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An Act To Amend the Maine Business Corporation Act

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 13-C MRSA §102, sub-§32-A, ¶B, as enacted by PL 2007, c. 289, §3, is amended to read:

B. "Qualified director" means a person who, at the time action is to be taken under:

(1) Section 755, does not have:

- (a) A material interest in the outcome of the proceeding; or
- (b) A material relationship with a person who has such an interest;

(2) Section 854 or 856:

- (a) Is not a party to the proceeding;
- (b) Is not a director as to whom a transaction is a director's conflicting-interest transaction or who sought a disclaimer of the corporation's interest in a business opportunity under section 881, which transaction or disclaimer is challenged in the proceeding; and
- (c) Does not have a material relationship with a director described in division (a) or (b);

(3) Section 873, is not a director:

- (a) As to whom the transaction is a director's conflicting-interest transaction; or
- (b) Who has a material relationship with another director as to whom the transaction is a director's conflicting-interest transaction; ~~or~~

(4) Section 881, would be a qualified director under subparagraph (3) if the business opportunity was a director's conflicting-interest transaction; ~~or~~ or

(5) Section 202, subsection 2, paragraph F, is not a director:

(a) To whom the limitation or elimination of a duty of an officer to offer potential business opportunities to the corporation would apply; or

(b) Who has a material relationship with another officer to whom the limitation or elimination would apply.

Sec. 2. 13-C MRSA §202, sub-§2, ¶¶D and E, as enacted by PL 2001, c. 640, Pt. A, §2 and affected by Pt. B, §7, are amended to read:

D. A provision eliminating or limiting the liability of a director to the corporation or its shareholders for money damages for an action taken or a failure to take an action as a director, except liability for:

- (1) The amount of a financial benefit received by a director to which the director is not entitled;
- (2) An intentional infliction of harm on the corporation or its shareholders;
- (3) A violation of section 833; or
- (4) An intentional violation of criminal law; ~~and~~

E. A provision permitting or making obligatory indemnification of a director for liability, as defined in section 851, subsection 5, to any person for an action taken or a failure to take an action as a director, except liability for:

- (1) Receipt of a financial benefit to which the director is not entitled;
- (2) An intentional infliction of harm on the corporation or its shareholders;
- (3) A violation of section 833; or
- (4) An intentional violation of criminal law; ~~and~~

Sec. 3. 13-C MRSA §202, sub-§2, ¶F is enacted to read:

F. A provision limiting or eliminating any duty of a director or any other person to offer the corporation the right to have or participate in any, or one or more classes or categories of, business opportunities, prior to the pursuit or taking of the opportunity by the director or other person; only if any application of the provision to an officer or a related person of that officer:

(1) Also requires a determination by the board of directors by action of qualified directors taken in compliance with the same procedures as are set forth in section 873 subsequent to the effective date of the provision applying the provision to a particular officer or any related person of that officer; and

(2) May be limited by the authorizing action of the board.

Sec. 4. 13-C MRSA §202, sub-§2-A is enacted to read:

2-A. Related person. As used in this section, "related person" has the meaning set forth in section 871, subsection 3.

Sec. 5. 13-C MRSA §626, sub-§4, as enacted by PL 2001, c. 640, Pt. A, §2 and affected by Pt. B, §7, is amended to read:

4. Signatures. Each share certificate must be signed, either manually or in facsimile, by:

A. Two officers designated in the bylaws or by the board of directors; or

B. The clerk and an officer designated in the bylaws; or by the board of directors.

C. ~~The corporation's board of directors.~~

A share certificate may bear the corporate seal or its facsimile.

Sec. 6. 13-C MRSA §702, sub-§1, ¶B, as enacted by PL 2001, c. 640, Pt. A, §2 and affected by Pt. B, §7, is amended to read:

~~B. If the holders of~~shareholders holding at least 10% of all the votes entitled to be cast on an issue proposed to be considered at the proposed special meeting sign, date and deliver to the corporation one or more written demands for the meeting describing the purpose or purposes for which it is to be held, except that the articles of incorporation may fix a lower percentage or a higher percentage not exceeding 25% of all the votes entitled to be cast on any issue proposed to be considered. Unless otherwise provided in the articles of incorporation, a written demand for a special meeting may be revoked by a writing to that effect received by the corporation prior to the receipt by the corporation of demands sufficient in number to require the holding of a special meeting.

Sec. 7. 13-C MRSA §723, sub-§§3 and 7, as enacted by PL 2001, c. 640, Pt. A, §2 and affected by Pt. B, §7, are amended to read:

3. Appointment of proxy effective. An appointment of a proxy is effective when a signed appointment form or an electronic transmission of the appointment is received by the inspector of election appointed pursuant to section 731 or the officer or agent of the corporation authorized to ~~tabulate~~count votes. An appointment is valid for ~~11 months unless a longer period is expressly~~the term provided in the appointment form ; if no term is provided, the appointment is valid for 11 months ~~unless the appointment is irrevocable under subsection 4.~~

7. Transfer of shares subject to irrevocable appointment. Unless it otherwise provides, an appointment made irrevocable under subsection 4 continues in effect after a transfer of the shares and a transferee takes subject to the appointment, except that a transferee for value of shares subject to an irrevocable appointment may revoke the appointment if the transferee did not know of the existence of the irrevocable appointment when the transferee acquired the shares and the existence of the irrevocable appointment was not noted conspicuously on the certificate representing the shares or on the information statement for shares without certificates.

Sec. 8. 13-C MRSA §725, as enacted by PL 2001, c. 640, Pt. A, §2 and affected by Pt. B, §7, is amended to read:

§ 725. Acceptance of votes and other instruments

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

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

- A. The shareholder is an entity and the name signed purports to be that of an officer or agent of the entity;
- B. The name signed purports to be that of an administrator, executor, guardian or conservator representing the shareholder and, if the corporation requests, evidence of fiduciary status acceptable to the corporation has been presented with respect to the vote, ballot, consent, waiver or proxy appointment;
- C. The name signed purports to be that of a receiver or trustee in bankruptcy of the shareholder and, if the corporation requests, evidence of this status acceptable to the corporation has been presented with respect to the vote, ballot, consent, waiver or proxy appointment;
- D. The name signed purports to be that of a pledgee, beneficial owner or attorney-in-fact of the shareholder and, if the corporation requests, evidence acceptable to the corporation of the signatory's authority to sign for the shareholder has been presented with respect to the vote, ballot, consent, waiver or proxy appointment; or
- E. Two or more persons are the shareholder as cotenants or fiduciaries and the name signed purports to be the name of at least one of the co-owners and the person signing appears to be acting on behalf of all the co-owners.

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

4. Not liable for damages. A corporation and its ~~officer or agent~~who the person authorized to count votes, including an inspector of election under section 731, that accept or reject a vote, ballot, consent, waiver or proxy appointment in good faith and in accordance with the standards of this section or section 723, subsection 2 are not liable in damages to the shareholder for the consequences of the acceptance or rejection.

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

6. Power of inspector. If an inspector of election has been appointed under section 731, the inspector of election also has the authority to request information and make determinations under subsections 1, 2 and 3. A determination made by the inspector of election under those subsections is controlling.

Sec. 9. 13-C MRSA §731, as amended by PL 2007, c. 289, §9, is further amended to read:

§ 731. Inspectors of election

1. Appointment of inspector. A public corporation shall, and any other corporation may, appoint one or more inspectors to act at a meeting of shareholders ~~and make a written report of the inspectors' determinations in connection with determining voting results.~~ Each inspector shall ~~take and sign an oath~~certify in writing that the inspector will faithfully to execute the duties of inspector with strict impartiality and according to the best of the inspector's ability. An inspector may be an officer or employee of the corporation. The inspector may appoint or retain other persons to assist in the performance of the duties of inspector under subsection 2 and may rely on information provided by such persons and other persons, including those appointed to count votes, unless the inspector believes reliance is unwarranted.

2. Duties of inspector. An inspector shall:

- A. Ascertain the number of shares outstanding and the voting power of each;
- B. Determine the shares represented at a meeting;
- C. Determine the validity of ~~proxies~~proxy appointments and ballots;
- D. Count ~~all~~the votes; and
- E. ~~Determine the result.~~
- F. Make a written report of the results.

3. ~~Clerk; officer; employee.~~ ~~An inspector may be the clerk or an officer or employee of the corporation.~~

4. Examinations by inspectors. In performing their duties, the inspectors may examine:

A. The proxy appointment forms and any other information provided in accordance with section 723, subsection 2;

B. Any envelope or related writing submitted with those appointment forms;

C. Any ballots;

D. Any evidence or other information specified in section 725; and

E. The relevant books and records of the corporation relating to its shareholders and their entitlement to vote, including any securities position list provided by a depository clearing agency.

5. Scope of inspectors' powers. In addition to information otherwise provided under this section, the inspectors may consider information that they believe is relevant and reliable for the purpose of performing any of the duties assigned to them pursuant to subsection 2, including for the purposes of evaluating inconsistent, incomplete or erroneous information and reconciling information submitted on behalf of banks, brokers, their nominees or similar persons that indicates more votes being cast than a proxy is authorized by the record shareholder to cast or more votes being cast than the record shareholder is entitled to cast. If the inspectors consider other information allowed by this subsection, they shall, in their report under subsection 2, specify the information considered by them, including the purpose or purposes for which the information was considered, the person or persons from whom they obtained the information, when the information was obtained, the means by which the information was obtained and the basis for the inspectors' belief that such information is relevant and reliable.

6. Judicial review. Determinations of law by the inspectors of election are subject to de novo review by a court in a proceeding under section 732 or other judicial proceeding.

Sec. 10. 13-C MRSA §732 is enacted to read:

§ 732. Judicial determination of corporate offices and review of elections and shareholder votes

1. Judicial determinations authorized. Upon application of or in a proceeding commenced by a person specified in subsection 2, the Superior Court of the county where a corporation's principal office or, if none in this State, its registered office, is located may determine:

A. The validity of the election, appointment, removal or resignation of the director or officer of the corporation;

B. The right of an individual to hold the office of director or officer of the corporation;

C. The result or validity of an election or vote by the shareholders of the corporation;

D. The right of a director to membership on a committee of the board of directors; and

E. The right of a person to nominate or an individual to be nominated as a candidate for election or appointment as a director of the corporation, and any right under a bylaw adopted pursuant to section 206, subsection 2 or any comparable right under any provision of the articles of incorporation, contract or applicable law.

2. Persons entitled to commence proceedings. An application or proceeding pursuant to subsection 1 may be filed or commenced by any of the following persons:

A. The corporation;

B. A record shareholder or beneficial shareholder of the corporation;

C. A director of the corporation, an individual claiming the office of the director or a director whose membership on a committee of the board of directors is contested, in each case who is seeking a determination of that individual's right to such office or membership;

D. An officer of the corporation or an individual claiming to be an officer of the corporation who is seeking a determination of the individual's right to such office; and

E. A person claiming a right covered by subsection 1, paragraph E and who is seeking a determination of such right.

3. Named defendants. In connection with any application or proceeding under subsection 1, the following must be named as defendants, unless that person made the application or commenced the proceeding:

A. The corporation;

B. An individual whose right to office or membership on a committee of the board of directors is contested;

C. An individual claiming the office or membership at issue; and

D. A person claiming a right covered by subsection 1, paragraph E that is at issue.

4. Service of process. In connection with any application or proceeding under subsection 1, service of process may be made upon each of the persons specified in subsection 3 by either:

A. Serving on the corporation process in any manner provided by statute of this State or by rule of the applicable court for service on the corporation; or

B. Service of process on such person in any manner provided by statute of this State or by rule of applicable court.

5. Notice of service of process. When service of process is made upon a person other than the corporation by service upon the corporation pursuant to subsection 4, paragraph A, the plaintiff and the corporation or its registered agent shall promptly provide written notice of such service, together with copies of all process and the application or complaint, to such person at the person's last known residence or business address, or as permitted by statute of this State or by rule of the applicable court.

6. Expedited proceedings; remedies. In connection with any application or proceeding under subsection 1, the court shall dispose of the application or proceeding on an expedited basis and also may:

- A. Order such additional or further notice as the court considers proper under the circumstances;
- B. Order that additional persons be joined as parties to the proceeding if the court determines that such joinder is necessary for a just adjudication of matters before the court;
- C. Order an election or meeting to be held in accordance with the provisions of section 703, subsection 2 or otherwise;
- D. Appoint a master to conduct an election or meeting;
- E. Enter temporary, preliminary or permanent injunctive relief;
- F. Resolve solely for the purpose of this proceeding any legal or factual issues necessary for the resolution of any of the matter specified in subsection 1, including the right and power of persons claiming to own shares to vote at any meeting of the shareholders; and
- G. Order such relief as the court determines is equitable, just and proper.

7. Shareholders as parties. It is not necessary to make a shareholder a party to a proceeding or application pursuant to this section unless the shareholder is a required defendant under subsection 3, paragraph D, relief is sought against the shareholder individually or the court orders joinder pursuant to subsection 6, paragraph B.

8. Jurisdiction or powers not exclusive. Nothing in this section limits, restricts or abolishes the subject matter jurisdiction or powers of the court as existed prior to the enactment of this section and an application or proceeding available with respect to the matters specified in subsection 1.

9. Right to jury trial. In any proceeding commenced under this section there is no right to a jury trial.

Sec. 11. 13-C MRSA §741, as enacted by PL 2001, c. 640, Pt. A, §2 and affected by Pt. B, §7, is amended to read:

§ 741. Voting trusts

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

2. Effective date of voting trust. A voting trust becomes effective on the date the first shares subject to the trust are registered in the trustee's name. ~~A voting trust is valid for not more than 21 years after its effective date unless extended under subsection 3.~~

3. Extension authorized. ~~All or some of the parties to a voting trust may extend it for additional terms of not more than 21 years each by signing written consent to the extension. An extension is valid for 21 years from the date the first shareholder signs the extension agreement. The voting trustee must deliver copies of the extension agreement and list of beneficial owners to the corporation's principal office. An extension agreement binds only those parties signing it.~~

4. Limits. Limits, if any, on duration of a voting trust are as set forth in the voting trust. A voting trust that became effective when this section provided a 21-year limit on its duration under former subsection 3 remains governed by the provisions of this section then in effect, unless the voting trust is amended to provide otherwise by unanimous agreement of the parties to the voting trust.

Sec. 12. 13-C MRSA §802, as enacted by PL 2001, c. 640, Pt. A, §2 and affected by Pt. B, §7, is repealed and the following enacted in its place:

§ 802. Qualifications of directors

1. General. The corporation's articles of incorporation or bylaws may prescribe qualifications for directors or for nominees for directors.

2. Residency, shareholder. 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.

3. Timing and application of nominee qualifications. A qualification for nomination for director prescribed before a person's nomination applies to such person at the time of nomination. A qualification for nomination for director prescribed after a person's nomination does not apply to such person with respect to such nomination.

4. Timing and application of director qualifications. A qualification for director prescribed before the start of a director's term applies only at the time an individual becomes a director or may apply during a director's term. A qualification prescribed during a director's term does not apply to that director before the end of that term.

Sec. 13. 13-C MRSA §832, sub-§1, ¶A, as repealed and replaced by PL 2007, c. 289, §17, is amended to read:

A. A defense interposed by the director does not preclude liability if the defense is based on:

(1) Any provision in the corporation's articles of incorporation authorized by section 202, subsection 2, paragraph D or E;

(2) The protection afforded by section 872 for action taken in compliance with section 873 or 874; or

(3) The protection afforded by section 881; and

Sec. 14. 13-C MRSA §871, sub-§3, as amended by PL 2007, c. 289, §27, is further amended to read:

3. Related person. "Related person" means:

A. The ~~director's~~individual's spouse;

C. A child, stepchild, grandchild, parent, stepparent, grandparent, sibling, stepsibling, half sibling, aunt, uncle, niece or nephew, or spouse of any of those persons, of the ~~director~~individual or of the ~~director's~~individual's spouse;

D. ~~An~~Another individual living in the same home as the ~~director~~individual;

E. An entity, other than the corporation or an entity controlled by the corporation, controlled by the ~~director~~individual or any person specified in paragraph A, C or D;

F. A domestic or foreign:

(1) Business or nonprofit corporation, other than the corporation or an entity controlled by the corporation, of which the ~~director~~individual is a director;

(2) Unincorporated entity of which the ~~director~~individual is a general partner or a member of the governing body; or

(3) Individual, trust or estate for whom or of which the ~~director~~individual is a trustee, guardian, personal representative or like fiduciary; or

G. A person that is, or an entity that is controlled by, an employer of the ~~director~~individual.

Sec. 15. 13-C MRSA §874, sub-§7, as enacted by PL 2007, c. 289, §30, is amended to read:

7. Definitions. As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. ~~"Holder" means and "held by" refers to shares held by both a record shareholder, as defined in section 1301, subsection 7, and a beneficial shareholder, as defined in section 1301, subsection 2.~~

B. "Qualified shares" means all shares entitled to be voted with respect to the transaction except for shares that the secretary or other officer or agent of the corporation authorized to ~~tabulate~~count votes either knows, or under ~~section 873, subsection 2~~subsection 4 is notified, are held by:

(1) A director who has a conflicting interest regarding the transaction; or

(2) A related person of the director, excluding a person described in section 871, subsection 3, paragraph G.

Sec. 16. 13-C MRSA §881, as enacted by PL 2007, c. 289, §31, is amended to read:

§ 881. Business opportunities

1. Business opportunity not actionable if standards met. ~~A director's taking~~If a director or officer or related person of either pursues or takes advantage, directly or indirectly, of a business opportunity, that action may not be the subject of equitable relief; or give rise to an award of damages or other sanctions against the director, officer or related person, in a proceeding by or in the right of the corporation on the ground that such opportunity should have first been offered to the corporation, ~~if before becoming legally obligated regarding the opportunity the director brings it to the attention of the corporation and:~~

A. ~~Action~~Before the director, officer or related person becomes legally obligated regarding the opportunity, the director or officer brings it to the attention of the corporation and action by qualified directors disclaiming the corporation's interest in the opportunity is taken in compliance with the same procedures set forth in section 873, ~~as if the decision being made concerned a director's conflicting-interest transaction as defined in section 871, subsection 2; or~~

B. ~~Action~~Before the director, officer or related person becomes legally obligated regarding the opportunity, the director or officer brings it to the attention of the corporation and action by shareholders disclaiming the corporation's interest in the opportunity is taken in compliance with the procedures set forth in section 874, as if the decision being made concerned a director's conflicting-interest transaction as defined in section 871, subsection 2; or

C. The duty to offer the corporation the particular business opportunity has been limited or eliminated pursuant to a provision of the articles of incorporation adopted and in the case of officers and their related persons, made effective by action of qualified directors in accordance with section 202, subsection 2, paragraph F.

In each case under paragraph A or B, the director, rather than making a required disclosure as defined in section 871, subsection 4, must have made prior disclosure to those acting on behalf of the corporation of all material facts concerning the business opportunity that are then known to the director.

2. No inference or change in burden of proof. In any proceeding seeking equitable relief or other remedies based upon an alleged improper pursuit or taking advantage of a business opportunity by a director or officer, the fact that the director or officer did not employ the procedure described in subsection 1, paragraph A or B before taking advantage of the opportunity does not create an inference that the opportunity should have been first presented to the corporation or alter the burden of proof otherwise applicable to establish that the director breached a duty to the corporation in the circumstances.

3. Related person. As used in this section, "related person" has the meaning set forth in section 871, subsection 3.

Sec. 17. 13-C MRSA §1430, sub-§2-A is enacted to read:

2-A. Publicly traded stock. Subsection 2 does not apply in the case of a corporation that, on the date of the filing of the proceeding, has shares that are:

A. A covered security under Section 18(b)(1)(A) or (B) of the federal Securities Act of 1933, as amended; or

B. Not a covered security under paragraph A, but are held of record by at least 500 shareholders and the shares outstanding have a market value of at least \$20,000,000 exclusive of the value of such shares held by the corporation's executive officers or directors or by any person or group that beneficially owns more than 10% of the outstanding shares.

SUMMARY

This is a periodic update of the Maine Business Corporations Act to reflect recently adopted changes to the Model Business Corporations Act.

This bill extends the existing ability of a corporation to reduce or eliminate certain fiduciary duties owed by directors to Maine corporations and their shareholders by means of provisions in the corporation's articles of incorporation to situations involving business opportunities that could be of interest to the corporation.

This bill makes minor clarifying changes to existing provisions relating to the signatures on share certificates, the right of shareholders to call special shareholders' meetings and the permitted duration of voting trusts, prospectively eliminating a restriction limiting such trusts to 21 years.

This bill clarifies existing provisions relating to the duration of proxies to vote shares in Maine corporations and the effectiveness of irrevocable proxies.

This bill clarifies and expands upon existing provisions relating to inspectors of elections, including provisions regarding the appointment, roles, duties and procedures of inspectors and judicial review of their actions and decisions.

This bill contains detailed provisions relating to judicial review of disputes concerning elections and appointments of directors and officers of Maine corporations, including the matters as to which the judiciary may issue rulings, the persons who may commence such proceedings, the persons who must be

named as defendants in such proceedings, service of process and the scope and types of remedies that may be granted in such actions.

This bill clarifies when and in what manner qualifications for service as a director of a Maine corporation, or to be nominated as such, may become applicable relative to the time of nomination or time of election or during such person's tenure as a director.

This bill provides that Maine's existing statutory provision allowing judicially mandated dissolution of a Maine corporation in cases involving "oppression" of one or more shareholders is applicable to corporations whose securities are publicly traded.