

2013 REVISIONS TO THE TENNESSEE BUSINESS CORPORATION ACT

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I. INTRODUCTION**

The Tennessee Business Corporation Act, as amended (“TBCA”), is the primary governing authority over the formation and operation of all Tennessee for-profit corporations. The TBCA was enacted in 1986 and became effective on January 1, 1987, replacing the Tennessee General Corporation Act of 1968.¹ The TBCA is codified in sections 48-11-101 through 48-27-103 of the Tennessee Code Annotated.²

In general, the TBCA was enacted as an enabling statute and was written to conform to the standards of the Revised Model Business Corporation Act (“MBCA”), which was adopted by the Corporate Law Committee of the Business Section of the American Bar Association and is continually reviewed and updated.³ As a result, a large part of the language of the TBCA mirrors that of the MBCA.

In order to modernize the current TBCA and, in particular, to keep up with the changes to the MBCA and the General Corporate Law of the State of Delaware (“DGCL”), the Tennessee Bar Association (“TBA”) asked its Business Law Section to review the current TBCA and suggest changes. This effort was undertaken by the TBA’s Business Law Section as part of a larger project, the Business Entity Study

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** ** This article addresses recent amendments to the Tennessee Business Corporation Act. On May 21, 2012, Governor Bill Haslam signed House Bill 3459, which revises the Act and becomes effective on January 1, 2013. Although this article predates January 1, 2013, for the sake of future usefulness to readers, the article will cite the amended Act as it is anticipated to appear in the 2013 Tennessee Code Annotated (i.e. TENN. CODE ANN. § x-x-x (2013)).

¹ 1986 Tenn. Pub. Acts 1013.

² Tennessee Business Corporation Act, TENN. CODE ANN. §§ 48-11-101–48-27-103 (2013).

³ *Kradel v. Piper Indus., Inc.*, 60 S.W.3d 744, 749 (Tenn. 2001).

Committee, which encompasses a review of all of Tennessee's key business law statutes to develop helpful edits and additions (and to better coordinate those statutes).⁴ Over the past three years, sixteen lawyers in various practice settings from across the state of Tennessee collaborated to review existing provisions in the TBCA, develop recommendations for revisions to the TBCA, formulate a process for developing revisions to the current TBCA, and in fact, develop, draft, and successfully advocate for the adoption of those revisions by the state legislature. Representatives of the office of the Secretary of State, legislative staff, legislative committees, both houses, and the Governor were also involved in this revisionary process. The amendments to the TBCA represent a significant update to the current TBCA, rather than a complete overhaul, formulated and drafted with intent to modernize the current TBCA and allow Tennessee to remain an attractive competitor in the market for incorporations (and, thus, the markets for business development and investment). On May 21, 2012, Tennessee Governor Bill Haslam signed into law House Bill 3459, which revises multiple provisions of the TBCA effective on January 1, 2013.⁵

This paper presupposes a general understanding of corporate law generally and the workings and implications of the current Tennessee Business Corporation Act specifically. The purpose of this article is to outline the most important 2012 revisions to the TBCA and identify their importance to attorneys—especially corporate counsel—practicing in Tennessee.

II. CHAPTER 11: GENERAL PROVISIONS

A. *General Provisions*

The definition section has been amended to some degree, largely due to changes in business communication, since the TBCA was last updated. Specifically, the Committee expounded upon the meaning of “electronic,”⁶ “electronic record,”⁷

⁴ Email from Allan F. Ramsaur, Executive Director, TBA Business Entity Study Committee, to Jim McCarten, et al., Chair, Tax Law Section (Apr. 8, 2007, 12:05 EST) (on file with author).

⁵ H.R. 3459, 107th Leg., (Tn. 2012).

⁶ TENN. CODE ANN. § 48-11-201(10A) (2013) (defining “electronic” as “relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities”).

⁷ TENN. CODE ANN. § 48-11-201(10B) (2013) (defining “electronic record” as “information that is stored in an electronic or other medium and is retrievable in paper form through an automated process used in conventional commercial practice, unless otherwise authorized in accordance with section 48-11-202”).

and “electronic transmission.”⁸ The Committee also added definitions related to “organic documents”⁹ and “organic law.”¹⁰ Practitioners, especially those who regularly work with the TBCA, should become familiar with these new defined terms for substantive and non-substantive reasons. Among other things, cross-references within the TBCA and citations to TBCA sections in other materials are changing due to the added definitions, in each case because of the renumbering of statutory subsections to implement the revised and new definitions.

B. *General Notice Requirements*

The Committee, in amending the current TBCA, added a language requirement for general notice.¹¹ Upon effectiveness of the amendments, for purposes of Chapters 11-27 of the revised TBCA, notices must be in English unless otherwise agreed upon by the sender and the recipient.¹² Formerly, there was no express requirement for use of a specific language when sending notice. This revision is congruent with the MBCA, which also requires that, “unless otherwise agreed between the sender and the recipient, words in a notice or other communication under this Act must be in English.”¹³ For practitioners in Tennessee, this new requirement will likely hold little consequence. However, the new requirement may be relevant to (especially closely held) corporations owned and managed exclusively or primarily by those for whom English is not their first language. For entities like these, notice likely occurred in another language common to the owner-managers out of convenience and familiarity. In any event, ambiguity no longer exists as to the requirement of a particular language when sending notice to another party, which should be noted.

⁸ TENN. CODE ANN. § 48-11-201(10C) (2013) (defining “electronic transmission” as “any form or process of communication not directly involving the physical transfer of paper or another tangible medium, which (a) is suitable for the retention, retrieval, and reproduction of information by the recipient, and (b) is retrievable in paper form by the recipient through an automated process used in conventional commercial practice, unless otherwise authorized in accordance with section 48-11-202(j)”).

⁹ TENN. CODE ANN. § 48-11-201(20A) (2013) (defining “organic document” as “a public organic document or a private organic document”).

¹⁰ TENN. CODE ANN. § 48-11-201(20B) (2013) (defining “organic law” as “the statute governing the internal affairs of a domestic or foreign business or nonprofit corporation or unincorporated entity”).

¹¹ TENN. CODE ANN. § 48-11-202(a) (2013).

¹² *Id.*

¹³ MODEL BUS. CORP. ACT § 1.41(a) (2011).

Further, TBCA section 48-11-202 already permits notice by “wire or wireless communication.”¹⁴ However, the MBCA and the DGCL use the term “electronic mail” or “electronic transmission.”¹⁵ The ABA Committee on Corporate Laws updated the MBCA to allow for “electronic technology” in as part of the 2009 amendments.¹⁶ So, the Committee recognized the importance of incorporating the MBCA’s “electronic technology” revisions to (1) make the TBCA’s definitions section more straightforward and (2) to allow maximum flexibility in corporate charters and bylaws to authorize electronic communication and notice to shareholders.

To achieve this end, the TBCA revisions now allow notice or any communication to be sent by any method, but electronic transmissions must meet certain requirements.¹⁷ To be in accordance with these requirements for electronic transmissions, the recipient must consent to the type of transmission, or the transmission must be authorized by subsection (j) of §48-11-202.¹⁸ Subsection (j) requires that the electronic transmission must be retrievable in a perceivable form, and the sender and recipient must have consented in writing to this use of electronic form.¹⁹ However, the person who consents to this type of notice may revoke any consent that is listed under subsection (d).²⁰ Further, consent is revoked if “the corporation is unable to deliver two consecutive electronic transmissions given by the corporation in accordance with such consent,” and this inability becomes known to the corporation or its agent.²¹

The changes to the notice rules reflect the Committee’s aim to further align itself with the MBCA and to allow more flexibility in the way that corporate communications are undertaken. The new provision balances the corporate desire for electronic communication for cost-efficiency and other reasons against the possible undesirability of electronic notice to specific recipients. For the practitioner,

¹⁴ TENN. CODE ANN. § 48-11-202(b) (2013).

¹⁵ DEL. CODE ANN. tit. 8, § 232(a) (2010); MODEL BUS. CORP. ACT § 1.41(d) (2011).

¹⁶ MODEL BUS. CORP. ACT § 1.40(7A) (2011).

¹⁷ TENN. CODE ANN. §48-11-202(b) (2013).

¹⁸ TENN. CODE ANN. § 48-11-202(d) (2013); TENN. CODE ANN. § 48-11-202(j) (2013)(“A notice or other communication may be in the form of an electronic transmission that cannot be directly reproduced in paper form by the recipient through an automated process used in conventional commercial practice only if (i) the electronic transmission is otherwise retrievable in perceivable form, and (ii) the sender and the recipient have consented in writing to the use of such form of electronic transmission.”).

¹⁹ TENN. CODE ANN. § 48-11-202(j) (2013).

²⁰ TENN. CODE ANN. § 48-11-202(e) (2013).

²¹*Id.*

this amendment allows greater (but still constrained) freedom to decide what is in the best interests of notice recipients.

C. Receipt of Transmission

In practice, it can be of critical importance to identify when and if another party received an electronic transmission. In light of this, the revised TBCA provides that, if the sender and recipient do not agree otherwise, a qualifying electronic transmission is deemed received when the notice enters an information processing system to which the shareholder has consented.²² Additionally, notice must be in a form capable of being processed by that system.²³ The “[r]eceipt of an electronic acknowledgment from an information processing system . . . establishes that an electronic transmission was received,” and for purposes of the revised section, “[a]n electronic transmission is received . . . even if no individual is aware of its receipt.”²⁴ This follows the wording of the MBCA and reflects the Committee’s concern with keeping up with changes in technology and forms of communication since the TBCA’s last update.

III. CHAPTER 17: SHAREHOLDERS

A. Annual Meeting

Under the former TBCA, an annual shareholders’ meeting was required, “[a]t a time stated in or fixed in accordance with the bylaws,” regardless of the decision being made.²⁵ However, to more closely conform the TBCA to § 7.01 of the MBCA on annual meetings,²⁶ the Committee revised the TBCA requirement on shareholder meetings to provide that a meeting must occur annually at a time stated or fixed in accordance with the bylaws, unless directors are elected by written consent in lieu of the meeting.²⁷ The new provision recognizes that shareholder meetings are not always necessary, especially in corporations that afford shareholders the ability to elect members of the board by written consent. The revised provision streamlines the process of voting in annual elections and makes the TBCA consistent with the

²² TENN. CODE ANN. § 48-11-202(f)(1) (2013).

²³ TENN. CODE ANN. § 48-11-202(f)(2) (2013).

²⁴ TENN. CODE ANN. § 48-11-202(g), (h) (2013).

²⁵ TENN. CODE ANN. § 48-17-101(a) (2012).

²⁶ MODEL BUS. CORP. ACT § 7.01(a) (2011).

²⁷ TENN. CODE ANN. § 48-17-101(a) (2013).

MBCA. The revised TBCA also aligns with the parallel provision under the DGCL.²⁸

B. Action Without Meeting

Under the revised TBCA, a corporation may amend its charter to give shareholders the ability to act by written consent of less than all shareholders, provided that the number of shares represented by signatures on any consent is greater than or equal to the number of shares that could adopt the action by voting at an actual meeting.²⁹ Accordingly, if a corporation's charter is amended to opt into this authority, a written consent signed by less than all shareholders may be sufficient to constitute due and proper shareholder action.³⁰ If a corporation does amend its charter to "opt-in" under this provision (allowing directors to be elected by written consent of the shareholders) and conducts its annual election of directors through a shareholder consent process, then the requirement to conduct an annual shareholders' meeting is eliminated entirely.³¹

This authority mirrors MBCA Section 7.04(b).³² It is also important to note that, under the DGCL, the statutory default rule allows for stockholder action to be taken by a written consent signed by less than all stockholders.³³ In lieu of a meeting, action may be taken by written consent if the writing is signed by enough shareholders with voting power sufficient to approve the action at a meeting without the inclusion of any enabling provision in the certificate of incorporation.³⁴ Accordingly, under the DGCL, the corporation must opt out of this provision by amending its certificate of incorporation if it desires to restrict or proscribe

²⁸ DEL. CODE ANN. tit. 8, §211(a)(2) (2009); *See* *Hoscett v. TSI Int'l Software*, 683 A.2d 43 (Del. Ch. 1996) (Section 211 was amended in 1997 to provide that stockholders may, unless a certificate of incorporation otherwise provides, act by written consent to elect directors following the decision in *Hoscett* wherein the Court of Chancery held that the mandatory requirement that an annual meeting of stockholders be held is not generally satisfied by stockholder action pursuant to section 228 purporting to elect a new board or to reelect an old one).

²⁹ TENN. CODE ANN. § 48-17-104(b) (2013).

³⁰ *Id.*

³¹ *Id.*

³² MODEL BUS. CORP. ACT § 7.04(b) (2011). *See also* MBCA § 7.04 cmt. 1 (2011) (For example, if an action requires the approval of a majority of shares represented at a meeting where a quorum is present, a corporation with 1,000 shares eligible to vote on the action will need 501 votes to approve the action by less than unanimous consent; at a meeting at which only a quorum is present the same action will be approved if the votes cast in favor of the proposed action exceed the votes cast opposing the action, resulting in approval by as few as 251 votes (assuming no abstention)).

³³ DEL. CODE ANN. tit. 8, § 228(a) (2009).

³⁴ *Id.*

stockholder actions by written consent, rather than opting into the authority to take action with non-unanimous shareholders consent.³⁵

Procedurally, the revised TBCA requires that written consent must also bear the date of signature of the shareholder signing the consent and be delivered to the corporation for inclusion in the minutes or filing with the corporate records.³⁶ Unless otherwise provided, consent is effective when the consents are signed by holders of a number of shares sufficient to approve the action and delivered to the corporation.³⁷ However, if less than all of the voting shareholders give written consent, “the corporation must give its non-consenting voting shareholders written notice of the action not more than 10 days after (i) written consents sufficient to take the action have been delivered to the corporation, or (ii) such later date that tabulation of consents is completed pursuant to an authorization under subsection (d).”³⁸ Also, “[t]he notice must reasonably describe the action taken and contain or be accompanied by the same material that . . . would have been required to be sent to voting shareholders in a notice of a meeting at which the action would have been submitted to the shareholders for action.”³⁹ However, the notice requirements do not “delay the effectiveness of actions taken by written consent, and a failure to comply with the notice requirements shall not invalidate actions taken by written consent,” so long as judicial power is not limited in any way to allow for an appropriate remedy “in favor of a shareholder adversely affected by a failure to give such notice within the required time period.”⁴⁰

These revisions to the TBCA will have no substantive effect on a shareholder’s voting rights. However, they will provide corporations with more flexibility by affording them the ability to forego the traditional requirement of a shareholders’ meeting and have the capacity to streamline the process for electing corporate directors.

C. *Notice Requirements*

³⁵ *Id.*

³⁶ TENN. CODE ANN. § 48-17-104(b) (2013).

³⁷ TENN. CODE ANN. § 48-17-104(d) (2013).

³⁸ TENN. CODE ANN. § 48-17-104(f) (2013).

³⁹ *Id.*

⁴⁰ TENN. CODE ANN. § 48-17-104(g) (2013).

Shareholders not signing an action by written consent must be given notice that the action is being taken and may exercise dissenters' (appraisal) rights.⁴¹ Specifically, within ten days after the effective date of an action by written consent, non-consenting shareholders entitled to vote on the action must receive notice that reasonably describes the action taken and contains information otherwise required to be sent in the notice of a shareholders' meeting.⁴² However, in the case of a lost shareholder, notice is no longer required provided that notices for two consecutive annual meetings, as well as all notices in between, cannot be delivered to the shareholder's recorded address.⁴³ A shareholder is also deemed lost if all dividend payments during a twelve-month period (but not less than two total) cannot be delivered.⁴⁴

Given that these exceptions are somewhat technical in nature, practitioners are well advised to carefully communicate the rule and exceptions to clients. In doing so, practitioners should seek to explain the requirements in such a way that clients can develop accurate systems for recording the distribution and return of notices, meetings, and dividends. This recordkeeping will enable clients to accurately determine who requires notice of consent, and hopefully preempt litigation that might arise from failing to notify an individual shareholder.

D. *Conduct of the Meeting*

The current TBCA contains no statutory requirements for the conduct of the shareholders' meeting. However, the Committee added new provisions to the TBCA which define certain procedural aspects of a shareholders' meeting. For example, the revised TBCA mandates that a chairperson shall preside at each meeting of the shareholders, and the chairperson shall be appointed according to the requirements in the corporation's bylaws.⁴⁵ In the absence of a specific provision in the bylaws governing the appointment of a chairperson of the meeting, the board determines the chairperson of the meeting.⁴⁶ Also, unless the charter or bylaws provide otherwise, the chairperson "shall determine the order of business and shall have the authority to establish rules," which must be fair to the shareholders,⁴⁷ "for

⁴¹ TENN. CODE ANN. § 48-17-104(f) (2013).

⁴² *Id.*

⁴³ TENN. CODE ANN. § 48-26-106(a)(i) (2013).

⁴⁴ TENN. CODE ANN. § 48-26-106(a)(ii) (2013).

⁴⁵ TENN. CODE ANN. § 48-17-110(a) (2013).

⁴⁶ *Id.*

⁴⁷ TENN. CODE ANN. § 48-17-110(c) (2013).

the conduct of the meeting.”⁴⁸ If no announcement is made, the polls close upon the meeting's adjournment.⁴⁹ Finally, “[a]fter the polls close, no ballots, proxies or votes nor any revocations or changes . . . may be accepted.”⁵⁰

IV. CHAPTER 18: DIRECTORS AND OFFICERS

A. *Required Officers*

Prior to the TBCA amendments made this year, the statute required that each corporation have a president and a secretary, and that the same individual could not serve in both offices unless that person was the sole shareholder.⁵¹ The MBCA and DGCL do not specifically require that a corporation have a president or secretary, and both permit a person to hold any number of offices.⁵² Comparable to the MBCA and the DGCL, the revised TBCA eliminates the requirement that a corporation have a President and a Secretary (and the attendant requirement that they may not be the same person), and adopts language similar to the corresponding MBCA provision, which provides greater flexibility in appointing corporate officers.⁵³

Under the revisions, a corporation's board or bylaws will designate its required officers (e.g., Chief Executive Officer, but no President).⁵⁴ The board or bylaws must designate an office to carry out the duties of a secretary,⁵⁵ but the “secretary” title need not be used to label this office. Also, under the revised TBCA, the same person can hold multiple offices.⁵⁶ It is important to note these changes, especially because of the statutory invitation to designate officers in the bylaws of the corporation. Although most corporations do identify and describe the key corporate offices in their bylaws, the new statute presents an opportunity for in-house and outside corporate counsel to revisit corporate bylaws to ensure that provision is made for the appropriate offices. In this regard, the TBCA provision now follows the corresponding MBCA provision in which, though no Secretary must be named,

⁴⁸ TENN. CODE ANN. § 48-17-110(b) (2013).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ TENN. CODE ANN. § 48-18-401(a).

⁵² *See* DEL. CODE ANN. tit. 8, § 142 (2012); MODEL BUS. CORP. ACT § 8.40 (2011).

⁵³ *See* DEL. CODE ANN. tit. 8, § 142 (2012); MODEL BUS. CORP. ACT § 8.40 (2011).

⁵⁴ TENN. CODE ANN. § 48-18-401(a) (2013).

⁵⁵ TENN. CODE ANN. § 48-18-401(c) (2013).

⁵⁶ TENN. CODE ANN. § 48-18-401(d) (2013).

each corporation must have a person who performs the same function as a secretary and to whom queries regarding records or documents of the organization are made.⁵⁷

B. *Action without Meeting*

The 2012 revisions to the TBCA relating to director actions taken by written consent in lieu of a meeting mirror the text from MBCA § 8.21.⁵⁸ The Committee revised this section of the TBCA by providing that any action required or permitted by the board of directors under Chapters 11 through 27 of the TBCA may be taken without a meeting if each director signs a letter of consent describing the action, and then delivers it to the corporation.⁵⁹ The revisions also allow a director to withdraw consent by a signed revocation⁶⁰ if consent is delivered to the corporation prior to delivery of the unrevoked letters of consent to the corporation by all the directors.⁶¹ Counsel advising corporations and directors on transactions and other matters approved by written consent in lieu of a meeting should be familiar with the new provisions to ensure that both consents and revocations comply with the new law, and are properly recorded before the corporation takes action for which authorization is sought.

V. **CONFLICTING INTEREST TRANSACTIONS**

Some view corporate directors as holding a principal-agent relationship with the corporation's shareholders.⁶² "The tension between the law of agency and the law of contracts...has been partially responsible for continuing dissonance over the extent to which directors of a corporation should have legal obligations and legal liability to the corporation, its shareholders, and third parties."⁶³ Among these legal responsibilities and liabilities that directors of a corporation owe to a corporation or its shareholders is the mandate to act in the best interest of the corporation. For this reason, the Committee recommended revising the conflicting interest transactions provisions of the TBCA.

⁵⁷ MODEL BUS. CORP. ACT § 8.40(c) (2011).

⁵⁸ *See generally*, TENN. CODE ANN. § 48-18-202 (2013); MODEL BUS.CORP. ACT § 8.40(c) (2011).

⁵⁹ TENN. CODE ANN. §48-18-202(a) (2013).

⁶⁰ TENN. CODE ANN. § 48-18-202(b) (2013).

⁶¹ *Id.*

⁶² James J. Hanks, Jr. & Larry P. Scriggins, *Protecting Directors and Officers from Liability: The Influence of the Model Business Corporations Act*, 56 BUS. LAW 3, 4 (2000).

⁶³ *Id.*

As counsel for a corporation, a practitioner should be able to fully inform clients of the responsibilities that come with serving as an officer or director of a corporation. Likewise, clients should be advised on the substantive and procedural law governing a conflicting interest transaction so that any decision to proceed with a transaction will be well-informed, valid, and enforceable.

A. Judicial Action

The Judicial Action section in the revised TBCA seeks to define the specific circumstances under which a conflicting interest transaction will not give rise to equitable relief or damages for the breach of fiduciary duty by an officer or director. Specifically, a transaction, proposed or effected by a corporation, may not be the subject of equitable relief, give rise to damages, or result in other sanctions against a director or officer of a corporation⁶⁴ in a proceeding, on the ground that a director or officer has an interest in the transaction if it is not a director's or officer's conflicting interest transaction.⁶⁵ Accordingly, in order to give rise to equitable relief or damages for a conflicting interest transaction, the plaintiff must allege and prove that the subject of the cause of action is, in fact, a "conflicting interest transaction."⁶⁶

Furthermore, a conflicting interest transaction may not be subject to a claim for equitable relief, damages, or other sanctions on the ground that a director or officer has an interest in the transaction under three particular circumstances. First, the claim is ineligible if the directors authorize the transaction at any time in accordance with specified disclosure, quorum, and voting requirements.⁶⁷ Second, if shareholders authorize the transaction at any time in accordance with specified disclosure, quorum, and voting requirements, the transactions is not subject to judicial remedy.⁶⁸ Finally, if the transaction, being judged according to the

⁶⁴ TENN. CODE ANN. §48-18-702(a) (2013).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ TENN. CODE ANN. §48-18-702(b)(1) (2013).

⁶⁸ TENN. CODE ANN. §48-18-702(b)(2) (2013).

circumstances at the relevant time,⁶⁹ is deemed fair to the corporation, then judicial remedy is not available.⁷⁰

B. *Directors' Action*

A director may pursue a conflicting interest transaction so long as the director obtains a majority vote authorization by a disinterested board of qualified directors.⁷¹ However, action is only appropriate after full disclosure of the conflict and interest of the conflicted director.⁷² As a result, a board of directors' action approving a conflicting interest transaction forestalls a successful claim of equitable relief, damages, or other sanction against a director or officer.⁷³ Likewise, under the MBCA, so called "qualified directors," who can be roughly defined as "independent directors" under the federal mandates, can ratify a defined conflict of interest transaction between a non-qualified director or officer and the corporation.⁷⁴

While there is no statutory requirement mandating director independence, there are incentives under state law for companies to utilize outside, independent directors.⁷⁵ Primarily, the incentive for independent directors is embodied in the business judgment rule, under which courts presume that board actions are a result of good faith decisions made in the best interest of the company.⁷⁶ Once again, however, the decision makers must be disinterested and independent.⁷⁷

Director liability and accountability are important issues in any corporate setting. The revisions to the TBCA highlight the fiduciary nature of the duties that are imposed on the directors of entities incorporated in the state of Tennessee. In order to uphold these duties, directors, corporations, and the shareholders that may bring derivative actions to enforce duties must be aware of these provisions and their

⁶⁹ TENN. CODE ANN. §48-18-701(8) ("Relevant time" means (i) the time at which directors' action respecting the transaction is taken in compliance with § 48-17-703, or (ii) if the transaction is not brought before the board of directors of the corporation (or its committee) for action under § 48-18-703, at the time the corporation (or an entity controlled by the corporation) becomes legally obligated to consummate the transaction").

⁷⁰ See generally, TENN. CODE ANN. §48-18-702 (2013).

⁷¹ TENN. CODE ANN. § 48-18-701(6) ("Qualified director" means a director, who at the time of action is both disinterested and independent of the action being taken).

⁷² TENN. CODE ANN. § 48-18-703(a).

⁷³ TENN. CODE ANN. § 48-18-702(a); TBCA § 48-18-702(b)(1).

⁷⁴ MODEL BUS. CORP. ACT §8.62 (2011).

⁷⁵ Jennifer Johnson, *What's Good for the Goose? A Critical Essay on "Best Practices" for Private Firms*, 2 J. Bus. & Tech. L. 251 (2007).

⁷⁶ *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

⁷⁷ *Id.*

potential ramifications. By communicating these changes to clients, corporate counsel may better enable directors to satisfy their duties to the corporation or its shareholders, as well as satisfy their desire and purpose to assist the corporation and its directors in avoiding litigation and liability. In addition, because of the increased detail in the definitions and process for corporate consideration of conflicting interest transactions under the revised TBCA, counsel to shareholders desiring to challenge conflicting interest transactions have a better-defined path to follow in making and succeeding in that kind of challenge. This also serves as a reminder to be familiar with the revised definition section of the TBCA, which provides a more detailed roadmap to plaintiffs' counsel in challenging conflicting interest transactions.

C. *Shareholders' Action*

Under the revised TBCA section 48-18-702(b)(2), a directors' conflicting interest transaction will not give rise to any equitable relief, an award of damages, or other sanctions against that director so long prior to the vote, (1) shareholders are given timely and adequate notice describing the transaction; (2) the director discloses information required by the statute; and (3) disclosure is made to the shareholders entitled to vote, as required by the statute.⁷⁸ This revision to the TBCA is, for the most part, parallel to the provisions under both the MBCA⁷⁹ and the DGCL.⁸⁰

Arguably, ratification by shareholders of a directors' conflicting interest transaction should add to the certainty of business transactions and protect directors from claims alleging a breach of fiduciary duty of loyalty.⁸¹ However, depending on the nature of the challenged transaction, ratification may mean claim extinguishment, burden shifting, business judgment rule protection, or nothing at all.⁸²

D. *Entire Fairness*

Independent board members can also function under the revised TBCA to validate conflict of interest transactions (or at least permit a more lenient standard of judicial review) by demonstrating, as the defendant, that the transaction was fair to

⁷⁸ Tenn. Code Ann. § 48-18-704(a) (2013).

⁷⁹ Model Bus. Corp. Act § 8.61(b)(2) (2011); MODEL BUS. CORP. ACT § 8.63 (2011).

⁸⁰ Del. Code Ann. tit. 8, § 144(a)(2) (2009).

⁸¹ Mary A. Jacobson, *Interested Director Transactions and the (Equivocal) Effects of Shareholder Ratification*, 21 Del J. Corp. L. 981 (1996).

⁸² *Id.* at 984.

the corporation.⁸³ This “entire fairness” test is also followed by the MBCA⁸⁴ and the DGCL.⁸⁵

Most of the common law development in this arena comes from the state courts of Delaware involving litigation of public corporations.⁸⁶ For example, in *In re eBay Shareholders Litigation*, the Delaware Court of Chancery emphasized that directors' independence was questionable because of “huge financial benefits” received as compensation for board service.⁸⁷ In *Beam v. Martha Stewart*, the Supreme Court of Delaware noted that non-financial ties could also impede independence and that “[a] variety of motivations, including friendship” could cause bias that would preclude a director from objectively evaluating the decision at hand.⁸⁸ The court did make clear, however, that “[n]ot all friendships, or even most of them, rise to this level”⁸⁹

In evaluating a transaction under the revised TBCA, on a judicial finding that the board breached its duty of care, the revised statutes require that a court evaluate a conflicting interest transaction under an “entire fairness” standard of review, which most likely includes scrutiny of both “fair dealing” and “fair price.”⁹⁰ Further, in evaluating the “independence” of a given director, an inquiry is likely to examine whether the directors' decision resulted from that director being controlled by another.⁹¹

With much of the law surrounding this coming out of Delaware courts, it is likely that Tennessee courts would also look to Delaware law in reaching a decision

⁸³ TENN. CODE ANN. § 48-18-702(3) (2013).

⁸⁴ MODEL BUS. CORP. ACT § 8.61(b)(3).

⁸⁵ DEL. CODE ANN. tit. 8, § 144(3) (2009).

⁸⁶ Johnson, *supra* note 74, at 259.

⁸⁷ *In re Ebay, Inc. S'holders Litig.*, No. C.A. 19988-NC, 2004 WL 253521 (Del. Ch. Feb. 11, 2004).

⁸⁸ *Beam v. Stewart*, 845 A.2d 1040 (Del. 2004).

⁸⁹ *Id.* at 1050.

⁹⁰ TENN. CODE ANN. §48-18-702(b)(3) (2013); *See Bomarko, Inc. v. Int'l Telecharge, Inc.*, 766 A.2d 437 (1999) (Where the CEO misinformed a special committee engaged in a financing search, submitted a counter proposal without telling the committee, and did not engage in meaningful negotiation for financing).

⁹¹ *See Orman v. Cullman*, 794 A.2d 5 (Del. Ch. 2002) (A director can be “controlled” by another, for purposes of determining whether the director lacked the independence necessary to consider the challenged transaction objectively, and thus whether business judgment or entire fairness review applies to transaction: (1) if in fact he is dominated by that other party, whether through close personal or familial relationship or through force of will, or (2) if he is beholden to the allegedly controlling entity, as when the entity has the direct or indirect unilateral power to decide whether the director continues to receive a benefit upon which the director is so dependent or is of such subjective material importance that its threatened loss might create a reason to question whether the director is able to consider the corporate merits of the challenged transaction objectively).

on litigation involving a corporation's conflicting interest transaction(s). However, because these revisions are new for Tennessee public corporations, it is not entirely clear how a court would decide cases concerning them. For this reason, awareness of both the revisions to the TBCA as well as the prominent case law involving conflicting interest transactions in other jurisdictions are extremely important for corporate counsel, as are the factors by which any case law was evaluated and ultimately decided.

VI. CHAPTER 21: MERGERS, SHARE EXCHANGES, AND CONVERSIONS

Under this section, the Committee saw the importance in adopting revisions, like the MBCA, that are more flexible in granting entities (domestic and foreign) the eligibility to merge with Tennessee corporations and consummate share exchanges or conversions with Tennessee corporations.

First, and most importantly, the 2013 revisions of the TBCA will permit a Tennessee corporation to merge with or convert into any other entity organized under Tennessee business entity laws.⁹² Moreover, the revisions will permit a Tennessee corporation to merge with or convert into any other business entity organized under another state's laws, if also authorized by the corresponding state's law governing the other entity.⁹³ As a result, the merger will conclude with one survivor.⁹⁴ This revised provision greatly enhances the flexibility for corporations wishing to merge with another corporation since conversion with any for-profit corporation, nonprofit corporation, general partnership, limited liability company, limited partnership, business trust, joint stock association, and unincorporated nonprofit association is now possible.⁹⁵

Second, the revisions allow for conversion of a corporation to another entity to be effected with the same voting requirement as a merger (majority of outstanding shares) instead of the current unanimous requirement.⁹⁶ Still, any shareholder (even a non-voting shareholder) can exercise dissenter's rights and cash out if ownership of the converted entity is not desired.⁹⁷

⁹² TENN. CODE ANN. § 48-21-102(a) (2013).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ TENN. CODE ANN. § 48-21-111 (2013).

⁹⁷ TENN. CODE ANN. § 48-23-102(a)(6) (2013).

Third, the revisions require that if a merger will result in a shareholder becoming subject to owner liability for the obligations of the surviving entity, the separate written consent of such a shareholder is required.⁹⁸ This provision also applies to conversions.⁹⁹

Finally, the revisions change the notice period to shareholders for a short-form “cash out” merger of a 90% subsidiary from one month before the merger to 10 days following the merger.¹⁰⁰ Practitioners should welcome this revision, as there will be no more waiting to file articles of a merger until a month after the plan of merger is sent to subsidiary shareholders.

There are also several points of which practitioners should be aware as both tools for their use and potential traps for the unwary. For example:

- The terms of a merger plan or a conversion plan may be made dependent on facts objectively ascertainable outside of the plan.¹⁰¹
- The merger plan or conversion plan may also provide that the plan may be amended prior to filing articles of merger, but if the shareholders of a domestic corporation that is party to the merger are required or permitted to vote on the plan, then the plan must provide that subsequent to approval of the plan by shareholders, the plan may not be amended to change certain, specified core terms.¹⁰²
- The gap-filling provisions in §§ 48-21-102(b), 48-21-103(b), and 48-21-109(c) provide that, if the organic law of an eligible domestic entity does not provide procedures for the approval of a merger, share exchange, or conversion, the relevant plan may be adopted and approved, the transaction effectuated, and dissenters’ rights exercised in accordance with the procedures in Chapters 21 and 23 (or, for a share exchange or conversion, in accordance with merger procedures, if available);¹⁰³
- A converting entity is not required to wind up its affairs, pay its liabilities, or distribute its assets;¹⁰⁴

⁹⁸ TENN. CODE ANN. § 48-21-104(h) (2013).

⁹⁹ TENN. CODE ANN. § 48-21-111(7) (2013).

¹⁰⁰ TENN. CODE ANN. § 48-21-105(d) (2013).

¹⁰¹ TENN. CODE ANN. § 48-21-102(e), 48-21-110(c), 48-21-116(e) (2013).

¹⁰² TENN. CODE ANN. §§ 48-21-102(f), 48-21-110(b), 48-21-116(d) (2013).

¹⁰³ TENN. CODE ANN. §§ 48-21-102(b), 48-21-103(b), 48-21-109(c) (2013).

¹⁰⁴ TENN. CODE ANN. § 48-21-114(c) (2013).

- Interests of the interest holders of the converting entity in a conversion are, by default, cancelled, and former holders are entitled only to the rights provided in the plan of conversion or the organic documents;¹⁰⁵
- Upon merger effectiveness, a foreign survivor is deemed to have agreed to promptly pay amounts owing on appraisal rights claims;¹⁰⁶
- There is no automatic discharge for liabilities arising before the effective time of the articles of merger or share exchange and the organic law of the non-surviving or acquired entity continues to govern the collection of these liabilities and any rights of contribution to which the person may be entitled;¹⁰⁷
- There is no owner liability for any debt, obligation or liability arising after the effective time of the articles of merger or share exchange.¹⁰⁸

In light of these revisions, practitioners and corporations should take heed to the greater flexibility of the revised law, and let the revisions aid in their expansion and business endeavors. Practitioners should also be aware of the listed provisions and be mindful of the traps for the unwary, in order to give corporate clients the best possible representation and take full advantage of the revised TBCA.

VII. CONCLUSION

It is evident that the Committee was concerned with updating the current TBCA in order to better align with modern, leading sources of corporate law, including principally the MBCA (on which Tennessee's framework is based) and the DGCL (which provides a common touchstone given the large number of Delaware corporations and the well-developed body of statutory and case law in Delaware). At the request and under the auspices of the TBA, the Committee took on the formidable task of evaluating the existing TBCA, highlighting areas for possible change, vetting potential changes, drafting the resulting amendments to the TBCA, and working with the TBA leadership and the Tennessee legislature to make these revisions become a reality. Each of these constituencies hope that the revised TBCA creates a corporate law environment in Tennessee that is friendlier to corporations and their directors, officers, and shareholders. In revising Tennessee's corporate law, the collective efforts of the Committee, the TBA, the Tennessee legislature, and the

¹⁰⁵ TENN. CODE ANN. § 48-21-114(d) (2013).

¹⁰⁶ TENN. CODE ANN. §§ 48-21-108(c)(2), 48-21-114(b)(2), 48-21-120(b)(2) (2013).

¹⁰⁷ TENN. CODE ANN. § 48-21-108(d) (2013).

¹⁰⁸ TENN. CODE ANN. § 48-21-114(d) (2013).

Governor is an excellent example of taking the necessary steps to ensure that Tennessee remains an attractive environment for business and able to compete for businesses incorporations and growth.

The importance of these TBCA revisions to practitioners in Tennessee cannot be overstated. The revisions involve matters important to incorporation, the conduct of corporate business by shareholders and directors, and business combinations— all vital matters in the life cycle of a corporation. Given the new provisions will take effect on January 1, 2013, Tennessee attorneys are well advised to study these revisions and make changes to relevant corporate forms used in day-to-day and transactional corporate practice.