THE LEGISLATIVE AND JUDICIAL RESPONSE TO RECENT CORPORATE GOVERNANCE FAILURES – WILL IT BE EFFECTIVE?

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Introduction

The thrust of my talk today is whether the various legislative and judicial reactions to the problems we have had, including Enron and WorldCom, are going to make a difference. It has been two years since the collapse of Enron. It was in late 2001 that WorldCom melted down. After that, we had Adelphia, Freddie Mac, HealthSouth, and others. It has been approximately one year since the Sarbanes-Oxley Act[2] ("Sarbanes-Oxley") became effective. As many of you know, that piece of legislation was an attempt by Congress to address the deficiencies Congress saw, largely in the areas of disclosure, governance, and independence.

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Mr. Latham is a member of the Alson & Bird's Securities Litigation and Capital Markets Groups. Mr. Latham counsels numerous public companies on corporate governance and disclosure matters and represents issuers, officers, directors, accountants, underwriters, and broker-dealers in securities disputes. Mr. Latham has served as Special Counsel to a number of public companies in connection with special investigations. He has represented clients in a variety of regulatory matters, including proceedings before the Securities and Exchange Commission, the New York Stock Exchange, the National Association of Securities Dealers, the State Securities Commissions in Georgia, Florida, and South Carolina, the Office of Thrift Supervision, the Office of the Comptroller of the Currency, and the Justice Department. Mr. Latham has also served as an expert witness in both civil and criminal federal securities actions. In addition, he has been appointed Special Assistant Attorney General, State of Georgia Teachers and Employees Retirement Fund (1998) (securities matters); Advisory Member, Board of Directors (2000) for the National Association of Corporate Directors, Atlanta Chapter; and member of the 2001-2002 Georgia Corporate Code Revision Committee.

[2] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 at 403 (2000) (codified in scattered sections of 11, 15, 18, 28, and 19 U.S.C.).

In addition to this legislation, numerous rules have been adopted by regulatory agencies, most notably the SEC,[3] to implement Sarbanes-Oxley. The Department of Labor[4] has also done some work in the whistleblower area. In addition to the regulatory rules, the courts have been active. That is the area where I am particularly interested. In my opinion, some Delaware decisions are redefining and changing the law perhaps in ways that are not clearly recognizable, even to those of us who have practiced in this area in the past.

The views expressed herein are the views of the speaker and do not necessarily reflect the views of Alston & Bird.

I would like to discuss two things today. First, I want to walk through the changes that have been brought about by Sarbanes-Oxley. In that regard, many of you will be as knowledgeable, and perhaps more knowledgeable, than I am on specific subjects. There has been a rash of legislation, rules, and interpretations that have come out recently. Second, I would like to step back and talk about whether this new legislation is going to make a difference. Is any particular pronouncement going to matter, and on the whole, is it going to matter? This simply reflects my personal view; others will undoubtedly differ. There are people in this audience that probably have very strong views that are equally valid.

My perspective comes from spending twenty-five years doing securities litigation and corporate work. My primary practice is devoted to counseling CEO's and boards of directors. I have a number of clients that I advise on the front end on disclosure issues, corporate governance matters, the relationship between the board and the CEO, and things like that. The balance of my practice primarily deals with what happens when the wheels come off the track and there is a crisis, such as when an audit committee requires a special investigation, when the auditor is refusing to sign off on the financials, or when the SEC or the Justice Department[5] has come in. Trying to get a company through that type of crisis can be very difficult, as you can imagine.

My practice group, the securities litigation practice group, has thirty lawyers in it. We are the largest in the Southeast, and we clearly have the dominant securities litigation defense practice in the Southeast. Unfortunately, in addition to drawing

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[3] United States Securities and Exchange Commission

[4] United States Department of Labor

[5] United States Department of Justice

upon the lawyers in the securities litigation group, I am drawing more and more on the lawyers in my white-collar group. One of the big changes from three years ago has been the aggressive enforcement by the Justice Department. I also have other corporate lawyers who have very specialized expertise in governance issues that work with me.

We are currently representing the Examiner in the Enron bankruptcy. We are also involved in HealthSouth; sometimes it seems like half of the bar is involved in that matter. We are also involved in Freddie Mac. For those of you that have not followed that situation, Baker & Botts LLP did a special investigation into the matter and there is a report that you can pull off of the Freddie Mac web site.[6] All of these cases I have mentioned have had a lot of public attention and a lot of concern about whether there was any wrongdoing. We are also involved in King Pharmaceutical,[7] a matter that is a little closer to home. We also represent a number of other large companies whose only sin is that their stock has dropped. In addition to the cases that I have mentioned, we probably have another 20 cases that we are handling in all variety of matters.

I think in order to go through the recent legislative and judicial developments and to reflect on whether they will make a difference, we need to take a second and look at the environment that we are in today and see how that differs from the past. When I was talking to Dr. Neel,[8] we spoke about how things have changed over the years. I remember perhaps five years ago, if a company missed its earnings, it suffered a significant percent stock drop. People thought that was terrible, and it was. Of course, you hate to lose market capitalization.

Last year I represented a small public company that missed its numbers, no restatement involved. It had a very heavy institutional ownership. When the company announced that it was going to miss its numbers, the institutions started bailing because many institutions have to get out if there is a twenty percent decline.

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[6] Baker Botts LLP. *Report to the Board of Directors: Internal Investigation of Certain Accounting Matters*, Dec. 10, 2002 – July 21, 2003, *available at* http://www.freddiemac.com/news/board_report/.

[7] King Pharmaceutical, Inc.

[8] C. Warren Neel, Director of the Center for Corporate Governance at the University of Tennessee. From 1977 to 2000, Dr. Neel served as Dean of the College of Business Administration at The University of Tennessee in Knoxville. Dr. Neel is also a director of Saks, Inc., and a former director of Clayton Homes, Inc. He served as the Commissioner of Finance for the State of Tennessee from June 2000 until January 2003.

It became self-fulfilling. There was a market imbalance and when the dust settled two days later, that stock had lost 82 percent of its value.

The statistics from NERA,[9] one of the top economic consulting firms, substantiate what I have told you. According to its analysis, the median investor losses in 2001 were about $176 million and just under $350 million in 2002. There are cases like Enron, WorldCom, and others where the losses are in the billions of dollars. In fact, these large losses are an example of the problems that companies face. A large company can lose just a few dollars per share, but given the market cap number of shareholders, could be looking at billions of dollars in losses. The plaintiffs' bar has not failed to notice this and has been extremely aggressive lately. The consequences of missing earnings are so much more dramatic today than they used to be. In the old days, a number of securities fraud suits were filed and would go through discovery, and you would settle some and others you would litigate. Generally, that was the extent of the issues you would encounter in securities fraud litigation.

Now when a company stumbles, the situation has an eerie resemblance to a Wild Kingdom show, when you see the wildebeest go down and all of the hyenas jump on it. Multiple securities class actions suits are filed, and with those suits there are multiple public press releases telling the world that these suits have been filed.

In addition to securities fraud suits filed in federal court, where there is a requirement that you either buy or sell securities, we are now seeing what are called "holders' suits." Where the State of California came up with this one, I do not know. *The Fritz Companies* case[10] is an example of this type of suit, where the plaintiff does not have to have bought or sold securities. The argument goes something like this: "I was holding it, and I would have sold it at the top for a lot of money if you had really told me the truth." The California courts apparently recognize the potential for abuse in such situations, and have set forth heightened pleading requirements.

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[9] National Economics Research Associates, or NERA Economic Consulting, is an international firm of economists who devise practical solutions to highly complex business and legal issues arising from competition, regulation,
public policy, strategy, finance, and litigation.

[10] *In re* Fritz Cos. Sec. Litig., No. 96-2712 MHP, 1998 U.S. Dist. LEXIS 23063 (N.D. Cal. March 5, 1998).

So now there is class action litigation in federal court. Some members of the plaintiffs' bar are bringing what are called Section 11 claims, claims based upon a securities offering in state court. There are state court actions by holders, and then there are derivative suits that get filed either federal or state court, or both. As if that was not bad enough, if a company happens to have an ERISA plan,[11] the company is going to be sued by the ERISA bar, which will do the same thing. The ERISA suit will be filed in federal court. And, just when you thought you could not stand the fun, you are going to get visits from the SEC, potentially the Department of Labor, and the Justice Department.

The big change has been in the Justice Department. In years past, the SEC and the Justice Department had to have fairly concrete complaints presented to them in order to take action. Now, those agencies are in a position where they do not want to be embarrassed. The SEC does not want to explain why it missed an Enron and why it did not review that company's financials for several years. The SEC and the Justice Department are now in an environment that if they get a complaint, they feel compelled to look at it.

The Justice Department became more aggressive in January 2003. Then Deputy Attorney General Larry Thompson put out some guidelines to the U.S. Attorney General's Office for charging corporations and partnerships with crimes. These guidelines update a 1999 pronouncement by then Deputy Attorney General Eric Holder. While these guidelines are carefully written in government speak, those of us who read them cautiously and know the environment believe that they significantly open the door to allow U.S. Attorneys to pursue public corporations. Before these guidelines were put out, I think there was a bias in the Justice Department against doing so. The Justice Department tended to go against the individuals who committed the crimes. But now, there is a clear movement to look hard at whether the corporation should be indicted as well. It is a terrible thing for a corporation to be indicted, particularly in this environment. In fact, it is not much better to have your officers indicted.

I can assure you that Wall Street does not wait around to let you sort things out. If that happens, the consequences are very high. The Justice Department understands that the shareholders of a public company are innocent shareholders and that they will be damaged if such an indictment is issued. However, the Justice Department also believes that there is a huge value in sending a message to the corporations that improprieties are not going to be tolerated, and that the

[11] The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001.

corporation and its officers will be made poster children for the Justice Department if the circumstances warrant it.

In my opinion, one of the most interesting things that has happened in the last two years is the movement by the SEC and the Justice Department to essentially deputize the private bar. They have figured out that their ability to unravel something like Enron, WorldCom, or other matters is tenuous. If these regulators put the kind of resources on those cases that the private bar can, they are going to lack resources on other matters.

What the government is doing now is to say to corporations: "if you will cooperate, if you will do the right thing, and if you convince us that you, the corporation, do not have a black heart, but that you just have some rogue officers or employees, we may agree not to indict you or we may go easier on you." The government looks at things like: whether the company has a compliance program; did it bring the matter to the attention of the government; and are they working aggressively with the government to find the problem? One area that troubles me most is that the government is asking companies to waive the work product and attorney-client privilege so that it can see exactly what went on. Unfortunately, that makes it very difficult for the company and for lawyers involved in the private litigation. That is an area that is still being resolved, but if a lawyer has to choose between having a problem with the Justice Department or the private bar, I submit we all know which one the lawyer will choose.

What else is going on out there? We are seeing more cases being filed. The PSLRA[12] has not slowed down the private bar. One of the things we have seen is that the members of the plaintiffs' bar have become very aggressive in using private investigators to talk to former employees in an effort to build their cases. The bar in Delaware is also using the books and records provision.[13] Most corporations are required under state law to provide information to shareholders upon request. It is amazing how few corporations really appreciate the fact that this provision exists. Frankly, it is amazing how few plaintiffs' lawyers utilize it as a means of informal discovery. The Delaware bar has pushed that for quite some time. Now, the plaintiffs' bar is becoming much more informed because the stakes are much greater. It is worth spending a couple hundred thousand dollars to conduct an investigation, if you are suing a major company.

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[12] Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4.

[13] 15 U.S.C. § 78m.

Settlements are now more costly. As a percentage of the loss, however, settlements have come down simply because the money is not there in D&O[14] insurance to pay for the kinds of losses that are being encountered. I do not have the statistics in front of me, but the median settlement is probably no more than, and possibly even less than, five percent of the investor's losses. But, D&O coverage is going through the roof, although I heard recently there may be some change in that. The carriers are much quicker to deny coverage than they ever were in the past. That is the environment that we are in.

Now, let us talk a little bit about what Congress and the regulators have done to try to address the current situation. Sarbanes-Oxley has three principal approaches to dealing with the problem. First, it focuses on enhanced corporate accountability for companies, executives, and directors, increasing their explicit oversight functions and creating criminal penalties for failure to do so. One such failure in oversight is not having the proper certifications. As any CEO or CFO in the room knows, the corporation must essentially certify the accuracy of its financial statements. Second, it increases the oversight of companies through enhanced disclosure requirements, auditor independence, and the creation of a Public Company Accounting Oversight Board. Third, it has extended the statute of limitations for securities fraud claims. Before Sarbanes-Oxley, the statute of limitations was one year from the date of discovery or three years from the violation. Now, the statute of limitations is two years from the date of discovery and five years from the violation.

Sarbanes-Oxley has been subject to considerable criticism from people who believe that the act was not well conceived, and that any legislation that is rushed through without getting the input of the various constituencies is flawed. It is not clear that the impediments in Sarbanes-Oxley have been cured by the rules themselves. There is a lot of concern that these measures are either duplicative or unnecessary. Beyond that, Congress had previously given the SEC the tools it needed. There were already provisions in the Securities Exchange Act dealing with the relationship between a corporation and its auditors. There were provisions which set forth the obligations of officers or directors with respect to the accuracy of financials. There were already provisions that allowed the SEC to bring actions against third parties for aiding and abetting. Finally, Sarbanes-Oxley is also costly from a compliance standpoint. In terms of cost, I think the real unknown is the cost to entrepreneurialism. Will all the focus on compliance and all of the concern about

[14] Directors and Officers Insurance Coverage

doing the wrong thing chill corporations from pursuing potential business opportunities?

Judicially, there have been a number of changes lately. It is probably true here in Tennessee, and it is certainly true in Georgia, that the body of law in the area of corporate governance is not particularly well developed. As a result, Georgia courts, like many others, tend to look to Delaware courts for guidance. The Delaware judges certainly believe that they are, and they may well be, the preeminent scholars in this area. However, lately some decisions have been coming out of the Delaware Chancery Court and the Delaware Supreme Court that are of concern to many people that practice in the corporate area, for the cases are interesting in terms of where they are taking the law. These cases primarily deal with either director independence or when a director is exculpated from personal liability.

A minute ago, I went through a list of horrors concerning what happens to a corporation when it has a problem. Some of you might be wondering why in the world anybody would want to serve on a board of a public company. One of the reasons people agree to serve is that generally there are provisions that exculpate the board members from personal liability as long as they act in good faith and are not disloyal to the corporation. Liability for a director is generally premised either on concepts akin to negligence or gross negligence. Delaware is a gross negligence state. There is some concern that Georgia and Florida, for example, may be simple negligence.

Suppose a director was negligent in doing a merger and acquisition transaction, and there was an allegation that the disclosures were incomplete. In that instance, the courts could step in and enjoin the transaction or order more complete disclosure. Generally, however, the director is not subject to personal liability in that situation unless he failed to act in good faith. If the director met the standard of care, was informed, and did not have a personal interest in the transaction, then the director should not be held personally liable. If, however, the director did not perform the requisite amount of work required to become informed and was negligent, the director would have breached his duty of care, but would not necessarily be subject to economic sanctions. Now, in light of a couple cases, including the Disney decision,[15] there is a greater likelihood that an inattentive director will not be only deemed negligent, but also disloyal and to have acted in bad faith.

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[15] *In re The Walt Disney Co. Derivative Litig.*, 825 A.2d 275 (Del. Ch. 2003).

In order to appreciate what Congress has done and whether it is going to make a difference, I have to step back and look into why we have the problem in the first place. If you do not know or have an opinion as to what causes the problem, it is hard to determine whether all of these changes really make a difference. From my personal perspective I think the problems stem from two things: greed and fear.

GREED

In the 1990's, unimaginable wealth was created by people who did not spend twenty or thirty years building businesses. Instead, this wealth was created overnight by people who had the next new idea, and by people who had options. Furthermore, the amount of money that people believed they were making was just staggering. You have all read about this. You have seen the person who made twenty or fifty million dollars, and you step back and wonder what they did that was so significant? Part of it was the times, but the problem was that companies, at that point in time, were largely compensating their employees with stock options. I remember when the mantra was: "…we have got to align the interest of the shareholders and management." That mantra did not work very well. I am not saying there is not a role for stock options, but in hindsight, I think a lot of stock options were given out with flawed criteria for vesting; that is, when you earned them. For example, options based upon a company hitting a share price are an invitation to disaster.

At the same time, money was flowing into the market because of mutual funds, the entrance of the retail investor, and fear that people were going to miss the next new thing. As a result, valuations of companies went through the roof. Multiples got to extraordinarily high levels. Unlike restrictive stock, stock options give an individual the option to purchase the stock at a certain stock price. For example, if the company stock is trading at twenty dollars when the employee is hired, the employee might get an option to purchase the company's stock at that price at a later date. As a result, the employee is able to realize the appreciation once the stock goes above twenty dollars.

Imagine a scenario where the company has just granted employees options. The company is in a go-go market and the stock goes through the roof. The CFO can see that the company is going to miss its numbers, and realizes that he and all of the employees will lose the value of their options. He also knows that shareholders are going to be devastated.

Fear

Unfortunately, the fear of disappointing the market, disappointing employees, and wiping out value creates an incentive for companies to finesse financial issues. I am afraid that there were some people who succumbed to that pressure.

To add to that, the mindset was different in the late 1990's and early 2000; it was a land rush. The quality of earnings suffered, but I think people knew it in many companies, particularly the new age companies. The idea was to get as much revenue as possible. Many new age companies decided to try to make as big of a footprint as possible. They knew that there was going to be shake-outs, so they thought, we will survive this; we will sort it out and get it cleaned up later. There was certainly a real problem with the quality of earnings.

At that time companies also became responsible for hitting the numbers set by First Call. These were numbers that often the company had embraced or were pushed to in order to sustain a certain level. That was not bad enough. The company could still get hurt if it reached its reported target, but missed the whisper. The whisper might be something like, "the consensus is ten cents a share, but I think they are going to do twelve." If the company hit ten, its stock was devastated because even though it hit the consensus number, it missed the whisper.

Analysis

In my opinion, because Sarbanes-Oxley does not fundamentally address greed or fear, the result of that legislation will be of limited value. I think the best thing that we are going to get out of Sarbanes-Oxley is a renewed focus, bringing all of this into the minds of people in public companies; reminding companies that the integrity of its numbers, and integrity of management, is important. Among other things, I think there will be some limited psychological value that will be positive; it will probably deter some people from pushing the envelope. Unfortunately though, after doing this for twenty-five years, I do not believe it is going to deter the crooks, those people that really intend to do bad things. There have always been penalties for people like that under the securities laws and under the federal criminal laws. These penalties have not worked before, and I do not believe this new legislation is going to make much of a difference now. Frankly, I think the only thing that will make a difference is that the John Public of the employees is savvier now and is more willing to turn in people that he knows are engaged in wrongdoing. But I do not think this legislation will get to the fundamental issues.

Advisories

At this time, I want to give you some advisories that Alston & Bird put together on the various Sarbanes-Oxley initiatives. After that I want to bring to your attention some cases that I find to be of interest. Hopefully, all of this will give you an overview of what Sarbanes-Oxley attempted to do, and what the folks who implement the rules have done.

The first rule is that Sarbanes-Oxley requires disgorgement of bonuses and profits in the event of a financial reporting restatement. The essence of this rule is that if you restate as a result of some sort of a problem, the CEO or CFO can be required to disgorge their bonuses, and many of those are substantial. However, it only applies when the company is "required to restate." Therefore, it only applies when there is some level of misconduct. It is understood that the CEO or CFO does not have to be aware of what preceded him. Right now it is also unclear what profits must be disgorged. It is easy to determine if the CEO got a cash bonus that year. It becomes harder if the bonus is part of a multi-year analysis that allows the CEO to vest options or receive other types of compensation. Obviously, no CEO or CFO wants to lose a bonus. I think that the intensity and focus is causing honest CEOs and CFOs to ask their subordinates, "are you sure that you got this right?" People are looking into things more diligently. However, I do not think anyone seriously believes that a CEO or CFO standing at the crossroads between committing a financial fraud that will probably be worth millions of dollars to him, and running the risk of getting caught, thus giving up his bonus, will be deterred by that consequence.

The second thing I want to talk about is that the SEC adopted rules requiring MD&A[16] disclosure of off-balance sheet arrangements and aggregate contractual obligations. I actually think this is a good one. The MD&A disclosure is the portion of a securities filing in which management is supposed to step back. I like Warren Buffett's[17] description of MD&A. He said, "It is like telling a partner who has been gone for a year what is going on in the business." It is when management is supposed to step back, and in a narrative fashion say here are all these numbers, but let me tell you what they mean. Things like whether your financing sources are going to be reoccurring, or whether your revenues are reoccurring, are a critical portion of

[16] Management Discussion & Analysis

[17] Warren Buffet, Chairman of Berkshire Hathaway, Inc.

the MD&A. One of the concerns is that there have been a lot of these special purpose entity off-balance sheet vehicles that, because of sophisticated swaps, put arrangements, or derivatives, still cause the public company to retain liability. That liability is then difficult for the reader of financial statements to fully appreciate.

Having said that, there is some debate as to whether the SEC rule goes far enough. The big debate was over whether a company had to disclose any arrangement of this nature that may affect its financials. Required disclosure is now reasonably likely. A company that does not necessarily want to show an off-balance sheet vehicle will potentially conclude that it is not reasonably likely the off-balance sheet vehicle will have a financial impact. There are still loop holes, but I think it is a good step in the right direction.

Lawyers have not been immune from this scrutiny. Right now there is a big debate between the state bar associations, the American Bar Association, the SEC, and Congress over some of these issues. Essentially, I think it was Congress' desire to turn lawyers into whistleblowers. If lawyers did not get satisfaction within a corporation, Congress wanted them to become whistleblowers, to go to the SEC or other regulators and tell on their clients. I am pretty fortunate, because I have always been able to get access to the audit committees and boards of directors. However, when you talk to lawyers in New York, for example, they are dealing with very large multi-national corporations and they have never gotten anywhere near the board.

In my case however, if I have a problem, I go before the board right away. But, if you are one of the hundreds of lawyers that GE[18] or Exxon[19] uses, your ability to get access to the board may be perhaps a little different. I am not sure that this is a major change at the end of the day. Lawyers have to be guided, not just by the ethics of the bar, but by their own personal ethics. Most lawyers that I know would take it up the ladder on their own or would withdraw if they came across a truly fraudulent situation. I think initiatives like the Justice Department and SEC initiative to get a lawyer to waive attorney-client privilege as part of cooperation, or initiatives designed to have you report to agencies, are things the bar needs to be concerned about and continue to examine. These types of initiatives run the risk of undermining the attorney-client privilege to the point where, the first advice that a lawyer will need to give to a client is, "You cannot trust me to keep your secrets confidential." That is a really tough way to start a relationship.

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[18] General Electric Company

[19] Exxon Mobil Corporation

Another set of rules primarily deal with auditor independence, audit committees, and rules on improper influence of audits. I think these rules are a good idea. Many of the boards that I have dealt with had at least a majority of exclusively independent directors on audit committees. It probably was not bad for the boards of some companies to get a little nudge to make sure they got to that point. Stock exchanges also have various rules on independence. Those listing requirements have helped as well.

The SEC adopted final rules regarding improper influence on audits, and it is a little broader than the previous Rule 13b-2 of the Securities and Exchange Act of 1934, as amended.[20] There were already rules that precluded a company from misleading its auditor or doing other things that were deemed inappropriate. I think this rule makes the requirement a little clearer, that the scope is broader than just trying to influence an auditor in connection with a registration statement or with respect to a periodic report. The more interesting aspect of the rule is that it signals that the SEC may go after third parties. Supposedly, there is no private right of action. One of the things that has bothered the SEC for quite a while is embodied in the following scenario: Company A is entering into transactions after the end of the year. It cannot get the transactions closed by year's end. Company B, which is buying from Company A, knows that Company A has to get these sales by year's end. A lot of companies are that way, particularly in the software industry. So Company B will take Company A to the wire. They may do a deal on January 2nd or 3rd. However, they will agree that that deal was done as of December 31st, so that Company A can book the deal as revenue in that year and not in the next year. I think to some extent, and this is a gross overstatement, Company B's attitude is that it is not its problem. Company B got a good deal and took advantage of a problem; it is up to Company A to report the transaction correctly. The SEC is not amused. I think companies are going to see the SEC bringing actions under this rule when those companies provide false information as part of the audit verification process, or when companies create documents that they know are false. I also think companies are going to see the SEC using more of the aiding and abetting capabilities that are already available under the anti-fraud provisions.

Another interesting requirement is the SEC's requirement on posting Section 16 reports.[21] Essentially, the SEC has shortened the time available for insiders to report on their trades. The rule used to be that insiders had a certain period of time

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[20] 15 U.S.C. § 78m(b).

[21] 15 U.S.C §16(a).

to report. Now it is essentially real time reporting. The concern was that insiders were bailing out ahead of bad news. I know there have been a few cases where this has happened, but I am not sure this requirement is going to make a whole lot of difference.

There are also the internal controls requirements. The SEC, as I mentioned earlier, is requiring public companies to have their CEO and CFO essentially attest to the accuracy of the company's financial statements and internal controls. The real big upcoming requirement is 404,[22] which is an internal control certification. It requires a deep analysis of the company's internal controls and documentation. Major corporations are spending in the hundreds of thousands of dollars trying to do the analysis and be prepared for it.

Whistleblower

The next to last thing that I want to cover under the topic of legislation is the recent pronouncement on whistleblower rules.[23] These are fairly specific. I think a lot of people were nervous early on that companies would get in trouble if they fired someone, and then that person would claim they were fired because they were aware of wrongdoing within the corporation. Now it is pretty clear that a company will not get in trouble for firing someone, unless it is doing so in retaliation for them going to one of the regulators. The other day I saw that there were about 140 whistleblower reports to the Department of Labor, but it was not clear how many of those were actually valid reports. In my opinion, this is going to have less benefit than people think because individuals rarely go to a regulator. However, I think that the focus on whistleblowers and the attention that certain whistleblowers have received lately has made it more comfortable for whistleblowers and disgruntled employees to come forward.

Director and Shareholder Voice

The last thing I want to advise you of in this area is the emergence of new rules regarding the director nomination process and shareholder communications with directors. The basic idea here is to give the shareholders more of a voice. The big debate right now is what is going to come out of these rules and whether they go far enough. As I understand it, some activists want shareholders to have the right to nominate candidates or to have a greater role in the nomination of director

[22] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 at 404 (2000).

[23] 18 U.S.C. 1514A.

candidates. Under the new rules, if a company is going to allow shareholders to participate, the company has to do more to let them know how to participate. One of the more interesting rules is that corporations have to say whether they have a mechanism for getting shareholder communications, and whether directors are going to be accessible to shareholders.

A company can say no to increased shareholder participation, but then the board will have a stigma that it does not listen to its shareholders. On the other hand, in this environment where people are saying that directors do not spend enough time on the core business, I am not sure if I want my directors leafing through six inches of e-mails from every shareholder who thinks they have a better idea on how to run the company. I think what you are going to find are procedures much like the ones in the compliance area, where the reports go to a lawyer to get carefully screened. At the end of the day, I am just not sure that these are going to have much value.

Case Law

Finally, I want to talk for just a minute about some of the cases that have come out because I think they are as interesting as anything else going on right now. The one that intrigues me the most is the new Disney decision.[24] Real quickly, for those of you who do not remember the facts: Michael Eisner,[25] the CEO of Disney, was facing a crisis. He had lost Jeffrey Katzenberg[26] and some of the other key lieutenants who had gone on to form Dream Works. Eisner had a problem; he was not viewed as the easiest guy to work for. So, he hired his good friend Michael Ovitz,[27] who had been the head of the talent agency, arguably without the full support or involvement of the board. Without going into the facts in great detail, Ovitz was a failure. So, Ovitz and Eisner purportedly worked out a not-for-cause termination that the plaintiffs allege puts $140 million in Ovitz's pocket.[28] The

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[24] *In re The Walt Disney Co. Derivative Litig.*, 825 A.2d 275 (Del. Ch. 2003).

[25] Michael Eisner, Chairman and CEO of Disney.

[26] Jeffrey Katzenberg, Former Disney Executive.

[27] Michael Ovitz, founder and head of CAA, Creative Artist Agency. Former Disney President.

[28] *In re The Walt Disney Co. Derivative Litig.*, 731 A.2d 342, 351 (Del. Ch. 1998).

plaintiffs' bar then brought a suit against the directors alleging that they had breached their fiduciary duty in the hiring and termination of Ovitz.[29]

At that time, the Delaware Chancery Court concluded that this was a decision protected by the Business Judgment Rule based on the record before it, which included the allegation that there was a compensation expert.[30] The Business Judgment Rule is a rule that the courts have adopted which basically says it is not appropriate for courts to try to second guess business decisions of boards of directors. So what the court is going to look at is whether the process worked, and whether the decision was made, as I said earlier, by directors who are independent, do not have a financial stake in the deal, and who are informed. If the court finds that the directors meet all of these requirements, essentially, that is it, and the case is dismissed. The first Disney case was thrown out. The Court found that the decision to hire Ovitz and the termination were protected by the Business Judgment Rule.[31]

Then Chancellor Chandler[32] gives a speech and he says, "You know, that old Disney case, that was a terrible pleading that we looked at, you know, but there might be something there." And guess what? The new complaint came in, and it focused on the issue of good faith.[33] This is something that people who practice in this area are watching very acutely. There is a Vice Chancellor by the name of Leo Strine[34] who has written an article, in which he suggests that if a director fails to be informed and to be active in the corporation, at some point that behavior becomes more than a failure of due care; it becomes a breach of the duty of loyalty.

Again, why does all this matter? Because, as I said up front, if a director violates the duty of care, and the corporation has an exculpation provision, the director is not personally liable. But if the director is not entitled to exculpation, and has acted in bad faith, the director can be held personally liable. In the second Disney decision, the Court found on the pleadings, not on the facts, that it is not good faith to allow two old friends to cut a deal like this without a compensation

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[29] *Id.*

[30] *Id.* at 365.

[31] *In Re The Walt Disney Co. Derivative Litig.*, 731 A.2d 342.

[32] The Honorable William B. Chandler III, Chancellor of the Delaware Court of Chancery.

[33] *In Re The Walt Disney Co. Derivative Litig.*, 825 A.2d 275.

[34] The Honorable Leo E. Strine, Jr., Vice Chancellor of the Delaware Court of Chancery.

expert.[35] If the case winds up that way, the directors will be personally liable subject to any insurance they might have that will pay for that $140 million plus severance.

In an interesting twist, possibly because the court felt sorry for the directors, the court also says, Ovitz, hang on here, you cannot just walk off with your $140 million.[36] While normally people can bargain at arm's length with the corporation, if a person is an officer, that person has a fiduciary duty to ensure that the process is fair. Negotiating with an old friend is not fair process.[37] I am sure Ovitz was shocked by that decision, as many people are, but he is in the case as well. Depending upon how it plays out, Ovitz might have to pay that money back. I think that the court's willingness to find at the pleading stage that there was not good faith is a problem, because it blurs the line between due care and good faith. In my opinion, this development is going to make it a lot easier for the plaintiffs' bar to get past a motion to dismiss. The prior cases, *McCall*[38] and *Abbott,*[39] were cases where the board had ignored repeated red flags, including FDA violations or other criminal conduct. So I think that this decision is critical.

I will now discuss other cases that have come out, and then I will take questions. *Oracle,*[40] a decision by Vice-chancellor Strine, is one in which the Oracle directors were sued. In the derivative context, a corporation can form a special committee of independent directors who decide whether the corporation should bring the suit itself or whether the suit should be dismissed. Oracle got two new directors out of Stanford University. The problem was that many of the people on the board, including Larry Ellison,[41] had deep ties to Stanford. The board, including Mr. Ellison, apparently pledged millions to the school. Vice-chancellor Strine said that those directors were not independent. Therefore, the millions that had been spent and all the work that had been done on the investigation would not be sufficient to throw out the lawsuit. Vice-chancellor Strine stated that even though

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[35] *In Re The Walt Disney Co. Derivative Litig., 825 A.2d 275,* 287-88.

[36] *Id.* at 290.

[37] *Id.* at 291.

[38] McCall v. Scott*,* 250 F.3d 997.

[39] *In Re* Abbot Labs. S'holders Litig., 352 F.2d 795, 809 (7th Cir. 2001).

[40] *In Re* Oracle Corp. Derivative Litig., 824 A.2d 917 (Del. Ch. 2003).

[41] Larry Ellison, Oracle's Chairman, C.E.O., and largest stockholder.

the new directors had no economic interest in the decision, the court could not ignore the social ties and relations that existed.[42]

The *Fuqua* decision[43] is not dissimilar. Where the judge found too much Cardinal red in *Oracle*; the judge found a little too much Duke University blue in *Fuqua*. Frankly, many people who practiced in this area would have avoided this type of situation.

The *Guttman* decision[44] is an interesting discussion of when demand is required or not required in a derivative suit. It also raises the question of whether a director is entitled to exculpation if the director has received an improper personal benefit. This case suggests that if a director is collecting a salary and stock options, and is asleep on the job, the director is receiving an improper personal benefit. That is where the commentary is going. Whether that means the director has to forfeit compensation to avoid being found liable for the transaction is yet to be determined.

The last one is an action that has been brought by the SEC against Chancellor Corporation.[45] This is a suit that, to me, fulfills the threat or promise that Stephen Cutler[46] has been giving for three years at "SEC Speaks" to start finding an audit committee that they are going to go after for an internal controls breakdown.

In sum, there has been a lot of recent activity in this area. I am not sure all of it is good or productive. It is going to take us a little bit longer to know for sure. Unfortunately, in the end, I tend to believe that the public perception and the change in the attitude of the public will do more than any of these specific rules. Thank you.

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[42] *In Re* Oracle, 824 A.2d at 947-48.

[43] Lewis v. Fuqua, 502 A.2d 962, 971 (Del. Ch. 1985).

[44] *Guttman v. Jen-Hsun Huang*, 823 A. 2d 492 (Del. Ch. 2003).

[45] SEC v. Chancellor Group, Inc., 1998 SEC LEXIS 2729 (D.D.C. 1998).

[46] Stephen Cutler, Director of Enforcement, United States Securities and Exchange Commission

Question and Answer

JOSEPH V. CARCELLO:[47] One of the things you said is that you do not think that Sarbanes-Oxley, and the judicial rules that resulted, are going to be very effective because they will not change the basic nature of man, namely, greed and fear. Although some of Sarbanes-Oxley certainly tries to get at those things by not recouping the bonus as well as others things, I would agree with you. I am curious as to your reaction to a major aspect of Sarbanes-Oxley and the change in the listing standards which significantly ratchets up the responsibilities of auditing professionals, both external and internal; it changes their locus of control from the CEO and CFO to an independent audit committee. If this process works the way it is intended, those parties should now have the ability to do much more extensive work with much less risk of being terminated by a CEO or CFO who does not want what they are doing discovered. So, the actual behavior may not change, but the detection of the behavior may change, and the base rate of misleading financial statements may go down.

JOHN L. LATHAM: I think you are right, that is a big change. It was not a great situation when the CEO or CFO hired the auditor. It was common knowledge that the audit was a loss leader. Everybody tried to get the audit fees down as low as they could. In turn, the auditors tried to make it up by selling tax or consulting services. So they were very dependent upon the discretion of the CEO or CFO. On the other hand, at the end of the day, it is really going to depend on the forcefulness of the audit committee.

I have seen two very different examples. In the first, the audit committee was responsible to auditors in name only. In another, I have a client that had some historical issues. The company got a new audit committee chairman who fired the auditors and hired a new auditor. The new chairman was very aggressive in having executive meetings with the auditors without the CFO present. Those auditors clearly understood that they reported to the audit committee. Although I am not suggesting that every company should fire its auditor, the message must be sent to the auditor in unmistakable terms. I think that is going to help.

JOSEPH V. CARCELLO: Let me follow up. In regards to the example you gave in which the audit committee was in charge of the relationship in name only,

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[47] Joseph V. Carcello, co-founder and Director of Research for the University of Tennessee's Corporate Governance Center, and William B. Stokely Distinguished Scholar in the Department of Accounting and Business Law at the University of Tennessee.

there are some very strong statutes that lay out specifically the responsibilities of the audit committee and what they are supposed to do. In cases where the committee does not carry out those responsibilities and there is a massive breakdown, do you think the private bar would have any success in that case arguing breach of the duty of loyalty?

JOHN L. LATHAM: I think that is where they are going to go, because they know that they cannot get there through duty of care. I think that most of those suits will allege sustained failure of oversight through sustained failure to ensure that there were adequate internal controls. It is dicey to be a board member these days and particularly to be on an audit committee. Former SEC Commissioner Richard C. Breeden, who became involved with WorldCom three years ago, made the statement to the commissioners and the enforcement staff that he thought that too much was being asked of audit committees. In his experience, he found it difficult to get qualified people to serve on boards. I think that problem is worse. With all due respect, if I were a CEO of a public company, I do not know if I would want to be on another corporation's board. Frankly, in that situation, I am not sure that the board of directors should let me be on another corporation's board. So, I think that there will be some negative aspects as well. Some people have suggested a retired CFO's relief act. I think those are the kind of folks that will serve on audit committees.

JOAN M. HEMINWAY:[48] A number of scholars have suggested that it might be useful for us to put more effort into looking at behavioral science and the way that boards and management makes decisions. What do you think about that suggestion?

JOHN L. LATHAM: That is an interesting question. I would say yes, but I am not sure what you do with the output of such a study. I know that given the same rules and the same number of people, the personal dynamic coupled with the nature of the people and their interaction with the CEO will give you totally different risk tolerances and attitudes. So, I think it is something that is worth exploring, and I would be interested in seeing the results. I have experienced it, but I have never seen it on a more studied basis. I think it is important.

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[48] Joan MacLeod Heminway, Associate Professor of Law, The University of Tennessee College of Law.

GEORGE W. KUNEY:[49] Do you see increased federal regulation continuing? By that I mean new regulations rather than strict enforcement of laws that are already on the books. Or do you see the states taking back governance of the accounting industry and governance of corporate decision making, which has historically been their role?

JOHN L. LATHAM: There are many people who believe that these decisions out of the Delaware Chancery Court are a reflection of the court's desire to protect its turf and show that it can handle problems by saying that the existing tools are adequate in order to avoid a federalization of the corporate governance area. I also think that the state securities regulators are becoming much more aggressive. Certainly, you can say whatever you want about the appropriate balance between the state regulators and the SEC, but I think a lot of people are troubled that Eliot Spitzer[50] is the one that keeps turning up the dirt and not the SEC. So I do not know. I think the SEC would like to be in control here. But it is pretty hard in this environment for Congress and the SEC to take action that would supplant the state regulators.

GEORGE W. KUNEY: That is all the questions we have time for today. On behalf of both The Clayton Center for Corporate Governance and The Clayton Center for Entrepreneurial Law, I want to thank you very much for coming and speaking with us today.

JOHN L. LATHAM: Thank you all.

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[49] George W. Kuney, Associate Professor of Law and Director of the Clayton Center for Entrepreneurial Law, The University of Tennessee College of Law.

[50] Attorney General Eliot Spitzer for the State of New York.

THE BUSINESS CORPORATION ACTS OF DELAWARE AND TENNESSEE: A COMPARATIVE APPROACH

ELIZABETH LOW[1]

Table of Contents

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Introduction

Although the General Corporation Law of the State of Delaware[2] (the "Delaware Statute") and the Tennessee Business Corporation Act[3] (the "Tennessee Statute") are substantially similar, key differences exist that a practitioner should consider when advising a client regarding the choice of jurisdiction for incorporation. The statute governing the place of incorporation may provide material advantages and disadvantages for the corporation. Part I of this article summarizes several key jurisdictional distinctions between Delaware and Tennessee corporate law. Part II presents a comprehensive, side-by-side comparison of the business corporation statutes for Delaware and Tennessee. The comparison chart highlights similar provisions and reveals provisions unique to each jurisdiction.

I. Summary of Jurisdictional Differences

Notice Requirements. The Tennessee Statute provides that any notice required by the statute must be in writing, except where oral notice is reasonable.[4] Additionally, the Tennessee Statute allows the corporation to specify in its charter and bylaws the notice requirements consistent with the statute.[5] In contrast, the Delaware Statute explicitly allows a corporation to provide notice to stockholders by facsimile or e-mail.[6] The Delaware Statute also specifies different requirements for other types of notice.

Filing Requirements. Under the Tennessee Statute, the filing fees are charged as a flat rate, ranging, for example, from $20 for a charter amendment to $100 for an initial charter.[7] Under the Delaware Statute, while the charges for filing some documents are flat fees, many documents are taxed at variable rates.[8] For

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[2] DEL. CODE ANN. tit. 8, §§ 101-398 (2002).

[3] TENN. CODE ANN. §§ 48-11-101- 48-27-103 (2002).

[4] TENN. CODE ANN. §§ 48-11-202(a).

[5] TENN. CODE ANN. §§ 48-11-202(g).

[6] DEL. CODE ANN. tit. 8, § 232(a)-(b).

[7] TENN. CODE ANN. § 48-11-303(a).

[8] DEL. CODE ANN. tit. 8, § 391.

example, the fee for filing an original certificate of incorporation is calculated on the basis of $.02 for each of the first 20,000 authorized shares of par value capital stock, $.01 for 20,000 to 200,000 shares, and $.004 for each share in excess of 200,000.[9]

The Tennessee Statute specifies eight types of documents that must be filed with both the secretary of state and the registrar of deeds in the county of the corporation's principal office.[10] The Delaware Statute does not require that documents be filed with the registrar of deeds.

Power to Adopt, Amend, or Repeal Bylaws. Under the Tennessee Statute, the initial bylaws may be adopted by the incorporators or by the board of directors.[11] After the initial adoption of the bylaws, the shareholders may amend or repeal the bylaws, if the charter grants them the power to do so.[12] The board of directors may also have the power to amend or repeal the bylaws, if the charter does not reserve the power exclusively to the shareholders or specifically exclude the board of directors from amending a certain provision.[13] Under the Delaware Statute, the initial bylaws may be adopted, amended, or repealed by the incorporators, the initial directors, or, if the corporation has not yet received payment for stock, the board of directors.[14] After the corporation receives payment for its stock, the stockholders posses the power to adopt, amend, or repeal the bylaws, and the corporation may reserve the same power to the board of directors in the certificate of incorporation.[15]

Service of Process. In Tennessee, the corporation's agent for service of process is the registered agent.[16] In Delaware, the corporation's agent for service of

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[9] *Id.*

[10] TENN. CODE ANN. § 48-11-303(a), (d).

[11] TENN. CODE ANN. § 48-20-201.

[12] *Id.*

[13] *Id.*

[14] DEL. CODE ANN. tit. 8, § 109(a).

[15] *Id.*

[16] TENN. CODE ANN. § 48-15-104(a).

process is not only the registered agent but also any officer or director of the corporation.[17]

Authorization of Shares. The Tennessee Statute states that a corporation *must* authorize at least one class of shares with unlimited voting rights, and entitle at least one class of shares to the net assets if the corporation dissolves.[18] The Delaware Statute states that a corporation *may*, but is not required to, issue stock.[19] A non-stock corporation, as specified in the certificate of incorporation, may have members rather than stockholders.[20]

Distributions. The Tennessee Statute prevents a corporation from making distributions to shareholders if the corporation would be insolvent under either an equity test or a balance sheet test.[21] The Delaware Statute prevents a corporation from paying dividends if its capital is less than the capital represented by the issued and outstanding stock;[22] however, the board of directors has discretion to determine the value of capital as greater than the consideration received for issued stock.[23]

Special Meeting of Shareholders. The Tennessee Statute provides that a special meeting of shareholders may be called by either the board of directors or by the shareholders upon demand of at least ten percent of the shareholders eligible to vote.[24] The Delaware Statute provides that a special meeting of shareholders may be called by the board of directors or as authorized by the certificate of incorporation.[25]

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[17] DEL. CODE ANN. tit. 8, § 321(a).

[18] TENN. CODE ANN. § 48-16-101(b).

[19] DEL. CODE ANN. tit. 8, § 151(a).

[20] DEL. CODE ANN. tit. 8, § 102(b)(1).

[21] TENN. CODE ANN. § 48-16-401(c).

[22] DEL. CODE ANN. tit. 8, § 170(a).

[23] DEL. CODE ANN. tit. 8, § 154.

[24] TENN. CODE ANN. § 48-17-102(a).

[25] DEL. CODE ANN. tit. 8, § 211(d).

Voting. Under the Delaware Statute, a director who willfully or negligently refuses to provide a list of stockholders entitled to vote at a meeting is ineligible for election to office at that meeting.[26] The Tennessee Statute does not have a corresponding provision.

Under the Tennessee Statute, an appointment of proxy is valid for only eleven months and is revocable, unless otherwise specified.[27] Under the Delaware Statute, a proxy is valid for three years and is irrevocable if, unless stated otherwise in the proxy, coupled with an interest adequate to support the power transferred.[28]

Under the Tennessee Statute, a voting trust is valid for only ten years unless renewed for another ten years.[29] The Delaware Statute does not have a corresponding provision.

Board of Directors. Under the Delaware Statute, a corporation must be managed by a board of directors unless otherwise specified in the certificate of incorporation.[30] Under the Tennessee Statute, a board of directors must manage the corporation unless the corporation has fifty or fewer shareholders and the charter specifies who will perform the duties of the board.[31]

Elimination or Limitation of a Director's Liability. Both the Tennessee Statute and the Delaware Statute provide that director liability may *not* be eliminated or limited for: (1) any breach of the director's duty of loyalty to the corporation or its shareholders; (2) acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; or (3) unlawful distributions.[32] The Delaware Statute includes a fourth exception prohibiting elimination or limitation of

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[26] DEL. CODE ANN. tit. 8, § 219(b).

[27] TENN. CODE ANN. § 48-17-203(c), (d).

[28] DEL. CODE ANN. tit. 8, § 212(b), (e).

[29] TENN. CODE ANN. § 48-17-302.

[30] DEL. CODE ANN. tit. 8, § 141(a).

[31] TENN. CODE ANN. § 48-18-101(a), (c).

[32] DEL. CODE ANN. tit. 8, § 102(b)(7); TENN. CODE ANN. § 48-12-102(b)(3)(A)-(C).

liability for any transaction from which the director derived an improper personal benefit.[33]

Officers. The Tennessee Statute requires a corporation to appoint both a president and a secretary.[34] The Delaware Statute only requires that a corporation have an officer with the duty to record and keep the minutes of meetings.[35]

Indemnification. Both the Tennessee Statute and the Delaware Statute allow for discretionary and mandatory indemnification.[36] In both jurisdictions a corporation may indemnify an individual who acted in good faith, reasonably believed that the conduct was in the best interest of the corporation, and, in the case of a criminal proceeding, had no reasonable cause to believe the conduct was illegal.[37] Under the Tennessee Statute, discretionary indemnification is limited to former directors of the corporation.[38] Under the Delaware Statute, the corporation may indemnify any director, officer, employee, corporation's agent, or a person serving at the request of the corporation as a director, officer, employee, or entity agent.[39]

Share Exchanges. The Tennessee Statute expressly provides for a share exchange,[40] while the Delaware Statutes does not.

Dissenters' Rights. Under the Tennessee Statute, if a shareholder dissents from a corporate action and properly demands payment of the value of her shares, the corporation must determine the value of the shares and pay the dissenter that value in exchange for the shares.[41] If the shareholder is dissatisfied with the

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[33] DEL. CODE ANN. tit. 8, § 102(b)(7).

[34] TENN. CODE ANN. § 48-18-401(a).

[35] DEL. CODE ANN. tit. 8, § 142(a).

[36] DEL. CODE ANN. tit. 8, §145; TENN. CODE ANN. §§ 48-18-502, 503.

[37] *Id.*

[38] TENN. CODE ANN. § 48-18-502(a).

[39] DEL. CODE ANN. tit. 8, §145(a).

[40] TENN. CODE ANN. § 48-21-103(a).

[41] TENN. CODE ANN. § 48-23-206(a).

valuation, the corporation must petition the court to determine fair value.[42] Under the Delaware Statute, a demand for an appraisal is automatically a matter for the Court of Chancery; either the corporation or the stockholder may file the petition.[43]

Dissolution. Under the Tennessee Statute, after dissolution, a corporation continues to exist until the corporation files articles of termination of corporate existence and after all assets are distributed to creditors and shareholders.[44] Under the Delaware Statute, corporate existence continues for three years after dissolution unless the Court of Chancery sets a longer period.[45]

Records and Reports. The Tennessee Statute requires every corporation to maintain at its principal office minutes of shareholder and board meetings, accounting records, records of shareholders, and a copy of the charter, bylaws, and board resolutions.[46] Additionally, corporations must prepare, and, if requested, furnish annual financial statements to shareholders.[47] The Delaware Statute only requires corporations to keep records maintained in the regular course of business.[48]

The Tennessee Statute provides that if a shareholder gives the corporation five days notice, the shareholder is entitled to copy the records that the corporation is required to maintain; this right may not be revoked in the charter or bylaws.[49] The Delaware Statute provides that if a stockholder gives written demand under oath, the stockholder has the right to copy records of the corporation during normal business hours.[50]

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[42] TENN. CODE ANN. § 48-23-301(a).

[43] DEL. CODE ANN. tit. 8, § 262(a).

[44] TENN. CODE ANN. § 48-24-108(a).

[45] DEL. CODE ANN. tit. 8, § 278.

[46] TENN. CODE ANN. § 48-26-101(a), (e).

[47] TENN. CODE ANN. § 48-26-201(a).

[48] DEL. CODE ANN. tit. 8, § 224.

[49] TENN. CODE ANN. § 48-26-102(a).

[50] DEL. CODE ANN. tit. 8, § 220(b).

II. Side-by-Side Comparison Chart[51]

GENERAL CORPORATION LAW OF THE STATE OF DELAWARE	TENNESSEE BUSINESS CORPORATION ACT
A. General Provisions	
	48-11-101 to **48-11-402**[52]
§232. Notice by electronic transmission. Any notice to stockholders given by the corporation shall be effective if given by a form of electronic transmission consented to by the stockholder receiving the notice. Notice requirements are listed in the statute where other notice types are required by the statute.	*§202. Notice.* Notice requirements may be specified in the charter and bylaws if consistent with the notice provisions of the Act. The Act specifies that notice shall be in writing except when oral notice is reasonable. Written notice is effective on the earliest of (1) the date of receipt, (2) five days after deposited in U.S. mail by first class mail, (3) as indicated by returned receipt, or (4) twenty days after deposited in U.S. mail by other than first class, registered, or certified mail.
§103. Execution, acknowledgment, filing, recording and effective date of original certificate of incorporation and other instruments; exceptions. Instruments to be filed shall be signed, in order of priority, by any authorized officer of the corporation, a majority of the board of directors ("board"), a majority of the stockholders, or all the stockholders. Any signature may be a facsimile, a conformed signature, or an electronically transmitted signature.	*§301. Filing Requirements.* Documents to be filed must: (1) be typewritten or printed on one side of paper; (2) be executed by the chair of the board of directors ("board"), the president, or an authorized officer; and (3) indicate that the document is filed pursuant to the Act. Execution requires a signature and a statement indicating the signor's capacity. The secretary of state may establish procedures for filing, including filing by facsimile.

[51] This chart reflects provisions of the General Corporation Law of the State of Delaware, DEL. CODE ANN. tit. 8, §§ 101-398 (2002), and the Tennessee Business Corporation Act, TENN. CODE ANN. §§ 48-11-101 – 48-27-103 (2002) [hereinafter the "Act"]. The chart lists the Act's provisions in numerical order on the right side, with the corresponding, non-numerical General Corporation Law of the State of Delaware provisions on the left side.

[52] Subsequent citations to specific sections of the Act within specified span cites are presented in the format: § 48-__-___.

GENERAL CORPORATION LAW OF THE STATE OF DELAWARE	TENNESSEE BUSINESS CORPORATION ACT
§103(b). Instruments may be acknowledged by either formal acknowledgement or by signature.	
§391. Taxes and fees payable to Secretary of State upon filing certificate or other paper. Taxes and fees for filing are listed in the statute.	*§303. Filing, service, and copying fees.* Fees for filing are listed in the statute. The following documents must also be filed in the office of the register of deeds in the county of the corporation's principal office: (1) charter, (2) charter amendment, (3) restatement of charter, (4) amended and restated charter, (5) articles of merger or share exchange, (6) articles of dissolution and termination by incorporators or directors, (7) articles of dissolution, (8) articles of revocation of dissolution.
§103(d). Execution, acknowledgment, filing, recording and effective date of original certificate of incorporation and other instruments; exceptions. A filed instrument shall be effective upon its filing date unless an effective date in the future, not later than ninety days after the date of filing, is specified.	*§304. Effective time and date of document.* Documents accepted for filing are effective at the time of filing unless a delayed effective date, no later than ninety days after the date of filing, is specified. A charter or application for a certificate of authority must specify the registered agent and registered office of the corporation.
§103(f). Execution, acknowledgment, filing, recording and effective date of original certificate of incorporation and other instruments; exceptions. A filed instrument that is defectively executed or that reflects an inaccurate record of a corporate action may be corrected by filing a certificate of correction or by filing a corrected instrument.	*§305. Correcting filed document.* A filed document that is defectively executed or that contains an incorrect statement may be corrected by filing articles of correction.

GENERAL CORPORATION LAW OF THE STATE OF DELAWARE	TENNESSEE BUSINESS CORPORATION ACT
B. Incorporation	
	48-12-101 to **48-12-107**
§101. Incorporators; how corporation formed; purposes. Any person, partnership, association, or corporation may incorporate a corporation by filing a certificate of incorporation with secretary of state.	*§101. Incorporators.* One or more individuals or entities may act as the incorporator or incorporators of a corporation by delivering a charter to the secretary of state.
§102. Contents of certificate of incorporation. The statute lists elements that the certificate of incorporation *shall* set forth, as well as elements that the certificate *may* set forth.	*§102. Charter.* The statute lists elements that the charter *must* set forth, as well as elements that the charter *may* set forth.
§106. Commencement of corporate existence. The incorporator(s) who signed the certificate of incorporation shall constitute the body corporate when certificate is successfully filed with the Secretary of State.	*§103. Incorporation.* Corporate existence begins when the secretary of state files the charter.
Promoters of a corporation are fiduciaries of the corporation itself, owing a duty of good faith in dealing to the corporation. A contract formed by a promoter prior to corporate existence does not bind the corporation.[53]	*§104. Liability for preincorporation transactions.* Persons acting on behalf of a corporation are jointly and severally liable for all liabilities created with knowledge that there was no incorporation, except for any liability to a person who reasonably should have known that there was no incorporation.
§107. Powers of incorporators. If the initial directors are not named in the certificate of incorporation, the incorporator(s) shall manage the affairs of the corporation, as necessary to organize the corporation, until the	*§105. Organization of corporation.* After incorporation, the incorporators or initial directors shall hold a meeting to elect directors. The initial or elected directors shall meet to elect officers, complete the organization of the

[53] Gladstone v. Bennett, 153 A.2d 577 (Del. Ch. 1959); Stringer v. Elecs. Supply Corp., 2 A.2d 78 (Del. Ch. 1938).

GENERAL CORPORATION LAW OF THE STATE OF DELAWARE	TENNESSEE BUSINESS CORPORATION ACT
directors are elected. *§108. Organization meeting of incorporators or directors named in certificate of incorporation.* After incorporation, the incorporators or the initial board of directors shall hold an organization meeting to adopt bylaws, elect directors to serve until the successors are elected at the first annual meeting of stockholders, elect officers, and transact other business before the meeting. A meeting is not required if each incorporator or director consents, in writing, to taking the actions which would have been taken at a meeting.	corporation, and carry on any other business brought before the meeting. A meeting is not required if each incorporator or director consents, in writing, to taking the actions which would have been taken at a meeting.
§109. Bylaws. The incorporators or initial directors, or if the corporation has not received payment for stock, the board of directors, may adopt, amend, or repealed the original bylaws. The bylaws may contain any lawful provision, consistent with the certificate of incorporation, that relates to the business of the corporation or the powers of its stockholders, directors, officers, or employees.	*§106. Bylaws.* The incorporators or board of directors of a corporation shall adopt initial bylaws for the corporation. The bylaws may contain any lawful provision, consistent with the charter of the corporation, for managing the business and affairs of the corporation.
§110. Emergency bylaws and other powers in emergency. The board of directors may adopt emergency bylaws, which are subject to change by the stockholders. The emergency bylaws may include any provision practical and necessary for circumstances of the emergency. Regular bylaws consistent with the emergency bylaws remain in effect during an emergency. No officer,	*§107. Emergency bylaws.* Unless the charter provides otherwise, the board of directors or the incorporators of a corporation may adopt emergency bylaws, which are subject to change by the shareholders. Emergency bylaws may include all provisions necessary for managing the corporation during, but not after, the emergency. Regular bylaws consistent with the emergency bylaws remain in

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director, or employee acting in accordance with emergency bylaws shall be liable except for willful misconduct.	effect during an emergency. Corporate action taken in good faith in accordance with the emergency bylaws bind the corporation and may not be used to impose liability on a corporate director, officer, employee, or agent.
§111. Interpretation and enforcement of the certificate of incorporation and bylaws.	
C. Purposes and Powers	
	48-13-101 to 48-13-104.
§101. Incorporators; how corporation formed; purposes. A corporation may be incorporated to conduct or promote any lawful business or purpose, except as otherwise provided by the laws of the State of Delaware or the United States Constitution.	*§101. Purposes.* Every corporation has the purpose of engaging in any lawful business unless a more limited purpose is set forth in the charter.
§121. General Powers. Every corporation, its officers, directors, and stockholders shall possess all powers and privileges granted by this chapter as necessary to conduct the business and promote the purposes set forth in its articles of incorporation. *§122. Specific powers.* The statute lists specific powers of a corporation.	*§102. General powers.* Generally, a corporation, like an individual, has the power to do all things necessary to carry out its business and affairs. The statute lists specific powers of a corporation. Unless otherwise provided by its charter, the duration of a corporation and succession of the corporate name is perpetual.
§110. Emergency bylaws and other powers in emergency. The board may modify lines of succession or change the head office as necessary for an emergency. Notice of a meeting of the board during an emergency is only required where feasible unless otherwise provided in the emergency bylaws.	*§103. Emergency powers.* The board of directors may modify lines of succession and relocate or designate alternative principal offices as necessary for an emergency. During an emergency, notice of a meeting of the board is required only when practicable, and officers present at the meeting may be deemed directors as necessary to achieve a quorum.

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§124. Effect of lack of corporate capacity or power; ultra vires. No act of a corporation and no transfer of property to or by a corporation shall be invalid by reason of lack of power or capacity, but a stockholder, the corporation, or the Attorney General may assert lack of capacity or power in a proceeding against the corporation.	*§104. Ultra vires actions.* A corporation's power to act may be challenged only by (1) a shareholder to enjoin the act; (2) by the corporation against an incumbent or former director, officer, employee, or agent; or (3) by the attorney general and reporter in an action for judicial dissolution.
§123. Powers respecting securities of other corporations or entities.	
§125. Conferring academic or honorary degrees.	
§126. Banking power denied.	
§127.Private foundation; powers and duties.	
D. Name	
	48-14-101 to 48-14-103.
§102(a)(1). Generally, a corporate name shall contain the word "corporation" or a similar word or abbreviation; shall be distinguishable from the name of other state entities; and shall not contain the word "bank."	*§101. Corporate name.* Generally, a corporate name must contain the word "corporation," the abbreviation "corp.," or similar language, unless formed for the purpose of banking or insurance. A corporate name, unless authorized, may not imply power to transact business, affiliation with organizations, or agency for the United States or Tennessee. A corporate name must be distinguishable from corporations authorized to transact business in Tennessee. A foreign or domestic corporation may adopt a corporate name while applying for authority to transact business.
	§102. Reserved name. A person may reserve the exclusive use of a corporate name for a period of four months by application to the secretary of state.

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	§103. Registered name. A foreign corporation may register its corporate name for exclusive use through the end of the calendar year of registration by application to the secretary of state. Registration may be renewed annually by application between October 1 and December 31 of the preceding year.
E. Officer and Agent	
	48-15-101 to 48-15-105.
§131. Registered office in State; principal office or place of business in State. Every corporation shall have and maintain a registered office in Delaware. *§132. Registered agent in State; resident agent.* Every corporation shall have and maintain a registered agent in Delaware. The agent may be (1) the corporation itself; (2) an individual resident in Delaware; (3) a domestic corporation, limited partnership, limited liability company, or business trust; or (4) foreign corporation, limited partnership, or limited liability company authorized to do business in Delaware.	*§101. Registered office and registered agent.* A corporation must continuously maintain a registered office and a registered agent in Tennessee. The agent may be (1) an individual resident in Tennessee, (2) a domestic corporation, or (3) a foreign corporation authorized to transact business in Tennessee. If a registered agent resigns or is otherwise unable to perform the duties of the agent, the corporation shall promptly designate another registered agent.
§135. Resignation of registered agent coupled with appointment of successor. The registered agent may resign and appoint a successor by filing a certificate accompanied by statement of the corporation ratifying and approving the substitution. The Secretary of State shall then issue a certificate ratifying and approving the change. *§136. Resignation of registered agent not coupled with appointment of successor.* The registered agent may resign without	*§103. Resignation of registered agent.* A registered agent may resign by signing and filing, with the secretary of state, a statement of resignation with a certification that the registered agent has mailed a copy to the principal office of the corporation by certified mail.

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appointing a successor, but the resignation will not become effective until thirty days after the agent files a certificate. The corporation must obtain and designate a new registered agent within thirty days after the certificate is filed, or the Secretary of State shall forfeit the charter.	
§133. Change of location of registered office; change of registered agent. Upon a resolution of the board, a corporation may change its registered office or agent by executing, acknowledging, and filing a certificate certifying the change. *§134. Change of address or name of registered agent.* A registered agent may change the address of the registered office or the agent's name by executing and acknowledging a certificate setting forth the new address or name and filing the certificate with the Secretary of State.	*§102. Change of registered office or registered agent.* A corporation may change its registered office or agent by delivering a statement of change to the secretary of state.
§321. Service of process on corporations. Service of process upon a corporation shall be made by delivering a copy personally to any officer, director, or the registered agent of the corporation in Delaware, or by leaving the copy at the dwelling house in Delaware of any officer or at the registered office or other place of business of the corporation. If the registered agent is a corporation, service of process may be made by serving, in Delaware, a copy on an officer or director of the registered agent. If service cannot be made in this	*§104. Service on corporation.* A corporation's agent for service of process, notice, or demand is the registered agent. If a corporation's agent is unavailable, then the secretary of state shall be the corporation's agent for service.

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manner, it shall be lawful to serve the process against the corporation on the Secretary of State.	
	§105. Procedure for service on domestic or foreign corporation by service on secretary of state. Service on the secretary of state, as an agent of a corporation, shall be made by delivering the original and one copy, certified by the clerk of court, with the proper fee. The secretary of state shall send the copy to the corporation at its registered office. The defendant shall not be required to appear and no judgment shall be taken against the defendant before one month after service is completed.
§322. Failure of corporation to obey order of court; appointment of receiver.	
§323. Failure of corporation to obey writ of mandamus; quo warranto proceedings for forfeiture of charter.	
§324. Attachment of shares of stock or any option, right or interest therein; procedure; sale; title upon sale; proceeds.	
F. Shares and Distributions	
	Part 1. Shares **48-16-101 to 48-16-104.**
§151. Classes and series of stock; redemption; rights. A corporation *may* issue one or more classes of stock or series of stock within a class as stated in the certificate of incorporation or as authorized by resolution of the board.	*§101. Authorized shares.* The charter *must* designate the number of shares of each class that a corporation is authorized to issue. For each class, the charter *must* describe a distinguishing designation, preferences, limitations, and relative rights. The charter *must* authorize (1) one or more classes that have unlimited voting rights

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	and (2) one or more classes of shares that are entitled to receive the net assets of the corporation upon dissolution.
§151(g). When the board adopts a resolution to (1) issue shares of stock of any class, or series of a class, not set forth in the certificate of incorporation or (2) increase or decrease the number of shares of a series, a certificate of designations shall be executed, acknowledged, and filed setting forth a copy of the resolution and stating the number of shares of such class or series.	*§102.Terms of Class or Series Determined by Board of Directors.* If so provided in the charter, the board may determine the preferences, limitations, and relative rights of a class or series of a class of shares before issuance. Prior to issuing shares created by the board, articles of amendment must be filed with the secretary of state.
§151(b). Following a redemption of shares by the corporation, the corporation shall have at least one share of a class or series of stock with full voting powers. *§243. Retirement of stock.* By resolution of the board, a corporation may retire any shares of its capital stock that are issued but are not outstanding. *§244. Reduction of capital.* By resolution of the board, a corporation may reduce its capital.	*§103. Issued and outstanding shares.* Issued shares are outstanding until reacquired, redeemed, converted, or cancelled. If there are outstanding shares, (1) at least one share with unlimited voting rights and (2) at least one share entitled to receive the net assets of the corporation upon dissolution must be outstanding.
§155. Fraction of shares. A corporation may issue fractions of a share. If no fractional shares are issued, the corporation must (1) arrange for disposition of fractional interests, (2) pay fair value in cash for fractional shares, or (3) issue scrip or warrants entitling the holder to a full share upon surrender of such scrip or warrants equaling a full share. The holder of a fractional share is entitled to exercise the	*§104. Fractional shares.* A corporation may (1) issue fractions of a share, (2) arrange for disposal of fractional shares, and (3) issue scrip entitling the holder to receive a full share in return for enough scrip to equal a full share. The holder of a fractional share is entitled to the rights of a shareholder, but the holder of scrip is not entitled to such rights unless provided in the scrip.

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rights of a stockholder, but a holder of scrip or warrants is not entitled to exercise such rights unless provided in the scrip or warrant.	
	Part 2. Issuance of Shares 48-16-201 to 48-16-208.
§161. Issuance of additional stock; when and by whom. The board may issue or take subscriptions for additional shares of capital stock up to the amount authorized in the certificate of incorporation. *§152. Issuance of stock; lawful consideration; fully paid stock.* If the full amount of consideration for purchase of capital stock is paid as required by the board, the stock is issued as fully paid and nonassessable. *§153. Consideration for stock.* Shares of stock with or without par value may be issued for consideration, provided that consideration is not less than par value. Treasury shares may be disposed of for consideration determined by the board or, if the certificate of incorporation so provides, by stockholders. *§156. Partly paid shares.* A corporation may issue the whole or any part of its shares as partly paid and subject to call for the payment of the balance of the consideration. *§165. Revocability of preincorporation subscriptions.* Unless otherwise provided by the terms of the subscription, a subscription for stock shall be irrevocable for six months	*§201. Subscription for shares.* A subscription for shares entered into before incorporation shall be in writing and shall be irrevocable for six months, unless otherwise specified in the subscription agreement. Shares issued pursuant to such an agreement are fully paid and nonassessable when the corporation receives the consideration for the shares. If a subscriber defaults in payment for shares issued pursuant to a pre-incorporation subscription, the corporation may (1) collect the amount owed as a debt, or, (2) if left unpaid for more than twenty days after written demand for payment, rescind the agreement and sell the shares. A subscription agreement entered into after incorporation shall be in writing and is a contract for issuance of shares. *§202. Issuance of shares.* The board of directors may authorize shares to be issued for adequate consideration. This power of the board may be reserved to the shareholders by the charter. Shares are issued, fully paid, and nonassessable when the corporation receives adequate consideration. The corporation may place shares in escrow for a contract for future services or other consideration.

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except with the consent of all subscribers or the corporation. *§166. Formalities required of stock subscriptions.* Whether made before or after the formation of a corporation, a subscription for stock must be in writing and signed by the subscriber or subscriber's agent.	
§162. Liability of stockholder or subscriber for stock not paid in full. When consideration has not been paid in full and the assets of the corporation are insufficient to satisfy the claims of creditors, each holder or subscriber of such unpaid shares shall be bound to pay the balance of consideration. Unpaid amounts may be recovered after a writ of execution as provided in §325. *§163. Payment for stock not paid in full.* The board may demand payment from the holder of a share not paid in full for sums necessary for the business thirty days after providing notice of such demand. *§164. Failure to pay for stock; remedies.* A corporation may collect unpaid balances from the stockholder by an action at law or may sell the part of the shares of the delinquent stockholder that will pay all demands due as well as interest and incidental expenses.	*§203. Liability of shareholders.* A purchaser of shares is only liable to the corporation for the consideration for which the shares are issued. A shareholder is not personally liable for the acts or debts of a corporation except where the shareholder becomes personally liable by reason of the shareholder's own acts.
§173. Declaration and payment of dividends. Dividends may be paid in cash, property, or shares of the corporation's capital stock.	*§204. Share dividends.* Unless provided otherwise in the charter, a corporation may issue share dividends by issuing shares pro rata and without consideration to shareholders.

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§157. Rights and options respecting stock. Unless otherwise provided in the certificate of incorporation, a corporation may create and issue rights or options to purchase shares of its capital stock.	*§205. Options to subscribe for or purchase shares. Instruments evidencing options. Authority to grant.* Unless otherwise provided in the charter, the board of directors may grant rights, options, or warrants to subscribe for or to purchase shares of any authorized class.
§151(f). If a corporation is authorized to issue more than one class of stock or more than one series of any class, the powers, designations preferences, and rights of each shall be set forth in the stock certificate. *§158. Stock certificates, uncertificated shares.* The shares of a corporation may be represented by certificates, but the board may provide, by resolution, for uncertificated shares. Every holder of stock shall be entitled to have a certificate signed by the corporation.	*§206. Form and content of certificate.* Shares may be, but are not required to be, represented by certificates. Each certificate *must* state on its face (1) the name of the corporation and organization under the laws of Tennessee; (2) the name of the bearer; (3) the number and class of shares and the designation of the series represented by the certificate; and (4) a summary of designations, rights, preferences, and limitations applicable to each class and series. Each certificate shall be signed by two officers and may bear the corporate seal.
§151(f). Within a reasonable time after the transfer of uncertificated stock, the corporation shall send to the registered owner a written notice containing the information required to be set forth in a certificate.	*§207. Shares without certificates.* Within a reasonable time after the issue or transfer of shares without certificates, the corporation shall send the shareholder a written statement of the information required to be stated on the face of a certificate.
§202. Restrictions on transfer and ownership of securities. A written restriction on the transfer of securities is enforceable against the holder of the restricted security if authorized and if noted conspicuously on the certificate. The statute lists actions authorized as restrictions.	*§208. Restriction on transfer of shares and other securities.* Transfer, or registration of transfer, of shares may be restricted by the corporation. A restriction is not enforceable unless authorized by this section and noted conspicuously on the certificate or statement of information.

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§203. Business combinations with interested stockholders.	
	Part 3. Subsequent Acquisition of Shares by Shareholders and Corporation **48-16-301 to 48-16-302.**
	§301. Shareholders' preemptive rights. Shareholders do not have a preemptive right to acquire unissued shares except to the extent provided in the charter.
§151(b). Any stock of any class or series may be made subject to redemption by the corporation. *§160. Corporation's powers respecting ownership, voting, etc., of its own stock; rights of stock called for redemption.* Generally, a corporation may purchase, redeem, receive, take or otherwise acquire, own and hold, sell, lend, exchange, transfer or otherwise deal in and with its own shares. However, a corporation may not do so if the capital is impaired or if such action will result in impairing capital. The corporation may not purchase for more than the price at which the share may be redeemed.	*§302. Corporation's acquisition of its own shares.* Shares of the corporation acquired by the corporation itself shall constitute authorized but unissued shares. If the charter prohibits the reissue of acquired shares, the number of authorized shares is reduced by the number of shares acquired. This is effective upon adoption of articles of amendment for which shareholder action is unnecessary.
	Part 4. Distributions **48-16-401.**
§151(c). The holders of preferred or special stock shall be entitled to receive dividends payable in preference to other classes or series of stock, as stated in the certificate of incorporation or in a resolution adopted by the board. After dividends are paid or declared, a dividend on the remaining classes or series of stock may then be paid.	*§401. Distributions to shareholders.* The board of directors may authorize the corporation to make distributions to the shareholders. However, no distribution may be made if, after giving it effect, (1) the corporation would be unable to pay debts as they come due in the usual course of business, or (2) the corporation's total assets would be less

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§170. Dividends; payment; wasting asset corporation. The board may declare dividends out of its surplus. If capital is less than the capital represented by the issued and outstanding stock, the corporation shall not declare and pay dividends. *§171. Special purpose reserves.* The board may set apart a reserve fund for any proper purpose from the funds available for dividends. *§173. Declaration and payment of dividends.* Dividends may be paid in cash, property, or shares of the corporation's capital stock. *§154. Determination of amount of capital; capital, surplus and net assets defined.* By resolution of the board, a corporation may determine that only part of the consideration, received in exchange for capital stock, shall represent capital, provided that capital is not less than aggregate par value of shares issued with a par value.	than total liabilities plus the amount necessary to satisfy preferential rights superior to those receiving the distribution if the corporation were to be dissolved.
G. Shareholders	
	Part 1. Meetings **48-17-101 to 48-17-109.**
§211. Meetings of stockholders. Meetings of stockholders may be held at the place designated in the certificate of incorporation or bylaws or as determined by the board. If authorized by the board of directors, stockholders may participate and be deemed present by means of remote communication. An annual meeting of stockholders shall be held for the election of directors. Unless provided otherwise in the	*§101. Annual meeting.* A corporation shall hold an annual meeting of shareholders at a time stated in the bylaws.

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certificate of incorporation, stockholders may act by written consent without a meeting to elect directors if all directorships which could be elected at the meeting are vacant and are filled by such action.	
§211(d). Special meetings of stockholders may be called by the board of directors or such persons as authorized by the certificate of incorporation or bylaws.	*§102. Special meeting.* A corporation shall hold a special meeting of shareholders (1) at the call of the board of directors or a person authorized by the charter or bylaws or (2) as demanded by at least ten percent of the votes entitled to be cast on any issued proposed to be considered at the special meeting. Only business within the purpose described in the meeting noticed may be conducted at the special meeting.
	§103. Court-ordered meeting. A court may summarily order a meeting upon application of a shareholder.
§228. Consent of stockholders or members in lieu of meeting. Unless otherwise provided in the certificate of incorporation, any action required to be taken at an annual or special stockholders' meeting may be taken without a meeting, prior notice, or a vote, if a consent is signed by the holders of outstanding stock having not less than the minimum votes necessary to authorize the action at a meeting where all shares entitled to vote were present and voting.	*§104. Action without a meeting.* Action required or permitted to be taken at a shareholders' meeting may be taken without a meeting if all shareholders entitled to vote on the action consent.

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§222. Notice of meetings and adjourned meetings. A written notice shall be given to stockholders required or permitted to take action at a meeting. Such notice shall be given not less than ten days nor more than sixty days before the date of the meeting. When a meeting is adjourned to another time and place, unless otherwise require by the bylaws, notice is not required if details are announced at the meeting at which the adjournment is taken, unless the adjournment is for more than thirty days. *§232. Notice by electronic transmission.* Any notice to stockholders given by the corporation shall be effective if given by a form of electronic transmission consented to by the stockholder receiving the notice.	*§105.Notice of meeting.* A corporation shall notify the shareholders, who are entitled to vote, of the meeting no fewer than ten days and no more than two months before meeting date. Notice of an annual meeting is not required to describe the purpose of the meeting, but notice of a special meeting must describe the purpose of the meeting.
§229. Waiver of notice. Whenever notice is required to be given, a written waiver signed by the person entitled to notice shall be deemed equivalent to notice. Attendance of a person at a meeting shall constitute a waiver of notice of such a meeting, except when a person attends for the express purpose of objecting because the meeting was not lawfully called or convened.	*§106. Waiver of notice.* A shareholder may waive notice before or after the date and time stated in the notice by delivery of a written waiver to the corporation. Unless the shareholder objects at the beginning of the meeting, a shareholder's attendance at a meeting (1) waives objection to lack of notice and (2) waives objection to consideration of a particular matter not specified in the notice.
§213. Fixing date for determination of stockholders of record. The board may fix a record date, subject to time requirements listed in the statute, to determine the stockholders entitled to (1) notice of or to vote at a	*§107. Record date.* The bylaws may provide the manner of fixing the record date for a voting group to determine the shareholders entitled to take an action. A record date may not be more than more than seventy days

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stockholder meeting, (2) consent to corporate action in writing without a meeting, and (3) receive payment of any dividend or distribution. The statute provides for a default date where the board does not fix a date.	before the action.
	§108. Waiver or approval by fiduciaries. A fiduciary who is a shareholder of record may waive notice and may consent to taking a corporate action without a meeting.
§211(a). If authorized by the board of directors, stockholders may participate and be deemed present by means of remote communication.	*§109. Shareholder meetings through special communication.* Unless provided otherwise in the charter or bylaws, the corporation may permit participation in a regular or special meeting through the use of any means of communication by which shareholders participating may simultaneously hear each other during the meeting.
	Part 2. Voting 48-17-201 to 48-17-210.
§219. List of stockholders entitled to vote; penalty for refusal to produce stock ledger. At least ten days before a stockholder meeting, the officer who has charge of the stock ledger shall prepare; and make a list of the stockholders entitled to vote at the meeting. The list should be arranged in alphabetical order showing the name, address and number of shares registered in the name of each stockholder. The list shall be open for examination at least ten days prior to the meeting on a reasonably accessible electronic network, provided that	*§201. Shareholders' list for meeting.* After fixing the record date for a meeting, a corporation shall prepare an alphabetical list of all shareholders entitled to notice of the meeting. The list must be arranged by voting group and list the address and number of shares held by each shareholder. The list must be available for inspection by any shareholder two business days after notice of the meeting, and the corporation must make the list available at the meeting.

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information required to gain access is provided in the meeting notice, during ordinary business hours at the principal place of business of the corporation. The list should be available during the meeting whether held at a place or by remote communication. Willful neglect or refusal of the directors to provide the list at any meeting for election of directors shall result in ineligibility for election to any office at that meeting.	
§212. Voting rights of stockholders; proxies; limitations. Unless otherwise provided in the certificate of incorporation, each stockholder shall be entitled to one vote for each share of capital stock.	*§202. Voting entitlement of shares.* Unless the charter or bylaws provide otherwise, each outstanding share is entitled to one vote on each matter voted on at a shareholders' meeting.
§212(b-e). Each stockholder entitled to vote may authorize another person to act for such stockholder by proxy. A proxy may be acted on for only three years, unless the proxy provides for a longer period. A proxy shall be irrevocable if (1) expressly stated in the proxy and (2) the proxy is coupled with an interest sufficient in law to support the irrevocable power.	*§203. Proxies.* A shareholder may vote in person or by proxy. The statute lists valid means by which a shareholder may authorize another to act as proxy. An appointment of proxy is effective for eleven months when received by the agent authorized to tabulate votes. An appointment of a proxy is revocable unless the appointment form states that it is irrevocable and is coupled with an interest. The statute lists the scope of such an interest.
	§204. Shares held by nominees. A corporation may establish a procedure to recognize the beneficial owner of shares as the shareholder when the shares are registered in the name of a nominee.

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	§205. Corporation's acceptance of votes. If the name signed on a vote, consent, waiver, or proxy appointment corresponds to the name of a shareholder, the corporation is entitled to accept the signed document as the act of the shareholder. If the name signed does not correspond to the name of the shareholder, the statute lists circumstances under which the corporation may give the signed document effect as an act of the shareholder. The corporation may reject a vote, consent, waiver, or proxy appointment if there is reasonable basis to doubt validity of the signature.
§216. Quorum and required vote for stock corporations. The certificate of incorporation or bylaws may specify the number of shares which shall be present to constitute a quorum for the transaction of business, but the specified number shall not be less than one-third of the shares entitled to vote at a meeting. In the absence of such specification, the statute provides a default requirement for a quorum.	*§206. Quorum and voting requirements for voting groups.* Shares entitled to vote as a separate voting group may take action only if a quorum exists. A majority of the votes entitled to be cast constitutes a quorum unless provided otherwise in the charter. If a quorum exists, action on a matter is approved if the number of votes in favor of the action is greater than the number of votes opposing the action.
	§207. Action by single and multiple voting groups. If the charter provides for voting by a single voting group on a matter, action is taken when voted upon by the group as provided in §206. If the charter provides for voting by two or more groups on a matter, action is taken only when voted upon by each group

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	counted separately as provided in §206.
	§208. Greater quorum or voting requirements. The charter may provide for a greater quorum or voting requirement for shareholders.
§160(c). If a corporation holds a majority of the shares of its own stock entitled to vote in the election of directors, such shares are not entitled to vote and may not be counted for quorum purposes. *§211(e).* All elections of directors shall be by written ballot unless otherwise provided in the certificate of incorporation. If authorized by the board, the ballot may be submitted by electronic transmission. *§214. Cumulative voting.* The certificate of incorporation may provide that for an election of directors, each stockholder shall be entitled to votes equaling the number of votes a stockholder would be entitled to cast based on number of shares held multiplied by the number of directors being elected. A stockholder may cast all such votes for a single director or distribute the votes as the stockholder sees fit.	*§209. Voting for directors. Cumulative voting.* Unless otherwise provided in the charter, directors are elected by a plurality of the votes cast by the shares entitled to vote in the election at the meeting at which a quorum is present. Unless so provided in the charter, shareholders do not have the right to cumulate their votes for directors. If cumulative voting is allowed in the charter, shareholders may multiply the number of votes they are entitled to cast by the number of directors for whom they are entitled to vote and cast the product for a single candidate or distribute the product among two or more candidates. Shares otherwise entitled to vote cumulatively may do so (1) only if the meeting notice or proxy statement authorizes or (2) if the shareholder gives notice to the corporation at least forty-eight hours before the meeting.
	Part 3. Voting Trusts and Shareholders' Agreements 48-17-301 to 48-17-302.
§218. Voting trusts or other voting agreements. Stockholders may, by written agreement, deposit or transfer capital stock of an original issue to a person or entity authorized to act as trustee for the purpose of voting. After a copy of the agreement is filed with the registered	*§301. Voting trusts.* One or more shareholders may create a voting trust by signing an agreement of the provisions of the trust and transferring their shares to a trustee. The trustee shall deliver a copy of the agreement and a list of the names and

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office of the corporation, certificates of stock or uncertificated shares shall be issued to the trustee.	addresses of all owners of beneficial interest to the corporation. A voting trust is valid for not more than ten years after its effective date unless extended by ten year terms.
	§302. Shareholders' agreements. A signed agreement between two or more shareholders may provide that the shares held by parties to the agreement shall be voted as provided in the agreement and may be specially enforced.
§217. Voting rights of fiduciaries, pledgors, and joint owners of stock. Persons holding stock in a fiduciary capacity shall be entitled to vote the shares so held. Persons whose stock is pledged shall be entitled to vote unless the holder expressly empowered the pledgee to vote. If shares are held by two or more persons, (1) the vote of one binds all owners; (2) the majority vote binds all owners if more than one votes; and (3) if more than one vote and the vote is split, each faction may vote proportionally.	
	Part 4. Derivative Proceedings **48-17-401.**
	§401. Procedure in Derivative Proceedings. A proceeding, in the right of a corporation, may only be commenced by a person who was a shareholder of the corporation when the transaction complained of occurred. The complaint must be verified and alleged with particularity. Such a proceeding may not be discontinued or settled without a

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	court's approval.
§215. Voting rights of members of nonstock corporations; quorum; proxies.	
§225. Contested election of directors; proceedings to determine validity.	
§226. Appointment of custodian or receiver of corporation on deadlock or for other cause.	
§227. Powers of Court in elections of directors.	
§231. Voting procedures and inspectors of elections.	
H. Directors and Officers	
	Part 1. Board of Directors 48-18-101 to 48-18-111.
§141. Board of directors; powers; number, qualifications, terms and quorum; committees; classes of directors; nonprofit corporations; reliance upon books; action without meeting; removal. Unless otherwise provided in the certificate of incorporation, a board of directors shall manage the business and affairs of the corporation.	*§101. Requirement for and duties of board of directors.* A board of directors will exercise all corporate powers and manage the business and affairs of the corporation. However, a corporation with fifty or fewer shareholders is not required to have a board of directors, if the corporation describes in its charter who will perform the duties of the board of directors.
§141(b). The certificate of incorporation or the bylaws may specify qualifications for directors, but unless specified, a director is not required to be a stockholder.	*§102. Qualifications of directors.* Qualifications for directors may be specified in the charter or bylaws. Unless required by the charter or bylaws, a director is not required to be a resident of Tennessee or a shareholder of the corporation.
§141(b). The board shall consist of at least one person. Unless the total number of directors is specified in the certificate of incorporation, the number shall be specified in the bylaws. If the number of directors is specified in the certificate, a change may be made only	*§103. Number and election of directors.* A board must consist of at least one individual. The total number of directors shall be listed in the charter or bylaws. Directors are elected at the first annual shareholders' meeting and at each annual meeting thereafter. Unless

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by amendment to the certificate.	the charter or bylaws permits the board to change the number of directors, only the shareholders have such power.
	§104. Election of directors by certain classes of shareholders. If the charter authorizes shares to be divided into classes or series, the charter may also authorize the election of the directors by the holders of one or more authorized classes or series of shares.
§141(b). Each director shall hold office until a successor is elected and qualified or until the director resigns or is removed.	*§105. Terms of directors generally.* The terms of the initial directors expire at the first shareholders' meeting at which directors are elected. The terms of all other directors expire at the next annual shareholders' meeting following their election, unless their terms are staggered or terms are for more than one year as provided by the charter. Despite the expiration of a director's term, the director continues to serve until a successor is elected.
§141(d). The certificate of incorporation may empower the stockholders of any class or series to elect directors that serve for different terms. The certificate of incorporation or bylaws may divide the directors into one, two, or three classes. The terms of the directors in the first class expire at the next annual meeting; the terms of the directors in the second class expire one year later; and the terms of the directors in the third class expire two years later. At subsequent annual meetings, directors shall be elected for full term to succeed the directors whose terms expire.	*§106. Staggered terms for directors.* The charter may provide for staggered terms by grouping the directors into two or three groups and designating expiration of the terms of the first group of directors at the first annual shareholders' meeting after their election. The terms of the second group of directors will expire at the second annual shareholders' meeting after their election. At each subsequent annual shareholders' meeting, directors will be elected for terms of two or three years.

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§141(b). A director may resign at anytime by giving written or electronic notice to the corporation.	*§107. Resignation of directors.* A director may resign at any time by delivering written notice to the board of directors, its chair or president, or to the corporation.
§141(k). The stockholders may remove a director without cause. If the corporation has cumulative voting and less than the entire board is to be removed, the stockholders may not remove a director without cause if the votes against removal would be sufficient to elect the director or if the director is part of a class. If the board is classified, the stockholders may only remove a director with cause.	*§108. Removal of directors.* The shareholders may remove directors with or without cause unless the charter provides removal only for cause. If a director is elected by a voting group of shareholders, only the shareholders of that voting group may participate in the vote to remove the director without cause. 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 directors' removal. If cumulative voting is not authorized, a director may be removed if the number of votes cast to remove the director exceeds the number cast not to remove. If provided by the charter, the board may remove any or all the directors by a vote of the majority of the entire board. The shareholders may only remove directors at a meeting called for the purpose of removing the director.

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	§109. Removal of directors by judicial proceeding. A court may remove a director in a proceeding commenced by the corporation or its shareholders holding at least ten percent of the outstanding shares of any class.
§223. Vacancies and newly created directorships. Unless otherwise provided in the certificate of incorporation or bylaws, vacancies and newly created directorships maybe filled by a majority of the directors then in office.	*§110. Vacancy on board.* Unless the charter provides otherwise, a vacancy on the board may be filled by the shareholders or the board.
§141(h). Unless otherwise restricted by the certificate of incorporation or bylaws, the board has the authority to fix compensation of directors.	*§111. Compensation of directors.* Unless the charter or bylaws provide otherwise, the board may fix the compensation of the directors.
	Part 2. Meetings and Actions of the Board **48-18-201 to 48-18-206.**
§141(g). Unless otherwise restricted by the certificate of incorporation or bylaws, the board may hold meetings in or outside of Delaware. *§141(i).* Unless otherwise restricted by the certificate of incorporation or bylaws, directors may participate in a board meeting by telephone conference or other means by which all participants may hear each other. Such participation constitutes presence at the meeting.	*§201. Meetings.* The board may hold regular or special meetings in or out of Tennessee. Unless the bylaws provide otherwise, special meetings may be called by the chair of the board, the president, or any two directors. Unless the charter or bylaws provide otherwise, the board may permit participation in a regular or special meeting through the use of any means of communication by which directors participating may simultaneously hear each other during the meeting.

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§141(f). Unless otherwise restricted in the certificate of incorporation or bylaws, an action of the board may be taken without a meeting if all members of the board consent in writing or electronically. Consent shall be filed with the minutes of board proceedings in the same form as received.	*§202. Action without meeting.* Action required, or permitted to be taken, at a board of directors' meeting may be taken without a meeting if all directors entitled to vote on the action consent.
	§203. Notice of meeting. Unless the charter or bylaws provide otherwise, regular meetings of the board of directors may be held without notice, but special meetings require notice of at least two days before the meeting.
	§204. Waiver of notice. A director may waive any notice required by filing a signed waiver in the minutes or corporate records. A director's participation in a meeting waives any required notice unless the director objects at the beginning of the meeting and does not vote.
§141(b). Unless the certificate of incorporation or bylaws requires a greater number, a majority of the total number of directors is a quorum for the transaction of business. Unless the certificate of incorporation provides otherwise, the bylaws may provide that a number less than a majority constitutes a quorum, provided that number may not be less than one-third the total number of directors. Unless the certificate of incorporation or bylaws requires a greater number, a vote of the majority of directors present at a meeting where a quorum is present shall be an act of the board.	*§205. Quorum and voting.* If the board has a fixed size, a quorum consists of a majority of the fixed number of directors. If the board has a variable size, a quorum consists of a majority of the number of directors prescribed or the number of directors in office directly immediately before the meeting. The charter or bylaws may authorize a quorum of greater size but no fewer than one-third of the fixed or prescribed number of directors. If a quorum is present when a vote is taken, the affirmative vote of a majority of the directors present is an act of the board.

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§141(j). A corporation that is not authorized to issue capital stock may provide that less than one-third of the members of the governing body may constitute a quorum. References to the board or to the stockholders shall be deemed to refer to the governing body of such corporation.	
§141(c). The board may designate committees consisting of at least one director. A committee may exercise all powers and authority of the board in the management of the business and affairs of the board. The statute lists specific matters for which a committee may not have authority or power, including approving actions expressly requiring stockholder approval and adopting, amending or approving bylaws.	*§206. Committees.* Unless the charter or bylaws provide otherwise, the board may create committees. A committee may consist of just one member, but all members of a committee that exercise powers of the board must be members of the board. The statute lists specific activities that may not be conducted by a committee, including authorizing distributions and adopting, amending, or repealing bylaws.
	Part 3. Standards of Conduct 48-18-301 to 48-18-304.
§141(e). A director performing the director's duties shall be fully protected in relying, in good faith, on the records of the corporation and upon information presented to the corporation as described in the statute.	*§301. General standards for directors.* A director shall discharge all duties as a director (1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner the director reasonably believes to be in the best interests of the corporation.
§144. Interested directors; quorum. No contract between a corporation and a director, officer, or entity, in which one of its directors or officers has an interest, shall be void solely for this reason if there was proper disclosure of	*§302. Director and officer conflict of interest.* A conflict of interest transaction is a transaction with the corporation in which a director or officer has a direct or indirect interest. The corporation may not void such a transaction solely

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material facts and approval by the stockholders or the board or if the transaction was fair to the corporation. Interested directors may be included in the determination of a quorum.	because of the officer or director's interest if there was proper disclosure of material facts to the board or to the shareholder or if the transaction was fair to the corporation.
§143. Loans to employees and officers; guaranty of obligation of employees and officers. A corporation may lend money to or guarantee an obligation of an officer or employee, including a director, when the board reasonably expects such action will benefit the corporation. The loan may be with or without interest and may be secured or unsecured.	*§303. Loans to directors and officers.* A corporation may not lend money to or guarantee the obligation of a director or officer unless approved by the shareholders or the board determines the loan or guarantee benefits the corporation.
§172. Liability of directors and committee members as to dividends or stock redemption. Directors and members of committees of the board may be fully protected in relying, in good faith, on the records of the corporation to calculate the amount of funds available for declaring dividends or redeeming stock. *§174. Liability of directors for unlawful payment of dividend or unlawful stock purchase or redemption; exoneration from liability; contribution among directors; subrogation.* This section applies to directors who act willfully or negligently to pay unlawful dividends or make an unlawful stock purchase or redemption. Within six years of the transaction, such directors shall be jointly and severally liable to the corporation for the full amount of the unlawfully paid dividend or stock purchase or redemption plus interest from the time the liability accrued. Such a director is entitled to	*§304. Liability for unlawful distributions.* A director who assents to an unlawful distribution is personally liable to the corporation for the amount of the distribution that exceeds what could have been distributed lawfully. Such director is entitled to contribution from other directors who could be liable for the same unlawful distribution and each shareholder accepting the distribution with knowledge of its unlawfulness.

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contribution from directors who voted in favor of the transaction. Such a director is also entitled to be subrogated to the rights of the corporation against stockholders who participated in the transaction to the extent of the amount paid in the transaction.	
	Part 4. Officers **48-18-401 to 48-18-406.**
§142. Officers; titles, duties, selection, term; failure to elect; vacancies. A corporation shall have officers for whom the titles, duties, and manner of selection are stated in the bylaws or specified in a resolution of the board. One officer shall have the duty to record and maintain minutes of meetings. Unless otherwise restricted by the certificate of incorporation or bylaws, a person may hold more than one office. An officer shall hold office until a successor is elected and qualified or until resignation or removal.	*§401. Required officers.* Every corporation shall have a president and a secretary as well as other officers as described in the bylaws or designated by the board of directors. Unless the charter or bylaws provide otherwise, officers shall be elected or appointed by the board of directors. A duly appointed officer may appoint officers or assistant officers if authorized by the bylaws or the board of directors.
	§402. Duties of officers. Each officer has the authority and shall perform the duties set forth in the bylaws or prescribed by the board of directors.
	§403. Standards of conduct for officers. An officer with discretionary authority shall discharge all duties under that authority (1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner the officer reasonably believes

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	to be in the best interest of the corporation.
§142(b). An officer may resign upon written notice to the corporation.	*§404. Resignation and removal of officers.* An officer may resign by delivering notice to the corporation. The board may remove any officer with or without cause.
	§405. Contract right of officers. The appointment of an officer does not itself create contract rights. An officer's removal does not affect the officer's contract rights with the corporation, and an officer's resignation does not affect the corporation's contract rights with the officer.
	§406. Release or assignment of life insurance on officers. When a corporation insures the life of any director, officer, agent, or employee or when such corporation is named as beneficiary, authority to take any action with reference to such insurance shall be sufficiently evidenced to the insurance company by a written statement to that effect.
§141(c). A corporation may secure fidelity of any or all officers or agents by bond or otherwise.	
	Part 5. Indemnification 48-18-501 to 48-18-509.
§145. Indemnification of officers, directors, employees, and agents; insurance. A corporation shall have the power to indemnify a director, officer, employee, or agent of the corporation made a party in a completed action, suit, or proceeding against the corporation for expenses, judgments, fines, and	*§502. Authority to indemnify.* A corporation may indemnify an individual made a party to a proceeding because the individual was a director against the liability incurred in the proceeding if the individual acted reasonably and in good faith. However, a corporation may not indemnify a

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settlement actually and reasonably incurred if the person acted in good faith. A corporation shall have the power to indemnify the same type of person in a proceeding in the right of the corporation to procure judgment in favor of the corporation against expenses actually and reasonably incurred, except where a person has been adjudged liable to the corporation.	director (1) in connection with a proceeding in the right of the corporation in which the director was adjudged liable to the corporation or (2) in connection with any other proceeding charging improper benefit to the director in which the director was adjudged liable on the basis that personal benefit was improperly received by the director. *§507. Indemnification of officers, employees, and agents.* An officer of the corporation who is not a director is entitled to mandatory indemnification and is entitled to apply for court-ordered indemnification to the same extent as a director. The corporation may indemnify and advance expenses to an officer, employee, or agent who is not a director to the same extent as to a director.
§145(c). To the extent that a person was a former director or officer has been successful on the merits or in defense of any action the person is made a party or in the right of the corporation, that person shall be indemnified against any expense actually and reasonably incurred.	*§503. Mandatory indemnification.* Unless limited by its charter, a corporation shall indemnify a director who was wholly successful in the defense of any proceeding to which the director was a party because the director is or was a director against reasonable expenses incurred in connection with the proceeding.
§145(e). Expenses may be paid in advance to a director or officer in defending a suit provided that the director or officer undertakes to repay the advance if determined that such person is not entitled to indemnification.	*§504. Advance for expenses.* A corporation may pay for the reasonable expenses incurred by a director who is a party to a proceeding if the director provides written affirmation of the director's good faith belief that the director's actions met the statutory

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	standard of conduct, provides a written undertaking to repay the advance if determined that the director is not entitled to indemnification, and determines the facts then known would not preclude indemnification.
§145(k). The Court of Chancery is vested with exclusive jurisdiction to hear and determine all actions for advancement of expenses or indemnification. The Court may summarily determine a corporation's obligation to advance expenses.	*§505. Court ordered indemnification.* Unless the charter provides otherwise, a court may order indemnification on receipt of application of a director of a corporation who is a party to a proceeding.
§145(d). Any indemnification shall be made only upon a determination that the present or former director, officer, employee or agent acted in good faith and in a manner which the person reasonably to be consistent with the best interests of the corporation.	*§506. Determination and authorization of indemnification.* A corporation may not indemnify a director unless authorized after a determination has been made that the indemnification is permissible because the director met the statutory standard of conduct. The determination shall be made by the board, independent special legal counsel, or the shareholders.
§145(g). A corporation shall have the power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee, or agent of the corporation or who was serving at the request of the corporation as such for another entity against liability incurred by such person acting in such capacity.	*§508. Insurance.* A corporation may purchase and maintain insurance on behalf of an individual who is or was a director, officer, employee, or agent of the corporation, as well as other individuals as listed in the statute, against liability asserted against or incurred by the individual in that capacity whether or not the corporation would have the power to indemnify the individual against the same liability.

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	Part 6. Limitation of Actions **48-18-601.**
	§601. Limitation of actions for breach of fiduciary duty. Any action alleging breach of fiduciary duties by director or officers must be brought within one year from the date of such breach, provided that where the violation is reasonably not discovered within the one-year period, the period of limitation shall be one year from the date of discovery. In no event shall any such action be brought more than three years after the date on which violation occurred. Where there is fraudulent concealment on the part of the defendant, the action shall be commenced within one year after the violation is discovered.
I. Amendment of Charter and Bylaws	
	Part 1. Amendment of Charter **48-20-101 to 48-20-109.**
§242. Amendment of certificate of incorporation after receipt of payment for stock; nonstock corporations. After a corporation has received payment for any of its capital stock, it may amend its certificate of incorporation. The statute lists the requirements of the board or the stockholders to make and effect such an amendment.	*§101. Authority to amend.* A corporation may amend its charter at any time. Provisions of the charter and bylaws do not vest shareholders with property rights. *§102. Amendment by board of directors.* Unless the charter provides otherwise, the board may amend the charter without shareholder action to change or delete the names and addresses of initial directors and registered agent or office; the address of the principal office; the corporate name; and convert outstanding shares of a class into a greater number of shares.

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	§103. Amendment by board of directors and shareholders. The board may propose amendments to the charter for adoption by the shareholders. To adopt the proposed amendment, a majority of the shareholder votes entitled to be cast on the amendment must vote in favor of the amendment. *§106. Articles of amendment.* A corporation shall file articles of amendment with the secretary of state to amend its charter.
§241. Amendment of certificate of incorporation before receipt of payment for stock. Before a corporation has received any payment for any of its stock, it may amend its certificate of incorporation. The amendment shall be adopted by a majority of the incorporators if directors were not named in the original certificate of incorporation, or by a majority of directors who have been elected and have qualified.	*§105. Amendment before issuance of shares.* If a corporation has not issued shares, the board, or the incorporators if there is no board, may adopt amendments to the charter.
	§104. Voting on amendments by voting groups. The holders of outstanding shares of a class are entitled to vote as a separate voting group if the proposed amendment would affect the class as described in the statute.

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§245. Restated certificate of incorporation. A corporation may adopt a restated certificate of incorporation to integrate into a single instrument all the provisions of the certificate of incorporation which are operative and in effect and further amend the certificate. The manner of stockholder voting necessary to adopt the restated certificate is dependent upon whether an amendment is included with the restating and integrating.	*§107. Restated charter.* The board may amend and restate the charter with or without shareholder action by filing a restated charter or an amended and restated charter with the secretary of state.
	§108. Amendment of charter pursuant to reorganization. The charter may be amended without action by the board or the shareholders where a court orders a plan of reorganization. Individuals designated by the court shall file articles of amendment with the secretary of state.
	Part 2. Amendment of Bylaws 48-20-201 to 48-20-203.
§109. Bylaws. After a corporation has received payment for stock, the power to adopt, amend, or repeal bylaws shall be in the stockholders or members entitled to vote. A corporation may confer power to adopt, amend, or repeal bylaws upon the board in the certificate of incorporation, but this action does not divest the stockholder or members of the same power.	*§201. Amendment of bylaws by board of directors or shareholders.* The board may amend or repeal the bylaws unless (1) the charter reserves this power exclusively to the shareholders or (2) the shareholders expressly provide that the board may not amend or repeal a specific bylaw. The shareholders may amend or repeal the bylaws even though the board has the same authority.
	§202. Bylaw increasing quorum or voting requirement for shareholders. If authorized expressly in the charter, the shareholders may adopt or amend a

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	bylaw that fixes a greater quorum or voting requirement for shareholders. Such a bylaw may not be adopted, amended, or repealed by the board.
	§203. Bylaw increasing quorum or voting requirement for directors. A bylaw that fixes a greater quorum or voting requirement for the board may be amended or repealed by (1) the shareholders if originally adopted by the shareholders and (2) either the shareholders or board of directors if originally adopted by the board of directors.
J. Merger and Share Exchange	
	48-21-101 to 48-21-112.
§251. Merger or consolidation of domestic corporations and limited partnership. Two or more domestic corporations may merge into a single corporation, which may be one of the two existing corporations or a new corporation. The board of each corporation must adopt a resolution to approve the agreement of merger or consolidation and to declare the advisability of the merger or consolidation.	*§102. Merger.* One or more corporations may merge to form a corporation, limited liability company, or limited partnership, if the board of each adopts and the shareholders approve a plan of merger. The plan must contain the terms and conditions of the merger, as well as the basis of converting existing shares into shares of the new entity. *§104. Action on plan.* The board of each corporation shall adopt a plan of merger or exchange and recommend the plan to the shareholders of each corporation for approval. Unless the charter provides otherwise, shareholder approval is <u>not</u> required (1) if a merger does not cause the corporate existence to cease and (2) if a merger or exchange does not affect the number of shares held by a shareholder and does not reduce the voting power of the

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	outstanding shares of the corporation or the number of participating shares outstanding. *§106. Abandonment of merger.* Anytime after a plan of merger or exchange is adopted and approved but before the merger or exchange has become effective, the merger may be abandoned without actions of the shareholders or partners. Procedures for abandonment may be set forth in the plan of merger or exchange or determined by the board or general partners. Prior to the effectiveness of the merger or exchange, a statement executed on behalf of each party to the merger or exchange stating that the merger has been abandoned must be filed with the secretary of state. *§107. Articles of merger or exchange.* After a plan of merger or exchange is adopted by the board and approved by the shareholders, if required, articles of merger or exchange shall be executed and filed with the secretary of state on behalf of each party to the merger.
§160. Corporation's powers respecting ownership, voting, etc., of its own stock; rights of stock called fore redemption. Generally, a corporation may purchase, redeem, receive, take or otherwise acquire, own and hold, sell, lend, exchange, transfer or otherwise deal in and with its own shares. However, a corporation may not do so if the capital is impaired or if such action will result in	*§103. Share exchange.* A corporation may acquire all of the outstanding shares of one or more classes or series of another corporation or units of a limited partnership in exchange for shares, units, cash or other property of a corporation or limited partnership that is a party to the exchange. A plan of exchange must set forth the terms and conditions of the

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impairing capital, the corporation may not purchase for more than the price at which the share may be redeemed.	exchange, as well as the basis of exchanging shares or units.
§253. Merger of parent corporation and subsidiary or subsidiaries. If at least ninety percent of the outstanding shares of each class of the stock of a corporation, of which there are outstanding shares that would be entitled to vote on a merger, is owned by another corporation, the corporation having such stock ownership may merge the other corporation into itself or merge or itself and one or more of the other corporations into one or more of the other corporations.	*§105. Merger of parent and subsidiary.* A parent corporation owning at least ninety percent of a subsidiary corporation or limited partnership may merge the two entities without shareholder approval if the board of the parent corporation adopts a plan of merger. A plan of merger must set forth the terms and conditions of the merger as well as the basis for converting the shares or units.
§259. Status, rights, liabilities, of constituent and surviving or resulting corporations following merger or consolidation. When a merger or consolidation becomes effective, the separate existence of all the constituent corporations, except the corporation into which the constituent corporations have been merged, shall cease and become the new corporation. The resulting corporation shall be subject to all the restrictions, liabilities, and duties of each constituent corporation so merged, and the resulting corporation shall be vested with all the rights, privileges, powers, and franchises of each constituent corporation.	*§108. Effect of merger or share exchange.* When a merger becomes effective, the surviving entity designated in the plan of merger comes into existence. When an exchange becomes effective, the designated shares are exchanged and the former holders are entitled only to those rights provided in the plan of exchange.
§252. Merger or consolidation of domestic and foreign corporations; service of process upon surviving or resulting corporation. Any one or more corporations of Delaware may merge or consolidate	*§109. Merger or share exchange with foreign corporation.* One or more foreign corporations may merge or enter into a share exchange with one or more domestic

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with one or more other corporations of any other state into a single corporation.	corporations.
§264. Merger or consolidation of domestic corporation and limited liability company. Any one or more corporations of Delaware may merge or consolidate with one or more limited liability companies.	*§110. Merger with foreign or domestic limited liability company.* One or more domestic corporations may merge with one or more foreign or domestic limited liability companies.
§266. Conversion of a domestic corporation to other entities. A corporation of Delaware may convert to a limited liability company, a general or limited partnership (including a limited liability partnership and a limited liability limited partnership), or business trust of Delaware.	*§111. Conversion of a corporation to a limited company.* A corporation may be converted to a limited liability company if the board adopts and <u>all</u> the shareholders approve a plan of conversion. The plan must contain the basis of converting shares into membership interests and the terms of the articles of organization of the limited liability company. The corporation shall file articles of conversion with the secretary of state.
§266(d-f). The conversion of a corporation shall not be deemed to affect any obligations or liabilities of the corporation or personal liability of a person incurred prior to such conversion. After the time the conversion becomes effective the corporation shall continue to exist as in the form of the type of entity to which the corporation converted. Unless otherwise provided in a resolution of conversion, the converting corporation shall not be required to wind up its affairs or pay its liabilities and distribute its assets, and the conversion shall not constitute a dissolution. *§260. Powers of corporation surviving or*	*§112. Effect of conversion to a limited liability company.* When a conversion takes effect, all property, obligations and liabilities, and actions and proceedings pending against the converting corporation become that of the converted entity. The conversion shall not be deemed a dissolution of the converting corporation. Shares of the converting corporation shall be cancelled, and the holders of the former shares shall be entitled only to rights as provided in the plan of conversion.

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resulting from merger or consolidation; issuance of stock, bonds or other indebtedness.	
§254. Merger or consolidation of domestic corporation and joint-stock or other association.	
§255. Merger or consolidation of domestic nonstock corporations.	
§256. Merger or consolidation of domestic and foreign nonstock corporations; service of process upon surviving or resulting corporation.	
§257. Merger or consolidation of domestic stock and nonstock corporations.	
§258. Merger or consolidation of domestic and foreign stock and nonstock corporations.	
§261. Effect of merger upon pending actions.	
§263. Merger or consolidation of domestic corporation.	
§265. Conversion of other entities to a domestic corporation.	
K. Sale of Assets	
	48-22-101 to 48-22-102.
§271. Sale, lease or exchange of assets; consideration; procedure. At a meeting of the board, any corporation may sell, lease, or exchange all or substantially all of its property and assets upon terms, conditions, and for consideration as the board deems expedient when authorized by a resolution adopted by a majority of the stockholders.	*§101. Sale of assets in regular course of business and mortgage of assets.* A corporation may (1) dispose of property in the usual and regular course of business; (2) encumber property whether or not in the usual and regular course of business; or (3) transfer property to a corporation of which it owns all shares. The board shall determine the terms and conditions of such a transaction, but shareholder approval is required only if stated in the charter.
	§102. Sale of assets other than in regular course of business. A corporation may dispose of its property in other than the regular course

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	of business if the shareholders approve of the transaction as submitted by the board.
§272. Mortgage or pledge of assets.	
L. Dissenters' Rights	
	Part 1. Right to Dissent and Obtain Payment for Shares **48-23-101 to 48-23-103.**
§262. Appraisal rights. A stockholder is generally entitled to appraisal rights if required by the terms of an agreement of merger or consolidation pursuant to the sections listed in the statute.	*§102. Right to dissent.* A shareholder is entitled to dissent from and obtain fair value of the shareholder's shares in the event of the following corporate actions: (1) consummation of a plan of merger, plan of share exchange, or a sale or exchange of all the property of the corporation other than in the usual course of business; (2) an amendment of the charter; or (3) any action taken pursuant to a shareholder vote to the extent that the shareholder is entitled to dissent and obtain payment for shares held. If the corporate action created the shareholder's entitlement, then the shareholder may only dissent if the action is unlawful or fraudulent. No shareholder may dissent as to shares of a security listed on an exchange. *§103. Dissent by nominees and beneficial owners.* A record shareholder asserting dissenters' rights for fewer than all shares registered in the shareholder's name, may do so only with respect to *all* shares beneficially owned by a single person by notifying the corporation of the name and address of each beneficial

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	owner. The beneficial shareholder must submit written consent to dissent, and may dissent only with respect to all shares of the same class which are held for the shareholder's benefit.
	Part 2. Procedure for Exercise of Dissenters' Rights 48-23-201 to 48-23-209.
§262(d)(1). If the merger or consolidation will be submitted to the stockholders for a vote, the corporation shall send a notice, including a copy of this section, to the record stockholders not less than twenty days before the meeting at which the merger or consolidation will be submitted for approval. *§262(d)(2).* If the merger or consolidation is approved without requirement for stockholder approval, the corporation must send a notice, including a copy of this section, to stockholders entitled to appraisal rights, either before or within ten days after the merger or consolidation.	*§201. Notice of dissenters' rights.* If a proposed corporate action ("proposed action") creating dissenters' rights is submitted to a vote at a shareholders' meeting, the meeting notice must indicate that and a copy of this chapter must accompany the notice. If a corporate action is taken without submission to shareholders, the corporation shall notify all shareholders in writing that the action was taken, along with the dissenters' notice.
§262(d)(1). If the merger or consolidation will be submitted to the stockholders for a vote, a stockholder must deliver written notice of intent to the corporation before the vote to demand appraisal rights. A proxy or vote against merger or consolidation is not adequate to constitute demand. *§262(d)(2).* If the merger or consolidation is approved without requirement for stockholder approval, a stockholder must demand appraisal within twenty days of the mailing date of the notice.	*§202. Notice of intent to demand payment.* To assert dissenters' rights against a proposed action, a shareholder must deliver to the corporation written notice of the shareholders' intent to demand payment for the shareholder's shares and not vote in favor of the proposed action.

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§262(d)(1). If the merger or consolidation is submitted to the stockholders for a vote, within ten days after the merger or consolidation becomes effective, the surviving corporation shall notify each stockholder, who properly notified the corporation of intent to demand appraisal and did not vote in favor of the merger or consolidation, of the date the merger or consolidation becomes effective.	*§203. Dissenters' notice.* If the shareholders authorize a proposed action, the corporation must provide a dissenters' notice to all shareholders who submitted notice of intent to demand payment no later than ten days after the action is authorized. The notice must specify the procedures and terms of payment for the dissenters' shares including a date by which the corporation must receive the payment demand. *§207. Failure to take action.* If the corporation does not effectuate the proposed action within two months after the date set to demand payment, the corporation shall return the deposited certificates and release restrictions on uncertificated shares. If the corporation effectuates the proposed action after return of certificates and release of restrictions, the corporation must repeat the payment demand procedure beginning with the dissenters' notice.
§262(e). Within 120 days after the effective date of the merger or consolidation, either the corporation or a stockholder, who properly notified the corporation of intent to demand appraisal, may file a petition in the Court of Chancery demanding a determination of the value of the stock of all such stockholders. Within sixty days of the effective date of the merger or consolidation, a stockholder may withdraw demand and accept the terms	*§204. Duty to demand payment.* To be entitled to payment for shares, shareholders, who received a dissenters' notice, must demand payment, certify whether the shareholder acquired shares before the date in the notice, and deposit the certificates in accordance with the terms of the notice. After the shares are deposited with the corporation, the shareholder retains rights as a shareholder until the proposed action is effectuated. A

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offered in the plan of merger or consolidation. *§262(g).* The Court shall determine the stockholders entitled to appraisal and determine the fair value of the shares. *§262(k).* After the effective date of the merger or consolidation, a stockholder who has demanded appraisal is not entitled to vote shares for any purpose and is not entitled to receive payment of dividends or other distributions.	shareholder may not withdraw a demand for payment unless the corporation consents. *§208. After-acquired shares.* A corporation may elect to withhold payment from a dissenter unless the dissenter was the beneficial owner of the shares before the date set for announcement of the proposed action to the media or shareholders. A corporation shall pay fair value plus accrued interest to dissenters from whom payment is withheld after the proposed action is effectuated.
§262(i). The Court shall direct the payment of the fair value of the shares plus interest from the corporation to the stockholders. *§262(j).* The costs of the proceeding may be determined by the Court and taxed as the Court deems equitable.	*§206. Payment.* The corporation shall pay each dissenter, who complied with the duty to demand payment, the fair value of each share plus accrued interest at the earlier of the date the proposed action is effectuated or the date payment demand is received. The corporation must provide financial statements, a statement of the estimation of fair value, an explanation of the interest calculation, and a copy of this chapter. *§209. Procedure if shareholder dissatisfied with payment or offer.* Under circumstances described in the statute, a dissenter may demand payment of the dissenter's estimate of fair value or reject the corporation's offer. The dissenter must notify the corporation of a demand within one month after the corporation's offer or such right to payment is waived.

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§262(l). The shares of the surviving corporation which would have become shares of the stockholders demanding appraisal will have the status of authorized and unissued shares of the corporation.	*§205. Share restrictions.* A corporation may restrict the transfer of uncertificated shares from the date demand for their payment is received until the proposed corporate action is effectuated, but the person for whom the dissenters' rights are asserted as to the uncertificated shares retains all other shareholder rights until the proposed action is effectuated.
	Part 3. Judicial Appraisal of Shares 48-23-301 to 48-23-302.
	§301. Court action. If a demand for payment from a dissatisfied shareholder remains unsettled, the corporation must petition a court ("appraisal proceeding") to determine fair value and interest within two months after receiving the payment demand or pay the shareholder the amount demanded.
	§302. Court costs and counsel fees. In an appraisal proceeding, the court shall determine all costs of the proceeding and assess the costs against the corporation. The court may assess costs against dissenters who acted arbitrarily, vexatiously, or in bad faith. The court has discretion to assess fees and expenses as provided in the statute.
§327. Stockholder's derivative action; allegation of stock ownership.	

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M. Dissolution	
	Part 1. Voluntary Dissolution 48-24-101 to 48-24-108.
§274. Dissolution before issuance of shares or beginning of business; procedure. If a corporation has not issued shares or commenced the business for which the corporation was organized, a majority of the incorporators, or, if elected or named in the certificate of incorporation, a majority of directors, may dissolve the corporation by filing a certificate, executed and acknowledged by a majority of the incorporators or directors.	*§101. Dissolution by incorporators or initial directors.* A corporation that has not issued shares or commenced business may be dissolved by a majority of the incorporators or initial directors by filing articles of dissolution and termination.
§275. Dissolution generally; procedure. If all the stockholders consent in writing, the stockholders may authorize the dissolution of a corporation without action by the board. The board may adopt a resolution to dissolve the corporation by a majority of the board and provide notice of a meeting to take action on the resolution to the stockholders entitled to vote. If a majority of the stockholders vote for the resolution, a certificate of dissolution shall be executed, acknowledged, and filed with the Secretary of State.	*§102. Dissolution by board of directors and shareholders.* A corporation may be dissolved voluntarily by the shareholders as an action without a meeting. The board may propose dissolution for submission to the shareholders with or without condition. The corporation must notify all shareholders of the meeting and must state that the purpose of the meeting is to consider dissolution. The shareholders must approve of dissolution by a majority of all the votes entitled to be case unless otherwise specified in the charter or by the board. *§103. Articles of dissolution.* The board shall file articles of dissolution with the secretary of state after dissolution is authorized.
§311. Revocation of voluntary dissolution. A corporation may revoke a dissolution effected by the board and stockholders within three years after the dissolution,	*§104. Revocation of dissolution.* A corporation may revoke dissolution any time prior to filing articles of termination of corporate existence with

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or for a longer period as directed by the Court of Chancery. The board shall adopt a resolution and a majority of the stockholders shall vote for revocation of dissolution. A certificate of revocation of dissolution shall be executed, acknowledged, and filed.	the secretary of state. Shareholders may authorize revocation in the same manner as dissolution may be authorized, unless the authorization for dissolution allowed revocation by the board alone. The corporation shall file articles of revocation of dissolution after revocation is authorized. Revocation is effective as of the effective date of dissolution.
§278. Continuation of corporation after dissolution for purposes of suit and winding up affairs. All corporations, whether dissolved or expired, shall continue for a term of three years from such expiration or dissolution or longer as determined by the Court of Chancery. The corporation shall continue to exist for the purpose of prosecuting and defending suits by or against the corporation and enabling them to gradually settle and close their business, but not for continuing the business for which the corporation was organized.	*§105. Effect of dissolution.* A dissolved corporation continues to exist, but may conduct business only to wind up and liquidate.
§280. Notice to claimants; filing of claims. After a corporation has been dissolved, the corporation or successor entity may give notice to require that all persons with claims against the corporation present the claims in accordance with the notice. The statute lists notice requirements for content and publication. A claim is barred if claimant does not meet the deadline to present the claim.	*§106. Known claims against dissolved corporations.* A dissolved corporation may dispose of known claims by notifying claimants of the dissolution in writing. The statute lists notice requirements, including a deadline by which the dissolved corporation must receive a claim. A claim is barred if claimant does not meet the deadline or the claimant does not commence a proceeding to enforce a claim rejected by the corporation within

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	three months of rejection. *§107. Unknown claims against dissolved corporation.* A dissolved corporation may also publish notice of dissolution requesting persons with claims against the corporation present the claims. The statute lists notice requirements. A claim may be enforced against a dissolved corporation to the extent of undistributed assets or, if assets are liquidated, against a shareholder as provided in the statute. If notice is published and a claimant does not commence a proceeding to enforce the claim within two years of publication, claims may be barred as provided by the statute.
	§108. Articles of termination of corporate existence. A corporation shall file articles of termination of corporate existence after all assets are distributed to creditors and shareholders and voluntary dissolution proceedings have not been revoked.
§279. Trustees or receivers for dissolved corporations; appointment; powers; duties. When a corporation is dissolved, upon application of any creditor, stockholder, or director, the Court of Chancery may (1) appoint a director to be trustee, (2) appoint a receiver.	
	Part 2. Administrative Dissolution 48-24-201 to 48-24-205
§312. Renewal, revival, extension and restoration of certificate of incorporation. A corporation whose certificate of incorporation has become inoperative by	*§201. Grounds for administrative dissolution.* The secretary of state may commence a proceeding to administratively dissolve a corporation for the reasons listed in the

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law for nonpayment of taxes, expired by failure to renew properly, or forfeited by the Court of Chancery, may procure an extension, restoration, renewal, or revival of its certificate of incorporation.	statute including failure of the corporation to deliver a properly completed annual report within two months after due and the corporation is without a registered agent or office in Tennessee for two months or more. *§202. Procedure for and effect of administrative dissolution.* The secretary of state shall serve the corporation with notice of a determination for administrative dissolution by first class mail. If the corporation does not correct each ground for dissolution within two months of service, the secretary of state shall dissolve the corporation by filing a certificate of dissolution. An administratively dissolved corporation continues in corporate existence but may conduct business only to wind up and liquidate. *§203. Reinstatement following administrative dissolution.* A corporation administratively dissolved may apply to the secretary of state for reinstatement stating that the ground for dissolution did not exist or has been eliminated. The secretary of state shall cancel the certificate of dissolution and file a certificate of reinstatement after determination that the information in the application is true. *§204. Appeal from denial of reinstatement.* If the secretary of state denies an application for reinstatement, the corporation may appeal the denial to the chancery court of Davidson County

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	within thirty days of service of the notice of denial. The court may summarily order the secretary of state to reinstate or may take other appropriate action. *§205. Articles of termination following administrative dissolution or revocation.* An administratively dissolved corporation or a corporation whose charter is revoked may terminate corporate existence by filing articles of termination following administrative dissolution or revocation.
	Part 3. Judicial Dissolution 48-24-301 to 48-24-304
§284. Revocation or forfeiture of charter; proceedings. The Court of Chancery shall have jurisdiction to revoke or forfeit the charter of any corporation for abuse, misuse, or nonuse of corporation powers, privileges, or franchises. The Court of Chancery shall have the power, by appointment of receivers or otherwise, to administer and wind up the affairs of any corporation whose charter shall be revoked or forfeited by a court.	*§301. Grounds for judicial dissolution.* A court may dissolve a corporation in a proceeding by the attorney general and reporter, a shareholder, or a creditor. Petitioners must establish grounds as listed in the statute. *§302. Procedure for judicial dissolution.* Venue lies in Davidson County for a proceeding by the attorney general and reporter; venue lies in the county of the corporation's principal office for a proceeding brought by a shareholder or creditor. A court in such a proceeding may take actions to preserve the corporate assets where located and carry on the business of the corporation until a full hearing may be held. The petitioner in such a proceeding shall execute and file a bond to cover defendant's probable costs in an amount determined by the court. *§303. Receivership or custodianship.* A court in a judicial dissolution

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	proceeding may appoint a receiver to wind up and liquidate the corporation or a custodian to manage the business and affairs of the corporation. *§304. Decree of dissolution.* If a court determines that a ground exists for judicial dissolution, the court may enter a decree dissolving the corporation, and the clerk of the court shall file the decree with the secretary of state. The court shall then direct the winding up and liquidation of the corporation and the notification of claimants.
§273. Dissolution of joint venture corporation having two stockholders.	
§276. Dissolution of nonstock corporation; procedure.	
§281. Payment and distribution to claimants and stockholders.	
§282. Liability of stockholders of dissolved corporations.	
N. Foreign Corporations	
	Part 1. Certificate of Authority 48-25-101 to 48-25-110.
§371. Definition; qualification to do business in State; procedure. A corporation organized under the laws of a jurisdiction other than Delaware shall not do business in Delaware until the corporation files a certificate evidencing existence and a statement setting forth the name and purpose of the corporation.	*§101. Authority to transact business required.* A foreign corporation, except a foreign insurance company, may not transact business in Tennessee without a certificate of authority. The statute lists activities allowed without a certificate of authority including maintaining, defending, or settling a claim, proceeding or dispute and holding board meetings or shareholder meetings.

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§378. Penalties for noncompliance. A foreign corporation doing business of any kind in Delaware without first filing for qualification shall be fined for each offense. Any agent of such unqualified foreign corporation doing any business in Delaware shall also be fined for each offense.	*§102. Consequences of transacting business without authority.* A foreign corporation transacting business in Tennessee without a certificate of authority may not maintain a proceeding in any court in Tennessee. A court may stay a proceeding commenced by a foreign corporation to determine whether a certificate of authority is required. A foreign corporation that conducts unauthorized business in Tennessee shall be liable to the state in an amount equal to treble the amount of fees, penalties, taxes, and interest imposed by the state had the corporation obtained a certificate of authority. A foreign corporation must pay such amounts before an application for a certificate of authority may be filed. *§103. Application for certificate of authority.* A foreign corporation must file an application for a certificate of authority with the secretary of state that meets the requirements listed in the statute, accompanied by a certificate of existence, authenticated nor more than two months before filing the application, by the secretary of state where the corporation is incorporated. *§105. Effect of certificate of authority.* A certificate of authority authorizes a foreign corporation to transact business in Tennessee subject to revocation. A foreign corporation with a certificate of authority is subject to the same duties and liabilities of a domestic corporation.

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§372. Additional requirements in case of change of name, change of business purpose or merger or consolidation. A foreign corporation admitted to do business in Delaware shall file a certificate with the Secretary of State if it changes its corporate name or changes the business proposed to conduct in Delaware.	*§104. Amended certificate of authority.* A foreign corporation authorized to conduct business in Tennessee must obtain an amended certificate of authority if it changes its corporate name, duration, or state or country of incorporation by following the same procedures required to obtain an original certificate of authority. *§106. Corporate name of a foreign corporation.* Generally, a foreign corporation may obtain a certificate of authority under a corporate name or an assumed name that meets the requirements for the name of a domestic corporation.
§377. Change of registered agent. A foreign corporation qualified to do business in Delaware may change its registered agent by filing a certificate with the Secretary of State. The registered agent of a foreign corporation may resign by filing a signed statement with the Secretary of State, with a representation that a written notice of resignation was given to the corporation at least thirty days prior to the filing of the statement.	*§107. Registered office and registered agent of foreign corporation.* A foreign corporation authorized to transact business in Tennessee shall continuously maintain a registered office and registered agent in Tennessee. *§108. Change of registered office or registered agent of foreign corporation.* A foreign corporation authorized to transact business in Tennessee may change its registered office or agent by filing a statement of change with the secretary of state. *§109. Resignation of registered agent of foreign corporation.* The registered agent of a foreign corporation may resign the appointment by filing with the secretary of state an original statement of resignation and certification that the agent sent a copy to the corporation by certified mail.

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§376. Service of process upon qualified foreign corporations. Service of process upon a foreign corporation may be served on the registered agent of the corporation. If there is no registered agent, then service may be made upon any officer, director, or other agent of the corporation.	*§110. Service on foreign corporation.* The registered agent of a foreign corporation authorized to transact business in Tennessee is the corporation's agent for service or process, notice, or demand.
	Part 2. Withdrawal **48-25-201.**
§381. Withdrawal of foreign corporation from State; procedure; service of process on Secretary of State. A foreign corporation qualified to do business in Delaware may surrender its authority by filing a certificate stating that the corporation surrenders authority, a copy of a certificate of dissolution, or a copy of an order of dissolution made by a court. The Secretary of State shall issue certificates evidencing the surrender of authority.	*§201. Withdrawal of foreign corporation.* A foreign corporation authorized to transact business in Tennessee may not withdraw form Tennessee without a certificate of withdrawal. The requirements for application for a certificate of withdrawal are listed in the statute.
	Part 3. Revocation of Certificate of Authority **48-25-301 to 48-25-305.**
§374. Annual report. On or before June 30 each year, a foreign corporation doing business in Delaware shall file an annual report with the Secretary of State.	*§301. Grounds for revocation.* The secretary of state may commence a proceeding to revoke a certificate of authority for the grounds listed in the statute including failure to properly deliver an annual report two months after due and the corporation is without a registered agent or office in Tennessee for two months or more.
§375. Failure to file report. If a foreign corporation fails to file an annual report within any two-year period, the Secretary of State may make an	*§302. Procedure for and effect of revocation.* The secretary of state shall serve the foreign corporation with notice of a determination for revocation of a

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investigation and terminate the right of the corporation to do business in Delaware.	certificate of authority by first class mail. If the foreign corporation does not correct each ground for revocation within two months of service, the secretary of state shall dissolve the corporation by filing a certificate of revocation. The authority of a foreign corporation to transact business in Tennessee ceases upon revocation, but the revocation does not terminate the authority of the registered agent.
	§303. Reinstatement following administrative revocation. A foreign corporation whose certificate of authority is administratively revoked may apply to the secretary of state for reinstatement stating that the ground for revocation did not exist or has been eliminated. The secretary of state shall reinstate the certificate of authority and file a certificate of authority after determination that the information in the application is true. *§304. Appeal from denial of reinstatement.* If the secretary of state denies a foreign corporation's application for reinstatement following administrative revocation, the foreign corporation may appeal the denial to the chancery court of Davidson County within one month of service of the notice of denial. The court may summarily order the secretary of state to reinstate the revoked corporation or may take other appropriate action. *§305. Certificate of withdrawal following administrative revocation.*

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	A foreign corporation whose certificate of authority is revoked may withdraw from the state by filing an application for a certificate of withdrawal following administrative revocation of the certificate of authority.
§379. Banking powers denied.	
§380. Foreign corporation as fiduciary in this State.	
§382. Service of process on nonqualifying foreign corporations.	
§383. Actions by and against unqualified foreign corporations.	
O. Records and Reports	
	Part 1. Records **48-26-101 to 48-26-104.**
§224. Form of records. Any records maintained by a corporation in the regular course of business may be kept in any manner that may be converted into clearly legible paper form within a reasonable time of a request by a person entitled to inspect such records.	*§101. Corporate records.* A corporation shall maintain (1) permanent records of minutes of all shareholder and board meetings, all actions taken at such meetings, and all actions taken by committees of the board; (2) accounting records; and (3) records of shareholders in written form. A corporation shall keep copies, at the principal office, of the charter, bylaws, and board resolutions creating shares, meetings minutes, written communication to shareholders, names and addresses of directors and officers, and the most recent annual report.
§220(b). Inspection of books and records. Upon written demand under oath directed to the corporation's principal place of business, any stockholder shall have the right to inspect, copy, and extract from the corporation's stock ledger, list of stockholders, and other	*§102. Inspection of records by shareholders.* If a shareholder provides written notice of demand five business days in advance, the shareholder is entitled to inspect and copy the records required to be kept at the principal office during regular business hours. Shareholders

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books and records during usual business hours for any proper purpose.	have rights to inspection of other documents as provided in the statute. These rights of inspection may not be abolished or limited by the charter or bylaws.
§220(b). Inspection of books and records. If the demand is accompanied by a power of attorney, an attorney or agent may seek the right to inspection on behalf of a stockholder.	*§103. Scope of inspection right.* A shareholder's agent or attorney has the same inspection and copying rights as the shareholder. The right to copy includes the right to receive copies. The corporation may impose a reasonable charge for copies.
§220(c). If the corporation fails to reply to demand within five business days after the demand has been made, the stockholder may apply to the Court of Chancery for an order to compel inspection. The Court is vested with exclusive jurisdiction to determine whether the person seeking the right of inspection is entitled to the right. If the stockholder seeks only to inspect the stock ledger and the stockholder list, the corporation bears the burden to prove an improper purpose and the court may summarily order the corporation to permit inspection. If the stockholder seeks to inspect the corporation's books and records, the stockholder must establish compliance with demand requirements and proper purpose. The Court has discretion to fashion terms upon which the corporation must permit inspection. A director shall have the same right of inspection, and the Court of Chancery is	*§104. Court-ordered inspection.* Upon application by a shareholder, a court may summarily order inspection and copying of records demanded at the corporation's expense if a corporation does not honor a shareholder's right to inspect and copy

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vested with jurisdiction similar to that for the stockholder's right of inspection.	
	Part 2. Reports **48-26-201 to 48-26-203.**
	§201. Financial statements for shareholders. A corporation shall prepare annual financial statements that include a balance sheet, an income statement, and a statement of changes in shareholders' equity. If requested in writing by the shareholder, the corporation shall furnish the statements within one month after notice of request.
	§202. Other reports to shareholders. The corporation shall report in writing to the shareholders with or before the notice of the next meeting (1) if a corporation indemnifies or advances expenses to a director, the corporation or (2) if a corporation issues or authorizes the issuance of shares for promissory notes or for promises to render services in the future.
	§203. Annual report for secretary of state. Each domestic corporation and foreign corporation authorized to do business in Tennessee shall file an annual report with the secretary of state on or before the first day of the fourth month following the close of the corporation's fiscal year.

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Subchapter XI. Insolvency; Receivers and Trustees	
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