

Comprehensive Revision of Louisiana Corporate Law to Become Effective January 1

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Earlier this year the Louisiana legislature replaced the existing Louisiana Business Corporation Law in its entirety in order to align Louisiana's law with the Model Business Corporation Act (the "*Model Act*"), which is in effect in thirty other states. The new Louisiana Business Corporation Act (the "*LBCA*") will go into effect on January 1, 2015, with its provisions affecting both existing and newly formed Louisiana corporations.

Although the changes to Louisiana corporation law embodied in the LBCA are extensive, we highlight below several noteworthy provisions.

Shareholder Voting. Under prior Louisiana law, fundamental actions such as the amendment of the articles of incorporation, mergers and entity conversions, required the vote of two-thirds of the voting shares present at a meeting. The LBCA changes this threshold to a simple majority of the shares entitled to vote. La. R.S. 12:1-952(5), 1003(A), 1104(5). This vote threshold varies from the requirements of the Model Act, which provide for approval by a majority of votes actually cast at a meeting for a merger or share exchange. The differences in these standards can be significant. For a corporation with 10,000 voting shares outstanding, 8,000 of which are represented and voting at a meeting called to consider a merger transaction, Louisiana's prior law would require approval by 5,334 shares (two-thirds of the voting shares present); the LBCA requires approval by 5,001 shares (a majority of the shares entitled to vote); and the Model Act requires approval by 4,001 shares (a majority of votes actually cast). Under the LBCA, shareholder quorum requirements may no longer be changed in the bylaws to deviate from the statutory requirements, but may be changed only in the articles (and may only be increased and not reduced). La. R.S. 12:1-727. In another change to shareholder rights, shareholders holding 10% (rather than the previous 20%) of the votes to be cast on an issue may call a special meeting. La. R.S. 12:1-702.

Rights of Oppressed Shareholders. The LBCA provides a remedy in the event of a corporation's oppression of minority shareholders (defined essentially as the corporation engaging in practices that, considered as a whole over an appropriate time, are "plainly incompatible with a genuine effort" to deal "fairly and in good faith" with the shareholder).

Such shareholders may withdraw from the corporation and require the corporation to buy all of their shares at "fair value" (without minority interest or marketability discounts). La. R.S. 12:1-1435(A). Unlike in the Model Act, an oppressed shareholder's first remedy is to be bought out rather than to cause an involuntary dissolution of the corporation. Further, the LBCA does not allow for damages to be awarded in cases of oppression.

Director and Officer Liability. Under the LBCA, the articles of incorporation of a Louisiana corporation must state whether the corporation accepts, rejects or limits the protections against director and officer liability provided in La. R.S. 12:1-832. La. R.S. 12:1-202(A)(5). Unless limited or rejected in the articles, Section 1-832 limits monetary liability of directors and officers for breaches of duty, other than breaches of loyalty, the intentional infliction of harm on the corporation or its shareholders, the authorization of unlawful distributions or an intentional violation of criminal law (although, if available, the corporation may obtain insurance to protect against these exceptions).

Unanimous Governance Agreements. The LBCA introduces the concept of a unanimous governance agreement (a "UGA"). La. R.S. 12:1-732. A UGA, which must be approved by all current shareholders, may govern the management of the corporation or the relationships among the shareholders, directors and the corporation. Shareholders may desire to enter into a UGA in order to modify statutory rules concerning governance that would otherwise be mandatory. Under a UGA, for example, shareholders could agree to eliminate the board of directors, make distributions that are not proportionate to share ownership and grant corporate powers to a shareholder or other individual.

Shareholder Derivative Suits. The LBCA (rather than the Louisiana Code of Civil Procedure) will now govern derivative actions. In derivative proceedings under previous Louisiana law, shareholder demand on the board was excused as futile if over half of the corporation's directors were named as defendants. Under the LBCA, this exception is removed and demand on the corporation will always be required. La. R.S. 12:1-742. Further, a management decision to reject demand or dismiss a derivative action will receive judicial deference if the decision is made by "qualified directors," generally meaning directors without a material interest in the suit or a material relationship with someone who has a material interest in the suit. La. R.S. 12:1-744.

Distributions. The LBCA will permit distributions (which include share repurchases and dividends other than liquidating dividends) to be made by a corporation so long as (1) it can pay its debts as they become due in the ordinary course of business and (2) its total assets are not less than its total liabilities. La. R.S. 12:1-640(C). Whether a distribution is permissible will be measured essentially at the earlier of the date of the payment (or, for payment pursuant to a promissory note, the date of the delivery of the note) or the date the shareholder ceases to be a shareholder. Under the prior law, a corporation could pay dividends or repurchase shares only to the extent (a) its net worth exceeded its stated capital and (b) it was not (and would not become by reason of the dividend) insolvent, and the prior law did not address when those restrictions were measured.

Issuance of Shares. Under the prior law, shares could not be issued for promissory notes or future services. The LBCA now allows those forms of payment for shares. La. R.S. 12:1-621(B). In addition, the LBCA does not require the board of directors to allocate any part of the consideration to any particular account. Under the LBCA, shareholders are required to approve the issuance of shares in a transaction for consideration other than cash if the shares to be issued constitute more than 20% of the voting power of the corporation outstanding before the transaction. La. R.S. 12:1-621(F).

Inspection Rights. The LBCA has abandoned the 25% ownership requirement for inspection of corporation records that was previously required for shareholders who were competitors of the corporation. La. R.S. 12:1-1602. Under the LBCA, one or more shareholders who have owned 5% of any class of shares of the corporation for six months can inspect corporate records if the demand is in good faith and for a proper purpose whether or not they are business competitors.

Appraisal Rights. Under the prior law, dissenters' rights to receive the fair value of shares in cash in the event that a shareholder voted against a fundamental transaction (and took all other steps required to perfect his dissenters' rights) would be unavailable if the transaction was approved by at least 80% of the total voting power of the corporation. That cut off of dissenters' rights (referred to as appraisal rights under the LBCA) has been eliminated under the LBCA.

Dissolution by Affidavit. Although the prior law provided for an expedited procedure for dissolution of a corporation by affidavit, because the process resulted in the shareholders assuming personal liability for any debts of the dissolved corporation, it was not considered a

desirable alternative. The LBCA retains an expedited dissolution process, but eliminates the assumption of personal liability by the shareholders under that process. La. R.S. 12:1-1441.

Variations from the Model Act. Those familiar with the Model Act should keep in mind that the LBCA deviates from the Model Act in certain respects, often to retain the current Louisiana approach. For example, unlike the Model Act, the LBCA provides the following:

- Certain documents must be acknowledged or executed by authentic act (including articles of incorporation and articles of merger). La. R.S. 12:1-120(H).
- The articles of incorporation cannot contain a provision imposing owner liability on the shareholders of the corporation. La. R.S. 12:1-202.
- The existence of bylaws is permissive rather than mandatory. La. R.S. 12:1-206.
- A shareholder is liable to return to the corporation any unlawful distributions received by that shareholder. La. R.S. 12:1-622(C).
- Directors may vote by proxy only if the articles of incorporation so provide. La. R.S. 12:1-812(A).
- The board of directors may continue to conduct business at a board meeting even if a quorum is lost in certain cases. La. R.S. 12:1-824.
- Exculpation of a director from liability for damages caused by the director's breach of the duty of loyalty is prohibited. La. R.S. 12:1-832.
- A secretary must be appointed. La. R.S. 12:1-840.
- A short form merger could trigger appraisal rights if the merger qualifies as an interested transaction. La. R.S. 12:1-1301.

Officers and directors of Louisiana corporations should review the organizational documents of their companies to consider whether changes to those documents are in order in light of the sweeping changes made to the Louisiana corporation law.

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