice specifies a future effective date. Section 8.10(g) also states that a director's resignation is to be tendered to the board, its chair, the president, or the secretary. See generally 7 Charles W. Murdock, BUSINESS ORGANIZATIONS §11.10 (2d ed. 2010, Supp. 2019) (Vol. 7 of the ILLINOIS PRACTICE SERIES).

It is sometimes useful to add a general statement that the individual is resigning from all other offices and directorships with all of the corporation's subsidiaries and affiliates, covering any inadvertent omissions. While a letter of resignation can include personal statements by the person tendering the resignation, it is often best to keep the official record simple and direct. Section 6.118 below contains a sample form of a simple director's resignation letter.

After receiving a resignation letter, the board of directors of the corporation may consider adopting a formal resolution to accept the resignation. Regardless of whether they do so, the original resignation should be inserted in the corporate minute book.

Section 8.30 of the Business Corporation Act of 1983 details the process by which vacancies on the board of directors may be filled, subject to the provisions of the bylaws of the corporation. 805 ILCS 5/8.30. Section 8.50 of the BCA delegates to the bylaws all provisions concerning election of officers, including, presumably, election of officers to fill vacancies. Thus, whenever an officer or director tenders a resignation, counsel should remind the other officers and directors of the provisions in the corporation's bylaws that may apply to the process of filling the vacancy.

2. [6.81] Removals of Directors and Officers

At times, an individual may be unwilling to resign voluntarily from a position as an officer or director of a corporation. In the case of an officer, if the corporation's directors have determined that the officer's removal is in the best interests of the corporation, the directors may remove the officer. See 805 ILCS 5/8.55. Provisions of the corporation's bylaws may provide additional guidance as to the procedures to be followed. Importantly, §8.55 specifically states that removal of an officer does not prejudice any contract rights of the person so removed. Thus, counsel should review an officer's employment agreements and other corporate documents that may contain contract rights that are affected by termination of the officer's employment with the corporation. For example, in a closely held corporation, a shareholder agreement may contain voting agreements

or other arrangements that effectively guarantee that a shareholder will be able to hold a particular office for as long as he or she owns shares of stock of the corporation. In such a case, the corporation would probably wish to reach agreement with the officer on some amendment of these provisions before effecting the removal from office.

If the directors have determined to remove an officer, the action should be memorialized in a resolution of the board. This resolution should specify the effective date of the removal.

Directors may also be removed, with or without cause, by the shareholders. 805 ILCS 5/8.35(a). Again, the bylaws may contain provisions that provide more details concerning the mechanics of the removal process, and in closely held corporations, contracts like shareholder agreements or voting agreements may contain restrictions on how the removal may be effected. The Business Corporation Act of 1983 also clarifies what shareholder vote is necessary and which shareholders or classes of shareholders must vote separately in the removal of a director. *Id.*

F. [6.82] Shareholder Remedies Under §12.56 of the Business Corporation Act of 1983

Occasionally, a corporation's shareholders and directors may have fundamental disagreements about the operation of the business, and they may be unable to resolve these disagreements. Or the shareholders may feel that the directors and officers are committing gross mismanagement of the corporation, but the shareholders may be unable, whether because of voting agreements, ownership of too few shares, or other reasons, to effect a change in the corporation's management. In such cases involving nonpublic corporations, 805 ILCS 5/12.56 provides a remedy. The counterpart provisions governing public corporations are found in 805 ILCS 5/12.55.

Under §12.56(a), the shareholders must establish one of four grounds for relief: (1) the directors are deadlocked, the shareholders are unable to break the deadlock, and either irreparable injury to the corporation is occurring or is threatened as a result, or the business of the corporation can no longer be conducted to the advantage of the shareholders; (2) the shareholders are deadlocked and have failed to elect directors for two consecutive annual meeting dates, and either irreparable injury to the corporation is occurring or is threatened as a result, or the business of the corporation can no longer be conducted to the advantage of the shareholders; (3) the individuals controlling the corporation have acted, are acting, or will act illegally, oppressively, or fraudulently with respect to the petitioning shareholders; or (4) corporate assets are being misapplied or wasted. For an application of some of these criteria, *see, e.g., Witters v. Hicks,* 335 Ill.App.3d 435, 780 N.E.2d 713, 717 – 719, 269 Ill.Dec. 241 (5th Dist. 2002).

If the petitioning shareholder can prove one of the specified grounds for relief, then the court has discretion to fashion a remedy. 805 ILCS 5/12.56(b). Section 12.56(b) lists some suggested remedies but explicitly empowers courts to order other types of relief as well. The suggested remedies include setting aside certain corporate actions, canceling or amending the articles of incorporation or bylaws of the corporation, removing an officer or director, appointing an officer or director, ordering an accounting, forcing a purchase of the petitioning shareholder's shares, or ordering dissolution of the corporation. The list of available remedies for public corporations set out in §12.55(b) differs slightly from those available to shareholders of nonpublic corporations, but both sets of alternatives include such options as appointment of a provisional director and appointment of a custodian.

In all cases, the court considering the dissolution request has discretion to select the remedy to be applied, and the court is free to impose whatever additional legal or equitable remedies it chooses. See 805 ILCS 5/12.55(b), 5/12.55(e), 5/12.56(b), 5/12.56(c).

Cases under §12.56 of the Business Corporation Act of 1983 do not appear to be litigated frequently in Illinois courts. The most common dispute appears to concern §§12.56(e) and 12.56(f), which provide that if a shareholder files a petition under this statute, the corporation or one of the other shareholders may, for a period of 90 days, elect to purchase all of the shares of the petitioning shareholder at their "fair value." The party electing to make the purchase must specify the price in its notice of election, but the court has equitable powers to overturn or modify this election, which suggests that the court could overturn or modify any price that did not represent fair value for the petitioning shareholder. *See generally Advanced Imaging Center of Northern Illinois Limited Partnership v. Cassidy,* 335 Ill.App.3d 746, 781 N.E.2d 664, 667, 269 Ill.Dec. 867 (2d Dist. 2002); *Hamlin v. Harbaugh Enterprises, Inc.,* 324 Ill.App.3d 612, 755 N.E.2d 993, 997 – 998, 258 Ill.Dec. 174 (3d Dist. 2001). In this regard, the statute also provides that the court may determine the fair value of the shares with or without the assistance of an appraiser, but if the court chooses to retain an appraiser, this expense is borne by the corporation. See 805 ILCS 5/12.56(e)(i), 5/12.56(g).

Section 12.56(e) also provides that determinations of the fair value of a petitioning shareholder's shares should be made without discount for minority status or (absent extraordinary circumstances) lack of marketability. In this regard, the definition of "fair value" here is consistent with that used in the BCA provisions on dissenters' rights. See 805 ILCS 5/11.70. The language of this section means Illinois has joined the growing group of states that reject minority and marketability discounts. Commentators argue that these kinds of discounts are inappropriate in a buyout transaction of the type contemplated by §12.56 because the very provisions of §12.56 can, in many cases, force a buyout of the shares (thus making the shares marketable) and because a minority discount is arguably inappropriate when the buyer of the minority block is either the issuing corporation or a controlling shareholder. See generally Charles W. Murdock, *Squeeze-outs, Freeze-outs and Discounts: Why Is Illinois in the Minority in Protecting Shareholder Interests?,* 35 Loy.U.Chi.L.J. 737, 759 – 760 (2004).

One of the goals of §12.56 is to give a minority shareholder a right to sue for various types of relief if the shareholder feels he or she is being oppressed by the actions of a controlling shareholder. One risk with this type of provision is that a bad-faith minority shareholder could use the statute as a way to block potentially legitimate corporate action by bringing suit and holding up further corporate action until he or she had been paid off. To avoid this type of "greenmail," the statute has permitted the corporation or one of the other shareholders to buy out the dissident shareholder for the fair value of his or her stock. Unfortunately, the operational effect of this section meant that the first shareholder who sought relief under §12.56 for a deadlock or other untenable corporate situation was at risk of being forced to sell his or her shares to the very shareholders whose conduct triggered the suit in the first place.

A subsequent amendment to §12.56 clarified that if a dissident shareholder files suit under this section, his or her shares may be bought out only if the dissident has stated in his or her complaint that the dissident wishes to be bought out. See 805 ILCS 5/12.56(f). For a discussion of this forced buyout provision, see Charles W. Murdock, *Oppression and Alternative Remedies — Is the Forced Buy-out Under 12.56(f) Wise Policy?,* ISBA Corp.Sec. & Bus.L.News. (Apr. 2005).

Situations involving deadlock and other intractable disagreements among directors, officers, and shareholders also sometimes test the bounds of fiduciary duties owed by those individuals to one another and to the corporation, particularly when one owner, officer, or director is exiting from the corporation's activities. In the infamous Illinois case *Hagshenas v. Gaylord,* 199 Ill.App.3d 60, 557 N.E.2d 316, 145 Ill.Dec. 546 (2d Dist. 1990), the court held that a person who resigned as an officer and director of a company (because of a deadlock among shareholders) but who retained his 50-percent share holdings owed a fiduciary duty to the other 50-percent shareholder. That fiduciary duty, the court held, limited his ability to engage in business activities that were competitive with the corporation. 557 N.E.2d at 322 – 323. Although *Hagshenas* has been criticized by practitioners, it has not been formally overturned by the Illinois courts. It has, however, been criticized in dicta on at least one occasion. *See Jano Justice Systems, Inc. v. Burton,* No. 08-cv-3209, 2010 WL 2012941 (C.D.Ill. May 20, 2010).

In a move that effectively limited the applicability of *Hagshenas,* the Illinois legislature amended the BCA by adding §7.90 effective August 1, 2005. This section permits a shareholder to "turn off" all fiduciary duties to the corporation and its shareholders arising by virtue of his or her share ownership if the shareholder delivers a signed agreement to the corporation waiving the right to (1) vote his or her shares for any purpose, (2) be a director, and (3) control any other corporate action in any manner. The shareholder cannot be serving as a director or officer at the time he or she delivers this waiver, and the waiver will not insulate the shareholder from liability for breaches of fiduciary duty occurring prior to the date of delivery of the waiver. See 805 ILCS 5/7.90. The statute is silent on whether such a waiver could later be revoked, but it does discuss other aspects of the use and enforcement of these waivers. Thus, at least in the situation at issue in *Hagshenas,* the departing shareholder now has a safe harbor, albeit one that seems to leave his or her equity investment in the corporation at the complete mercy of the corporate managerial skills and business acumen of the remaining shareholders. The statute also states that this type of waiver is available only if the corporation has not specifically prohibited such waivers in its articles of incorporation. See 805 ILCS 5/7.90(a). Thus, counsel should examine the articles of incorporation before advising a client on the availability of this provision.

X. APPENDIX — SAMPLE FORMS

A. [6.83] Script for Annual Shareholders' Meeting

[NOTE: The following script is somewhat streamlined in that it does not provide for motions to close discussion following the presentation of each resolution. Under standard parliamentary procedure, a discussion would be appropriate after a motion was made and seconded, and discussion on this motion could continue until a motion to call the question or otherwise act on the motion was made. Practitioners should consider whether they want to add this formality to their own meeting scripts.

This script does not follow the convention of having the chair ask for a second on all motions. As noted in §§6.27 and 6.44 above, some commentators argue that a second is not necessary when considering motions at a shareholders' meeting. However, some practitioners find that clients are accustomed to following this practice and will do so regardless of whether the script calls for it.**]**

SCRIPT FOR MEETING
[NAME OF CORPORATION]
[ANNUAL] [SPECIAL] **MEETING OF SHAREHOLDERS — _____, 20__**

The [annual] [special] **meeting of shareholders of** [name of corporation] **convened in** [location]**, on _____, 20__, at _____** [a.m.] [p.m.]**, with _____, President of the Corporation, presiding.**

President: Good [morning] [afternoon]**. Welcome to the** [annual] [special] **meeting of shareholders of** [name of corporation]**. I am _____, President of the Corporation.**

[Introduction of other directors and officers present at the meeting.]

Now to the business of the meeting. If you have not yet received a copy of the agenda, please raise your hand and one will be brought to you. Pursuant to Article _____, Section _____, of the Bylaws of the Corporation, I will act as Chair of this meeting and _____ will act as Secretary of this meeting.

Chair: To act as the Inspectors of Election, [I] [the Board of Directors of the Corporation] **appointed _____ and _____.** [Names of inspectors]**, will you please make your presence known? The Inspectors of Election have been sworn faithfully to execute their duties at this meeting, and I present their signed oaths to the Secretary. The Secretary is directed to file the oaths of the Inspectors with the minutes of the meeting.**

Chair: Will the holders of undelivered proxies please present them at this time to the Secretary, who will in turn deliver them to the Inspectors. The Board of Directors of the Corporation set _____, 20__, as the date of record for this annual meeting of shareholders. We have here a record of shareholders as of this date. This record has been on file at the registered office of the Corporation for the last ten days and available for inspection by any shareholder at any time during usual business hours. The Inspectors will please read the report of attendance at this meeting.

Inspector: [Mr.] [Ms.] [Chairman] [Chairwoman]**,** [number] **common shares are represented at this meeting out of the** [number] **common shares issued and outstanding on the record date for the meeting. The shares represented at this meeting constitute _____ percent of the voting power of the Corporation's issued and outstanding shares.**

[NOTE: Check bylaws to confirm quorum requirements. Also, references should be made to all classes of stock if the corporation has more than one.]

Shareholder 1: [Mr.] [Ms.] [Chairman] [Chairwoman]**, I move that the Inspectors' report of attendance be approved.**

Chair: You have heard the motion for the approval of the Inspectors' report in which they have indicated that _____ percent of the shares are represented here today. All those in favor, please say "Aye."

[Response.**]**

All opposed, say "Nay."

[Response.**]**

The motion is carried.

Since a majority of the voting power of the issued and outstanding shares is represented here today, a quorum is present, and we shall proceed with the business of the meeting. The Secretary will read the notice of the annual meeting and the affidavit of mailing of the notice.

Shareholder 2: [Mr.**] [**Ms.**] [**Chairman**] [**Chairwoman**], I move that the reading of the notice of the annual meeting and the affidavit of mailing be dispensed with.**

Chair: You have heard the motion to dispense with the reading of the notice and affidavit. All those in favor, please say "Aye."

[Response.**]**

All opposed, say "Nay."

[Response.**]**

The Secretary will please insert the notice of the annual meeting and the affidavit of mailing of the notice in the minute book of the Corporation. The Secretary will please read the minutes of the [annual**] [**special**] meeting of shareholders of the Corporation held on _____, 20__ [***i.e.,*** the date of last shareholders' meeting**].**

Shareholder 3: [Mr.**] [**Ms.**] [**Chairman**] [**Chairwoman**], I move that the reading of the minutes of the [**annual**] [**special**] meeting of shareholders of the Corporation held on _____, 20__, be dispensed with.**

Chair: You have heard the motion to dispense with the reading of the minutes. All those in favor, please say "Aye."

[Response.**]**

All opposed, say "Nay."

[Response.**]**

The motion is carried.

[The Board of Directors of the Corporation designated _____ to serve as the proxies for this meeting. The first item of business to come before the meeting is election of members of the Board of Directors.**]**

We will now open the meeting for nominations.

Shareholder 4: [Mr.**] [**Ms.**] [**Chairman**] [**Chairwoman**], I nominate _____ to be elected to serve as Directors.**

Chair: Are there any further nominations?

Shareholder 5: [Mr.**] [**Ms.**] [**Chairman**] [**Chairwoman**], I move that nominations for Director be closed.**

Chair: You have heard the motion to close nominations. All those in favor, please say "Aye."

[Response.**]**

All opposed, say "Nay."

[Response.**]**

The motion is carried, and hearing no other nominations, I declare that nominations are closed.

To be elected, a nominee must receive the affirmative vote of the holders of a majority [adjust this amount or the entire description of this process if the corporation's articles of incorporation or bylaws specify election of directors by means of a different vote requirement, class voting, staggered board, etc.**] of the Corporation's common shares voting at today's meeting. If anyone wishes to vote by ballot, please raise your hand so that a ballot may be brought to you. Please mark your ballot and hold it over your head so that it may be picked up by the Inspectors. We will continue with the business of the meeting while the votes are being tallied.**

[I would like to remind all shareholders that you have the right to vote cumulatively for directors of the Corporation. This means that because we are electing _____ directors today, each of you may cast the number of votes equal to _____ multiplied by the number of shares that you own, and you may cast that total number of votes for whichever candidate or candidates you choose, in whatever proportion you choose. If you have questions about cumulative voting, please direct them to the Inspectors of Election before you complete your ballot.**]**

The next item of business is to vote to [other items of business**].**

Shareholder 6: [Mr.**] [**Ms.**] [**Chairman**] [**Chairwoman**], I move to [**resolution for other items of business**].**

Chair: You have heard the motion to [description of resolution**]. The approval of [**item of business**] requires the affirmative vote of the holders of a [**insert vote requirement as specified in bylaws and, if applicable, Business Corporation Act of 1983**] of the Corporation's common shares voting at today's meeting. We will now proceed with the voting. If anyone wishes to vote by ballot, please raise your hand so that a ballot may be brought to you. Please mark your ballot and hold it over your head so that it may be picked up by the Inspectors. While the Inspectors are counting the ballots, I would like to introduce [**name of accountant and name of accounting firm**]. Do you wish to make a statement at this time?**

Accountant: [Mr.**] [**Ms.**] [**Chairman**] [**Chairwoman**], thank you. I do not wish to make a statement. However, I would be happy to respond to any appropriate questions the shareholders may have, either now or after the meeting.**

[Pause for questions.**]**

Chair: The Inspector of Election has been counting the proxies and ballots that have been delivered. I believe that the votes have now been tallied, and I will ask the Inspectors to present the report as to the results of the voting.

[A copy of the report with the numbers filled in is then presented to the Chair.**]**

Chair: _____ received _____ votes, which constitutes _____ percent of the total votes. Accordingly, [he**] [**she**] has been elected a member of the Board of Directors.**

With respect to [description of resolution**], there were _____ votes constituting _____ percent cast for approval, _____ votes constituting _____ percent cast against, and _____ votes constituting _____ percent abstained from voting. Accordingly, the resolution has [**outcome**].**

[Chair's or president's report, if any, for year just ended.**]**

I will now entertain a motion that this meeting be adjourned.

Shareholder 7: [Mr.**] [**Ms.**] [**Chairman**] [**Chairwoman**], I move that the meeting be adjourned.**

Chair: You have heard the motion. All in favor, please say "Aye."

[Response.**]**

All opposed, say "Nay."

[Response.**]**

The motion is carried. The meeting of shareholders is hereby adjourned. Thank you very much for your participation.

1. [6.84] Responses to Disruptive Shareholder Conduct

Sections 6.85 – 6.88 below contain responses to disruptive shareholder conduct, listed in ascending degree of severity. They should probably be given in this order.

a. [6.85] Request for Quiet

Chair: I must request that if you are not recognized by the chair, please keep quiet so that we may continue with the orderly conduct of this meeting. You will have the opportunity to ask questions or comment on the affairs of the Corporation after we have concluded the formal items of business of the meeting.

b. [6.86] Second Warning

Chair: I repeat that if you are not recognized by the chair, your conduct is out of order. Please keep quiet so that we may continue with the meeting in an orderly manner. Otherwise, you will be asked to leave the meeting and, if necessary, be removed from this room.

c. [6.87] Removal of Shareholder

Chair: [Sir**] [**Madam**], I have repeatedly asked you to stop your disruptive conduct and have advised you that your action is out of order. However, you have chosen not to comply with my request and the wishes of your fellow shareholders, and as chair of this meeting, I must now ask you to leave the meeting.**

d. [6.88] Recess of Meeting

Chair: Please let the record indicate that the conduct of [Mr.**] [**Ms.**] _____ has become disorderly and disruptive to the extent that the business of the meeting cannot be conducted in an orderly fashion. Accordingly, I will now entertain a motion to recess this meeting of shareholders until _____ is removed.**

Shareholder: [Mr.**] [**Ms.**] [**Chairman**] [**Chairwoman**], I move this meeting of shareholders be recessed until _____ is removed from this meeting.**

Chair: You have heard the motion to recess this [annual**] [**special**] meeting of shareholders until _____ is removed from this meeting. All those in favor, please say "Aye."**

[Response.**]**

All opposed, say "Nay."

[Response.**]**

Chair: The meeting is recessed until _____ is removed from this meeting. Thank you very much, ladies and gentlemen, for your patience. We hope that we will be able to resume

the meeting shortly and sincerely regret this inconvenience. Please stay within earshot, and we will announce the resumption of the meeting from this podium.

2. [6.89] Response to Shareholder Nomination of Additional Nominees

Shareholders already have the right to insert the name of the candidate of their choice on the proxy card or ballot. However, in the event that a shareholder desires to nominate a director other than one of the persons named in the proxy statement for the annual meeting, it is often considered the prudent course to entertain the nomination.

[Shareholder requests the floor to nominate additional nominees.**]**

Chair: I will now entertain the nomination as proposed.

[Shareholder nominates director.**]**

Chair: Please let the record indicate that _____ has been nominated to serve as a director to be elected by the shareholders. _____'s name has not been printed on the ballots that we are using today, so if you would like to vote for _____, please do so by writing [his**] [**her**] name on the blank space provided for that purpose on the printed ballot.**

3. [6.90] Response to Shareholder Motion

Before entertaining a motion from a shareholder, the chair should consult briefly with counsel to determine whether the proposal is appropriate and otherwise within the scope of the shareholder's corporate rights.

Chair: For the record, please identify yourself and confirm for us that you are an owner of stock of [name of corporation**].**

[Shareholder explains purpose and nature of motion.**]**

Chair: I will entertain the formal motion as proposed.

[Shareholder makes motion.**]**

Chair: You have heard the proposed motion. Ballots will be passed out by the Inspectors.

[Ballots are passed out, completed, collected, and counted by the inspectors.**]**

[NOTE: Add the following statement, if applicable:**]**

Chair: The proxy committee has advised that it has voted all proxies [for**] [**against**] the motion. The motion is accordingly [**approved**] [**defeated**]. The Inspectors will furnish a precise vote count on the motion at the end of the meeting should anyone desire such information.**

B. [6.91] Merger Resolutions

MERGER RESOLUTIONS

WHEREAS, [XYZ**] Corporation [**(XYZ)**] desires to merge itself with and into [**ABC**] Company, an Illinois corporation [**(ABC)**], and to cause [**ABC**] to be possessed of all the estate, property, rights, privileges, and franchises of [**XYZ**] ([**ABC**], in such capacity as the surviving corporation of the said merger, may also be referred to as the "Surviving Corporation");**

NOW THEREFORE BE IT RESOLVED, the Plan of Merger attached hereto as Exhibit A (Plan of Merger), providing for the merger of [XYZ**] with and into [**ABC**] be, and it is hereby, adopted and approved in the form attached hereto, with such changes therein as the officer or officers of [**XYZ**] executing it shall approve, such approval to be conclusively evidenced for purposes of these resolutions by the signature or signatures of such officer or officers thereon; and**

FURTHER RESOLVED, that the Effective Time of this Plan of Merger shall be upon its filing with the Secretary of State of the State of Illinois (Effective Time); and

FURTHER RESOLVED, that the Surviving Corporation shall continue to be governed by the laws of the State of Illinois; and

FURTHER RESOLVED, that the Articles of Incorporation of [ABC**] shall continue as the Articles of Incorporation of the Surviving Corporation; and**

FURTHER RESOLVED, that the Bylaws of [ABC**] in effect immediately prior to the Effective Time shall continue as the Bylaws of the Surviving Corporation, and that the officers and directors of [**ABC**] holding office immediately prior to the Effective Time shall hold their respective positions as officers and directors of the Surviving Corporation; and**

FURTHER RESOLVED, that the manner and basis of dealing with the outstanding shares of capital stock of each of the constituent corporations shall be as follows:

(a) Each share of common stock of [XYZ**] that is issued and outstanding immediately prior to the Effective Time shall, by virtue of the Merger and without any action on the part of the holder thereof, be converted into the right to receive $_____ net in cash;**

(b) Each share of common stock of [ABC**] that is issued and outstanding immediately prior to the Effective Time shall, without further action, remain outstanding and shall be a share of common stock of the Surviving Corporation; and**

(c) As soon as practical after the Effective Time, each holder of a certificate or certificates that prior thereto represented outstanding common stock of [ABC**] shall surrender such certificate or certificates to the Secretary of the Surviving Corporation and shall receive in exchange therefor a replacement certificate or certificates representing a like number of shares of common stock of the Surviving Corporation; and**

FURTHER RESOLVED, that the officers of [ABC**] be, and they hereby are, authorized and directed, in the name and on behalf of [**ABC**], to present the foregoing resolutions and the Plan of Merger to the shareholders of [**ABC**] for their consideration and to indicate that the directors of [**ABC**] recommend a vote in favor of the Merger and the Plan of Merger; and**

FURTHER RESOLVED, that, subject to obtaining the approval of the shareholders of [ABC**], the President or a Vice President and the Secretary or Assistant Secretary of [**ABC**] be, and they hereby are, directed to execute, under the corporate seal of [**ABC**], the Plan of Merger and all such other documents as they shall deem necessary or appropriate to accomplish the transactions described in the preceding resolutions and to file Articles of Merger in the office of the Secretary of State of Illinois; and**

FURTHER RESOLVED, that, subject to obtaining the approval of the shareholders of [ABC**], the officers of [**ABC**] be, and they hereby are, authorized and directed to do all acts and things whatsoever, whether within or without the State of Illinois, that may be in any way necessary or proper to effect said Merger; and**

FURTHER RESOLVED, that all actions heretofore taken and all documents heretofore executed by the officers of [ABC**] in furtherance of the foregoing resolutions be, and they hereby are, ratified, confirmed, and approved in all respects.**

C. [6.92] Plan of Merger

AGREEMENT AND PLAN OF MERGER OF
[XYZ**], INC. WITH AND INTO**
[ABC**], INC.**

THIS AGREEMENT AND PLAN OF MERGER (Plan of Merger) is entered into as of _____, 20__, by and between [ABC**], Inc., an Illinois corporation [**(ABC)**], and [**XYZ**], Inc., an Illinois corporation [**(XYZ)**].**

WHEREAS, [ABC**] and [**XYZ**] desire that [**XYZ**] should be merged with and into [**ABC**], with [**ABC**] thereafter to be possessed of all the estate, property, rights, privileges, and franchises of [**XYZ**];**

THEREFORE, [XYZ**] and [**ABC**] hereby agree as follows:**

1. As soon as practicable after the adoption of this Plan of Merger, appropriate documents shall be filed in the offices of the Secretary of State of Illinois to effectuate the Merger contemplated hereby. The term "Effective Time" as used herein shall mean the date on which the Articles of Merger for the Merger are accepted for filing with the Secretary of State of Illinois.

2. At the Effective Time, [XYZ**] shall be merged with and into [**ABC**], and the separate corporate existence of [**XYZ**] shall cease (such transaction is herein referred to as the "Merger"). [**ABC**] shall be the Surviving Corporation, and it shall continue to be governed by the laws of the State of Illinois.**

3. The Bylaws of [ABC**] in effect immediately prior to the Effective Time shall continue as the Bylaws of the Surviving Corporation. The officers and directors of [**ABC**] holding office immediately prior to the Effective Time shall hold their respective positions as officers and directors of the Surviving Corporation.**

4. [XYZ**] has authorized [**number**] shares of common stock, $1 par value per share, of which [**number**] shares are issued and outstanding. [**ABC**] has authorized [**number**] shares of common stock, $1 par value per share, of which [**number**] shares are issued and outstanding.**

5. The manner and basis of dealing with the outstanding shares of capital stock of each of the constituent corporations shall be as follows:

(a) Each share of common stock of [XYZ**] that is issued and outstanding immediately prior to the Effective Time shall, by virtue of the Merger and without any action on the part of the holder thereof, be converted into the right to receive $_____ net in cash.**

(b) Each share of common stock of [ABC**] that is issued and outstanding immediately prior to the Effective Time shall, without further action, remain outstanding and shall be a share of common stock of the Surviving Corporation.**

(c) As soon as practical after the Effective Time, each holder of a certificate or certificates that prior thereto represented outstanding common stock of [ABC**] shall surrender such certificate or certificates to the Secretary of the Surviving Corporation and shall receive in exchange therefor a replacement certificate or certificates representing a like number of shares of common stock of the Surviving Corporation.**

6. This Plan of Merger may be amended for any reason at any time prior to the filing of the Articles of Merger with the Secretary of State of Illinois by the officers or directors of [XYZ**] and [**ABC**].**

7. The officers of [XYZ**] and [**ABC**] shall make and execute, under the corporate seal of their respective corporations, Articles of Merger and shall file them in the office of the Secretary of State of Illinois.**

8. The officers of [XYZ**] and [**ABC**] shall do all acts and things whatsoever, whether within or without the State of Illinois, that may be in any way necessary or proper to effect said Merger.**

IN WITNESS WHEREOF, [XYZ**] and [**ABC**] have caused this Agreement and Plan of Merger to be signed and attested by their respective officers, as indicated below, as of the date first written above.**

[XYZ**], INC.**	**[**ABC**], INC.**
By: _____	**By: _____**
[typed name**], President**	**[**typed name**], President**
ATTEST: _____	**ATTEST: _____**
[typed name**], Secretary**	**[**typed name**], Secretary**

D. [6.93] Directors' Resolution Authorizing Annual Shareholders' Meeting

DIRECTORS' RESOLUTION AUTHORIZING ANNUAL SHAREHOLDERS' MEETING

RESOLVED, that the annual meeting of the shareholders of [name of corporation**], an Illinois corporation (Corporation) will be held at [**location**] on [**day of week**], _____, 20__, at _____ [**a.m.**] [**p.m.**]; and**

FURTHER RESOLVED, that only shareholders of record as of the close of business on _____, 20__, shall be entitled to notice of and to vote at such meeting, but the transfer books of the Corporation will not be closed; and

FURTHER RESOLVED, that the purposes of such meeting of which the shareholders should be notified are (1) the election of [number**] Directors to serve until the next annual meeting, or until their successors have been duly elected and qualified; and (2) [**any other business to be transacted**]; and**

FURTHER RESOLVED, that _____, Secretary of the Corporation, is hereby ordered to send a notice of the annual meeting to each shareholder entitled to vote thereat, and that such notice shall be sent, in the manner prescribed by the bylaws of the Corporation, not later than _____, 20__; and

FURTHER RESOLVED, that the officers of the Corporation be, and each of them acting individually hereby is, authorized and directed, in the name and on behalf of the Corporation, to solicit proxies from those shareholders eligible to vote at said annual meeting but unable to attend, and that the Secretary of the Corporation shall include such a solicitation of proxies along with each notice of this meeting that is sent out, such solicitation to take the form of Exhibit A to these minutes, with such revisions therein as the President of the Corporation shall approve, such approval to be conclusively evidenced for purposes of these resolutions by said President's signature on said proxy solicitation; and

FURTHER RESOLVED, that _____, with power of substitution, shall be management's proxies for such annual meeting, and such persons shall be and hereby are directed to vote for the election of [director nominees**] and in favor of [**any other proposals**].**

E. [6.94] Call of Special Meeting of Shareholders

CALL OF SPECIAL MEETING

TO: _____, Secretary of [name of corporation**]**

The undersigned, by the authority granted [him**] [**her**] [**them**] by law and the [**articles of incorporation**] [**bylaws**] of [**name of corporation**] (Corporation), do hereby call a special meeting of the shareholders of the Corporation. The meeting shall be held at the principal office of the Corporation, located at _____, on [**day of week**], _____, 20__, at _____ [**a.m.**] [**p.m.**].**

The purposes of this special meeting are as follows:

[Business to be considered at the meeting.**]**

Such other business as may properly come before the meeting, or adjournments thereof, will also be transacted.

You are directed to give notice of the meeting, in the manner prescribed by the bylaws of the Corporation, to all shareholders entitled to vote thereat, within the time period prescribed by law and the bylaws of the Corporation.

Dated: _____, 20__.

_____

[Typed names and title or status that authorizes individuals to call meeting (*e.g.,* holders of *X* percent of outstanding stock, etc.).**]**

F. [6.95] Notice of Meeting of Shareholders and Affidavit of Mailing

[NAME OF CORPORATION**]**
NOTICE OF [ANNUAL**] [**SPECIAL**] MEETING**
OF SHAREHOLDERS
TO BE HELD
_____, 20__

Notice is hereby given that, pursuant to a call of _____, [an annual**] [**a special**] meeting of shareholders of [**name of corporation**] will be held on _____, 20__, at _____ [**a.m.**] [**p.m.**], at [**location**].**

The purposes of the meeting are

1. **to elect [**number**] members of the Board of Directors [**(applicable to annual meeting)**];**

2. **[**any other purposes**].**

Only shareholders of record at the close of business on _____, 20__, are entitled to notice of, and to vote at, the meeting.

By order of [person issuing notice**].**

_____
[typed name and office**]**

[NOTE: The officer actually issuing the required notices should execute a declaration certifying that proper notices were issued in a timely manner and stating the actual method used to deliver them to the shareholders. This declaration should then be filed in the corporation's minute book, along with the original copy of the notice and any signed waivers of notice, immediately preceding the minutes of the meeting to which it pertains. This procedure is not required by statute, but such a declaration, regularly filed with the corporation's records, would be evidence of the fact that the notice was actually delivered.**]**

STATE OF ILLINOIS)
) ss.
COUNTY OF _____)

AFFIDAVIT OF MAILING

_____, being first duly sworn on oath, deposes and says that on _____, 20__, [he**] [**she**] was [**position with the corporation**], and that on this date, under [**his**] [**her**] supervision and direction, copies of a Notice of [**Annual**] [**Special**] Meeting and a Proxy Statement, along with a return envelope, were mailed to each holder of shares of common stock of [**name of corporation**] of record as of the close of business on _____, 20__, as the names and addresses of such shareholders appeared on the books and records of [**name of corporation**] as of the close of business on _____, 20__, in properly addressed, sealed, and postage-prepaid envelopes.**

_____
[typed name and office**]**

Subscribed and sworn to
before me this _____ day
of _____, 20__.

_____
Notary Public

G. [6.96] Waiver of Notice of Shareholders' Meeting

WAIVER OF NOTICE

The undersigned, as a shareholder of [name of corporation**], an Illinois corporation (Corporation), being entitled to vote at meetings of shareholders of the Corporation, does hereby waive written notice of the [**annual**] [**special**] meeting of the shareholders of the Corporation [**held**] [**to be held**] on [**day of the week**], _____, 20__, at _____ [**a.m.**] [**p.m.**], at [**location**] for the purpose of [**business transacted or to be transacted at the meeting**].**

_____

Print Name: _____

Number of Shares Held: _____

H. [6.97] Agenda for Annual Shareholders' Meeting

AGENDA
FOR [ANNUAL**] [**SPECIAL**] MEETING OF SHAREHOLDERS OF**
[NAME OF CORPORATION**]**
_____, 20__

1. **Call to Order**
2. **Selection of Chair and Secretary of Meeting**
3. **Chair's Introduction and Comments**
4. **Report of Attendance**
5. **Reading of Notice of Meeting and Affidavit of Mailing**
6. **Reading of Minutes of Last Meeting of Shareholders**
7. **Introduction of Proxies**
8. **Introduction of Inspectors of Election**
9. **Vote on Election of Directors**
10. **Vote on [**other matters to be voted on**]**
11. **Report of Inspectors of Election**
12. **Adjournment**

I. [6.98] Certificate of Inspectors of Election for Shareholders' Meeting

CERTIFICATE OF INSPECTORS OF ELECTION FOR
[ANNUAL**] [**SPECIAL**] MEETING OF SHAREHOLDERS OF**
[NAME OF CORPORATION**]**
_____, 20__

We, the undersigned, having been designated to act as Inspectors of Election at the [annual**] [**special**] meeting of shareholders of [**name of corporation**], an Illinois corporation (Corporation), held on _____, 20__, do hereby certify that the number of votes cast at such meeting by shareholders, in person or by proxy, was as follows:**

1. **For the election of [**number**] Directors of the Corporation:**

Nominee	**Votes**
_____	_____
_____	_____
_____	_____

2. **For the [**description of resolution**]:**

Votes For	**Votes Against**	**Abstentions**
_____	_____	_____

_____
[typed name**], Inspector of Election**

_____
[typed name**], Inspector of Election**

Dated: _____, 20__.

J. [6.99] Minutes of Shareholders' Meeting

MINUTES OF SHAREHOLDERS' MEETING

[The annual**] [**A special**] meeting of the shareholders of [**name of corporation**], an Illinois corporation (Corporation), was held at [**location**], on [**day of week**], _____, 20__, at _____ [**a.m.**] [**p.m.**]. The meeting was called in the manner prescribed by law and the bylaws of the Corporation, and notice was mailed to each shareholder entitled to notice on _____, 20__. The call, a copy of the notice and all waivers thereto, and the Secretary's declaration that such notice was properly served are attached to these minutes.**

The meeting was called to order by _____, President of the Corporation, who served as Chair of the meeting. _____, Secretary of the Corporation, served as Secretary of the meeting and recorded the minutes. A copy of the agenda for the meeting, in the form distributed to all shareholders in attendance, is attached to these minutes.

The Chair welcomed all of the shareholders to the meeting and introduced the following officers and directors of the Corporation who were present: [officers and directors**]. Also present as invited guests of the Board of Directors were [**accountant, counsel, consultant, etc.**].**

The Chair reported that the Board of Directors had set _____, 20__, as the date of record for the meeting and that the list of shareholders as of that date had been on file at the office of the Corporation for the last ten days and had been available for inspection by any shareholder.

The Chair then requested the Secretary to read the report of attendance. The Secretary's report of attendance was as follows:

Class of Stock	Shares Issued and Outstanding	Shares Represented at the Meeting (in person or by proxy)
_____	_____	_____

The Secretary announced that shares constituting _____ percent of the Corporation's issued and outstanding stock were represented at the meeting. The Chair announced that therefore a quorum was present.

On motion duly made and carried, the minutes of the [annual**] [**special**] meeting held on _____, 20__, were unanimously approved by voice vote, [**after the reading of the minutes was dispensed with**] [**after the minutes were read by the Secretary**].**

[NOTE: If annual meeting and if an annual report is presented, add the following statement:

The Chair presented to the meeting the annual report of the Corporation for the year ended _____, 20__, and reviewed that report. A motion was duly made and carried waiving the reading of the report, and a copy of it was ordered attached to the minutes of this meeting.**]**

The Chair then introduced _____, representatives of _____, the Corporation's principal accountants. The Chair offered them an opportunity to make a statement. _____ [stated (substance of statement)**] [**informed the Chair that they had no statement to make but that they would respond to any questions that any shareholder might have**].**

Upon motion duly made and carried, it was resolved to dispense with the reading of the Notice of the Meeting and the Affidavit of Mailing of the Notice, and these were ordered filed with the minutes of the meeting.

The Chair then called for nominations for Directors to serve until the next annual meeting or until their successors are elected and take office. The following names were placed in nomination by _____: [names of nominees**].**

The Chair announced the first item of formal business was the election of [number**] members of the Board of Directors. Pursuant to authority under the bylaws, the Chair appointed _____ to serve as the Inspectors of Election. [**NOTE: If inspectors of election were elected by the board, the minutes should reflect this fact.**]**

After discussion of the nominees, voting was conducted. The Inspectors of Election reported that the following number of shares were voted for each nominee: [nominees and the votes cast for each**].**

The report of the Inspectors was declared official, and the following persons were elected as Directors: _____.

The following resolutions were then presented to the meeting, and the shareholders took the following actions: [Set forth the exact text of each resolution in the order presented to the meeting along with the votes cast for and against each; consider adding a discussion of the substance of the resolution, especially if it relates to a complex, material transaction, such as a merger or sale or an action relating to pension plans for employees.**]**

The Chair ordered that the reports of the Inspectors of Election as to the balloting on each resolution be annexed to the minutes of this meeting.

There being no further business, on motion duly made and carried, the Chair declared the meeting adjourned.

_____
[typed name**], Secretary**

K. [6.100] Shareholders' Action by Written Consent

[NAME OF CORPORATION]
SHAREHOLDERS' ACTION BY WRITTEN CONSENT
PURSUANT TO SECTION 7.10 OF THE ILLINOIS
BUSINESS CORPORATION ACT OF 1983, AS AMENDED

The undersigned, being all of the shareholders of [name of corporation**], an Illinois corporation (Corporation), do hereby declare and state pursuant to Section 7.10 of the Illinois Business Corporation Act of 1983, as amended, that they hereby adopt the following resolutions and take the following action:**

WHEREAS, _____; and

WHEREAS, _____;

NOW THEREFORE BE IT RESOLVED, that _____; and

FURTHER RESOLVED, that _____.

[NOTE: Counsel should consider adding the following three resolutions, but only if they are applicable and if their effect is truly intended by the shareholders:

FURTHER RESOLVED, that the officers of the Corporation, and each of them individually, be, and each of them hereby is, authorized, empowered, and directed, in the name and on behalf of the Corporation, to execute and deliver such documents and to do or to cause to be done all such acts as are contemplated by the foregoing resolutions; and

FURTHER RESOLVED, that all actions heretofore taken and all documents heretofore executed and delivered by the officers of the Corporation, or any of them individually, in furtherance of the foregoing resolutions be, and they hereby are, ratified, confirmed, and approved in all respects; and

FURTHER RESOLVED, that this Written Consent may be executed in one or more counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument.**]**

IN WITNESS WHEREOF, we have executed this Shareholders' Consent this _____ day of _____, 20__.

_____	_____
Shareholder	**Shareholder**
_____	_____
Shareholder	**Shareholder**

Being all of the Shareholders of the Corporation.

L. [6.101] Ballot-Type Proxy

PROXY FOR SHAREHOLDERS OF COMMON STOCK
SOLICITED ON BEHALF OF THE BOARD OF
DIRECTORS FOR THE [ANNUAL**] [**SPECIAL**]**
MEETING OF THE SHAREHOLDERS OF
[NAME OF CORPORATION**]**
TO BE HELD ON _____, 20__

The undersigned hereby appoints _____, with power of substitution, attorney and proxy for and in the name and place of the undersigned, to vote the number of shares of common stock that the undersigned would be entitled to vote if then personally present at the [annual**] [**special**] meeting of shareholders of [**name of corporation**], an Illinois corporation (Corporation), to be held at [**location**] on _____, 20__, at _____ [**a.m.**] [**p.m.**], local time, or any adjournment thereof, on the matters set forth in the Notice of [**Annual**] [**Special**] Meeting and Proxy Statement, receipt of which is hereby acknowledged, as follows:**

1. ELECTION OF DIRECTORS:

FOR all nominees listed below (except as marked to the contrary below)	**WITHHOLD AUTHORITY to vote for all nominees listed below**
☐	☐
[names of nominees**]**	_____ _____

(INSTRUCTION: TO WITHHOLD AUTHORITY TO VOTE FOR ANY INDIVIDUAL NOMINEE, WRITE THAT NOMINEE'S NAME IN THE SPACE PROVIDED BELOW.)

_____
_____

2. PROPOSAL TO [description of proposal**]:**

For _____ Against _____ Abstain _____

3. In accordance with the proxy holder's discretion, on all other matters that may properly come before said meeting and any adjournments thereof.

THIS PROXY WHEN PROPERLY EXECUTED WILL BE VOTED IN THE MANNER DIRECTED HEREIN BY THE UNDERSIGNED SHAREHOLDER. IF NO DIRECTION IS MADE, THIS PROXY WILL BE VOTED FOR THE NOMINEES LISTED UNDER PROPOSAL 1 AND FOR PROPOSAL 2.

Please sign here: _____

Dated: _____, 20__.

NOTE: Please date proxy and sign it exactly as name or names appear above. All joint owners of shares should sign. State full title when signing as executor, administrator, trustee, guardian, etc. Please return signed proxy in the enclosed envelope.

M. [6.102] General Proxy for Specific Meeting or Period of Time

PROXY

I, _____, as holder of the number and class of shares of [name of corporation**], an Illinois corporation (Corporation), indicated next to my signature below, revoke all previous proxies and hereby appoint _____ as my proxy to attend [**all meetings of the shareholders**] [**the meeting of the shareholders to be held on _____, 20__, at _____ (a.m.) (p.m.), at (location), and at any continuation or adjournment thereof**] and to represent, vote, execute consents, and otherwise act for me in the same manner and to the same effect as if I were personally present. I authorize my proxy to substitute any other person to act under this proxy, to revoke any substitution, and to file this proxy and any substitution or revocation with the Corporation. This proxy and the authority represented herein may be revoked at any time by the undersigned and unless revoked shall terminate [**on _____, 20__**] [**upon final adjournment of the meeting for which it is executed**].**

Dated: _____, 20__.

_____
[typed name]

Number and Class of Shares Owned: _____

N. [6.103] Proxy with Limitation on Authority or for Particular Purpose

PROXY

I, the undersigned, holder of the number and class of shares of stock of [name of corporation**], an Illinois corporation (Corporation), indicated next to my signature below, hereby designate and appoint _____ as proxy to vote and otherwise represent the above shares at the [**annual**] [**special**] meeting of the shareholders to be held _____, 20__, at [**location**], [**with respect to the matters**] [**in all matters except those**] listed below:**

[Specify matters.]

[NOTE: If proxy for particular purposes, include the following provision:

The proxy named herein shall vote and otherwise represent the above shares with respect to the following matters:

(1) For the election of _____ to the board of directors, or if this person may not be voted for, for any other person in the proxy's discretion.

(2) For the (specific proposals on which an affirmative vote is to be cast).]

The proxy named herein shall represent the undersigned at the above meeting for the purpose of determining a quorum, but with authority specifically limited to an affirmative vote for [or written consent to**] the particular matters stated above.**

This proxy and the authority represented herein may be revoked at any time by the undersigned and unless revoked shall terminate [on _____, 20__**] [**upon final adjournment of the meeting for which it is executed**].**

Dated: _____, 20__.

_____
[typed name**]**

Number and Class of Shares Owned: _____

O. [6.104] Revocation of Proxy

REVOCATION OF PROXY

The undersigned, as holder of [number**] shares of [**description**] stock of [**name of corporation**], an Illinois corporation (Corporation), hereby revokes any and all proxies and substitutions of proxies with respect to said shares, including but not limited to that certain proxy executed on _____, 20__, and filed with the Secretary of the Corporation on _____, 20__.**

The undersigned further revokes any and all authority previously given or supposed to have been given to _____ to attend meetings, vote, consent, or otherwise act with respect to said shares or for my account in any manner whatsoever.

Dated: _____, 20__.

_____
[typed name**]**

P. [6.105] Call of Meeting of Board of Directors

CALL OF MEETING
OF THE BOARD OF DIRECTORS OF
[NAME OF CORPORATION**]**

The undersigned, as [title of office**] of [**name of corporation**], an Illinois corporation (Corporation), pursuant to the authority granted under Section _____ of the [**bylaws**] [**articles

of incorporation**] of the Corporation, hereby calls a [**regular**] [**special**] meeting of the Board of Directors to be held on _____, 20__, at _____ [**a.m.**] [**p.m.**], at [**full address**].**

Dated: _____, 20__.

_____
[typed name and title**]**

Q. [6.106] Notice of Meeting of Board of Directors

NOTICE OF MEETING

[names and addresses of directors**]**

TO ALL DIRECTORS:

You are hereby notified as directors of [name of corporation**], an Illinois corporation, that a [**regular**] [**special**] meeting of the Board of Directors will be held at _____ [**a.m.**] [**p.m.**] on _____, 20__, at [**full address**].**

[The (purpose) (agenda) of this meeting is as follows: (description of purpose or agenda).**]**

Dated: _____, 20__.

[name of corporation**]**

By: _____
[typed name and title**]**

R. [6.107] Waiver of Notice of Meeting of Board of Directors

WAIVER OF NOTICE OF MEETING
OF THE BOARD OF DIRECTORS OF
[NAME OF CORPORATION**]**

I, the undersigned, being a director of [name of corporation**], hereby waive [**call and notice of**] [**any and all irregularities in the call and notice of**] the [**regular**] [**special**] meeting of the Board of Directors held at [**full address**], at _____ [**a.m.**] [**p.m.**], on _____, 20__.**

Dated: _____, 20__.

_____
[typed name**]**

S. [6.108] Minutes of Directors' Meeting

MINUTES OF [REGULAR**] [**SPECIAL**] MEETING**
OF BOARD OF DIRECTORS OF
[NAME OF CORPORATION**]**
_____, 20__

A [regular**] [**special**] meeting of the Board of Directors of [**name of corporation**], an Illinois corporation (Corporation), was held at _____ [**a.m.**] [**p.m.**] on _____, 20__, at [**full address**]. The meeting was called by _____ and [**notice was duly and timely given to each director**] [**all directors were either given timely notice of this meeting or else have signed a waiver of notice, which is attached to these minutes, or have waived notice by their presence at this meeting**].**

The following directors were present [list by name**], constituting a quorum of the Board of Directors. [**If no quorum was present, the meeting would be adjourned at this point.**] [**Mr.**] [**Ms.**] _____, the Corporation's [**legal counsel**] [**accountant**] [**consultant**] also attended the meeting at the invitation of the Board of Directors.**

The meeting was called to order by _____, who acted as Chair of the meeting. _____ acted as Secretary of the meeting.

The minutes of the meeting of the Board of Directors of the Corporation held on _____, 20__, were read to those present, and there being no objections, corrections, or modifications thereto offered, the minutes were approved by a resolution moved by _____ and approved by voice vote of all of the directors.

A statement was then made by _____, [title**], concerning [**brief description of the matter proposed**].**

Director _____ moved that the Corporation adopt a resolution to [description of resolution**]. After discussion concerning this motion, on the affirmative vote of [**number**] in favor and [**number**] against, it was:**

RESOLVED, [insert full resolution**].**

Directors _____ dissented on the resolution on the grounds that [detailed reasons**].**

[Insert additional resolutions and actions of the board.**]**

[There being no further business to come before the meeting, on a motion duly made, the directors voted to adjourn the meeting.**]** **[**On a motion duly made, the directors voted to adjourn the meeting to _____, 20__, _____ (a.m.) (p.m.) at (location).**]**

Dated: _____, 20__.

_____
[typed name**], Secretary**

[Approved:

_____
Chair of the Meeting**]**

T. [6.109] Directors' Action by Written Consent

[NAME OF CORPORATION**]**
DIRECTORS' ACTION BY WRITTEN CONSENT
PURSUANT TO SECTION 8.45 OF THE
ILLINOIS BUSINESS CORPORATION ACT OF 1983, AS AMENDED

The undersigned, being all of the directors of [name of corporation**], an Illinois corporation (Corporation), do hereby declare and state pursuant to Section 8.45 of the Illinois Business Corporation Act of 1983, as amended, [**and pursuant to Article _____, Section _____, of the bylaws of the Corporation**], that they hereby adopt the following resolutions and take the following actions by unanimous written consent in lieu of holding a meeting:**

WHEREAS, _____; and

WHEREAS, _____;

NOW THEREFORE BE IT RESOLVED, that _____; and

FURTHER RESOLVED, that _____.

IN WITNESS WHEREOF, we have executed this Unanimous Written Consent of Directors as of this _____ day of _____, 20__.

_____ _____
[name of director**]** **[**name of director**]**

_____ _____
[name of director**]** **[**name of director**]**

Being all of the Directors of the Corporation.

[NOTE: The effective date to be filled in (preceding the signature lines) should be the date that the last director executed the consent, and this is the effective date unless a later date is specified in the consent. An alternative form of signature block would indicate the date each director signed the consent, and the last of these dates would be the effective date of the consent, again, unless a later date is specified in the consent, as in the following alternative:

IN WITNESS WHEREOF, we have executed this Directors' Consent as of the dates set forth below our signatures.

_____	_____
(name of director)	(name of director)
Date: _____	Date: _____
_____	_____
(name of director)	(name of director)
Date: _____	Date: _____

Being all of the Directors of the Corporation.**]**

U. [6.110] Directors' Resolutions

RESOLUTIONS OF BOARD OF DIRECTORS

WHEREAS, [set forth background or reasons for resolutions**]; and**

WHEREAS, [set forth further background or reasons for resolution**];**

NOW THEREFORE BE IT RESOLVED, that [set forth main resolution**]; and**

FURTHER RESOLVED, that [set forth related resolution, if any**]; and**

FURTHER RESOLVED, that [continue to set forth separate related resolutions, if any**].**

V. [6.111] Certificate of Adoption of Directors' Resolutions

CERTIFICATE OF ADOPTION OF RESOLUTIONS
SECRETARY'S CERTIFICATE

I, _____, do hereby certify that I am the duly elected and acting Secretary of [name of corporation**], an Illinois corporation (Corporation), and I am the keeper of the corporate records of the Corporation. I do further certify that [**attached as Exhibit A to this Secretary's Certificate**] [**set forth below**] are true and correct copies of certain resolutions of the Board of Directors of the Corporation, adopted [**by unanimous written consent as of

_____, 20__**] [**at a meeting held on _____, 20__, duly called and convened with a quorum present and acting throughout**], which resolutions have not been modified or rescinded and are in full force and effect as of the date hereof.**

IN WITNESS WHEREOF, I have executed this Secretary's Certificate and affixed the seal of the Corporation this _____ day of _____, 20__.

[seal**]**

_____
[typed name**], Secretary**

W. [6.112] Directors' Resolution Electing Officers and Establishing Salary

RESOLUTION ELECTING OFFICERS AND ESTABLISHING SALARY

RESOLVED, that the following persons be and they are hereby elected to the office set forth opposite their names to serve for the term provided in the bylaws at the annual salary as set forth below.

Title	**Name**	**Annual Salary**
President	_____	**$**_____
Vice President	_____	**$**_____
Treasurer	_____	**$**_____
Secretary	_____	**$**_____
Assistant Secretary	_____	**$**_____

X. [6.113] Directors' Resolution Approving Contract

RESOLUTION APPROVING CONTRACT

WHEREAS, the Directors of the Corporation have concluded that it is in the best interests of the Corporation to enter into that certain [name of agreement**] with _____ to [**general purpose of agreement**];**

NOW THEREFORE BE IT RESOLVED, that the form, terms, and conditions of the [name of agreement**] between the Corporation and _____, a copy of which is attached hereto as Exhibit A, be, and they hereby are, accepted, adopted, and approved, in the form attached hereto, with such amendments thereto as the officer or officers executing the amendments shall approve, such approval to be conclusively evidenced for purposes of these resolutions by such officer's or officers' signature(s) thereon.**

Y. [6.114] Directors' Resolution Approving Contract with Interested Director

RESOLUTION APPROVING CONTRACT WITH INTERESTED DIRECTOR

WHEREAS, an offer has been made to the corporation to enter into a [contract**] [**transaction**] with _____ for the purpose of [**brief explanation**]; and**

WHEREAS, _____, a director of the Corporation, has disclosed to the Board of Directors that [he**] [**she**] is interested in such [**contract**] [**transaction**] in that [**explanation of interest**], and the other directors have determined that the [**contract**] [**transaction**] is fair to the Corporation;**

NOW THEREFORE BE IT RESOLVED, that the Corporation accept the offer of _____ to enter into such [contract**] [**transaction**], and the [**title of officer**] of the Corporation be, and [**he**] [**she**] hereby is, authorized, empowered, and directed, in the name and on behalf of the Corporation, to enter into a written contract with _____ in substantially the form presented to this meeting and attached to these minutes, with such changes as the officer deems necessary and in the best interests of the Corporation, [**his**] [**her**] signature to constitute evidence of [**his**] [**her**] approval thereof; and**

FURTHER RESOLVED, without limiting the generality of the preceding resolution, that the terms of the [contract**] [**transaction**] be, and they hereby are, ratified and confirmed as being commercially reasonable and fair to the Corporation in the good-faith judgment of the Board of Directors of the Corporation; and**

FURTHER RESOLVED, that these resolutions shall be effective if adopted by a majority of the Board of Directors of the Corporation without counting the vote of director [name of interested director**], and that the Secretary shall note in the minutes of this meeting and in any copy of these resolutions certified by [**him**] [**her**] the names of the directors voting for and against the adoption of these resolutions.**

Z. [6.115] Directors' Resolution Declaring Cash Dividend

RESOLUTION DECLARING CASH DIVIDEND

WHEREAS, being advised by [officer presenting financial statements**] that the Corporation's unreserved earned surplus as of _____, 20__, is $_____, its cash flow from operations for the _____-month period ended _____, 20__ (after deducting dividends paid), exceeds $_____, its cash flow is adequate to cover the Corporation's obligations as they become due, and the payment of the dividend authorized herein will not cause the Corporation to be out of compliance with the restrictions on the payment of the dividends contained in any agreement to which the Corporation is a party;**

NOW THEREFORE BE IT RESOLVED, that the Board of Directors hereby declares a dividend of $_____ on each outstanding share of common stock of the Corporation, payable on _____, 20__, to shareholders of record on _____, 20__.

AA. [6.116] Directors' Resolution Declaring Property Dividend

[NOTE: This sample resolution assumes that the property of the corporation that is being distributed in kind to its shareholders consists of shares of stock of another corporation that is held by the distributing corporation. If less fungible items of property are to be distributed, the resolution probably should include a discussion of the valuation of the property, to establish that all shareholders were treated equally.]

RESOLUTION DECLARING PROPERTY DIVIDEND

WHEREAS, the Corporation has earned surplus in excess of $_____ according to the financial statements presented to this meeting by the President and the Treasurer; and

WHEREAS, the Corporation has in its assets [number**] shares of common stock of [**company**] with an approximate current market value of $_____; and**

WHEREAS, the Corporation needs its cash for working capital purposes but desires to distribute a dividend of property consisting of the common stock of [company**];**

NOW THEREFORE BE IT RESOLVED, that there be and there hereby is declared on the earned surplus of the Corporation a dividend of [number**] shares of the common stock of [**company**], payable on the outstanding shares of the common stock of the Corporation, payable on _____, 20__, to holders of record of the common stock of the Corporation at the close of business on _____, 20__; and**

FURTHER RESOLVED, that the officers of this Corporation be, and they hereby are, authorized and directed to take such action as they may deem necessary or proper promptly to effect the transfer and delivery of such [number**] shares, on a pro rata basis, to all of the shareholders of record on _____, 20__, as of the close of business on that date; and**

FURTHER RESOLVED, that promptly after the transfer and delivery of the foregoing dividend, the Treasurer of this Corporation be, and [he**] [**she**] hereby is, authorized and directed to charge the Corporation's earned surplus account with $_____ and to make such other entries in the books of accounts to reflect the foregoing distribution.**

BB. [6.117] Directors' Resolution Declaring Stock Dividend

RESOLUTION DECLARING STOCK DIVIDEND

WHEREAS, according to the financial statements presented to this meeting by the President and the Treasurer, there is adequate earned surplus available for the declaration of a stock dividend; and

WHEREAS, the increased growth of the corporation's business makes it desirable to retain all of the cash available for working capital;

NOW THEREFORE BE IT RESOLVED, that a dividend of [number of shares**] of common stock of the Corporation, $_____ par value per share, be, and it hereby is, declared and payable on each share of common stock of the Corporation, $_____ par value per share, outstanding as of _____, 20__, and the delivery of such stock dividend be made not later than _____, 20__; and**

FURTHER RESOLVED, that in all cases in which the aggregate amount of stock issuable to any shareholder of the Corporation for such dividend is less than one share or includes a fractional amount of less than one share, the Corporation shall issue transferable fractional scrip certificates for said fractional amounts, which scrip certificates shall be exchangeable on or before _____, 20__, in amounts aggregating one or more full shares, for common stock plus any dividends declared and paid on such common stock, but until so exchanged the holders of the fractional scrip certificates shall not by reason of their ownership of such certificates have the right to vote or the right to receive dividends or any other right pertaining to such common stock; and every fractional scrip certificate not so exchanged shall, after _____, 20__, be redeemed by the Corporation for cash upon demand of the holder thereof at its proportionate value measured in terms of the common stock of the corporation at par; and

FURTHER RESOLVED, that the Treasurer is hereby directed to charge the earned surplus account with the total par value of the foregoing stock dividend.

CC. [6.118] Director's Resignation Letter

_____, 20__

To: [name of corporation**]**

I hereby tender my resignation as a director of [name of corporation**], an Illinois corporation (Corporation) effective as of the date of this letter. I also hereby tender my resignation from all other directorships and all other offices of the Corporation and of all of its subsidiaries that I hold, all effective as of the date of this letter.**

Sincerely,

[name of individual**]**