

**2014 AMENDMENTS TO THE  
MINNESOTA BUSINESS CORPORATION ACT**



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The Minnesota following changes to the Minnesota Business Corporation Act (“MBCA”) as set forth in Chapter 302A of the Minnesota statutes have been adopted by the Minnesota legislature and signed into law.

### **1. Filing Pre-Clearance**

The changes to chapter 5 of the Minnesota Statutes provides a mechanism by which the Secretary of State would pre-approve documents for filing, thereby allowing the eventual filing of the document without any further substantive review. By providing documents in advance and paying a \$250 fee, filers could receive pre-clearance from the Secretary of State’s office or notification that the filing was deficient in some way. The procedure provides useful assurance that the documents will be accepted for filing in certain situations where an adverse effects may occur if there is a delay because documents are found deficient.

### **2. Squeeze Outs Through Reduction to Fractional Shares**

The amendments to the MBCA add a new dissenters’ rights trigger that applies when:

- An amendment to the articles in connection with a combination of shares reduces the number of shares of a class or series owned by a shareholder to less than a full share; and
- the corporation exercises its right to cash out and redeem fractional shares.

This amendment is a direct response to the 2011 Minnesota Supreme Court decision in *Cold Spring Granite*. In that case certain minority shareholders were involuntarily cashed out by means of a reverse stock split that left them with fractional shares followed by a redemption of fractional shares. The minority shareholders argued, among other things, that they were entitled to dissenters’ rights as a result of the corporation’s actions; the Court disagreed, holding that Section 302A.471 does not provide for dissenters’ rights in this particular situation.

The ABA’s Model Business Corporation Act (the “Model Act”) already contains a similar dissenters’ rights trigger, although there are differences between the Model Act and the Minnesota amendments. In the Model Act, dissenters’ rights are triggered by an amendment that would leave a shareholder with a fraction of a share if the corporation has the right or obligation to repurchase fractional shares. Under the Minnesota amendments, the dissenters’ rights are not triggered unless the corporation actually repurchases the fractional shares.

### **3. Interest in Dissenters’ Rights Actions**

MBCA 302A.473 currently requires interest to be paid in connections with dissenters’ rights actions by reference to the post-verdict and judgment statute set forth in Minnesota Statute 549.09. That statute generally provides:

- For a judgment or award of \$50,000 or less, the rate of interest is simple interest based on the secondary market yield of one year United States Treasury bills, calculated on a bank discount basis, with a minimum rate of four percent.

- For a judgment or award over \$50,000, the interest rate is ten percent per year until paid.

The split formulation was problematic in dissenters' rights proceedings, both because the ultimate judgment was not known when then the initial interest payment was made and ambiguity as to whether the rate should be determined on an aggregate basis for all shareholders or on a shareholder by shareholder basis. The problems have been compounded in recent years, as interest rates have fallen, leading many to believe dissenters' rights may be exercised merely because of the enticing 10% interest rate.

The amendments revise MBCA 302A.473 to provide that interest shall be paid at the same rate as that attributable to judgments and awards of \$50,000 or less in all cases.

#### **4. Cross Entity Conversion**

The amendments permit (i) Minnesota organized corporations and limited liability companies ("LLCs") to convert to foreign corporations or LLCs and (ii) and foreign corporations and LLCs to convert to Minnesota organized corporations and LLCs. Previously, the MBCA only permitted conversions of Minnesota corporations to Minnesota LLCs and vice versa.

Additional requirements as a result of the amendments for the plan of conversion include:

- Specifying whether the converted organization is a domestic or foreign corporation or LLC and the name of the jurisdiction under which the converted organization will be incorporated or organized.
- If the converted organization is a domestic organization, a copy of the proposed articles of incorporation or organization of the converted organization.

Where the converting organization is a domestic organization, the plan of conversion must be approved according to existing requirements:

- Approval by the board of directors or governors.
- Adoption by the affirmative vote of the holders of a majority of all shares or membership interests entitled to vote.

If the converting organization is a foreign organization, the conversion must be approved in accordance with the laws of the jurisdiction under which the foreign organization is incorporated or organized.

The requirements for articles of conversion follow existing requirements, with the addition that the name of the jurisdiction under which the converted organization will be incorporated or organized must be specified.

If the converted organization is a foreign organization that will transact business in Minnesota, then the converted organization must be qualified to do business in Minnesota. In addition, a converted organization that is a foreign organization must:

- File with the Minnesota Secretary of State an agreement that may be served with process in the State of Minnesota for obligations of the converting organization and in a proceeding for enforcement of dissenter's rights.
- Irrevocably appoint the Minnesota Secretary of State as its agent to accept service of process.
- File with the Minnesota Secretary of State an agreement that it will promptly pay to dissenting owners amounts due under the applicable dissenters' rights statute.

Note that the provisions for conversion included in the bill updating the Minnesota Business Corporation Act are inconsistent with the provisions in the recently enacted Minnesota Revised Uniform Limited Liability Company Act ("MRULLC Act"). Under its terms the MRULLC Act will not become effective until August 1, 2015 so it is hoped the provisions can be conformed before that date.

## **5. Class or Series Voting on Amendments**

The MBCA grants class or series voting rights to shareholders in connection with certain types of amendments to the articles that could adversely affect their shares, even if the shares otherwise were without voting rights. The existing statute does not allow similarly situated classes or series of shares to be combined for voting purposes, however. As a result, even if multiple classes of shares would be affected in the same way by an amendment to the articles that triggers class voting, each class would be required to vote separately.

Under the amendments the default rule can be overridden in the articles if the articles include a provision that two or more classes or series of shares must vote together as a single group if they are "affected in the same or a substantially similar way" by the proposed amendment to the articles. The Delaware General Corporations Law, the Model Business Corporations Act, and the corporations acts of a number of other states already contain a similar provision allowing classes or series to be combined under these circumstances.

## **6. The Definition of "Officer"**

The amendments update the definition of "officer" to make clear that, unless otherwise provided in the articles or bylaws, the term does not include a person merely designated as the chairperson of the board. Without this clarification, board chairpersons that do not carry out any officer functions of the corporation could cause problems relating to director independence standards. For example, a chairperson could be disqualified from serving on a committee of disinterested directors under the MBCA's business combination statute set forth in 302A.673. Similar problems could result for public companies with respect to NASDAQ and NYSE independence standards. Experience suggests that older forms of by-laws sometimes indicate a chairperson is an officer and if that is the case consideration should be given to amending the by-laws.

## **7. Standard of Conduct for Officers**

The same general standard of conduct applies to directors and officers of Minnesota corporations – each must discharge the duties of the office in good faith, in a manner reasonably believed to be in the best interests for the corporation, and with the care of an ordinarily prudent person in a like position under similar circumstances. The director standard of conduct statute goes on to state that, if a director has met this standard of conduct, the director is not liable by reason of being or having been a director. The amendment to Section 302A.361 adds a mirroring sentence to the officer standard of conduct.

## **8. Delegation of Duties by Officers**

The MBCA could be read to impose upon an officer strictly liable for the actions of a person to whom the officer delegated duties, regardless of whether the officer violated the statutory standard of conduct. The amendment to Section 302A.351 clarifies that an officer is not strictly liable for the acts of a person to whom duties are delegated, but the delegating officer could face liability as a result of violating the standard of conduct with respect to the act of delegation or for supervision of the person to whom the duties are delegated. This was the intended purpose of Section 302A.351 all along, as reflected in the 1981 reporter's notes. We also believe the amendment draws the appropriate balance between unwarranted strict liability and providing accountability for the act of delegation.

## **9. Merger Consideration**

The amendments expressly allow for a plan of merger to provide for shares to be cancelled without consideration as is often the case in connection with merger transactions. This is already permitted under Minnesota law, but it has not been specifically included in the MBCA before.

## **10. Short-Form Mergers**

Section 302A.621 of the MBCA permits so called “short form mergers” of a parent and subsidiary without a shareholder vote in certain circumstances if the parent and related organizations own 90% of the subsidiary's capital stock. In connection with a short form merger, articles of merger are currently required to include the number of shares of each class and series of the subsidiary's stock and the number of such shares owned by the parent. However, calculating these share numbers exactly can be problematic, such as in the case of a public company tender offer, as the outstanding share count sometimes increases as in-the-money options and warrants are exercised. To remedy this problem, the amendments adopt the Delaware approach and simply require the articles of merger to include a certification that the parent owns at least 90% of each class and series of the stock of each merging subsidiary.

## **11. Effect of Mergers**

Minnesota law current provides that a merger does not cause title to or interest in real property of any constituent organization to revert or become impaired as a result of the merger. The amendments broaden this concept to apply not just to real property, but to personal or mixed property, as well, bringing Minnesota in line with similar statutes of other states.

## **12. Shareholder Written Actions**

The MBCA provides that, in the event fewer than all of the shareholders take action by written consent, notice of the action so taken must be provided to all shareholders. The amendment to Section 302A.441 requires that notice of the action taken only needs to be provided to the shareholders who did not consent to the taking of the action.