

ONE HUNDRED FIFTH LEGISLATURE - FIRST SESSION - 2017
COMMITTEE STATEMENT
LB35

Hearing Date: Tuesday January 24, 2017
Committee On: Banking, Commerce and Insurance
Introducer: Harr
One Liner: Change provisions relating to the Nebraska Model Business Corporation Act

Roll Call Vote - Final Committee Action:
Advanced to General File

Vote Results:

Aye: 8 Senators Baker, Brewer, Craighead, Kolterman, Lindstrom, McCollister, Schumacher, Williams
Nay:
Absent:
Present Not Voting:

Verbal Testimony:

Proponents:

Senator Burke Harr
Bill Mueller

Representing:

Introducer
NE State Bar Association

Opponents:

Representing:

Neutral:

Representing:

Summary of purpose and/or changes:

This bill amends various sections of the Nebraska Model Business Corporation Act in order to enact recent updates in the Model Business Corporation Act (on which the Nebraska act is based) as approved and promulgated by the Committee on Corporate Laws of the Section of Business Law of the American Bar Association. The bill proposes eight revisions as follows:

1. Sections 1 and 11 amend section 21-201 and enact a new section to provide for judicial review of corporate elections, shareholder votes, and other corporate governance disputes. The proposed new section provides subject matter jurisdiction to the specified court to resolve certain corporate governance disputes and establishes an expedited procedure for doing so. The purpose of such a proceeding is to prevent a corporation from being immobilized by controversies with respect to the identity of its directors or officers, the members of any committee of its board of directors, or the results or validity of shareholder votes. This section specifies the types of disputes that come within its coverage (subsection (a)), the persons who may initiate such proceedings (subsection (b)), the persons who must be named as defendants to such proceedings (subsections (c) and (g)), how service may be effectuated on the required defendants (subsection (d)), what notice must be provided to the required defendants (subsection (e)), and the remedial powers available to the court in connection with such a proceeding (subsection (f)). This section does not displace or alter any preexisting remedies and is not intended to be the exclusive remedy for disputes of the type covered by this section.

2. Sections 2, 5, 6, 8, 11 to 13, 19, 21 to 24, and 26 amend sections 21-214, 21-254, 21-255, 21-265, 21-275, 21-283, 21-2,123, 21-2,171 to 21-2,173, 21-2,197, and 21-2,222 to unify and harmonize provisions relating to beneficial owners.

There are inconsistencies throughout the act in the treatment of "beneficial owners" and "beneficial shareholders," with those terms sometimes used interchangeably or with differences. Accordingly, these amendments update definitions of "shareholder," "record shareholder," and "beneficial shareholder," and revise various sections of the act where the foregoing terms are used.

3. Sections 3, 4, 15, 18, and 20 amend sections 21-217, 21-220, 21-2,103, 21-2,120, and 21-2,124 relating to business opportunities. The amendments permit corporations to include in their articles of incorporation a provision that limits or eliminates a director's or an officer's duty to present a business opportunity to the corporation. The authorization could apply to officers but only if accompanied by action of qualified directors, incorporating the procedures used elsewhere in the act.

4. Section 7 amends section 21-264 relating to proxies. The amendments clarify that, unless it otherwise provides, an appointment of an irrevocable proxy does not terminate upon transfer of the shares, except that a transferee for value of shares subject to an irrevocable appointment may revoke the appointment if the transferee did not know of its existence when acquiring the shares and the existence of the irrevocable appointment was not noted on the certificate representing the shares or contained in the information statement for uncertified shares.

5. Sections 7, 9 to 11, and 19 amend sections 21-264, 21-266, 21-271, and 21-2,123 relating to inspectors of election. Section 21-271 deals with the role of inspectors of elections in the shareholder voting process. That process and the role of inspectors of election have changed in recent years, at least in the case of public corporations, with the increase in "street name" holdings, the use of a securities depository system and involvement of intermediaries, and the resulting increased role of vote tabulators. The amendments are intended to update the provisions on inspectors of election to reflect what inspectors of election in fact do under the current shareholder voting system. Section 21-266, dealing with acceptance of votes and other instruments relating to shareholder voting, is amended to better conform to and coordinate with section 21-271. Section 21-264, dealing with proxies, is amended to more accurately reflect the term of proxy appointments, including irrevocable proxy appointments.

6. Section 14 amends section 21-285 relating to qualifications for directors and nominees for directors. The ABA Model Business Corporation Act historically has provided that qualifications for directors may be set forth in the articles of incorporation and bylaws, but standards for content and timing of application of qualifications have not been meaningfully addressed. Qualifications as amended are in the nature of eligibility requirements. The amendments provide that qualifications must be reasonable as applied to the corporation and lawful. Qualifications based on action or expression of an opinion that would restrict a director's ability to discharge his or her duties as a director would not be permissible. The amendments also add provisions with respect to the timing of application of qualifications.

7. Sections 16 and 17 amend sections 21-2,113 and 21-2,114 relating to advances for expenses. The amendments to section 21-2,113 address the prerequisites for advancing expenses to directors and officers. Such amendments eliminate the requirement that a director or officer seeking advancement provide a written affirmation that he or she has met the applicable standards for indemnification under the act, or, in the case of a director, that the proceeding involves conduct for which liability has been eliminated under the articles of incorporation. The amendments do not, however, eliminate a corporation's ability to require such an affirmation. Section 21-2,113 will continue to require that a director or officer seeking advancement provide a written undertaking to repay funds advanced if it is ultimately determined that such individual is not entitled to indemnification.

8. Section 25 amends section 21-2,201 relating to election to purchase in lieu of dissolution. Section 21-2,201 provides that when a shareholder petitions for court-ordered dissolution, the corporation and the other shareholders have the option to purchase the petitioner's shares with the value to be determined by agreement of the parties or by the court. Subsection (g) of this section provides that when the court determines the value of the petitioner's shares, the corporation retains the option to dissolve rather than consummate the purchase. The amendment eliminates this option.

Giving the corporation the option to purchase and then to reverse course and dissolve is perceived as unfair to any petitioning shareholder, which, in turn, may discourage shareholders from exercising their statutory right to seek court-ordered dissolution.

Brett Lindstrom, Chairperson