FORMING, FINANCING, OPERATING AND DISSOLVING
A TENNESSEE CORPORATION

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I. INTRODUCTION

The corporate law that primarily governs the formation and operation of all Tennessee corporations is the Tennessee Business Corporation Act, as amended. It is codified in the sections 48-11-101 through 48-27-103 of the Tennessee Code Annotated. In this article, the Tennessee Business Corporation Act will be referenced as the “TBCA” or, simply, the “Act.”

The TBCA was enacted in 1986 and became effective on January 1, 1988.¹ It significantly overhauled and simplified the earlier corporate act, the Tennessee General Corporation Act. The Act is largely modeled after the Revised Model Business Corporation Act (the “RMBCA”) adopted by the Committee on Corporate Laws of the Business Law Section of the American Bar Association in 1984. Thus, much of the TBCA’s language mirrors that of the RMBCA. At least nine other states, including neighboring states Arkansas, Georgia, Kentucky, Mississippi and Virginia, have also adopted versions of the RMBCA.

The premier body of corporate law in the United States is the Delaware General Corporate Law (the “DGCL”). While the TBCA contains many of the same substantive provisions as the DGCL, the TBCA has the advantages of being simpler

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¹ 1986 Tenn. Pub. Acts 887 (Portions of the TBCA have since been amended; the last significant amendments occurred in 1993).
and more cohesive. On the other hand, Delaware enjoys the advantages of well-established judicial interpretations of the DGCL and a judiciary and bar accustomed to dealing with complex corporate law issues.

II. INCORPORATION

A. Commencement of Existence

Corporate existence begins when the Charter is filed with the Secretary of State of the State of Tennessee, unless the Charter specifies a later date, but no later than ninety days after filing. A fee of $100 must accompany the filing of the Charter with the Secretary of State.

Note that the Charter (and any amendments or restatements thereto) must also be filed with the Register of Deeds for the county in which the corporation’s principal office is located. There may be a filing fee of $5 plus fifty cents per page in excess of five pages.

B. The Charter

The charter is filed by one or more incorporators, and must include the following:

1. Name of the corporation;
2. Number of authorized shares of at least one class of shares;
3. Name of the initial registered agent;

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5 Id.
6 The Tennessee Secretary of State’s Website has many helpful forms. A charter form can be located by visiting http://www.state.tn.us/sos/profit.htm and clicking on the link that says, “Charter.”
8 TENN. CODE ANN. § 48-12-102 (2004).
9 There are many restrictions regarding names of corporations. See infra Part II.E.
4. Street address, zip code, and county of the initial registered office;

5. Name, street address, and zip code of each Incorporator;

6. Street address and zip code of the initial principal office;

7. If more than one class of shares is authorized, a description of a distinguishing designation for each class. Prior to issuance of more than a single class of shares, the Charter must describe the “preferences, limitations, and relative rights of that class”;¹⁰

8. Statement that the corporation is for profit.

A corporation may include numerous other provisions in its charter. The statute specifies certain optional provisions.¹¹ In addition, Ronald Gillman has identified optional charter provisions;¹² the optional features are as follows:

1. Name and address of the initial directors;¹³

2. Purpose for which the corporation is organized;¹⁴

3. Provisions regarding the management of the business and regulating the affairs of the corporation;¹⁵

4. Provisions defining, limiting and regulating the powers and rights of the corporation, its board of directors, and shareholders;¹⁶


¹¹ TEnn. CODE ANN. § 48-12-102(b) (2004).

¹² RONALD LEE GILMAN, TENNESSEE CORPORATIONS, 13-5, 13-6 (1st ed. Supp. 2001). Subsequent amendments to the TBCA have slightly affected Gillman’s original list, and these changes are reflected in the article.


5. Provisions eliminating or limiting the personal liability of a director for monetary damages for breach of fiduciary duty, subject to certain exceptions set forth in section 48-12-102(b)(3);

6. Provisions that are required or permitted by the Act to be set forth in the bylaws;¹⁷

7. Provision eliminating the option to give oral notice of actions that require notice;¹⁸

8. Provision delaying the effective date of the Charter for up to ninety days after filing with the Secretary of State;¹⁹

9. Provision prohibiting the board of directors from adopting “emergency bylaws”;²⁰

10. Provision limiting the purpose(s) of the corporation;²¹

11. Provision limiting perpetual existence and prescribing or limiting the powers of the corporation;²²

12. Provision that restricts authority to issue stock dividends;²³

13. Provision reserving to the shareholders, instead of board of directors, authority to issue shares;²⁴

14. Provision restricting the authority of directors to grant rights, options, or warrants to acquire shares;²⁵

¹⁹ TENN. CODE ANN. § 48-11-304(b) (2004).
²⁰ TENN. CODE ANN. § 48-12-107(a) (2004).
²³ TENN. CODE ANN. § 48-16-204(a) (2004).
²⁵ TENN. CODE ANN. § 48-16-205(a) (2004).
15. Provision imposing restrictions on the transfer or registration of transferred shares;\textsuperscript{26}

16. Provision granting preemptive rights to shareholders;\textsuperscript{27}

17. Provision modifying shareholder quorum and voting requirements;\textsuperscript{28}

18. Provision authorizing cumulative voting for directors;\textsuperscript{29}

19. Provision eliminating the board of directors if less than fifty-one shareholders;\textsuperscript{30}

20. Provision prescribing qualifications for directors;\textsuperscript{31}

21. Provision that specifying the number of directors;\textsuperscript{32}

22. Provisions empowering the board of directors to fix or change the number of directors;\textsuperscript{33}

23. Provision establishing a variable range for the size of the board of directors by fixing a minimum and maximum number;\textsuperscript{34}

24. Provision authorizing the board of directors to change the range for the size of the board or change from a fixed to a variable-range size board;\textsuperscript{35}

\textsuperscript{26} TENN. CODE ANN. § 48-16-208(a) (2004).

\textsuperscript{27} TENN. CODE ANN. § 48-16-301(a) (2004).

\textsuperscript{28} TENN. CODE ANN. §§ 48-17-206(a), 48-17-208(a) (2004).

\textsuperscript{29} TENN. CODE ANN. § 48-17-209 (2004).

\textsuperscript{30} TENN. CODE ANN. § 48-18-101(c) (2004).

\textsuperscript{31} TENN. CODE ANN. § 48-18-102 (2004).

\textsuperscript{32} TENN. CODE ANN. § 48-18-103(a) (2004).

\textsuperscript{33} TENN. CODE ANN. § 48-18-103(b) (2004).

\textsuperscript{34} TENN. CODE ANN. § 48-18-103(e) (2004).

\textsuperscript{35} Id.
25. Provision providing for shareholder election of directors by class voting;\textsuperscript{36}

26. Provision specifying terms for directors of not less than one nor more than three years;\textsuperscript{37}

27. Provision staggering terms for directors;\textsuperscript{38}

28. Provisions limiting removal of directors by shareholders to removal for cause;\textsuperscript{39}

29. Provision allowing for removal of a director for cause by a vote of a majority of the entire board;\textsuperscript{40}

30. Provision limiting authority of the board of directors to fill a director vacancy;\textsuperscript{41}

31. Provision limiting the authority of the board to fix compensation of directors;\textsuperscript{42}

32. Provision prohibiting the board of directors from conducting a telephonic conference meeting;\textsuperscript{43}

33. Provision requiring unanimous written consent for the board of directors to take action without a meeting;\textsuperscript{44}

\textsuperscript{36} TENN. CODE ANN. § 48-18-104 (2004).

\textsuperscript{37} TENN. CODE ANN. § 48-18-105(b) (2004).

\textsuperscript{38} TENN. CODE ANN. § 48-18-106 (2004).

\textsuperscript{39} TENN. CODE ANN. § 48-18-108(a) (2004).

\textsuperscript{40} TENN. CODE ANN. § 48-18-108(d) (2004).

\textsuperscript{41} TENN. CODE ANN. § 48-18-110(a) (2004).

\textsuperscript{42} TENN. CODE ANN. § 48-18-111 (2004).

\textsuperscript{43} TENN. CODE ANN. § 48-18-201(b) (2004).

\textsuperscript{44} TENN. CODE ANN. § 48-18-202(a) (2004).
34. Provision requiring notice of regular meetings of the board of directors;\textsuperscript{45}  
35. Provision specifying the period of notice required prior to special meetings of the board;\textsuperscript{46}  
36. Provision increasing the quorum requirements for the board of directors;\textsuperscript{47}  
37. Provision prohibiting the board of directors from creating committees\textsuperscript{48}  
38. Provision authorizing committees to exercise only authority specified by the board directors;\textsuperscript{49}  
39. Provision limiting the corporation’s obligation to indemnify a director who is successful in defending litigation;\textsuperscript{50}  
40. Provision prohibiting directors from seeking mandatory or permissive indemnification;\textsuperscript{51}  
41. Provision limiting or prohibiting mandatory or permissive indemnification for officers;\textsuperscript{52}  
42. Provision prohibiting the board of directors from adopting one or more charter amendments specified in section 48-20-102;  
43. Provision limiting the authority of board of directors to amend or repeal bylaws;\textsuperscript{53}

\textsuperscript{45} \textsc{tenn. code ann. § 48-18-203(a)} (2004).  
\textsuperscript{46} \textsc{tenn. code ann. § 48-18-203(b)} (2004).  
\textsuperscript{47} \textsc{tenn. code ann. § 48-18-205(a)} (2004).  
\textsuperscript{48} \textsc{tenn. code ann. § 48-18-206(a)} (2004).  
\textsuperscript{49} \textsc{tenn. code ann. § 48-18-206(d)} (2004).  
\textsuperscript{50} \textsc{tenn. code ann. § 48-18-503} (2004).  
\textsuperscript{51} \textsc{tenn. code ann. § 48-18-505} (2004).  
\textsuperscript{52} \textsc{tenn. code ann. § 48-18-507} (2004).
44. Provision authorizing shareholders to adopt or amend a bylaw that sets a higher quorum or voting requirement for shareholders than as otherwise statutorily required;\textsuperscript{54}

45. Provision describing additional corporate actions subject to the shareholder’s right to dissent and obtain payment of fair value;\textsuperscript{55}

46. Provision reserving to the shareholders, instead of to the board of directors, the authority to issue shares;\textsuperscript{56} and

47. Provision establishing a par value for the classes of stock.\textsuperscript{57}

\section*{C. Organizational Meeting}

After incorporation, the initial directors named in the charter must hold an organizational meeting.\textsuperscript{58} If the charter does not name initial directors, the incorporators must hold the meeting.\textsuperscript{59} At a directors’ meeting, directors must complete the organization of the corporation by appointing officers and adopting bylaws.\textsuperscript{60} At an incorporators’ meeting, incorporators must elect directors and complete the organization of the corporation or elect a board of directors who will complete the organization of the corporation.\textsuperscript{61}

Any action that the incorporators are required or permitted to take at an organizational meeting may be taken without a meeting.\textsuperscript{62} All incorporators must consent to taking such action without a meeting, but the vote on the action itself

\textsuperscript{53} TENN. CODE ANN. § 48-20-201(a)(1) (2004).
\textsuperscript{54} TENN. CODE ANN. § 48-20-202(a) (2004).
\textsuperscript{56} TENN. CODE ANN. § 48-16-202 (2004).
\textsuperscript{57} TENN. CODE ANN. § 48-16-101(c)(5) (2004).
\textsuperscript{58} TENN. CODE ANN. § 48-12-105(a)(1) (2004).
\textsuperscript{59} TENN. CODE ANN. § 48-12-105(a)(2) (2004).
\textsuperscript{60} TENN. CODE ANN. § 48-12-105(a)(1) (2004).
\textsuperscript{61} TENN. CODE ANN. § 48-12-105(a)(2) (2004).
\textsuperscript{62} TENN. CODE ANN. § 48-12-105(b) (2004).
does not have to be unanimous.\(^{63}\) In order for an action to be taken without a meeting, the action must receive the number of affirmative votes as would be required to take the same action at a “live” meeting.\(^{64}\)

D. Bylaws

The bylaws may contain any provision for managing the business and regulating the affairs of the corporation that is not inconsistent with the charter or applicable law.\(^{65}\) The Act specifies bylaws as the source of authority and duties of officers.\(^{66}\)

E. Name

1. **Required Words or Abbreviations**

Except for insurance or banking businesses, the corporation’s name must contain one of the following words or abbreviations: (i) Corporation, (ii) Incorporated, (iii) Company, (iv) Corp., (v) Inc., (vi) Co. Alternatively, the corporate name may contain “words or abbreviations of like import in another language (provided they are written in roman characters or letters).”\(^{67}\)

2. **Distinctiveness**

Except as noted below, the corporate name must be distinguishable from:

(i) The corporate name or assumed name of a corporation incorporated or authorized to transact business in Tennessee;

(ii) A reserved or registered corporate name or assumed corporate name;

(iii) The corporate name of a not-for-profit corporation incorporated or authorized to transact business in Tennessee;

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\(^{63}\) Id.

\(^{64}\) Id.

\(^{65}\) TENN. CODE ANN. § 48-12-106(b) (2004).


\(^{67}\) TENN. CODE ANN. § 48-14-101(a) (2004).
(iv) A limited partnership name reserved or organized under the laws of Tennessee or registered as a foreign limited partnership in Tennessee; and

(v) The name of a limited liability company authorized to do business as a foreign limited liability company in Tennessee. 68

3. Assumed Name

A domestic corporation or a foreign corporation authorized to transact business or applying for a certificate of authority to transact business may elect to adopt an assumed corporate name. 69 Subject to certain limitations, 70 an assumed name is any name used by the corporation other than its true corporate name. An assumed name must comply with the requirements listed above regarding corporate names, except that an assumed name is not required to contain any certain words or abbreviations. 71

Before transacting any business in Tennessee under an assumed corporate name, the corporation must, pursuant to resolution by its board of directors, execute and file an application setting forth the true corporate name, the state or country under the laws of which it is organized, that it intends to transact business under an assumed corporate name, and the assumed corporate name which it proposes to use. 72 The right to use an assumed name is effective for five years from the date of filing with the Secretary of the State. 73

4. Reserved Name

A person may reserve the exclusive use of a corporate name by delivering an application and a $20 fee 74 to the Secretary of State for filing. 75 If the Secretary of

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70 Id.

71 Id.


State finds that the corporate name satisfies the requirements of section 48-54-101 and is available,\(^{76}\) the Secretary of State shall reserve the name for the applicant’s exclusive use for a four-month period.\(^{77}\)

5. **Registered Name**\(^{78}\)

A foreign corporation may register its corporate or assumed name if the name is distinguishable from other corporate names on file with the Tennessee Secretary of State.\(^{79}\) The registration is effective for the balance of the calendar year and is annually renewable.\(^{80}\) A $20 fee must accompany the application.\(^{81}\)

**F. Registered Agent and Office**

Each corporation must continuously maintain in this state both a registered office and a registered agent.\(^{82}\) A registered agent may be an individual who resides in Tennessee, a domestic corporation, or a foreign corporation authorized to transact business in this state.\(^{83}\) A registered office in Tennessee must be a business address

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\(^{75}\) TENN. CODE ANN. § 48-54-102 (2004). Application for Reservation of Corporate Name, [at](http://www.state.tn.us/sos/forms/ss-4428.pdf).

\(^{76}\) A document entitled “Business Name Availability Guidelines” is available on the Tennessee Secretary of State’s Website, at [http://www.state.tn.us/sos/forms/busname.pdf](http://www.state.tn.us/sos/forms/busname.pdf). This document provides guidance in determining whether a corporate name is “available.” A searchable database called “Business Name Availability” is also helpful in determining whether a proposed name is distinguishable. This database is available on the Tennessee Secretary of State’s Website, at [http://www.tennesseeanytime.org/sosname/](http://www.tennesseeanytime.org/sosname/).

\(^{77}\) TENN. CODE ANN. § 48-54-102(a) (2004).

\(^{78}\) The Application for Registration of Corporate Name, [at](http://www.state.tn.us/sos/forms/ss-4429.pdf).

\(^{79}\) TENN. CODE ANN. § 48-14-103(a) (2004).

\(^{80}\) TENN. CODE ANN. § 48-14-103(c) (2004).

\(^{81}\) TENN. CODE ANN. § 48-11-303(a) (2004).


\(^{83}\) TENN. CODE ANN. § 48-15-104(a)(2) (2004). If a registered agent resigns or is unable to perform his or her duties, the designating corporation shall promptly designate another registered agent so that the corporation will at all times have a registered agent in Tennessee. TENN. CODE ANN. § 48-15-101(b) (2004).
of the registered agent and may be the same as any of the corporation’s places of business.\textsuperscript{84} Also note that this information must be included in the original charter.\textsuperscript{85}

G. Initial Officers and Directors

No later than the date of the organizational meeting, each corporation must name at least one director to its board of directors and have a President and a Secretary, who must be different individuals.\textsuperscript{86}

H. Filing of Charter with Register of Deeds

A copy of the charter and related documents must be filed with the Register of Deeds in the county in Tennessee where, if at all, the corporation maintains its principal place of business in this state.\textsuperscript{87} A filing fee of $5, plus fifty cents for each page exceeding five pages, may be charged.\textsuperscript{88}

III. TENNESSEE TAX ISSUES

A. Franchise Tax and Excise Tax

Franchise and excise taxes are privilege taxes. Generally, all corporations and LLCs in Tennessee are subject to both the franchise tax and the excise tax.\textsuperscript{89} All businesses subject to either of these taxes must register with the Tennessee Department of Revenue by completing and filing the Application for Franchise, Excise Tax Registration form.\textsuperscript{90} This form must be filed within fifteen days of the date on which the business becomes subject to the tax.\textsuperscript{91}

\textsuperscript{84} TENN. CODE ANN. § 48-15-101(a) (2004).

\textsuperscript{85} TENN. CODE ANN. § 48-12-102(a)(3) (2004).

\textsuperscript{86} TENN. CODE ANN. § 48-12-105(a)(2) (2004). For more information about officers of the corporation, see infra Part IV.A. For more information about directors of a corporation, see infra Part IV.B.

\textsuperscript{87} TENN. CODE ANN. § 48-11-303(d) (2004).

\textsuperscript{88} TENN. CODE ANN. § 48-11-303(d) (2004).

\textsuperscript{89} TENN. CODE ANN. §§ 67-4-2007(a), 67-4-2105(a) (2004).

\textsuperscript{90} See http://www.state.tn.us/revenue/forms/fae/faeapply99.pdf.

\textsuperscript{91} TENN. CODE ANN. § 67-4-2003(e) (2004).
1. Due Dates

The Franchise, Excise tax return is due the fifteenth day of the fourth month following the close of the business’s books and records. The return form\textsuperscript{92} will be sent automatically to the registered agent’s address as stated in the Charter. Quarterly estimated payments are due the fifteenth day of the fourth, sixth, and ninth months of the current tax year and the fifteenth day of the first month of the next tax year. A six-month extension will be granted upon request.\textsuperscript{93}

2. Tax Rates

The franchise tax is based on values shown on a company’s balance sheet at the end of its fiscal year.\textsuperscript{94} The franchise tax rate is 0.25% of the greater of (1) the net worth or (2) the value of real and tangible property in Tennessee. The net worth is defined as total assets less total liabilities, determined in accordance with generally accepted accounting principles (“GAAP”). Treasury stock is not included in net worth. The minimum tax is $100.\textsuperscript{95}

The excise tax is 6.5% of Tennessee net earnings.\textsuperscript{96} Net earnings are defined as federal taxable income before the operating loss deduction and special deductions subject to certain state adjustments.\textsuperscript{97} Those adjustments are listed at section 67-4-2006(b).

3. Apportionment

Taxpayers doing business both in and out of the state of Tennessee, within the meaning of section 67-4-2010, so as to be entitled to apportionment, shall apportion net earnings or net loss using the appropriate apportionment formula.\textsuperscript{98}

\textsuperscript{92} The Franchise, Excise Tax Return form, at http://www.state.tn.us/revenue/forms/fae/newfe1702002.pdf.

\textsuperscript{93} The Application for Extension of Time to File Franchise, Excise Return, at http://www.state.tn.us/revenue/forms/fae/fac173.pdf.

\textsuperscript{94} Id.

\textsuperscript{95} Id.

\textsuperscript{96} TENN. CODE ANN. § 67-4-2007(a) (2004).

\textsuperscript{97} TENN. CODE ANN. § 67-4-2006(a)(1) (2004).

\textsuperscript{98} TENN. CODE ANN. § 67-4-2006(c) (2004).
When calculating both the franchise and excise tax, corporations that are taxable in states other than Tennessee may apportion the measure of tax between Tennessee and the other states where business activities are taxable. The precise method by which apportionment may be accomplished depends on the tax and the type of business.99

4. **Excise Tax Apportionment Formula**100

Net business earnings101 \cdot \frac{(property factor + payroll factor + 2 \cdot (receipts factor))}{4}

Property factor102 = \frac{Average value of taxpayer’s real and tangible personal property owned or rented and used in Tennessee during tax period}{Average value of taxpayer’s real and tangible personal property owned or rented and used during tax period}

Payroll factor103 = \frac{Total amount paid in Tennessee during the tax period by the taxpayer for compensation to employees}{Total amount paid everywhere during the tax period by the taxpayer for compensation to employees}

Receipts factor104 = \frac{Total receipts of taxpayer in Tennessee during the tax period}{Total receipts of the taxpayer everywhere}

Non-business earnings are allocated in accordance with section 67-4-2111.

99 See TENN. CODE ANN. §§ 67-4-2013, 67-4-2113 (2004) (stating special apportionment formulas for common carriers, air carriers, air express carriers, and insurance companies).

100 TENN. CODE ANN. § 67-4-2012(a) (2004).

101 Business earnings are earnings that arise in the regular course of the taxpayer’s business. TENN. CODE ANN. § 67-4-2004(1) (2004).

102 TENN. CODE ANN. § 67-4-2012(b) (2004).

103 TENN. CODE ANN. § 67-4-2012(c) (2004).

104 TENN. CODE ANN. § 67-4-2012(g) (2004).
5. **Franchise Tax Apportionment Formula**  

\[
\text{Net worth} \cdot \frac{(\text{property factor} + \text{payroll factor} + 2 \cdot (\text{receipts factor}))}{4}
\]

**Property factor** \(^{106}\):

\[
\text{Average value of taxpayer’s real and tangible personal property, excluding exempt inventory, owned or rented and used in Tennessee during the tax period}
\]

\[
\text{Average value of taxpayer’s real and tangible personal property, excluding exempt inventory, owned or rented and used during tax period}
\]

**Payroll factor** \(^{107}\):

\[
\text{Total amount paid in Tennessee during the tax period by the taxpayer for compensation}
\]

\[
\text{Total amount paid everywhere during the tax period by the taxpayer for compensation}
\]

**Receipts factor** \(^{108}\):

\[
\frac{\text{Total receipts of the taxpayer in Tennessee during the tax period}}{\text{Total receipts of the taxpayer everywhere during the tax period}}
\]

### B. Sales and Use Tax

If a business is involved in manufacturing, distributing, selling, renting, or leasing tangible personal property, or providing taxable services, the business must

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\(^{105}\) TENN. CODE ANN. § 67-4-2111(a) (2004).

\(^{106}\) TENN. CODE ANN. § 67-4-2111(b) (2004).

\(^{107}\) TENN. CODE ANN. § 67-4-2111(e) (2004).

\(^{108}\) TENN. CODE ANN. § 67-4-2111(g) (2004).
hold a Certificate of Registration\textsuperscript{109} to conduct business in Tennessee. A business that has more than one location in Tennessee must hold a Certificate for each location.

The sales tax rate varies by location in the state.\textsuperscript{110} The state levies a 7\% tax on each item or article of tangible personal property sold at retail\textsuperscript{111} in the state and a 6\% tax on the retail sale of food and food ingredients subject to certain exceptions.\textsuperscript{112} In addition, counties and cities may levy a local option tax, provided that the tax is applicable to only the first $1600 of sale or use of any single item of personal property.\textsuperscript{113}

The use tax is the counterpart to the sales tax. The use tax rate is the same as the sales tax rate and is imposed on the sale of tangible personal property when the tangible personal property is not sold, but is used, consumed, distributed, or stored for use or consumption in Tennessee provided that there is no duplication of the tax.\textsuperscript{114}

A corporation must file the sales and use tax return\textsuperscript{115} monthly, quarterly, or annually, based on the corporation’s qualifications.\textsuperscript{116} If the corporation is required

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{109} The Application for Registration for the Sales and Use Tax, \textit{at} \url{http://www.state.tn.us/revenue/forms/general/f13005_1.pdf}.
\item \textsuperscript{110} See Tennessee Department of Revenue Chart, \textit{at} \url{http://www.state.tn.us/revenue/pubs/taxlist.pdf}.
\item \textsuperscript{111} TENN. CODE ANN. \textsection 67-6-202(a) (2004). There is an additional tax at the rate of 2.75\% “on the amount in excess of one thousand six hundred dollars ($1,600), but less than or equal to three thousand two hundred dollars ($3,200), on the sale or use of any single article of personal property as defined in \textsection 67-6-702(d).” \textit{Id.}
\item \textsuperscript{112} TENN. CODE ANN. \textsection 67-6-228(a) (2004).
\item \textsuperscript{113} TENN. CODE ANN. \textsection 67-6-202(a) (2004). A chart detailing the local option rates for each city and county in Tennessee is available at \url{http://state.tn.us/revenue/pubs/taxlist.pdf}.
\item \textsuperscript{114} TENN. CODE ANN. \textsection 67-6-203(a) (2004).
\item \textsuperscript{115} The Revised State and Local Sales and Use Tax Return form, \textit{at} \url{http://www.state.tn.us/revenue/forms/sales/2002sls450after715.pdf}. Instructions for the preparation of the Tennessee Sales or Use Tax Returns, \textit{at} \url{http://www.state.tn.us/revenue/forms/sales/saleinst.pdf}.
\item \textsuperscript{116} TENN. CODE ANN. \textsection 67-5-505 (2004); TENN. COMP. R. & REGS. Ch. 1320-5-1-.74 (1), (2)(a) (2004).
\end{itemize}
\end{footnotesize}
to file a monthly return, the return is due on the twentieth day of the month following the end of the reporting period.117

C. Annual Reports

With limited exceptions,118 domestic corporations and foreign corporations authorized to transact business in Tennessee must file an annual report each year.119 This report contains information about the corporation such as its name and the state or country where it is incorporated, the address of its registered office, the name of its registered agent, and the names and addresses of its directors and principal officers.120 The annual report form121 is due on the first day of the fourth month following the close of the corporation’s fiscal year and the corporation must file with the Secretary of State122 accompanied by a $20 filing fee.123 Failure to file an annual report may result in administrative dissolution of the corporation.124

D. Business Tax125

Prior to engaging in business, every corporation must contact the office of the county clerk in the county where the business will be domiciled along with the city tax collector, if applicable, to register for payment of appropriate business

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117 See http://www.state.tn.us/revenue/tntaxes/salesanduse.htm.
118 State and local banks are not required to file annual reports. TENN. CODE ANN. § 48-26-203(d) (2004).
120 TENN. CODE ANN. § 48-26-203(a) (2004).
121 Annual report forms are not available as blank forms and must be filed on the preprinted forms provided by the Division of Business Services. The forms are prepared and mailed to each active company on an annual basis. Requests for replacement annual report forms may be made to the Division via e-mail, by telephone, or in writing.
122 TENN. CODE ANN. § 48-26-203(c) (2004).
taxes. Corporations should contact the appropriate county or city official to obtain information and forms for that jurisdiction.

E. State Unemployment Insurance

Most employers who have workers in Tennessee are required to pay the state unemployment tax (SUTA) premiums. These premiums are used solely to pay unemployment benefits to workers who have lost their jobs through no fault of their own.

A new employer must complete a Report to Determine Status – Application for Employer Number. If a business is liable for unemployment insurance premiums in Tennessee, it will be assigned an eight-digit employer account number.

All employers covered under Tennessee’s Employment Security Law are required to submit Quarterly Premium and Wage reports (Forms LB-0456 and LB-0851). These reports must be submitted with the appropriate payment by the date due, even if no wages were paid during the quarter. The due dates are April 30th, July 31st, October 31st and January 31st.

Each quarter, covered employers must report total gross wages paid to all employees and pay unemployment insurance premiums based on the first $7000 paid to each employee in a calendar year. Premiums are calculated by using a premium rate assigned by the Department of Labor each year.

The employer premium rate is dependent upon whether the business is a new employer or an experience-rated employer. New employers in Tennessee are

127 The following website is useful for obtaining contact information for county and city officials: http://www.tennesseeanytime.org/local/index.html.
128 Employers are subject to this tax if (1) total payroll equals or exceeds $1500 in any calendar quarter in either the current or preceding calendar year, or (2) if the business has at least one employee on any day during twenty different calendar weeks in either the current or the preceding calendar year. TENN. CODE ANN. § 50-7-205 (2004).
130 These forms are not currently available online. To obtain these forms, contact the Tennessee Department of Labor at 1.800.344.8337 (if calling from within Tennessee), or call 1.615.741.2486 (if calling from outside Tennessee).
131 TENN. CODE ANN. § 50-7-403(a) (2004).
initially subject to a "new employer" rate until their account has been subject to 
premiums and chargeable with benefits for thirty-six consecutive months ending on 
the computation date (December 31st of each year). An employer must pay unemployment 
insurance premiums for thirty-six consecutive months ending on December 31st. An 
experience-rated employer's premium rate is determined by two factors: the 
employer's reserve ratio and the level of the unemployment insurance 
compensation trust fund. Generally, covered employers must also pay a Job Skills Fee quarterly, based on the first $7000 paid to each employee in a calendar year.

F. Worker's Compensation Insurance

Every employer is required to display the Tennessee Workers' Compensation Insurance notice. If an employer has five or more employees, including part-

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133 Id.
134 Id.
135 Id.
137 TENN. CODE ANN. § 50-7-403(f) (2004).
138 An employer's reserve ratio is determined by taking the total premiums the employer has paid as of December 31 and subtracting from that all benefits charged against that employer as of December 31. The difference is then divided by the employer's average payroll for the last three years. The resulting figure is the employer's reserve ratio percent. An employer's premium rate is the rate that corresponds with his reserve ratio on the effective Premium Table. TENN. CODE ANN. § 50-7-403(b)(1)(A) (2004).
139 See TENN. CODE ANN. § 50-7-403 (2004).
140 TENN. CODE ANN. § 50-7-451(b) (2004).
time employees, full-time employees, and family member employees, or if the business is engaged in the construction industry (even if it has less than five employees) it is required to have workers’ compensation insurance. A business may obtain workers’ compensation coverage even if it is not required to.

Corporate officers may elect to be exempt from an employer’s workers’ compensation policy. Corporate officers may elect to be exempt from an employer’s workers’ compensation policy.143 Sole proprietors and partners who devote full time to the partnership are excluded from a workers’ compensation policy, but may elect coverage.144

Employers subject to workers’ compensation laws must maintain coverage with a private insurer or self-insure if they meet minimum requirements of financial ability to pay claims arising under the law.145 The Tennessee Department of Commerce and Insurance determines whether a business qualifies for self-insurance146 and will generally require workers’ compensation premiums to be $350,000 or greater before self-insurance is allowed.147

IV. CAPITAL STRUCTURE AND FINANCING THE CORPORATION

A. Introduction

Every corporation organized under the laws of Tennessee must authorize the existence of at least one class of shares.148 Although the former Tennessee General Corporation Act required a minimum of $1000 consideration for the issuance of shares, the current act allows for the issuance of shares without consideration.149

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143 TENN. CODE ANN. § 50-6-104 (2004). A corporate officer may elect to be excluded from the employer’s workers’ compensation policy by filing the appropriate form, available at http://www.state.tn.us/labor-wfd/forms/i-6.pdf.

144 TENN. CODE ANN. § 50-6-102(9)(B) (2004). A sole proprietor or partner may elect to be included in the employer’s workers’ compensation policy by filing the appropriate form, available at http://www.state.tn.us/labor-wfd/forms/i-4.pdf.

145 TENN. CODE ANN. § 50-6-405(a) (2004).

146 TENN. CODE ANN. § 50-6-405(b) (2004).

147 More information regarding qualification requirements for self-insurance is available at http://www.state.tn.us/commerce/insurance/pdf/forms/findapp.pdf.

initial shares, the TBCA prescribes no minimum value of capitalization. However, a new corporation should have adequate capital in light of its initial anticipated business in order to avoid shareholder liability under a “piercing the corporate veil” theory.

B. Classes of Stock


A corporation’s charter must authorize one or more classes of shares that, in the aggregate, have unlimited voting rights and the right to receive any net assets upon dissolution. At all times following initial capitalization, at least one of these types of shares must be outstanding.

The charter must state the number of shares of each class that the corporation is authorized to issue. If the charter authorizes more than one class or series of shares, each class or series must have a unique name. The preference, limitations, and relative rights of shares of a class must be described in the charter before those shares may be issued. Generally, all shares of a particular class must have preferences, limitations, and relative rights identical to other shares in the same class. However, the description of a series within a class may provide that its preferences, limitations, and relative rights are not identical to other series in its class.

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150 See infra Part VIII for more information about piercing the corporate veil.


152 TENN. CODE ANN. § 48-16-103(c) (2004).


154 TENN. CODE ANN. § 48-16-101(a) (2004).  If the charter does not already describe these characteristics of the class, it must be amended.

155 Id.

156 TENN. CODE ANN. § 48-46-102(c) (2004).
The charter may include a “blank check” provision empowering the board of directors, rather than shareholders, to specify,

in whole or part, the preferences, limitations, and relative rights of any unissued class or series of shares.\textsuperscript{158}

A charter may authorize one or more classes of shares that:

- Have no voting rights as long as there is one class of voting stock;

- Are redeemable or convertible;\textsuperscript{159}

- Entitle the holders to distributions calculated in any manner;\textsuperscript{160}

- Have preferences over any other class of shares with respect to distributions;\textsuperscript{161} or

- Have a par value.\textsuperscript{162}


The TBCA provides that a shareholder of a corporation does not have a vested property right resulting from any provision in the charter or bylaws.\textsuperscript{163} Each

\textsuperscript{157} The board of directors must file articles of amendment to the charter, which are effective without shareholder approval, with certain information such as the name of the corporation and the date the board of directors adopted the amendment. TENN. CODE ANN. § 48-16-102(d) (2004). The Articles of Amendment to the Charter, \textit{at} http://www.state.tn.us/sos/forms/ss-4421.pdf.

\textsuperscript{158} TENN. CODE ANN. § 48-16-102(a) (2004). The ability of the board of directors to make this determination is subject to the limitations set forth in section 48-16-101. \textit{Id.}

\textsuperscript{159} TENN. CODE ANN. § 48-16-101(c)(2) (2004). The charter must specify whether the redemption or conversion (1) will occur at the option of the corporation, shareholder, or another person or upon the occurrence of a designated event; (2) is for cash, indebtedness, securities or other property; and (3) is in a designated amount or is in an amount determined in accordance with a designated formula or by reference to extrinsic data or events. \textit{Id.}

\textsuperscript{160} TENN. CODE ANN. § 48-16-101(c)(3) (2004).

\textsuperscript{161} TENN. CODE ANN. § 48-16-101(c)(4) (2004).

\textsuperscript{162} TENN. CODE ANN. § 48-16-101(c)(5) (2004). Shares may have a stated par value, provided that the mere recitation of a par value for shares shall not create a requirement for a minimum consideration for the issuance of any such shares or impose any other restriction on their issuance or create any other right or liability with respect thereto. \textit{Id.}

\textsuperscript{163} TENN. CODE ANN. § 48-20-101(b) (2004).
shareholder must protect himself against discriminatory future charter amendments by bargaining for charter provisions that limit the right of the board of directors and other shareholders to amend particular charter provisions.\textsuperscript{164}

C. Sale of Stock by a Corporation Under the TBCA

1. Introduction

An offer by a Tennessee corporation to sell stock to Tennessee residents is governed by the TBCA, the Federal Securities Act of 1933, as amended (the “1933 Act”), and the Tennessee Securities Act of 1980, as amended (the “Tennessee Securities Act”). The corporation that issues shares of stock is identified as an “issuer” in securities law parlance.

2. Subscription for Shares

A subscription\textsuperscript{165} to purchase shares is enforceable only if it is in writing.\textsuperscript{166} When the subscription agreement is entered into before incorporation, the subscription is irrevocable for six months unless the subscription agreement provides otherwise or all the subscribers agree to revocation.\textsuperscript{167} When the subscription agreement is entered into after incorporation, the subscription “is a contract between the subscriber and the corporation subject to section 48-16-202.”\textsuperscript{168}

3. Stock Certificates

Stock certificates must be signed by two officers of the corporation (typically, the President and the Secretary), either manually or in facsimile.\textsuperscript{169} The Act also provides for the use of stock without certificates.\textsuperscript{170}

\textsuperscript{164} TENN. CODE ANN. § 48-20-101(a) (2004).

\textsuperscript{165} A subscription is “[a] written contract to purchase newly issued shares of stock or bonds.” BLACK’S LAW DICTIONARY 1441 (7th ed. 1999).

\textsuperscript{166} TENN. CODE ANN. § 48-16-201(a) (2004) (regarding pre-incorporation subscriptions); TENN. CODE ANN. § 48-16-201(c) (regarding post-incorporation subscriptions).

\textsuperscript{167} TENN. CODE ANN. § 48-16-201(a) (2004).

\textsuperscript{168} TENN. CODE ANN. § 48-16-201(c) (2004).


\textsuperscript{170} TENN. CODE ANN. § 48-16-207(a) (2004).
4. **Required Consideration**

Shareholders must pay for shares with “adequate” consideration.\(^{171}\) The consideration may consist of cash, promissory notes, tangible or intangible property, past or future services, other benefits to be received, or other securities of the corporation.\(^{172}\) The board of directors must make the determination of whether the consideration is adequate unless the charter reserves that right to the shareholders.\(^{173}\)

The corporation may place in escrow shares purchased with promissory notes or the promise of future services or benefits and issue the shares in installments as the shareholder performs his obligations.\(^{174}\) The corporation may cancel escrowed shares in whole or in part if the shareholder defaults.\(^{175}\) In general, a transferee of shares issued in exchange for a note or a future services contract is liable only to the extent of the consideration for which the shares were authorized to be issued.\(^{176}\) Therefore, it is advisable that companies place these shares in escrow.

5. **Options and Warrants**

Unless limited or prohibited by the charter, the board of directors is empowered to grant rights, warrants, and options to purchase shares of any authorized class or series up to the maximum number of authorized shares that would be available if exercised.\(^{177}\) If insufficient authorized shares are available for this purpose, the granting of the rights, options, or warrants is subject to approval by the holders of the classes of shares necessary to amend the charter to increase the number of authorized shares.\(^{178}\)

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\(^{172}\) **TENN. CODE ANN. § 48-16-202(b)** (2004).

\(^{173}\) **TENN. CODE ANN. § 48-16-202(a), (c)** (2004).

\(^{174}\) **TENN. CODE ANN. § 48-16-202(e)** (2004). In most cases, attorneys should advise their clients to place such shares in escrow.

\(^{175}\) *Id.*

\(^{176}\) **TENN. CODE ANN. § 48-16-203** (2004).

\(^{177}\) **TENN. CODE ANN. § 48-16-205(a)** (2004).

6. Preemptive Rights

The TBCA abolished shareholders’ preemptive rights unless those rights are expressly provided for in the charter. 179 If a corporation includes in its charter the phrase “the corporation elects to have pre-emptive rights” or a statement of similar import, certain principles will apply to that corporation, unless the charter expressly provides otherwise. 180 These principles include special preemptive rights for both voting and non-voting shareholders. 181 However, preemptive rights do not apply to certain types of stock. 182

V. SHAREHOLDER RIGHTS

A. Meetings

1. Annual Meetings

A corporation must hold at least one shareholders’ meeting per year. 183 The date of the meeting or the manner of fixing the date must be set forth in the bylaws. 184 Generally, the bylaws also specify a location or manner of selecting the location for the annual meeting. 185 A corporation’s failure to hold an annual meeting at the time determined in the bylaws does not affect the validity of any corporate action. 186

2. Special Meetings

A special meeting may be convened by the board of directors, by persons designated in the charter or bylaws, or unless otherwise provided in the charter,

179 TENN. CODE ANN. § 48-16-301(a) (2004).
180 TENN. CODE ANN. § 48-16-301(b) (2004).
184 Id. TENN. CODE ANN. § 48-17-101(b) (2004).
185 Id. If the bylaws do not determine the location of the annual meeting, it must be held at the corporation’s principal office. Id.
186 TENN. CODE ANN. § 48-17-101(c) (2004).
holders of 10% or more of the shares entitled to vote on a matter proposed for consideration upon delivering written demand to the corporate secretary.\textsuperscript{187}

Special shareholders’ meetings are held at the place stated in or fixed in accordance with the corporation’s bylaws. If no place is stated or fixed in accordance with the bylaws, special meetings are held at the corporation’s principal office.\textsuperscript{188}

3. Notice

Generally, a corporation must give notice of annual or special meetings only to the shareholders entitled to vote at the meeting.\textsuperscript{189} This notice must occur no fewer than ten days nor more than two months before the date of the meeting.\textsuperscript{190} The notice generally need not specify the purpose of an annual meeting.\textsuperscript{191} However, notice for a special meeting must include the purpose of the meeting.\textsuperscript{192}

The corporation must generally give notice in writing, but oral notice is effective if it is reasonable under the circumstances and not prohibited by the charter or bylaws.\textsuperscript{193} Notice may be given by facsimile transmission, by wire or wireless communication, by private carrier, or by mail.\textsuperscript{194} Written notice to a corporation’s shareholders is effective when mailed so long as it is comprehensible, mailed “postpaid,” and addressed to the shareholder’s address shown in the corporation’s current record of shareholders.\textsuperscript{195}

\textsuperscript{187} TENN. CODE ANN. § 48-17-102(a) (2004).

\textsuperscript{188} TENN. CODE ANN. § 48-17-102(c) (2004).

\textsuperscript{189} TENN. CODE ANN. § 48-17-105(a) (2004).

\textsuperscript{190} Id.

\textsuperscript{191} TENN. CODE ANN. § 48-17-105(b) (2004).

\textsuperscript{192} TENN. CODE ANN. § 48-17-105(c) (2004). “Only business within the purpose or purposes described in the meeting notice . . . may be conducted at a special shareholders’ meeting.” TENN. CODE ANN. § 48-17-102(d).

\textsuperscript{193} TENN. CODE ANN. § 48-11-202(a) (2004).

\textsuperscript{194} TENN. CODE ANN. § 48-11-202(b) (2004). This section also specifies other permitted forms of notice. Id.

\textsuperscript{195} TENN. CODE ANN. § 48-11-202(c) (2004). Presumably, “postpaid” means first class mail. To determine the effective date of notice in other circumstances, see TENN. CODE ANN. § 48-11-202(e), (f) (2004).
A shareholder may waive notice at any time.\textsuperscript{196} The waiver must be in writing, signed by the shareholder, and delivered to the corporation so it may be included in the minutes or filed in the corporate records.\textsuperscript{197} Unless a shareholder objects at the beginning of the meeting, his attendance at the meeting constitutes a waiver of any objection to lack of notice.\textsuperscript{198} In addition, a shareholder waives objection to the consideration of a particular matter that is not within the announced purpose of the meeting unless the shareholder objects when the matter is presented.\textsuperscript{199}

4. Court-Ordered Meetings

A court of the jurisdiction in which a corporation’s principal office is located may order a meeting to be held on application of any shareholder of the corporation entitled to participate in an annual meeting if an annual meeting was not held during the proper time period.\textsuperscript{200} The court may also order a meeting to be held on application of any shareholder who signed a valid demand for a special meeting if the notice was not given within the proper time period\textsuperscript{201} or the special meeting was not held in accordance with the notice.\textsuperscript{202}

The court has very broad authority to order a meeting. Among other powers, the court may fix the time and place of the meeting, determine the shares entitled to participate in the meeting, specify a record date, and fix the quorum required for specific matters to be considered at the meeting.\textsuperscript{203}

\begin{itemize}
\item \textsuperscript{196} TENN. CODE ANN. § 48-17-106(a) (2004).
\item \textsuperscript{197} \textit{Id}.
\item \textsuperscript{198} TENN. CODE ANN. § 48-17-106(b)(1) (2004).
\item \textsuperscript{199} TENN. CODE ANN. § 48-17-106(b)(2) (2004).
\item \textsuperscript{200} TENN. CODE ANN. § 48-17-103(a)(1) (2004). The proper time period for an annual meeting to be held is within the earlier of six months after the end of the corporation’s fiscal year or fifteen months after its last annual meeting. \textit{Id}
\item \textsuperscript{201} TENN. CODE ANN. § 48-17-103(a)(2)(A) (2004). Notice must be given within one month after the date the demand was delivered to the corporation’s secretary. \textit{Id}.
\item \textsuperscript{202} TENN. CODE ANN. § 48-17-103(a)(2)(B) (2004).
\item \textsuperscript{203} TENN. CODE ANN. § 48-17-103(b) (2004).
\end{itemize}
B. Action Without a Meeting

Any action that is required or permitted to be taken at a shareholders’ meeting may be taken without a meeting if the shareholders entitled to vote on the action give unanimous written consent.204 The consent to take the action without a meeting is separate from the shareholders’ vote on the action itself.205 In other words, shareholders who approve a vote on the action without a meeting may nevertheless vote against the action.

The action must be evidenced by one or more written consents that indicate each shareholder’s vote or abstention on the action and by the signature of each shareholder entitled to vote.206 The consent must be delivered to the corporation so that it may be included in the corporation’s minutes or filed with the corporate records.207

C. Voting

1. Matters Requiring Shareholder Approval

The TBCA requires that certain matters be subject to approval of the shareholders. The charter may allocate the voting rights on these issues among one or more series or classes of shares. In any event, at least one class or series or some combination of one or more classes or series must possess the requisite shareholder voting rights, even if certain of the series or classes are excluded altogether from voting.

In general, the matters that the Act subjects to shareholder approval (and on which a charter cannot disenfranchise shareholders) are:

- Election of the board of directors;208
- Removal of directors.209

204 TENN. CODE ANN. § 48-17-104(a) (2004).
205 Id.
206 Id.
207 Id.
208 TENN. CODE ANN. § 48-17-209(a) (2004).
• Approval of a merger plan;\textsuperscript{210}

• Sale or other disposition of all or substantially all of a corporation’s assets not in the usual and regular course of business;\textsuperscript{211}

• Approval of a share exchange;\textsuperscript{212}

• Dissolution.\textsuperscript{213}

The Act mandates that shareholders of a class or series are entitled to vote as a separate voting group\textsuperscript{214} on a proposed charter amendment, even if the class or series is designated as nonvoting, if the amendment would:

• Increase or decrease the number of authorized shares of the class or series;

\textsuperscript{209} \textsc{tenn. code ann.} § 48-18-108 (2004). This section provides for several limitations on the removal of directors. \textit{See} \textsc{tenn. code ann.} § 48-18-108(a) (2004) (charter may provide that directors may be removed only for cause); \textsc{tenn. code ann.} § 48-18-108(b) (2004) (director elected by voting group may only be removed without cause by that voting group); \textsc{tenn. code ann.} § 48-18-108(c) (2004) (cumulative voting considerations); \textsc{tenn. code ann.} § 48-18-108(d) (2004) (charter may provide for removal for cause by a majority vote of the entire board of directors); \textsc{tenn. code ann.} § 48-18-108(e) (2004) (notice of meeting must state that one purpose of the meeting is removal of directors).

\textsuperscript{210} \textsc{tenn. code ann.} § 48-21-104(a) (2004). However, under certain circumstances, shareholders are not entitled to vote on a merger plan. \textit{See} \textsc{tenn. code ann.} § 48-21-104(h) (2004) (shareholders of acquiring corporation do not vote if the charter of that corporation is not amended in the transaction, their share rights are not modified, and the corporation does not increase its outstanding shares by greater than 20\%); \textsc{tenn. code ann.} § 48-21-105(c) (2004) (shareholders of a non-surviving party to a merger not entitled to approve merger plan if acquiring corporation owns 90\% or more of the shares of non-surviving corporation; and shareholders of surviving party not entitled to approve merger plan if one party to merger owns 90\% of the shares of second party to merger).

\textsuperscript{211} \textsc{tenn. code ann.} § 48-22-102(a) (2004). Generally, a sale or other disposition of all or substantially all of the assets of one or more subsidiaries of a corporation is covered under this provision (and must be approved by the shareholders of the corporation) if the subsidiary or subsidiaries constitute all, or substantially all, of the properties of the corporation. \textit{Id.}

\textsuperscript{212} \textsc{tenn. code ann.} § 48-21-104(a) (2004). \textit{But see} \textsc{tenn. code ann.} §§ 48-21-104(h), 48-21-105(c) (2004).

\textsuperscript{213} \textsc{tenn. code ann.} § 48-24-102(c)(2) (2004).

\textsuperscript{214} \textit{See supra} Part V.C-4.
- Cause an exchange or reclassification of the class into shares of another class or series;
- Cause an exchange or reclassification, or create the right of exchange, of shares of another class or series into shares of the class or series;
- Change the designation, rights, preferences or limitations of the shares of the class or series;
- Split or reverse split the shares of a class or series;
- Create a class or series with senior distribution or liquidation rights to the class or series;
- Make a junior class or series superior to the class or series in distribution or liquidation rights;
- Deny or limit preemptive rights of the class.215

2. Matters Not Requiring Shareholder Approval

Unless the charter provides otherwise, a corporation’s board of directors may adopt amendments to the corporation’s charter without shareholder action to:

- Delete the names and addresses of initial directors;
- Delete the name and address of the initial registered agent or registered office if a statement of change is on file with the Secretary of State;
- Designate or change the address of the principal place of business;
- Designate a stock split to increase the number of shares if the corporation has only one class of shares outstanding;
- Change the corporate name by changing “corporation” to “corp.,” “company” to “co.,” and “incorporated” to “inc.” or vice-versa, or by adding, deleting, or changing a geographical attribution for the name;
- Change the address of the corporation’s current registered office and the name of its current registered agent at that office;

215 TENN. CODE ANN. § 48-20-104(a) (2004). This list is not exhaustive.
Delete the initial principal office, if an annual report is on file with the Secretary of State; or

- Make any other change expressly permitted by the Act to be made without shareholder action.\(^\text{216}\)

3. Special Voting Approval Requirements

Directors are elected by a plurality of the shareholders unless the charter specifies otherwise.\(^\text{217}\) There is no cumulative voting unless it is expressly provided for in the charter.\(^\text{218}\) The voting requirement for director elections applies to each class or series entitled in the charter to separate class or series voting.\(^\text{219}\)

Generally, each voting group entitled to vote separately on the plan must approve of the plan of merger or exchange by a majority of all the votes entitled to be cast on the plan by that voting group.\(^\text{220}\) Similarly, the sale or transfer of all or substantially all of the corporation’s assets must be approved by a majority of the votes entitled to be cast on the action.\(^\text{221}\)

4. Quorum

A quorum must exist at a meeting in order for any action to be taken.\(^\text{222}\) Unless the charter or the Act provides otherwise,\(^\text{223}\) a majority of the votes entitled to


\(^{217}\) TENN. CODE ANN. § 48-17-209(a) (2004).

\(^{218}\) TENN. CODE ANN. § 48-17-209(b) (2004). Cumulative voting may be provided in the charter by including the following statement or words of similar import: “[A designated voting group of] shareholders are entitled to cumulate their votes for directors.” TENN. CODE ANN. § 48-17-209(c) (2004).

\(^{219}\) TENN. CODE ANN. § 48-17-207(2004).

\(^{220}\) TENN. CODE ANN. § 48-21-104(f) (2004). However, the Act, the charter, or the board of directors may require a greater vote or a vote by voting groups. TENN. CODE ANN. § 48-22-102(c) (2004).

\(^{221}\) TENN. CODE ANN. § 48-22-102 (2004). The charter or the board of directors may require a greater vote or a vote by voting groups. Id.

\(^{222}\) TENN. CODE ANN. § 48-17-206(a) (2004).

\(^{223}\) An amendment to the charter that adds, changes, or deletes a greater quorum or voting requirement is subject to a special quorum requirement, which is the greater of the existing quorum provision or the proposed quorum requirement. TENN. CODE ANN. § 48-17-208(b) (2004).
be cast on a matter constitutes a quorum on that matter.\footnote{224} Action on a matter is approved by a quorum if the number of favorable votes exceeds the number of negative votes; therefore, abstentions count toward the quorum requirement but do not affect voting requirements.

If two or more voting groups are entitled to vote on a matter, each voting group must have a quorum.\footnote{225} Action may be taken by one voting group on a matter even though no action is taken by another voting group entitled to vote on the matter.\footnote{226}

5. Proxy Voting

A shareholder may vote his shares in person or by proxy.\footnote{227} The Act sets forth several valid ways in which a shareholder may name a proxy, including by writing,\footnote{228} telegram, cablegram, facsimile, or other electronic transmission.\footnote{229}

6. Record Date

The bylaws may fix or provide a manner for fixing the record date to be used for determining the shareholders entitled to notice of a shareholders’ meeting, to demand a special meeting, to vote, or to take any other action.\footnote{230} If the record date is

\footnotetext[224]{TENN. CODE ANN. § 48-17-206(a) (2004).}
\footnotetext[225]{TENN. CODE ANN. § 48-17-207(b) (2004).}
\footnotetext[226]{TENN. CODE ANN. § 48-17-207(b) (2004).}
\footnotetext[227]{TENN. CODE ANN. § 48-17-203(a) (2004). Proxy is “a person who is authorized to vote another’s stock shares.” BLACK’S LAW DICTIONARY 1241 (7th ed. 1999).}
\footnotetext[228]{TENN. CODE ANN. § 48-17-203(b)(1) (2004). The writing authorizing a proxy must be signed by the shareholder or an attorney-in-fact in the case of an individual shareholder, by an authorized officer, director, employee, agent or attorney-in-fact in the case of any other shareholder, or affixing the shareholder’s signature to the writing. \textit{Id}.}
\footnotetext[229]{TENN. CODE ANN. § 48-17-203(b)(2) (2004). The telegram, cablegram, facsimile or other electronic transmission shall either set forth or be submitted with information from which it can be determined that it was authorized by the shareholder. \textit{Id}. A reliable reproduction of any of the foregoing is also permitted so long as it is a complete reproduction of the entire original writing or transmission. TENN. CODE ANN. § 48-17-203(b)(3) (2004).}
\footnotetext[230]{TENN. CODE ANN. § 48-17-107(a) (2004).}
not determined by the bylaws, the board of directors may fix a future date as the record date.\textsuperscript{231}

If the board of directors sets the record date, it may not be more than seventy days before the meeting or action requiring a determination of shareholders.\textsuperscript{232} If a meeting is adjourned, the board of directors is permitted to fix a new record date.\textsuperscript{233} However, the board of directors must fix a new record date if the meeting is adjourned to a date more than four months after the date fixed for the original meeting.\textsuperscript{234}

D. Derivative Lawsuits

The Act establishes standing requirements and other procedures.\textsuperscript{235}

VI. OFFICERS AND DIRECTORS

A. Officers

1. Requirements

Two officers are required at a minimum: the President and the Secretary, who must be different persons.\textsuperscript{236} Additional officers are as designated in the bylaws or appointed by the board of directors.\textsuperscript{237} All officers must be appointed or elected by the board of directors unless the charter or bylaws provide otherwise.\textsuperscript{238} An

\textsuperscript{231} Id.

\textsuperscript{232} TENN. CODE ANN. § 48-17-107(b) (2004).

\textsuperscript{233} TENN. CODE ANN. § 48-17-107(c) (2004).

\textsuperscript{234} Id. When a court orders a meeting adjourned to a date more than four months after the date fixed for the original meeting, the court may provide that the original record date continues in effect or it may fix a new record date. TENN. CODE ANN. § 48-17-107(d) (2004).

\textsuperscript{235} TENN. CODE ANN. § 48-17-401 (2004).

\textsuperscript{236} TENN. CODE ANN. § 48-18-401(a), (d) (2004). One individual may simultaneously hold more than one office in a corporation, except the offices of president and secretary. TENN. CODE ANN. § 48-18-401(d) (2004). However, if the corporation has only one shareholder, the same person may hold the offices of both president and secretary. Id.

\textsuperscript{237} TENN. CODE ANN. § 48-18-401(a) (2004).

\textsuperscript{238} Id.
officer may appoint other officers or assistant officers only if expressly authorized to do so by the board of directors or the bylaws.\(^{239}\)

2. **Authority**

Authority of an officer is determined in accordance with the bylaws.\(^{240}\) In addition, the Tennessee Supreme Court has stated a tripartite test to determine whether a corporation is liable for the unauthorized act of an agent:\(^{241}\)

- The corporation manifested consent or knowingly permitted the agent to assume exercise of authority;
- The third party knew of facts and in good faith had reason to believe, and did believe, that the agent was authorized; and
- The third party changed position in reliance and will be injured or suffer loss if the act done does not bind the corporation.

3. **Resignation and Removal of Officers**

An officer may resign at any time by delivering notice to the corporation.\(^{242}\) Unless a later date is specified, the resignation is effective when delivered.\(^{243}\) If the resignation is made effective at a later date, the board of directors may fill the vacated position before the effective date so long as the new officer does not take office until the effective date.\(^{244}\)

The board of directors has the power to remove any officer with or without cause.\(^{245}\) Additionally, an officer may remove, with or without cause, any officer he appointed.\(^{246}\) It is important to note that officers under employment contracts may

\(^{239}\) TENN. CODE ANN. § 48-18-401(b) (2004).


\(^{241}\) Knox-Tenn Rental Co. v. Jenkins Ins., 755 S.W.2d 33, 40-41 (Tenn. 1988).

\(^{242}\) TENN. CODE ANN. § 48-18-404(a) (2004).

\(^{243}\) Id.

\(^{244}\) Id.

\(^{245}\) TENN. CODE ANN. § 48-18-404(b) (2004).

\(^{246}\) Id.
be removed, but the corporation may be subject to damages if such removal is a breach of contract. In addition, there are federal and state anti-discrimination laws that may limit removal powers under the Act.

4. **Standard of Care**

Officers of a corporation owe the corporation a duty of care and a duty of loyalty. Although the Act does not use the terms “duty of care” and “duty of loyalty,” it sets forth a three-part test requiring officers:

- To act in good faith;
- With care of an ordinarily prudent person in a similar position; and
- In a manner he believes to be in the best interests of the corporation.

In addition, in *Knox-Tenn Rental v. Jenkins Insurance*, the Tennessee Supreme Court held an officer of a closely-held corporation to the “quasi-fiduciary” standard of the duty of loyalty and duty of care.

An officer may rely on other officers or employees, legal counsel, public accountants and other professionals who he reasonably believes are competent as to particular matters in satisfying the duty of care and duty of loyalty. Officers who breach the duty of care or duty of loyalty are liable to the corporation for resulting damages.

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249 *Knox-Tenn Rental*, 755 S.W.2d at 36-37.

250 TENN. CODE ANN. § 48-18-403(b) (2004). If the officer has knowledge of the matter in question that makes such reliance unwarranted, the officer is not acting in good faith. TENN. CODE ANN. § 48-18-403(c) (2004).

B. Directors

1. Requirements

A board of directors exercises corporate powers and manages the affairs of the corporation. The charter or bylaws may prescribe qualifications for directors. In general, all corporations are required to have a board of directors. The number of directors is fixed in accordance with the charter or bylaws, and there is no statutory maximum or minimum. The charter or bylaws may provide that the board of directors may fix or change the number of directors. Alternatively, the charter or bylaws may provide a variable range for the size of the board by fixing a minimum and a maximum number of directors. In this case, the shareholders or the board of directors may fix or change the number of directors, within the range.

2. Election of Directors

Shareholders elect directors at the first annual shareholders’ meeting and at each annual meeting thereafter, unless their terms are staggered, or unless their terms are for more than one year. The charter may authorize certain classes or...
series of shares to elect a certain number of directors, and each such class or series constitutes a separate voting group. 261

Directors are elected by a plurality of votes cast by the shares entitled to vote, unless otherwise provided in the charter. 262 Cumulative voting is not allowed unless the charter so provides. 263

A vacancy may occur from an increase in the number of directors, a removal with or without cause, or a resignation. 264 Unless the charter provides otherwise, if a vacancy occurs on the board of directors, the shareholders or the board of directors may fill the vacancy. 265 If a director resigns and makes his resignation effective at a later date, the pending vacancy may be filled, but the new director may not take office until the vacancy occurs. 266

3. Term of Directors

Initial directors’ terms expire at the first annual shareholders’ meeting at which directors are elected. 267 For all other directors, their terms expire at the next annual shareholders’ meeting following their election unless their terms are staggered, or unless the charter provides for longer terms. 268 A director continues to serve until a successor is elected and qualified or until there is a decrease in the number of directors, even if that director’s term has expired. 269

262 TENN. CODE ANN. § 48-17-209(a) (2004).
263 See supra note 218.
264 TENN. CODE ANN. § 48-18-110(a), (c) (2004).
265 TENN. CODE ANN. § 48-18-110 (2004). If the shareholders fill the vacancy and a director that was elected by a voting group of shareholders held the vacant office, only that group is entitled to vote to fill the vacancy. TENN. CODE ANN. § 48-18-110(b) (2004).
266 TENN. CODE ANN. § 48-18-110(c) (2004).
268 TENN. CODE ANN. § 48-18-105(b) (2004). The charter may not provide for terms longer than three years. Id. The term of a director elected to fill a vacancy expires at the next shareholders’ meeting at which directors are elected. TENN. CODE ANN. § 48-18-105(d) (2004).
The charter may provide for staggered terms by dividing the total number of directors into two or three groups. The terms of the first group expire at the first annual shareholders’ meeting after their election; the terms of the second group expire at the second annual meeting after their election; and the terms of the third group, if any, expire at the third annual meeting after their election. At each annual shareholders’ meeting, new directors are chosen for a term of two years (if there are two groups) or three years (if there are three groups) to succeed those whose terms expire.

4. Resignation & Removal of Directors

A director may resign at any time by delivering written notice to the board of directors, its chair, or the corporation. The resignation may specify a later date as the effective date of the resignation. If a later date is not specified, the resignation is effective immediately.

Shareholders may remove directors with or without cause unless the charter provides that they may be removed only for cause. Notice of the meeting must state that one purpose of the meeting is removal of directors.

271 Id.
272 Id.
274 TENN. CODE ANN. § 48-18-107(b) (2004). If a later date is specified, the vacancy may be filled but the new director will not take office until the vacancy occurs. TENN. CODE ANN. § 48-18-110(e) (2004).
276 If provided by the charter, any or all of the directors may be removed for cause by a vote of a majority of the entire board of directors. TENN. CODE ANN. § 48-18-108(d) (2004).
277 If a director is elected by a voting group of shareholders, only shareholders of that voting group may vote to remove the director without cause. TENN. CODE ANN. § 48-18-108(b) (2004).
If cumulative voting is authorized, a director may not be removed if the number of votes sufficient to elect the director under cumulative voting is voted against the director’s removal. If cumulative voting is not authorized, a director may be removed only if a majority of the votes cast is in favor of removal.

5. Meetings of Directors

The bylaws should specify the dates or the procedure for scheduling regular meetings. The Act does not specify who should convene regular meetings. Regular meetings may be held without notice of time, date, or purpose, unless the charter or bylaws provide otherwise.

Special meetings may be called, unless the bylaws otherwise provide, by any of the following: the chairman of the board, the president of the corporation, or any two directors. Unless the charter or bylaws specify shorter or longer periods, a minimum of two days’ notice is required for special meetings. No statement of purpose is necessary unless the charter or bylaws require one.

Regular meetings and special meetings may be conducted by any means of communication that allows all directors participating in the meeting to simultaneously hear each other during the meeting. A director participating in a meeting of this type is deemed to be present in person for the meeting.

6. Action Without Meeting

Unless the charter or bylaws provide otherwise, any action that is required or permitted to be taken at a board of directors’ meeting may be taken without a


281 Id.


283 TENN. CODE ANN. § 48-18-201(a) (2004).

284 TENN. CODE ANN. § 48-18-203(b) (2004). The notice must include the date, time, and place of the meeting. Id.


286 TENN. CODE ANN. § 48-18-201(b) (2004).

287 Id.
meeting with unanimous written consent from the directors.\footnote{288} The consent to take the action without a meeting is separate from the directors’ vote on the action itself.\footnote{289} In other words, directors who approve of taking the action without a meeting may nevertheless vote against the action.

The action must be evidenced by one or more written consents\footnote{290} that indicate each director’s vote or abstention on the action and the signature of each director entitled to vote.\footnote{291} The consent must be delivered to the corporation so that it may be included in the corporation’s minutes or filed with the corporate records.\footnote{292}

7. Voting Requirement

The charter or bylaws may determine what constitutes a quorum of directors needed for a vote.\footnote{293} However, if the charter or bylaws do not contain such a provision, the number of directors that constitutes a quorum depends on whether the size of the board of directors is fixed or variable-range.\footnote{294} If there is a fixed board size, a quorum of a board of directors consists of a majority of the fixed number of directors.\footnote{295} If there is a variable-range size board, a quorum consists of a majority of the number of directors prescribed.\footnote{296} If no number is prescribed, then a quorum consists of a majority of the number of directors in office immediately before the meeting begins.\footnote{297}


\footnote{289} Id.

\footnote{290} The consent may be in the form of minutes to a meeting. Herskowitz v. Pilot House Motor Inns, 806 S.W. 2d 531, 533 (Tenn. Ct. App. 1980).


\footnote{292} Id.


\footnote{297} Id.
When a quorum is present and unless the charter or bylaws require a greater number of votes, the affirmative vote of a majority of directors present is the act of the board of directors.\textsuperscript{298} A director present at a meeting who fails to vote is deemed to have assented unless he objects, enters his dissent in the minutes, delivers written notice of his dissent to the presiding officer before the meeting’s adjournment, or delivers written notice of his dissent to the corporation immediately after the meeting’s adjournment.\textsuperscript{299}

8. **Committees of the Board**

Unless the charter or bylaws provide otherwise, the board of directors may create one or more committees.\textsuperscript{300} Each committee must have at least one member.\textsuperscript{301} The creation of a committee and appointments to that committee must be approved by the greater of a majority of all the directors in office when the vote is taken, or the number of directors required by the charter or bylaws to take action under section 48-18-205.\textsuperscript{302}

A committee may exercise the authority of the board of directors,\textsuperscript{303} except that a committee may not do any of following actions:

(i) Authorize distributions, except according to a board-approved formula;

(ii) Fill vacancies on the board of directors or its committees;

(iii) Adopt, amend, or repeal bylaws;

(iv) Authorize repurchase of the corporation’s stock, except according to a board-approved formula; or

\textsuperscript{298} TENN. CODE ANN. § 48-18-205(c) (2004).

\textsuperscript{299} TENN. CODE ANN. § 48-18-205(d) (2004).

\textsuperscript{300} TENN. CODE ANN. § 48-18-206(a) (2004).

\textsuperscript{301} Id.


\textsuperscript{303} TENN. CODE ANN. § 48-18-206(d) (2004). The committee’s authority must be granted by the board of directors or in the charter or bylaws. Id.
(v) Authorize or approve the issuance or sale of the corporation’s stock unless specifically authorized by the board of directors, or

(vi) Determine the designation and relative rights, preferences, and limitations of a class or series of shares, unless specifically authorized by the board of directors.

9. Fiduciary Duty

Directors owe a fiduciary duty, comprised of the duty of care and the duty of loyalty, to the corporation and its shareholders. The Act describes the fiduciary duty in a three-pronged test:

• To act in good faith;

• With the care of an ordinarily prudent person in a similar position; and

• In the manner he believes to be in the best interests of the corporation.

If a disinterested director satisfies the three-pronged test of the Act, he will not be liable for any action taken as a director, or any failure to take action.


305 Id.

306 The principal case describing the duty of care under Delaware law is Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985). The Delaware Supreme Court stated:

Directors must exercise the care that a reasonably prudent person would exercise under similar circumstances. This standard of care requires that prior to making any business decision, the directors inform themselves of all material information reasonably available to them.


308 Whether a director or officer has properly discharged the duties of office is a question of fact to be determined in each case in view of all the circumstances. Fitch v. Midland Bank & Trust Co., 737 S.W.2d 785 (Tenn. Ct. App. 1987).

The Tennessee Supreme Court has indicated that the statutory obligations of the Act render a director and an officer, or at least a senior officer, a “quasi-fiduciary” to the corporation and its shareholders subject to the duty of “utmost good faith, loyalty and honesty.”

In a broad sense, the directors and officers of a corporation are its agents. While they may not be in a strict sense trustees, it is well established that they occupy a fiduciary, or more exactly a quasi-fiduciary, relation to the corporation and its stockholders. 18B Am.Jur.2d, Corporations, § 1689, p. 541. An agent is a fiduciary with respect to the matters within the scope of his agency. The very relationship implies that the principal has reposed some trust or confidence in the agent and the agent or employee is bound to the exercise of the utmost good faith, loyalty, and honesty toward his principal or employer. 3 Am.Jur.2d Agency, § 210, p. 713. The correct rule on the status of a corporate officer as a fiduciary is found in Hayes v. Schieckart’s Upholstering Co., 402 S.W.2d 472, 483, 55 Tenn. App. 442 (1965), citing from 19 C.J.S. p. 107, as follows:

“A corporate officer must at all times be loyal to his trust and act in good faith and unselfishly toward the corporation and its stockholders, and cannot assume positions in conflict with the interests of the corporation; but the restrictions on their activities growing out of the fiduciary status extend only to such corporate interests as exist at the time or may reasonably be expected in the development of the corporate business. If the officers transcend or abuse their powers, they are as much responsible to their principal as the agent of an individual, is to him.”

“A mere employee does not ordinarily occupy a position of trust or confidence toward the corporation unless he is also its agent. On the other hand, one employed as manager of a corporation under the control and direction of the president and board of directors has been held to be an employee in a quasi fiduciary capacity, and as such, bound to

310 Knox-Tenn Rental v. Jenkins, 755 S.W.2d 33, 36 (Tenn. 1988).

We do not believe appellant seriously argues that the foregoing provisions of the Tennessee General Corporation Act, particularly T.C.A. § 48-1-813 delineating the duty of directors and officers, authorizes or condones the fraudulent conduct engaged in by Mr. Carte who was undoubtedly a fiduciary. There is nothing in the General Corporation Act as it existed at the time these acts occurred, or in its revised provisions, (T.C.A. § 48-18-403(3)) to suggest that Carte was acting in good faith or in a manner he reasonably believed to be in the best interest of the corporation.311

In discharging his fiduciary duty, a director may rely on others, including the following:

(i) Officers or employees of the corporation whom a director believes to be reliable and competent;312

(ii) Legal counsel, public accountants and others on matters reasonably believed to be within such others’ competence;313 and

(iii) Committees of the Board.314

However, if a director has reason to believe that reliance upon any of the above individuals is unwarranted, then that director may not, in good faith, rely on them.315

311 Id.


315 TENN. CODE ANN. § 48-18-301(c) (2004).
VII. DISSOLUTION

A. Voluntary Dissolution

1. Prior to Issuance of Shares or Commencement of Business

If a corporation has either not issued shares or not commenced business, a majority of the incorporators or initial directors may dissolve the corporation by filing articles of dissolution and termination with the Secretary of State. The articles of dissolution and termination should state the following: the name of the corporation and the date of its incorporation, either that no shares have been issued or the corporation has not commenced business, that the corporation has no outstanding debt, that the net assets of the corporation remaining after winding up have been distributed to the shareholders, if shares were issued, that a majority of the incorporators or initial directors authorized the dissolution, and the date of the dissolution.

2. Proposal by Directors for Shareholders’ Consent

A corporation may be dissolved by unanimous written consent of its shareholders. A corporation’s board of directors may also submit a proposal for dissolution to the shareholders. Generally, for the board of directors’ proposal to be adopted, the board of directors must recommend dissolution to the shareholders, and a majority of the shareholders entitled to vote must approve the


317 TENN. CODE ANN. § 48-24-101(a) (2004). Even though section 48-24-101(b) states that the articles of dissolution must be accompanied by a tax clearance verification from the commissioner of revenue, the Filing Guide for For-Profit Corporations, at http://www.state.tn.us/sos/forms/fg-fp.pdf, states that tax clearance forms are no longer required as of July 1, 1999. Upon proper filing of the aforementioned documents, the corporation will cease to exist. However, the termination of corporate existence does not extinguish any remedy to or against the corporation, its directors, officers or shareholders, for any right or claim existing or any liability incurred, prior to the termination. TENN. CODE ANN. § 48-24-101(b) (2004).


319 The board of directors may condition its submission of the proposal for dissolution on any basis. TENN. CODE ANN. § 48-24-102(d) (2004).

320 TENN. CODE ANN. § 48-24-102(b) (2004).
proper proposal.\textsuperscript{321} Proper notice must be given to both voting and non-voting shareholders, and the notice must state that the purpose of the meeting is to consider dissolving the corporation.\textsuperscript{322}

Once the dissolution is authorized, the corporation must deliver articles of dissolution to the Secretary of State for filing.\textsuperscript{323} The corporation is dissolved when the articles of dissolution are filed unless a delayed effective date is included in the articles of dissolution.\textsuperscript{324} Upon dissolution, the corporation must wind up and liquidate its business and may not otherwise carry on business.\textsuperscript{325} The Act specifies several actions that are appropriate during this time period, including collecting assets, discharging liabilities, and distributing property to shareholders.\textsuperscript{326}

Once a corporation distributes all of its assets to creditors and shareholders and voluntary dissolution proceedings have not been revoked, the corporation must deliver to the Secretary of State articles of termination of corporate existence.\textsuperscript{327}

3. Disposing of Claims

A corporation may dispose of the known claims against it by following the procedure set forth in section 48-24-106. Generally, the dissolved corporation must provide to claimants written notice that describes the information that must be

\textsuperscript{321} TENN. CODE ANN. § 48-24-102(c) (2004). \textit{But see} TENN. CODE ANN. § 48-24-102(c)(1) (2004) (when board determines that conflict of interest or other special circumstances exist, the board must make no recommendation regarding dissolution and must communicate the basis for its determination to shareholders); TENN. CODE ANN. § 48-24-102(f) (2004) (under certain circumstances, majority approval of shareholders not required).

\textsuperscript{322} TENN. CODE ANN. 48-24-102(c) (2004).


\textsuperscript{324} TENN. CODE ANN. § 48-24-103(b) (2004).

\textsuperscript{325} TENN. CODE ANN. § 48-24-105(a) (2004).

\textsuperscript{326} Id.

\textsuperscript{327} TENN. CODE ANN. § 48-24-108 (2004). Even though section 48-24-108(b) states that the articles of termination of corporate existence must be accompanied by a tax clearance verification from the commissioner of revenue, the Filing Guide for For-Profit Corporations, \textit{at} http://www.state.tn.us/sos/forms/fg-fp.pdf, states that tax clearance forms are no longer required as of July 1, 1999.
included in the claim and whether the claim is admitted.\textsuperscript{328} The written notice must also contain a mailing address to which the claim may be sent, a deadline for making the claim, and a statement that any claims not received by the deadline will be barred.\textsuperscript{329}

In addition, a corporation may dispose of unknown claims against it by publishing a notice of dissolution in accordance with section 48-24-107. Unknown claims against the corporation are barred unless the claimant commences a proceeding within two years of the publication of the newspaper notice.\textsuperscript{330} Claims allowed under section 48-24-107 may be enforced against the dissolved corporation or by recapturing distributions to shareholders.\textsuperscript{331}

\textbf{B. Involuntary Dissolution}

1. \textit{Administrative Dissolution}

The Secretary of State may commence a proceeding to administratively dissolve a corporation for any reason listed in section 48-24-201, including the corporation’s failure to deliver its annual report within two months of its due date or its failure to have a registered agent or registered office in Tennessee for two or more months.\textsuperscript{332} The Secretary of State must first provide notice to the corporation that there are grounds for administrative dissolution.\textsuperscript{333} If the corporation does not correct each ground for dissolution within two months, the Secretary of State will dissolve the corporation and provide notice of such dissolution to the company.\textsuperscript{334}

\textsuperscript{328} TENN. CODE ANN. § 48-24-106(b) (2004).

\textsuperscript{329} Id. Articles of Termination of Corporation Existence form, at http://www.state.tn.us/sos/forms/ss-4412.pdf.

\textsuperscript{330} TENN. CODE ANN. § 48-24-107(c) (2004).

\textsuperscript{331} TENN. CODE ANN. § 48-24-107(d) (2004).

\textsuperscript{332} TENN. CODE ANN. § 48-24-201 (2004).

\textsuperscript{333} TENN. CODE ANN. § 48-24-202(a) (2004).

\textsuperscript{334} TENN. CODE ANN. § 48-24-202(b) (2004). The administratively dissolved corporation may apply to the secretary of the state for reinstatement. TENN. CODE ANN. § 48-24-203 (2004).
2. Judicial Dissolution

A court of record with proper venue may dissolve a corporation in certain proceedings instituted by the attorney general and reporter, a shareholder, or a creditor. In addition, a corporation may be judicially dissolved in a proceeding instituted by the corporation to have its voluntary dissolution continued under court supervision.

VIII. PIERCING THE CORPORATE VEIL

A. Liability of Directors, Officers, and Shareholders

Courts apply multiple factors to determine whether corporate existence will be disregarded in order to hold directors, officers and shareholders personally liable. The United District Court for the Eastern District of Tennessee described the doctrine as follows:

[T]he doctrine that a corporation is a legal entity existing separate and apart from the persons composing it is a legal theory introduced for the purposes of convenience. The concept cannot, therefore, be extended to a point beyond its reason and policy, and when invoked in support of an end subversive of this policy, will be disregarded by the courts. Thus, in an appropriate case and in furtherance of the ends of justice, a corporation and the individual or individuals owning all its stock and assets will be treated as identical, the corporate cloak being disregarded where used as a cover for fraud or illegality and the corporation and individual or individuals owning all its stock and assets will be treated as identical.

Factors to be considered in determining whether to disregard the corporate veil include not only whether the entity has been used to work a fraud or injustice in contravention of public policy, but also: (1) whether there was a failure to collect paid in capital; (2) whether the corporation was grossly undercapitalized; (3) the nonissuance of

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335 Proper venue is determined under section 48-24-302(a). Venue for a proceeding by the attorney general and reporter to dissolve a corporation lies in Davidson County. Id. For all other judicial dissolution proceedings, venue lies in the county where the corporation’s principal office is or was located. Id.


stock certificates; (4) the sole ownership of stock by one individual; (5) the use of the same office or business location; (6) the employment of the same employees or attorneys; (7) the use of the corporation as an instrumentality or business conduit for an individual or another corporation; (8) the diversion of corporate assets by or to a stockholder or other entity to the detriment of creditors, or the manipulation of assets and liabilities in another; (9) the use of the corporation as a subterfuge in illegal transactions; (10) the formation and use of the corporation to transfer to it the existing liability of another person or entity; and (11) the failure to maintain arms length relationships among related entities.

In addition, when a corporation is dominated by an individual or individuals not only as to finance but also as to policy and business practices so that the corporation has no mind, will, or existence of its own and this domination is used to commit a wrong, or fraud or perpetrate a violation of statutory or positive legal duty, the corporate veil will be pierced.338

The Tennessee Court of Appeals has adopted a more protective rule of the corporate shield:

[T]o disregard the corporate entity and find personal liability, there must be a demonstration of the use of control to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of third parties’ rights.339

B. Liability of Parent for Subsidiary Liabilities

A parent corporation can be held liable for the subsidiary’s liabilities if a court “pierces the corporate veil.” Ordinarily, an individual corporation and its shareholders are recognized as separate and distinct entities. However, if the


subsidiary is a mere alter-ego of the parent corporation or if the subsidiary is created to perpetuate a fraud, courts will disregard the corporate entity.340

Essentially, piercing the corporate veil prevents a parent corporation from avoiding liability by creating and acting through a subsidiary that is undercapitalized and controlled by the parent. In United States v. Mottolo,341 the court pierced the corporate veil to reach the corporation’s owner who admittedly incorporated to avoid personal liability. The court explained that a corporate entity “may not be employed to avoid overriding federal legislative policies, and federal courts will disregard it if the interests of public convenience, fairness, and equity so demand.”342 When disregarding the corporate entity, the dispositive factors are parental control of the subsidiary’s activities and any significant financial or ownership interests held by the parent.343


342 Id. at 624. Cf. In re Acushnet River & New Bedford Harbor Proceedings, 675 F. Supp. 22 (D. Mass. 1987) (The court did not pierce the corporate veil because there was a “well-capitalized, non-fraudulent, separate corporate subsidiary” and because the parent did not control the subsidiary to such a level that required piercing the corporate veil.)