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Legislative Document

No. 1136

S.P. 405

In Senate, March 31, 2015

An Act To Amend the Maine Business Corporation Act

Reference to the Committee on Judiciary suggested and ordered printed.

A handwritten signature in cursive script, reading "Heather J.R. Priest".

HEATHER J.R. PRIEST
Secretary of the Senate

Presented by Senator KATZ of Kennebec.
Cosponsored by Senators: BURNS of Washington, DAVIS of Piscataquis, HASKELL of
Cumberland, HILL of York, SAVIELLO of Franklin.

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

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

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

5 (1) Section 755, does not have:

6 (a) A material interest in the outcome of the proceeding; or

7 (b) A material relationship with a person who has such an interest;

8 (2) Section 854 or 856:

9 (a) Is not a party to the proceeding;

10 (b) Is not a director as to whom a transaction is a director's conflicting-
11 interest transaction or who sought a disclaimer of the corporation's interest in
12 a business opportunity under section 881, which transaction or disclaimer is
13 challenged in the proceeding; and

14 (c) Does not have a material relationship with a director described in
15 division (a) or (b);

16 (3) Section 873, is not a director:

17 (a) As to whom the transaction is a director's conflicting-interest transaction;
18 or

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

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

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

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

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

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

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

33 (1) The amount of a financial benefit received by a director to which the director
34 is not entitled;

35 (2) An intentional infliction of harm on the corporation or its shareholders;

36 (3) A violation of section 833; or

- 1 (4) An intentional violation of criminal law; ~~and~~
2 E. A provision permitting or making obligatory indemnification of a director for
3 liability, as defined in section 851, subsection 5, to any person for an action taken or a
4 failure to take an action as a director, except liability for:
5 (1) Receipt of a financial benefit to which the director is not entitled;
6 (2) An intentional infliction of harm on the corporation or its shareholders;
7 (3) A violation of section 833; or
8 (4) An intentional violation of criminal law; and

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

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

15 (1) Also requires a determination by the board of directors by action of qualified
16 directors taken in compliance with the same procedures as are set forth in section
17 873 subsequent to the effective date of the provision applying the provision to a
18 particular officer or any related person of that officer; and

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

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

21 **2-A. Related person.** As used in this section, "related person" has the meaning set
22 forth in section 871, subsection 3.

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

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

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

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

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

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

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

33 B. If ~~the holders of~~ shareholders holding at least 10% of all the votes entitled to be
34 cast on an issue proposed to be considered at the proposed special meeting sign, date
35 and deliver to the corporation one or more written demands for the meeting
36 describing the purpose or purposes for which it is to be held, except that the articles

1 of incorporation may fix a lower percentage or a higher percentage not exceeding
2 25% of all the votes entitled to be cast on any issue proposed to be considered.
3 Unless otherwise provided in the articles of incorporation, a written demand for a
4 special meeting may be revoked by a writing to that effect received by the
5 corporation prior to the receipt by the corporation of demands sufficient in number to
6 require the holding of a special meeting.

7 **Sec. 7. 13-C MRSA §723, sub-§§3 and 7**, as enacted by PL 2001, c. 640, Pt. A,
8 §2 and affected by Pt. B, §7, are amended to read:

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

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

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

26 **§725. Acceptance of votes and other instruments**

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

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

35 A. The shareholder is an entity and the name signed purports to be that of an officer
36 or agent of the entity;

37 B. The name signed purports to be that of an administrator, executor, guardian or
38 conservator representing the shareholder and, if the corporation requests, evidence of
39 fiduciary status acceptable to the corporation has been presented with respect to the
40 vote, ballot, consent, waiver or proxy appointment;

1 C. The name signed purports to be that of a receiver or trustee in bankruptcy of the
2 shareholder and, if the corporation requests, evidence of this status acceptable to the
3 corporation has been presented with respect to the vote, ballot, consent, waiver or
4 proxy appointment;

5 D. The name signed purports to be that of a pledgee, beneficial owner or attorney-in-
6 fact of the shareholder and, if the corporation requests, evidence acceptable to the
7 corporation of the signatory's authority to sign for the shareholder has been presented
8 with respect to the vote, ballot, consent, waiver or proxy appointment; or

9 E. Two or more persons are the shareholder as cotenants or fiduciaries and the name
10 signed purports to be the name of at least one of the co-owners and the person signing
11 appears to be acting on behalf of all the co-owners.

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

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

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

24 **6. Power of inspector.** If an inspector of election has been appointed under section
25 731, the inspector of election also has the authority to request information and make
26 determinations under subsections 1, 2 and 3. A determination made by the inspector of
27 election under those subsections is controlling.

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

30 **§731. Inspectors of election**

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

- 1 **2. Duties of inspector.** An inspector shall:
- 2 A. Ascertain the number of shares outstanding and the voting power of each;
- 3 B. Determine the shares represented at a meeting;
- 4 C. Determine the validity of ~~proxies~~ proxy appointments and ballots;
- 5 D. Count ~~all~~ the votes; and
- 6 E. ~~Determine the result.~~
- 7 F. Make a written report of the results.

8 ~~**3. Clerk; officer; employee.** An inspector may be the clerk or an officer or~~

9 ~~employee of the corporation.~~

10 **4. Examinations by inspectors.** In performing their duties, the inspectors may

11 examine:

- 12 A. The proxy appointment forms and any other information provided in accordance
- 13 with section 723, subsection 2;
- 14 B. Any envelope or related writing submitted with those appointment forms;
- 15 C. Any ballots;
- 16 D. Any evidence or other information specified in section 725; and
- 17 E. The relevant books and records of the corporation relating to its shareholders and
- 18 their entitlement to vote, including any securities position list provided by a
- 19 depository clearing agency.

20 **5. Scope of inspectors' powers.** In addition to information otherwise provided

21 under this section, the inspectors may consider information that they believe is relevant

22 and reliable for the purpose of performing any of the duties assigned to them pursuant to

23 subsection 2, including for the purposes of evaluating inconsistent, incomplete or

24 erroneous information and reconciling information submitted on behalf of banks, brokers,

25 their nominees or similar persons that indicates more votes being cast than a proxy is

26 authorized by the record shareholder to cast or more votes being cast than the record

27 shareholder is entitled to cast. If the inspectors consider other information allowed by

28 this subsection, they shall, in their report under subsection 2, specify the information

29 considered by them, including the purpose or purposes for which the information was

30 considered, the person or persons from whom they obtained the information, when the

31 information was obtained, the means by which the information was obtained and the basis

32 for the inspectors' belief that such information is relevant and reliable.

33 **6. Judicial review.** Determinations of law by the inspectors of election are subject

34 to de novo review by a court in a proceeding under section 732 or other judicial

35 proceeding.

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

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

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

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

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

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

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

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

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

20 A. The corporation;

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

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

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

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

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

34 A. The corporation;

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

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

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

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

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

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

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

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

17 A. Order such additional or further notice as the court considers proper under the
18 circumstances;

19 B. Order that additional persons be joined as parties to the proceeding if the court
20 determines that such joinder is necessary for a just adjudication of matters before the
21 court;

22 C. Order an election or meeting to be held in accordance with the provisions of
23 section 703, subsection 2 or otherwise;

24 D. Appoint a master to conduct an election or meeting;

25 E. Enter temporary, preliminary or permanent injunctive relief;

26 F. Resolve solely for the purpose of this proceeding any legal or factual issues
27 necessary for the resolution of any of the matter specified in subsection 1, including
28 the right and power of persons claiming to own shares to vote at any meeting of the
29 shareholders; and

30 G. Order such relief as the court determines is equitable, just and proper.

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

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

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

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

5 **§741. Voting trusts**

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

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

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

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

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

30 **§802. Qualifications of directors**

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

33 **2. Residency, shareholder.** A director need not be a resident of this State or a
34 shareholder of the corporation unless the articles of incorporation or bylaws so prescribe.

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

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

5 **Sec. 13. 13-C MRSA §832, sub-§1, ¶A,** as repealed and replaced by PL 2007, c.
6 289, §17, is amended to read:

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

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

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

13 (3) The protection afforded by section 881; and

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

16 **3. Related person.** "Related person" means:

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

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

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

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

24 F. A domestic or foreign:

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

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

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

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

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

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

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

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

- 8 (1) A director who has a conflicting interest regarding the transaction; or
9 (2) A related person of the director, excluding a person described in section 871,
10 subsection 3, paragraph G.

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

13 **§881. Business opportunities**

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

22 A. ~~Action~~ Before the director, officer or related person becomes legally obligated
23 regarding the opportunity, the director or officer brings it to the attention of the
24 corporation and action by qualified directors disclaiming the corporation's interest in
25 the opportunity is taken in compliance with the same procedures set forth in section
26 873, ~~as if the decision being made concerned a director's conflicting interest~~
27 ~~transaction as defined in section 871, subsection 2; or~~

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

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

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

1 including the matters as to which the judiciary may issue rulings, the persons who may
2 commence such proceedings, the persons who must be named as defendants in such
3 proceedings, service of process and the scope and types of remedies that may be granted
4 in such actions.

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

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