

# Model Business Corporation Act— Chapter 8: Directors and Officers<sup>1</sup>

## Subchapter A. BOARD OF DIRECTORS

### §8.01. REQUIREMENT FOR AND DUTIES OF BOARD OF DIRECTORS

- (a) Except as provided in section 7.32, each corporation must have a board of directors.
- (b) All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors, subject to any limitation set forth in the articles of incorporation or in an agreement authorized under section 7.32.

### §8.02. QUALIFICATIONS OF DIRECTORS

The articles of incorporation or bylaws may prescribe qualifications for directors. A director need not be a resident of this state or a shareholder of the corporation unless the articles of incorporation or bylaws so prescribe.

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<sup>1</sup>Adopted by the Committee on Corporate Laws of the Section of Business Law with the support of the American Bar Foundation (Chicago: ABA, 1994). The material contained in this text excludes the official comments and statutory cross-references revised through 1998 as well as Subchapter D, Officers, Subchapter E, Indemnification, and Subchapter F, Directors' Conflicting Interest Transactions. For an expanded discussion, see *The Report of the American Bar Association Task Force on Corporate Responsibility*, March 31, 2003, at [www.abanet.org/buslaw/corporateresponsibility/home/html](http://www.abanet.org/buslaw/corporateresponsibility/home/html) (the Task Force website).

**§8.03. NUMBER AND ELECTION OF DIRECTORS**

- (a) A board of directors must consist of one or more individuals, with the number specified in or fixed in accordance with the articles of incorporation or bylaws.
- (b) If a board of directors has power to fix or change the number of directors, the board may increase or decrease by 30 percent or less the number of directors last approved by the shareholders, but only the shareholders may increase or decrease by more than 30 percent the number of directors last approved by the shareholders.
- (c) The articles of incorporation or bylaws may establish a variable range for the size of the board of directors by fixing a minimum and maximum number of directors. If a variable range is established, the number of directors may be fixed or changed from time to time, within the minimum and maximum, by the shareholders or the board of directors. After shares are issued, only the shareholders may change the range for the size of the board or change from a fixed to a variable-range size board or vice versa.
- (d) Directors are elected at the first annual shareholders' meeting and at each annual meeting thereafter unless their terms are staggered under section 8.06.

**§8.04. ELECTION OF DIRECTORS BY CERTAIN CLASSES OF SHAREHOLDERS**

If the articles of incorporation authorize dividing the shares into classes, the articles may also authorize the election of all or a specified number of directors by the holders of one or more authorized classes of shares. A class (or classes) of shares entitled to elect one or more directors is a separate voting group for purposes of the election of directors.

**§8.05. TERMS OF DIRECTORS GENERALLY**

- (a) The terms of the initial directors of a corporation expire at the first shareholders' meeting at which directors are elected.
- (b) The terms of all other directors expire at the next annual shareholders' meeting following their election unless their terms are staggered under section 8.06.
- (c) A decrease in the number of directors does not shorten an incumbent director's term.

- (d) The term of a director elected to fill a vacancy expires at the next shareholders' meeting at which directors are elected.
- (e) Despite the expiration of a director's term, he continues to serve until his successor is elected and qualified or until there is a decrease in the number of directors.

#### **§8.06. STAGGERED TERMS FOR DIRECTORS**

If there are nine or more directors, the articles of incorporation may provide for staggering their terms by dividing the total number of directors into two or three groups, with each group containing one-half or one-third of the total, as near as may be. In that event, the terms of directors in the first group expire at the first annual shareholders' meeting after their election, the terms of the second group expire at the second annual shareholders' meeting after their election, and the terms of the third group, if any, expire at the third annual shareholders' meeting after their election. At each annual shareholders' meeting held thereafter, directors shall be chosen for a term of two years or three years, as the case may be, to succeed those whose terms expire.

#### **§8.07. RESIGNATION OF DIRECTORS**

- (a) A director may resign at any time by delivering written notice to the board of directors, its chairman, or to the corporation.
- (b) A resignation is effective when the notice is delivered unless the notice specifies a later effective date.

#### **§8.08. REMOVAL OF DIRECTORS BY SHAREHOLDERS**

- (a) The shareholders may remove one or more directors with or without cause unless the articles of incorporation provide that directors may be removed only for cause.
- (b) If a director is elected by a voting group of shareholders, only the shareholders of that voting group may participate in the vote to remove him.
- (c) If cumulative voting is authorized, a director may not be removed if the number of votes sufficient to elect him under cumulative voting is voted against his removal. If cumulative voting is not authorized, a director may be removed only if the number of votes cast to remove him exceeds the number of votes cast not to remove him.

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

**§8.09. REMOVAL OF DIRECTORS BY JUDICIAL PROCEEDING**

- (a) The [name or describe] court of the county where a corporation's principal office (or, if none in this state, its registered office) is located may remove a director of the corporation from office in a proceeding commenced either by the corporation or by its shareholders holding at least 10 percent of the outstanding shares of any class if the court finds that (1) the director engaged in fraudulent or dishonest conduct, or gross abuse of authority or discretion, with respect to the corporation and (2) removal is in the best interest of the corporation.
- (b) The court that removes a director may bar the director from reelection for a period prescribed by the court.
- (c) If shareholders commence a proceeding under subsection (a), they shall make the corporation a party defendant.

**§8.10. VACANCY ON BOARD**

- (a) Unless the articles of incorporation provide otherwise, if a vacancy occurs on a board of directors, including a vacancy resulting from an increase in the number of directors:
  - (1) the shareholders may fill the vacancy;
  - (2) the board of directors may fill the vacancy; or
  - (3) if the directors remaining in office constitute fewer than a quorum of the board, they may fill the vacancy by the affirmative vote of a majority of all the directors remaining in office.
- (b) If the vacant office was held by a director elected by a voting group of shareholders, only the holders of shares of that voting group are entitled to vote to fill the vacancy if it is filled by the shareholders.
- (c) A vacancy that will occur at a specific later date (by reason of a resignation effective at a later date under section 8.07(b) or otherwise) may be filled before the vacancy occurs but the new director may not take office until the vacancy occurs.

**§8.11. COMPENSATION OF DIRECTORS**

Unless the articles of incorporation or bylaws provide otherwise, the board of directors may fix the compensation of directors.

**Subchapter B.  
MEETINGS AND ACTION OF THE BOARD****§8.20. MEETINGS**

- (a) The board of directors may hold regular or special meetings in or out of this state.
- (b) Unless the articles of incorporation or bylaws provide otherwise, the board of directors may permit any or all directors to participate in a regular or special meeting by, or conduct the meeting through the use of, any means of communication by which all directors participating may simultaneously hear each other during the meeting. A director participating in a meeting by this means is deemed to be present in person at the meeting.

**§8.21. ACTION WITHOUT MEETING**

- (a) Unless the articles of incorporation or bylaws provide otherwise, action required or permitted by this Act to be taken at a board of directors' meeting may be taken without a meeting if the action is taken by all members of the board. The action must be evidenced by one or more written consents describing the action taken, signed by each director, and included in the minutes or filed with the corporate records reflecting the action taken.
- (b) Action taken under this section is effective when the last director signs the consent, unless the consent specifies a different effective date.
- (c) A consent signed under this section has the effect of a meeting vote and may be described as such in any document.

**§8.22. NOTICE OF MEETING**

- (a) Unless the articles of incorporation or bylaws provide otherwise, regular meetings of the board of directors may be held without notice of the date, time, place, or purpose of the meeting.
- (b) Unless the articles of incorporation or bylaws provide for a longer or shorter period, special meetings of the board of directors must be preceded by at least two days' notice of the date, time, and place of the meeting. The

notice need not describe the purpose of the special meeting unless required by the articles of incorporation or bylaws.

### **§8.23. WAIVER OF NOTICE**

- (a) A director may waive any notice required by this Act, the articles of incorporation, or bylaws before or after the date and time stated in the notice. Except as provided by subsection (b), the waiver must be in writing, signed by the director entitled to the notice, and filed with the minutes or corporate records.
- (b) A director's attendance at or participation in a meeting waives any required notice to him of the meeting unless the director at the beginning of the meeting (or promptly upon his arrival) objects to holding the meeting or transacting business at the meeting and does not thereafter vote for or assent to action taken at the meeting.

### **§8.24. QUORUM AND VOTING**

- (a) Unless the articles of incorporation or bylaws require a greater number or unless otherwise specifically provided in this Act, a quorum of a board of directors consists of:
  - (1) a majority of the fixed number of directors if the corporation has a fixed board size; or
  - (2) a majority of the number of directors prescribed, or if no number is prescribed the number in office immediately before the meeting begins, if the corporation has a variable-range size board.
- (b) The articles of incorporation or bylaws may authorize a quorum of a board of directors to consist of no fewer than one-third of the fixed or prescribed number of directors determined under subsection (a).
- (c) If a quorum is present when a vote is taken, the affirmative vote of a majority of directors present is the act of the board of directors unless the articles of incorporation or bylaws require the vote of a greater number of directors.
- (d) A director who is present at a meeting of the board of directors or a committee of the board of directors when corporate action is taken is deemed to have assented to the action taken unless: (1) he objects at the beginning of the meeting (or promptly upon his arrival) to holding it or transacting business at the meeting; (2) his dissent or abstention from the action taken is entered in the minutes of the meeting; or (3) he delivers written notice of his

dissent or abstention to the presiding officer of the meeting before its adjournment or to the corporation immediately after adjournment of the meeting. The right of dissent or abstention is not available to a director who votes in favor of the action taken.

### **§8.25. COMMITTEES**

- (a) Unless the articles of incorporation or bylaws provide otherwise, a board of directors may create one or more committees and appoint members of the board of directors to serve on them. Each committee must have two or more members, who serve at the pleasure of the board of directors.
- (b) The creation of a committee and appointment of members to it must be approved by the greater of (1) a majority of all the directors in office when the action is taken or (2) the number of directors required by the articles of incorporation or bylaws to take action under section 8.24.
- (c) Sections 8.20 through 8.24, which govern meetings, action without meetings, notice and waiver of notice, and quorum and voting requirements of the board of directors, apply to committees and their members as well.
- (d) To the extent specified by the board of directors or in the articles of incorporation or bylaws, each committee may exercise the authority of the board of directors under section 8.01.
- (e) A committee may not, however:
  - (1) authorize distributions;
  - (2) approve or propose to shareholders action that this Act requires be approved by shareholders;
  - (3) fill vacancies on the board of directors or on any of its committees;
  - (4) amend articles of incorporation pursuant to section 10.02;
  - (5) adopt, amend, or repeal bylaws;
  - (6) approve a plan of merger not requiring shareholder approval;
  - (7) authorize or approve reacquisition of shares, except according to a formula or method prescribed by the board of directors; or
  - (8) authorize or approve the issuance or sale or contract for sale of shares, or determine the designation and relative rights, preferences, and limitations of a class or series of shares, except that the board of directors may authorize a committee (or a senior executive officer of the corpo-

ration) to do so within limits specifically prescribed by the board of directors.

- (f) The creation of, delegation of authority to, or action by a committee does not alone constitute compliance by a director with the standards of conduct described in section 8.30.

## **Subchapter C. STANDARDS OF CONDUCT**

### **§8.30. GENERAL STANDARDS FOR DIRECTORS**

- (a) A director shall discharge his duties as a director, including his duties as a member of a committee:
  - (1) in good faith;
  - (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
  - (3) in a manner he reasonably believes to be in the best interests of the corporation.
- (b) In discharging his duties a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:
  - (1) one or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;
  - (2) legal counsel, public accountants, or other persons as to matters the director reasonably believes are within the person's professional or expert competence; or
  - (3) a committee of the board of directors of which he is not a member if the director reasonably believes the committee merits confidence.
- (c) A director is not acting in good faith if he has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) unwarranted.
- (d) A director is not liable for any action taken as a director, or any failure to take any action, if he performed the duties of his office in compliance with this section.



**§8.31. [RESERVED]**

The text of §8.31 of the 1984 Model Act is printed and discussed in the Annotation to §8.60.

**§8.32. [RESERVED]****§8.33. LIABILITY FOR UNLAWFUL DISTRIBUTIONS**

- (a) A director who votes for or assents to a distribution made in violation of section 6.40 or the articles of incorporation is personally liable to the corporation for the amount of the distribution that exceeds what could have been distributed without violating section 6.40 or the articles of incorporation if it is established that he did not perform his duties in compliance with section 8.30. In any proceeding commenced under this section, a director has all of the defenses ordinarily available to a director.
- (b) A director held liable under subsection (a) for an unlawful distribution is entitled to contribution:
  - (1) from every other director who could be held liable under subsection (a) for the unlawful distribution; and
  - (2) from each shareholder for the amount the shareholder accepted knowing the distribution was made in violation of section 6.40 or the articles of incorporation.
- (c) A proceeding under this section is barred unless it is commenced within two years after the date on which the effect of the distribution was measured under section 6.40(e) or (g).