

## Changes in the Model Business Corporation Act—Proposed “Force the Vote” Amendments to Chapters 8, 9, 10, 11, 12 and 14\*

*By the Committee on Corporate Laws, ABA Section of Business Law\*\**

The Committee on Corporate Laws of the ABA Section on Business Law (Committee) develops, and from time to time publishes proposed changes in, the Model Business Corporation Act (the Act).

The Committee has approved the changes described in this Report on second reading and invites comments from interested persons. **Comments should be addressed to Herbert S. Wander, Chair, Committee on Corporate Laws, 525 West Monroe Street, Chicago, Illinois 60661, or sent to him by e-mail at hwander@kattenlaw.com.** Comments should be received by May 1, 2008 in order to be considered by the Committee before adoption of the amendments on third reading.

The proposed amendments clarify the authority of the board of directors to agree to submit a matter for shareholder approval even if the board later determines it can no longer recommend that shareholders approve the action because of subsequent events. The proposed amendments consist of a new section 8.26 of the Act, generally authorizing “force the vote” agreements, as well as amendments to relevant provisions of chapters 9, 10, 11, 12 and 14. Changes to existing provisions are first presented marked to show changes from the current Act, followed by a clean version, as amended. New language is indicated by underscoring and deletions by strikeout.

(i) *Add a new section 8.26 and Official Comment as follows:*

### **§ 8.26. SUBMISSION OF MATTERS FOR SHAREHOLDER VOTE.**

A corporation may agree to submit a matter to a vote of its shareholders even if, after approving the matter, the board of directors determines it no longer recommends the matter.

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\* Editor's Note: This report is published in the form approved by the Committee on Corporate Laws without further editing by *The Business Lawyer*.

\*\* Herbert S. Wander, Chair.

## OFFICIAL COMMENT

Section 8.26 is intended to clarify that a corporation can enter into an agreement, such as a merger agreement, containing a force the vote provision. Section 8.26 is broader than some analogous state corporation law provisions and applies to several different provisions of the Model Act that require the directors to approve a matter before recommending that the shareholders vote to approve it. Under section 8.26, directors can agree to submit a matter to the shareholders for approval even if they later determine that they no longer recommend it. This provision is not intended to relieve the board of directors of its duty to consider carefully the proposed transaction and the interests of the shareholders.

(ii) Amend section 9.21(2) and the related Official Comment as follows:

### **§ 9.21. ACTION ON A PLAN OF DOMESTICATION.**

In the case of a domestication of a domestic business corporation in a foreign jurisdiction:

\* \* \*

- (2) After adopting the plan of domestication the board of directors must submit the plan to the shareholders for their approval. The board of directors must also transmit to the shareholders a recommendation that the shareholders approve the plan, unless (i) the board of directors makes a determination that because of conflicts of interest or other special circumstances it should not make such a recommendation, ~~in which case~~ or (ii) section 8.26 applies. If (i) or (ii) applies, the board must transmit to the shareholders the basis for that determination so proceeding.

## OFFICIAL COMMENT

### 1. IN GENERAL

This section sets forth the rules for adoption and approval of a plan of domestication of a domestic business corporation in a foreign jurisdiction. The manner in which the domestication of a foreign business corporation in this state must be adopted and approved will be controlled by the laws of the foreign jurisdiction. The provisions of this section follow generally the rules in chapter 11 for adoption and approval of a plan of merger or share exchange.

A plan of domestication must be adopted by the board of directors. ~~Although~~ Section 9.21(2) permits the board either to refrain from making a recommendation, subject to the described circumstances, or if section 8.26 applies, to change its recommendation that the shareholders approve the plan that. Section 9.21(2) does not change the underlying requirement that the board first adopt the plan before it is submitted to the shareholders. Clauses (i) and (ii) are not intended to relieve the board of its duty to consider carefully the proposed transaction and the

interests of shareholders. Approval of a plan of domestication by the shareholders is always required.

**§ 9.21. ACTION ON A PLAN OF DOMESTICATION.**

In the case of a domestication of a domestic business corporation in a foreign jurisdiction:

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- (2) After adopting the plan of domestication the board of directors must submit the plan to the shareholders for their approval. The board of directors must also transmit to the shareholders a recommendation that the shareholders approve the plan, unless (i) the board of directors makes a determination that because of conflicts of interest or other special circumstances it should not make such a recommendation or (ii) section 8.26 applies. If (i) or (ii) applies, the board must transmit to the shareholders the basis for so proceeding.

**OFFICIAL COMMENT**

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This section sets forth the rules for adoption and approval of a plan of domestication of a domestic business corporation in a foreign jurisdiction. The manner in which the domestication of a foreign business corporation in this state must be adopted and approved will be controlled by the laws of the foreign jurisdiction. The provisions of this section follow generally the rules in chapter 11 for adoption and approval of a plan of merger or share exchange.

A plan of domestication must be adopted by the board of directors. Section 9.21(2) permits the board either to refrain from making a recommendation, subject to the described circumstances, or if section 8.26 applies, to change its recommendation that the shareholders approve the plan. Section 9.21(2) does not change the underlying requirement that the board first adopt the plan before it is submitted to the shareholders. Clauses (i) and (ii) are not intended to relieve the board of its duty to consider carefully the proposed transaction and the interests of shareholders. Approval of a plan of domestication by the shareholders is always required.

(iii) *Amend section 9.31(2) and the related Official Comment as follows:*

**§ 9.31. ACTION ON A PLAN OF NONPROFIT  
CONVERSION.**

In the case of a conversion of a domestic business corporation to a domestic or foreign nonprofit corporation:

\* \* \*

- (2) After adopting the plan of nonprofit conversion, the board of directors must submit the plan to the shareholders for their approval. The board of directors must also transmit to the shareholders a recommendation that the shareholders approve the plan, unless (i) the board of directors makes a determination that because of conflicts of interest or other special circumstances it should not make such a recommendation, ~~in which case or (ii) section 8.26 applies. If (i) or (ii) applies, the board~~ must transmit to the shareholders the basis for ~~that determination~~ so proceeding.

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## OFFICIAL COMMENT

### 1. IN GENERAL

This section sets forth the rules for adoption and approval of a plan of nonprofit conversion of a domestic business corporation to a domestic or foreign nonprofit corporation.

A plan of nonprofit conversion must be adopted by the board of directors. ~~Although~~ Section 9.31(2) permits the board either to refrain from making a recommendation, subject to the described circumstances, or if section 8.26 applies, to change its recommendation that the shareholders approve the plan that. Section 9.31(2) does not change the underlying requirement that the board first adopt the plan before it is submitted to the shareholders. Clauses (i) and (ii) are not intended to relieve the board of its duty to consider carefully the proposed transaction and the interests of shareholders. Approval of a plan of domestication by the shareholders is always required.

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### § 9.31. ACTION ON A PLAN OF NONPROFIT CONVERSION.

In the case of a conversion of a domestic business corporation to a domestic or foreign nonprofit corporation:

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- (2) After adopting the plan of nonprofit conversion, the board of directors must submit the plan to the shareholders for their approval. The board of directors must also transmit to the shareholders a recommendation that the shareholders approve the plan, unless (i) the board of directors makes a determination that because of conflicts of interest or other special circumstances it should not make such a recommendation or (ii) section 8.26 applies. If (i) or (ii) applies, the board must transmit to the shareholders the basis for so proceeding.

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## OFFICIAL COMMENT

### 1. IN GENERAL

This section sets forth the rules for adoption and approval of a plan of nonprofit conversion of a domestic business corporation to a domestic or foreign nonprofit corporation.

A plan of nonprofit conversion must be adopted by the board of directors. Section 9.31(2) permits the board either to refrain from making a recommendation, subject to the described circumstances, or if section 8.26 applies, to change its recommendation that the shareholders approve the plan. Section 9.31(2) does not change the underlying requirement that the board first adopt the plan before it is submitted to the shareholders. Clauses (i) and (ii) are not intended to relieve the board of its duty to consider carefully the proposed transaction and the interests of shareholders. Approval by the shareholders of a plan of nonprofit conversion is always required.

\* \* \*

(iv) Amend section 9.52(2) and the related Official Comment as follows:

### **§ 9.52. ACTION ON A PLAN OF ENTITY CONVERSION.**

In the case of an entity conversion of a domestic business corporation to a domestic or foreign unincorporated entity:

\* \* \*

- (2) After adopting the plan of entity conversion, the board of directors must submit the plan to the shareholders for their approval. The board of directors must also transmit to the shareholders a recommendation that the shareholders approve the plan, unless (i) the board of directors makes a determination that because of conflicts of interest or other special circumstances it should not make such a recommendation, in which case or (ii) section 8.26 applies. If (i) or (ii) applies, the board must transmit to the shareholders the basis for that determination so proceeding.

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## OFFICIAL COMMENT

### 1. IN GENERAL

This section sets forth the rules for adoption and approval of a plan of entity conversion by a domestic business corporation. The manner in which the conversion of a foreign unincorporated entity to a domestic business corporation must be adopted and approved will be controlled by the laws of the foreign jurisdiction. The provisions of this section follow generally the rules in Chapter 11 for adoption and approval of a plan of merger or share exchange.

A plan of entity conversion must be adopted by the board of directors. ~~Although~~ Section 9.52(2) permits the board either to refrain from making a

recommendation, subject to the described circumstances, or if section 8.26 applies, to change its recommendation that the shareholders approve the plan that. Section 9.52(2) does not change the underlying requirement that the board first adopt the plan before it is submitted to the shareholders. Clauses (i) and (ii) are not intended to relieve the board of its duty to consider carefully the proposed transaction and the interests of shareholders. Approval of a plan of domestication by the shareholders is always required.

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### **§ 9.52. ACTION ON A PLAN OF ENTITY CONVERSION.**

In the case of an entity conversion of a domestic business corporation to a domestic or foreign unincorporated entity:

\* \* \*

- (2) After adopting the plan of entity conversion, the board of directors must submit the plan to the shareholders for their approval. The board of directors must also transmit to the shareholders a recommendation that the shareholders approve the plan, unless (i) the board of directors makes a determination that because of conflicts of interest or other special circumstances it should not make such a recommendation or (ii) section 8.26 applies. If (i) or (ii) applies, the board must transmit to the shareholders the basis for so proceeding.

\* \* \*

## **OFFICIAL COMMENT**

### **1. IN GENERAL**

This section sets forth the rules for adoption and approval of a plan of entity conversion by a domestic business corporation. The manner in which the conversion of a foreign unincorporated entity to a domestic business corporation must be adopted and approved will be controlled by the laws of the foreign jurisdiction. The provisions of this section follow generally the rules in Chapter 11 for adoption and approval of a plan of merger or share exchange.

A plan of entity conversion must be adopted by the board of directors. Section 9.52(2) permits the board either to refrain from making a recommendation, subject to the described circumstances, or, if section 8.26 applies, to change its recommendation that the shareholders approve the plan. Section 9.52(2) does not change the underlying requirement that the board first adopt the plan before it is submitted to the shareholders. Clauses (i) and (ii) are not intended to relieve the board of its duty to consider carefully the proposed transaction and the interests of shareholders. Approval by the shareholders of a plan of entity conversion is always required.

\* \* \*

(v) Amend section 10.03(b) and the related Official Comment as follows:

**§ 10.03. AMENDMENT BY BOARD OF DIRECTORS  
AND SHAREHOLDERS.**

If a corporation has issued shares, an amendment to the articles of incorporation shall be adopted in the following manner:

\* \* \*

- (b) Except as provided in sections 10.05, 10.07, and 10.08, after adopting the proposed amendment the board of directors must submit the amendment to the shareholders for their approval. The board of directors must also transmit to the shareholders a recommendation that the shareholders approve the amendment, unless (i) the board of directors makes a determination that because of conflicts of interest or other special circumstances it should not make such a recommendation, in which case or (ii) section 8.26 applies. If (i) or (ii) applies, the board must transmit to the shareholders the basis for that determination so proceeding.

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**OFFICIAL COMMENT**

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**2. SUBMISSION TO SHAREHOLDERS**

Section 10.03 requires the board of directors, after having adopted an amendment, to submit the amendment to the shareholders for approval except as otherwise provided by sections 10.05, 10.07, and 10.08. When submitting the amendment, the board of directors must make a recommendation to the shareholders that the amendment be approved, unless (i) the board of directors makes a determination that because of conflicts of interest or other special circumstances it should make no recommendation or (ii) section 8.26 applies. For example, the board of directors may might make such a determination under clause (i) where there is not a sufficient number of directors free of having a conflicting interest to approve makes it inadvisable for them to recommend the amendment or because where the board is evenly divided as to the merits of an amendment but is able to agree that shareholders should be permitted to consider the amendment. The This exception for conflicts of interest or other special circumstances is intended to be used sparingly. Generally, shareholders should not be asked to vote on an amendment in the absence of a recommendation by the board. Clause (ii) is intended to provide for situations in which the board might wish to commit in advance to submit an amendment to the articles to the shareholders but later determines it is inadvisable or withdraws the recommendation for some other reason. If the board ~~makes such a determination proceeds under either clause (i) or (ii), it must describe the conflict of interest or special circumstances, and~~

communicate the basis for its determination, when so proceeding. ~~The exception is~~ Clauses (i) and (ii) are not intended to relieve the board of its duty to consider carefully the amendment and the interests of shareholders.

\* \* \*

### **§ 10.03. AMENDMENT BY BOARD OF DIRECTORS AND SHAREHOLDERS.**

If a corporation has issued shares, an amendment to the articles of incorporation shall be adopted in the following manner:

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## **OFFICIAL COMMENT**

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### **2. SUBMISSION TO SHAREHOLDERS**

Section 10.03 requires the board of directors, after having adopted an amendment, to submit the amendment to the shareholders for approval except as otherwise provided by sections 10.05, 10.07, and 10.08. When submitting the amendment, the board must make a recommendation to the shareholders that the amendment be approved, unless (i) the board makes a determination that because of conflicts of interest or other special circumstances it should make no recommendation or (ii) section 8.26 applies. The board might make a determination under clause (i) where the number of directors having a conflicting interest makes it inadvisable for them to recommend the amendment or where the board is evenly divided as to the merits of an amendment but is able to agree that shareholders should be permitted to consider the amendment. This exception is intended to be used sparingly. Generally, shareholders should not be asked to vote on an amendment in the absence of a recommendation by the board. Clause (ii) is intended to provide for situations in which the board might wish to commit in advance to submit an amendment to the articles to the shareholders but later



determines it is inadvisable or withdraws the recommendation for some other reason. If the board proceeds under either clause (i) or (ii), it must communicate the basis for its determination, when so proceeding. Clauses (i) and (ii) are not intended to relieve the board of its duty to consider carefully the amendment and the interests of shareholders.

\* \* \*

(vi) Amend section 11.04(b) and the related Official Comment as follows:

**§ 11.04. ACTION ON A PLAN OF MERGER OR SHARE EXCHANGE.**

In the case of a domestic corporation that is a party to a merger or share exchange:

\* \* \*

- (b) Except as provided in subsection (g) and in section 11.05, after adopting the plan of merger or share exchange the board of directors must submit the plan to the shareholders for their approval. The board of directors must also transmit to the shareholders a recommendation that the shareholders approve the plan, unless (i) the board of directors makes a determination that because of conflicts of interest or other special circumstances it should not make such a recommendation, ~~in which case~~ or (ii) section 8.26 applies. If (i) or (ii) applies, the board must transmit to the shareholders the basis for ~~that determination~~ so proceeding.

**OFFICIAL COMMENT**

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**2. SUBMISSION TO THE SHAREHOLDERS**

Section 11.04(b) requires the board of directors, after having adopted the plan of merger or share exchange, to submit the plan of merger or share exchange to the shareholders for approval, except as provided in subsection (g) and section 11.05. When submitting the plan of merger or share exchange, the board of directors must make a recommendation to the shareholders that the plan be approved, unless (i) the board of directors makes a determination that because of conflicts of interest or other special circumstances it should make no recommendation or (ii) section 8.26 applies. For example, the The board of directors ~~may~~ might make such a determination under clause (i) where there is not a sufficient the number of directors ~~free of~~ free of having a conflicting interest ~~to approve~~ makes it inadvisable for them to recommend the transaction or where the board is evenly divided as to the merits of the transaction but is able to agree that shareholders should be permitted to consider the transaction. ~~The~~ This exception ~~for conflicts of interest or other special circumstances~~ is intended to be used sparingly. Generally, shareholders

should not be asked to vote on a plan of merger or share exchange in the absence of a recommendation by the board. ~~Clause (ii) is intended to provide for situations in which the board might wish to commit in advance to submit a plan of merger or share exchange to the shareholders but later determines it is inadvisable or withdraws the recommendation for some other reason.~~ If the board ~~makes such a determination proceeds under either clause (i) or (ii),~~ it must describe the conflict of interest or special circumstances, and communicate the basis for its determination, ~~when so proceeding.~~ ~~The exception is—~~Clauses (i) and (ii) are not intended to relieve the board of its duty to consider carefully the proposed transaction and the interests of shareholders.

#### **§ 11.04. ACTION ON A PLAN OF MERGER OR SHARE EXCHANGE.**

In the case of a domestic corporation that is a party to a merger or share exchange:

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- (b) Except as provided in subsection (g) and in section 11.05, after adopting the plan of merger or share exchange the board of directors must submit the plan to the shareholders for their approval. The board of directors must also transmit to the shareholders a recommendation that the shareholders approve the plan, unless (i) the board of directors makes a determination that because of conflicts of interest or other special circumstances it should not make such a recommendation or (ii) section 8.26 applies. If (i) or (ii) applies, the board must transmit to the shareholders the basis for so proceeding.

#### **OFFICIAL COMMENT**

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##### **2. SUBMISSION TO THE SHAREHOLDERS**

Section 11.04(b) requires the board of directors, after having adopted the plan of merger or share exchange, to submit the plan of merger or share exchange to the shareholders for approval, except as provided in subsection (g) and section 11.05. When submitting the plan of merger or share exchange the board must make a recommendation to the shareholders that the plan be approved, unless (i) the board makes a determination that because of conflicts of interest or other special circumstances it should make no recommendation or (ii) section 8.26 applies. The board might make a determination under clause (i) where the number of directors having a conflicting interest makes it inadvisable for them to recommend the transaction or where the board is evenly divided as to the merits of a transaction but agrees that shareholders should be permitted to consider the transaction. This exception is intended to be used sparingly. Generally,

shareholders should not be asked to vote on a plan of merger or share exchange in the absence of a recommendation by the board. Clause (ii) is intended to provide for situations in which the board might wish to commit in advance to submit a plan of merger or share exchange to the shareholders but later determines it is inadvisable or withdraws the recommendation for some other reason. If the board proceeds under either clause (i) or (ii), it must communicate the basis for its determination when so proceeding. Clauses (i) and (ii) are not intended to relieve the board of its duty to consider carefully the proposed transaction and the interests of shareholders.

(vii) Amend section 12.02(b) and the related Official Comment as follows:

**§ 12.02. SHAREHOLDER APPROVAL OF CERTAIN DISPOSITIONS.**

\* \* \*

(b) A disposition that requires approval of the shareholders under subsection (a) shall be initiated by a resolution by the board of directors authorizing the disposition. After adoption of such a resolution, the board of directors shall submit the proposed disposition to the shareholders for their approval. The board of directors shall also transmit to the shareholders a recommendation that the shareholders approve the proposed disposition, unless (i) the board of directors makes a determination that because of conflicts of interest or other special circumstances it should not make such a recommendation, ~~in which case~~ or (ii) section 8.26 applies. If (i) or (ii) applies, the board must transmit to the shareholders the basis for ~~that determination~~ so proceeding.

\* \* \*

**OFFICIAL COMMENT**

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**2. SUBMISSION TO SHAREHOLDERS**

Section 12.02(b) requires the board of directors, after having adopted a resolution authorizing a disposition that requires shareholder approval, to submit the disposition to the shareholders for approval. When submitting the proposed disposition, the board of directors must make a recommendation to the shareholders that the disposition be approved, unless (i) the board of directors makes a determination that because of conflicts of interest or other special circumstances it should make no recommendation or (ii) section 8.26 applies. ~~For example, the board of directors may~~ might make such a determination under clause (i) where there is not a sufficient number of directors free of having a conflicting interest to approve makes it inadvisable for them to recommend the transaction or ~~because~~ where the board is evenly divided as to the merits of the transaction but

is able to agree that shareholders should be permitted to consider the transaction. ~~The This exception for conflicts of interest or other special circumstances is intended to be used sparingly. Generally, shareholders should not be asked to vote on a disposition in the absence of a recommendation by the board. Clause (ii) is intended to provide for situations in which the board might wish to commit in advance to submit a disposition to the shareholders but later determines it is inadvisable or withdraws the recommendation for some other reason. If the board makes such a determination proceeds under either clause (i) or (ii), it must describe the conflict of interest or special circumstances, and communicate the basis for its determination, when so proceeding. The exception is Clauses (i) and (ii) are not intended to relieve the board of its duty to consider carefully the proposed transaction and the interests of shareholders.~~

\* \* \*

#### **§ 12.02. SHAREHOLDER APPROVAL OF CERTAIN DISPOSITIONS.**

\* \* \*

- (b) A disposition that requires approval of the shareholders under subsection (a) shall be initiated by a resolution by the board of directors authorizing the disposition. After adoption of such a resolution, the board of directors shall submit the proposed disposition to the shareholders for their approval. The board of directors shall also transmit to the shareholders a recommendation that the shareholders approve the proposed disposition, unless (i) the board of makes a determination that because of conflicts of interest or other special circumstances it should not make such a recommendation or (ii) section 8.26 applies. If (i) or (ii) applies, the board must transmit to the shareholders the basis for so proceeding.

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#### **OFFICIAL COMMENT**

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##### **2. SUBMISSION TO SHAREHOLDERS**

Section 12.02(b) requires the board of directors, after having adopted a resolution authorizing a disposition that requires shareholder approval, to submit the disposition to the shareholders for approval. When submitting the disposition to the shareholders, the board must make a recommendation to the shareholders that the disposition be approved, unless (i) the board makes a determination that because of conflicts of interests or other special circumstances it should make no recommendation or (ii) section 8.26 applies. The board might make a determination under clause (i) where the number of directors having a conflicting interest

makes it inadvisable for them to recommend the transaction or where the board is evenly divided as to the merits of a transaction but is able to agree that shareholders should be permitted to consider the transaction. This exception is intended to be used sparingly. Generally, shareholders should not be asked to vote on a disposition in the absence of a recommendation by the board. Clause (ii) is intended to provide for situations in which the board might wish to commit in advance to submit a disposition to the shareholders but later determines it is inadvisable or withdraws the recommendation for some other reason. If the board proceeds under either clause (i) or (ii), it must communicate the basis for its determination when so proceeding. Clauses (i) and (ii) are not intended to relieve the board of its duty to consider carefully the proposed transaction and the interests of shareholders.

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(vii) Amend section 14.02(b) and the related Official Comment as follows:

**§ 14.02. DISSOLUTION BY BOARD OF DIRECTORS  
AND SHAREHOLDERS.**

\* \* \*

(b) For a proposal to dissolve to be adopted:

- (1) The board of directors must recommend dissolution to the shareholders unless (i) the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation ~~and or (ii) section 8.26 applies. If (i) or (ii) applies, it must communicate to the shareholders the basis for its determination so proceeding;~~ and

\* \* \*

**OFFICIAL COMMENT**

Section 14.02(b) requires the board of directors, after approving a proposal to dissolve, to submit the proposal to the shareholders for their approval. When submitting the proposal, the board of directors must make a recommendation to the shareholders that the plan be approved, unless (i) the board of directors makes a determination that because of conflicts of interest or other special circumstances it should make no recommendation or (ii) section 8.26 applies. ~~For example, the board of directors may might make such a determination under clause (i) where there is not a sufficient the number of directors free of having a conflicting interest to approve makes it inadvisable for them to recommend the proposal or because where the board is evenly divided as to the merits of the proposal but is able to agree that shareholders should be permitted to consider dissolution. The This exception for conflicts of interest or other special circumstances is intended to be used sparingly. Generally, shareholders should not be asked to vote on a plan of dissolution in the absence of a recommendation by the board. Clause (ii)~~

~~is intended to provide for situations in which the board might wish to commit in advance to submit a plan of dissolution but later determines it is inadvisable or withdraws the recommendation for some other reason. If the board makes such a determination proceeds under either clause (i) or (ii), it must describe the conflict of interest or special circumstances, and communicate the basis for its determination, when so proceeding. The exception is Clauses (i) and (ii) are not intended to relieve the board of its duty to consider carefully the proposed transaction and the interests of shareholders.~~

**§ 14.02. DISSOLUTION BY BOARD OF DIRECTORS AND SHAREHOLDERS.**

\* \* \*

- (b) For a proposal to dissolve to be adopted:
- (2) The board of directors must recommend dissolution to the shareholders unless (i) the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation or (ii) section 8.26 applies. If (i) or (ii) applies, it must communicate to the shareholders the basis for so proceeding; and

\* \* \*

**OFFICIAL COMMENT**

Section 14.02(b) requires the board of directors, after approving a proposal to dissolve, to submit the proposal to the shareholders for their approval. When submitting the proposal the board must make a recommendation to the shareholders that the plan be approved, unless (i) the board makes a determination that because of conflicts of interest or other special circumstances it should make no recommendation or (ii) section 8.26 applies. The board might make a determination under clause (i) where the number of directors having a conflicting interest makes it inadvisable for them to recommend the proposal or where the board is evenly divided as to the merits of the proposal but agrees that shareholders should be permitted to consider dissolution. This exception is intended to be used sparingly. Generally, shareholders should not be asked to vote on a plan of dissolution in the absence of a recommendation by the board. Clause (ii) is intended to provide for situations in which the board might wish to commit in advance to submit a plan of dissolution to the shareholders but later determines it is inadvisable or withdraws the recommendation for some other reason. If the board proceeds under either clause (i) or (ii), it must communicate the basis for its determination when so proceeding. Clauses (i) and (ii) are not intended to relieve the board of its duty to consider carefully the proposed dissolution and the interests of shareholders.