Changes in the Model Business Corporation Act—Proposed Amendments to Incorporate Electronic Technology Amendments

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

The Committee on Corporate Laws of the ABA Section of Business Law ("Committee") develops, and from time to time publishes proposed changes in, the Model Business Corporation Act (the "Act" or "Model 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 October 30, 2009, in order to be considered by the Committee before adoption of the amendments on third reading.

The proposed amendments incorporate into the Model Act terminology and concepts from the Uniform Electronic Transmissions Act ("UETA") and the federal Electronic Signatures in Global and National Commerce Act ("E-Sign"). The amendments add new defined terms "document," "electronic," "electronic record," and "writing" or "written." The amendments are accompanied by changes to the definitions of "deliver" or "delivery," "electronic transmission," and "sign" or "signature." The objectives of the amendments are to weave UETA and E-Sign concepts into the Model Act, primarily confining changes to sections 1.40 and 1.41 and thereby avoiding unnecessary revisions throughout the rest of the Model Act.

The changes are set forth below. Changes to existing provisions are presented marked to show changes from the current Act. New language is indicated by underlining and deletions by strikeout.

§ 1.20. REQUIREMENTS FOR DOCUMENTS; EXTRINSIC FACTS

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OFFICIAL COMMENT

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* Herbert S. Wander, Chair.
2. Signing

The requirement in earlier versions of the Model Act and in many state statutes that documents must be acknowledged or verified as a condition for filing has been eliminated. These requirements serve little purpose in connection with documents filed under corporation statutes. (See section 1.29, which makes it a criminal offense for any person to sign a document for filing with knowledge that it contains false information.) On the other hand, many organizations, like lenders or title companies, may desire that specific documents include acknowledgments, verifications, or seals; section 1.20(g) therefore provides that the addition of these additional forms of execution do not affect the eligibility of the document for filing.

4. Number of Copies

Under section 1.20(i) an “exact” copy is a reproduction of the executed and signed original document; a “conformed” copy is a copy on which the existence of signatures is entered or noted on the copy. The substitution of exact or conformed copies for duplicate originals reflects advances in the art of office copying machines that permit the routine reproduction of exact copies of executed documents. However, a person submitting “duplicate originals” meets any requirement for an exact or conformed copy since the secretary of state may treat the duplicate original as a “conformed copy.”

§ 1.40. Act Definitions

In this Act:

(3) “Conspicuous” means so written, displayed, or presented that a reasonable person against whom the writing is to operate should have noticed it. For example, printing text in italics or boldface or, contrasting color, or typing in capitals or underlined, is conspicuous.

(5) “Deliver” or “delivery” means any method of delivery used in conventional commercial practice, including delivery by hand, mail, commercial delivery, and, if authorized in accordance with section 1.41, by electronic transmission.

(6A) “Document” means (i) any tangible medium on which information is inscribed, and includes any writing or written instrument, or (ii) an electronic record.
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(6B) “Domestic unincorporated entity” means an unincorporated entity whose internal affairs are governed by the laws of this state.

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(7A) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(7B) “Electronic record” means information that is stored in an electronic or other medium and is retrievable in paper form through an automated process used in conventional commercial practice, unless otherwise authorized in accordance with section 1.41(j).

(7C) “Electronic transmission” or “electronically transmitted” means any form or process of communication, not directly involving the physical transfer of paper that or another tangible medium, which (a) is suitable for the retention, retrieval, and reproduction of information by the recipient, and (b) is retrievable in paper form by the recipient through an automated process used in conventional commercial practice, unless otherwise authorized in accordance with section 1.41(j).

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(22A) “Sign” or “signature” means, with present intent to authenticate or adopt a document:

(i) to execute or adopt a tangible symbol to a document, and includes any manual, facsimile, or conformed or electronic signature; or

(ii) to attach to or logically associate with an electronic transmission an electronic sound, symbol, or process, and includes an electronic signature in an electronic transmission.

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(28) “Writing” or “written” means any information in the form of a document.

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Offical Comment

4. ELECTRONIC TRANSMISSION

The terms “electronic” and “electronic record,” and the amended terms “electronic transmission” or “electronically transmitted,” includes both are part of a suite of electronic technology changes adopted in 2009 to incorporate into the Model Act terminology from the Uniform Electronic Transmissions Act (“UETA”) and the federal Electronic Signatures in Global and National Commerce Act (“E-Sign”). See Official Comment to section 1.41, Note on the Relationship Between Model Act Provisions on Electronic Technology and UETA and E-Sign. The 2009 changes to the Model Act add new defined terms “document,” “electronic,” “electronic record,” and “writing” or “written.” The
amendments were accompanied by changes to the definitions of “deliver” or “delivery,” “electronic transmission,” and “sign” or “signature.” The principal objective of the 2009 changes was to weave UETA and E-Sign concepts into the Model Act, primarily confining changes to sections 1.40 and 1.41 and thereby avoiding unnecessary revisions throughout the rest of the Model Act.

Specifically, the term “electronic” is identical to the defined term in section 2(5) of UETA, and in section 106(a)(2) of E-Sign. The term “electronic record” includes information stored in an electronic medium, but must also be retrievable in paper form through an automated process used in conventional commercial practice unless otherwise specifically authorized in accordance with section 1.41(j). “Electronic transmission” or “electronically transmitted” similarly includes communications using systems which in the normal course produce paper, such as facsimiles, as well as communication those using systems which transmit and permit the retention of data which is then subject to subsequent retrieval and reproduction in written form. Electronic transmission is capable of subsequent retrieval in paper form by the recipient through an automated process used in conventional commercial practice, unless otherwise authorized in accordance with section 1.41(j). The “used in conventional commercial practice” qualifier is drawn from the definition of “deliver” in section 1.40(5). Electronic records and transmissions are intended to be broadly construed and include the evolving methods of electronic delivery, including electronic transmissions via the Internet, as well as data stored and delivered on computer diskettes. The phrase is a typical form of electronic transmission is an e-mail, which the recipient can print. The terms electronic record and electronic transmission are not intended to include voice mail, text messaging, and communications using other similar systems which do not automatically provide for the retrieval of data in printed or typewritten form, until and unless those methods become sufficiently accepted and in widespread use in commercial transactions that they can be said to be “used in conventional commercial practice,” or unless specifically authorized in accordance with section 1.41(j). For example, while voice recognition computer software exists to convert voicemails to data that can be read on a computer monitor and printed on a linked printer, thereby providing for the automatic retrieval of data in paper form, its use in 2009 when the electronic technology amendments to the Act were promulgated was not sufficiently widespread in conventional commercial practice to support its general acceptance as a default in corporate law.

9. SIGN OR SIGNATURE

The definition of “sign” or “signature” incorporates into the Model Act concepts and terminology from UETA and the federal E-Sign. Thus, the terms “sign” and “signature” include not only traditional forms of signing, such as manual, facsimile-, or conformed or electronic signatures, but also electronic signatures in electronic transmissions. In this regard, it is intended that any manifestation of an intention to sign or authenticate a document will be accepted. Electronic
signatures are expected to encompass any methodology approved by the secretary of state for purposes of verification of the authenticity of the document, so long as electronic transmissions having electronic signatures comply with the requirements in the definition of “electronic transmission,” including being retrievable in paper form by the recipient through an automated process unless otherwise authorized in accordance with section 1.41(1).

This could include a typewritten conformed signature or other electronic entry in the form of a computer data compilation of any characters or series of characters comprising a name intended to evidence authorization and signing of a document.

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13. WRITING OR WRITTEN

“Writing” or “written” means information in the form of a “document,” which in turn means any tangible medium on which information is inscribed, such as a paper instrument, as well as an electronic record. Thus, under the Model Act a written consent, e.g., a unanimous written consent of shareholders under section 7.04(a), may be in the form of paper or an electronic record.

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§ 1.41. NOTICES

§ 1.41. NOTICES AND OTHER COMMUNICATIONS

(a) Notice under this Act must be in writing unless oral notice is reasonable under the circumstances. Notice by electronic transmission is written notice in the circumstances. Unless otherwise agreed between the sender and the recipient, words in a notice or other communication under this Act must be in English.

(b) Notice or other communication may be communicated in person, by mail or otherwise given or sent by any method of delivery, or by telephone, voice mail or other, except that electronic means of communications must be in accordance with this section. If these forms of personal methods of communication are impracticable, a notice or other communication may be communicated by a newspaper of general circulation in the area where published, or by radio, television, or other form of public broadcast communication.

(c) Written notice by a domestic or foreign corporation to its shareholders, if in a comprehensible form, is effective (i) upon deposit in the United States mail, if mailed postpaid and correctly addressed to the shareholder’s address shown in the corporation’s current record of shareholders, or (ii) when electronically transmitted to the shareholder in a manner authorized by the shareholder.

(d) Written notice to a domestic or foreign corporation (Notice or other communication to a domestic or foreign corporation authorized to
transact business in this state) may be addressed to its registered agent at its registered office or to the secretary of the corporation at its principal office shown in its most recent annual report or, in the case of a foreign corporation that has not yet delivered an annual report, in its application for a certificate of authority.

(d) Notice or other communications may be delivered by electronic transmission if consented to by the recipient or if authorized by subsection (k), and if the electronic transmission contains or is accompanied by information from which the recipient can determine the date of the transmission, and that the transmission was authorized by the sender or the sender’s agent or attorney-in-fact.

(e) Any consent under subsection (d) may be revoked by the person who consented by written or electronic notice to the person to whom the consent was delivered. Any such consent is deemed revoked if (1) the corporation is unable to deliver two consecutive electronic transmissions given by the corporation in accordance with such consent, and (2) such inability becomes known to the secretary or an assistant secretary of the corporation or to the transfer agent, or other person responsible for the giving of notice or other communications; provided, however, the inadvertent failure to treat such inability as a revocation shall not invalidate any meeting or other action.

(f) Unless otherwise agreed between sender and recipient, an electronic transmission is received when:

(1) it enters an information processing system that the recipient has designated or uses for the purposes of receiving electronic transmissions or information of the type sent, and from which the recipient is able to retrieve the electronic transmission; and

(2) it is in a form capable of being processed by that system.

(g) Receipt of an electronic acknowledgement from an information processing system described in subsection (f)(1) establishes that an electronic transmission was received but, by itself, does not establish that the content sent corresponds to the content received.

(h) An electronic transmission is received under this section even if no individual is aware of its receipt.

(e) Except as provided in subsection (c), written notice or other communication, if in a comprehensible form or manner, is effective at the earliest of the following:

(1) if in physical form, when it is left at:

(A) a shareholder’s address shown on the corporation’s record of shareholders maintained by the corporation under section 16.01(c);

(B) a director’s residence or usual place of business; or

(C) the corporation’s principal place of business;

(2) five days after its deposit in the United States mail, (2) if mailed postage prepaid and correctly addressed, to a shareholder, upon deposit in the United States mail;
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(3) if mailed by United States mail postage prepaid and correctly addressed to a recipient other than a shareholder, the earliest of:

(A) if sent by registered or certified mail, return receipt requested, and the date shown on the return receipt is signed by or on behalf of the addressee; or

(B) five days after it is deposited in the United States mail;

(4) if an electronic transmission, when it is received as provided in subsection (f); and

(5) if oral, when communicated.

(f) Oral notice is effective when communicated, if communicated in a comprehensible manner.

(j) A notice or other communication may be in the form of an electronic transmission that cannot be directly reproduced in paper form by the recipient through an automated process used in conventional commercial practice only if (i) the electronic transmission is otherwise retrievable in perceivable form, and (ii) the sender and the recipient have consented in writing to the use of such form of electronic transmission.

(k) If this Act prescribes notice requirements for notices or other communications in particular circumstances, those requirements govern. If articles of incorporation or bylaws prescribe notice requirements for notices or other communications, not inconsistent with this section or other provisions of this Act, those requirements govern. The articles of incorporation or bylaws may authorize or require delivery of notices of meetings of directors by electronic transmission.

OFFICIAL COMMENT

Section 1.41 establishes rules for determining how notices and other communications may be given and when notice is effective for a variety of purposes under the Model Act. Not only do the rules of section 1.41 apply to the delivery of notices of meetings of shareholders and directors and other similar notices, they apply as well to director and shareholder consents, demands to hold meetings, proxies, demands to commence derivative actions, demands to inspect books and records, assertions of appraisal rights, and other communications to and from the corporation.

1. NOTICE BY A CORPORATION TO ITS SHAREHOLDERS

Section 1.41(c) provides that notice by a corporation to its shareholders is effective when mailed if correctly addressed with sufficient postage. The correct address for this purpose is the address shown in the corporation's shareholder records. Written notice includes notice by electronic transmission, but notice may be provided through electronic transmission only if specifically authorized by the shareholder. This allows corporations to provide notices by electronic means, but only when, and in the manner, authorized by the shareholder. Absent such
authorization, notice must be provided to the shareholder in the traditional manner consistent with the other provisions of section 1.41.

Written notice to shareholders by persons other than the corporation is effective as provided in section 1.41(e). Notice by the corporation to its shareholders that is not addressed to the record address of the shareholder is effective when received under section 1.41(e).

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NOTE ON THE RELATIONSHIP BETWEEN MODEL ACT PROVISIONS ON ELECTRONIC TECHNOLOGY AND UETA AND E-SIGN

In 2009, the Committee on Corporate Laws adopted a suite of changes in the Model Act relating to electronic records, electronic transmissions, and related matters. These changes are found principally in the definitions in section 1.40; their principal applications are in section 1.41. The 2009 Model Act changes were adopted against the backdrop of the 1999 promulgation of the Uniform Electronic Transmissions Act (“UETA”) and the 2000 passage of the federal Electronic Signatures in Global and National Commerce Act (“E-Sign”). A brief description of certain aspects of UETA and E-Sign is necessary in order to understand the Model Act electronic technology provisions.

UETA adopted definitions for the terms electronic, electronic records, electronic signatures, records, transactions, and the like, as well as provisions governing the use of those terms. UETA applies to “transactions,” which are defined to mean actions between two or more persons “relating to the conduct of business [or] commercial . . . affairs.” UETA §§ 2(16), 3(a). The reach of the term “transactions” in the context of a comprehensive business corporation act is unclear. For example, while obtaining a proxy from a shareholder that is voting on a cash-out merger would likely constitute a “transaction,” the unilateral act by a corporation of sending notice of an annual meeting at which no significant action is proposed might not.

If UETA applies, it establishes certain statutory norms for the validity of electronic signatures, electronic records, etc. However, UETA also provides that it applies only to transactions between parties each of which has agreed to conduct transactions by electronic means, and that such agreement is determined from the context and surrounding circumstances, including the parties’ conduct. Id. § 5(b).

E-Sign, codified at 15 U.S.C. §§ 7001 et seq., in turn adopted the substance of UETA’s principal definitions, including electronic, electronic signature, record, and transaction, as well as many of the operative provisions of UETA. The applicability of E-Sign, like UETA, turns on whether a “transaction” is involved. Id. § 7001(a). And, like UETA, E-Sign’s applicability also depends upon the parties consenting to transact business by electronic means. Id. § 7001(b)(2) (“This title . . . does not . . . require any person to agree to use or accept electronic records or electronic signatures . . . .”).

Importantly, E-Sign contains a federal preemption provision that itself excepts certain state adoptions of UETA. Thus, in general terms, section 7002(a) of
E-Sign allows a state statute to modify, limit, or supersede the provisions of E-Sign section 7001 only if [A] it is a state enactment of the version of UETA approved in 1999, and [B] the state’s enactment of UETA does not contain any state exceptions, or “carve outs,” other than those contained in the 1999 version of UETA section 3(b)(4). If, for example, a state enactment of UETA carved out that state’s general business corporation law from the applicability of UETA, a carve out that is not contained in the 1999 version of UETA section 3(b)(4), and that business corporation law was deemed to be inconsistent with E-Sign, the offending provisions of the business corporation law would be preempted. Id. § 7002(a)(1).

Note one aspect of the definition of “record” in both UETA and E-Sign: they both provide that information that is stored in an electronic medium must simply be “retrievable in perceivable form.” This is in contrast to states that require not only that an electronic transmission may be retained, retrieved, and reviewed but also require that it “may be directly reproduced in paper form by [the] recipient through an automated process.” The former would include, e.g., a voicemail, a text message, and an electronic page, while the latter would not.

Against that backdrop, the Committee on Corporate Laws updated the Model Act’s electronic technology provisions to bring them into alignment, in all material respects, with the more modern terminology and concepts reflected in UETA and E-Sign. However, the Committee did not adopt wholesale the vocabulary and concepts of UETA and E-Sign for the following reasons:

1. Such wholesale changes would have involved amendments to the black letter in over fifty sections of the Model Act. Given that more than half the states in the United States have state corporation laws based in large measure on the Model Act, the Committee was reluctant to adopt an approach to electronic technology that would require so many statutory changes in each state.

2. The vocabulary of UETA and E-Sign, particularly the definition of “record” and “sign,” while technically precise, are not written in the same style as the Model Act, do not use its terminology, and are less understandable to the ordinary reader. And if engrafted directly into the full body of the Model Act, the result would have been a major change from well-understood, obvious, and traditional terminology (e.g., a “unanimous written consent”) to a comparatively awkward and less intuitively obvious terminology (e.g., a “consent in the form of a record”).

3. The Committee did not embrace the concept that a voicemail or a text message should, as a default matter, have the same status as a paper document. In so doing, the Committee implicitly acknowledged the corruptibility and/or inaccessibility of electronic data over the long term, issues with which universities, archives, libraries, and other repositories of information continue to struggle.

The Committee instead adopted an approach that involved incorporating into the definitions in Model Act section 1.40 the principal electronic technology vocabulary and concepts of UETA and E-Sign in ways that did not require substantial changes throughout the Model Act.
Thus, the 2009 electronic technology amendments:

- Add new definitions of “document” and “writing” or “written,” which include electronic records.
- Revise the definition of “deliver” or “delivery” to include electronic transmissions if properly authorized.
- Add new definitions of “electronic” and “electronic record” that borrow heavily from UETA and E-Sign.
- Revise the definition of “electronic transmission” or “electronically transmitted” to incorporate UETA and E-Sign vocabulary and concepts.
- Require that electronic records and electronic transmissions be retrievable in paper form through an automated process used in conventional commercial practice, unless specifically authorized in accordance with section 1.41(j), thereby establishing the default rule that, until they are used in conventional commercial practice, voicemails and text messages are not generally recognized as valid, absent a specific consent. The parties can, however, consent to their use.
- Revise the definitions of “sign” or “signature” to incorporate technical E-Sign and UETA terminology, while retaining common terminology such as “any manual, facsimile, or conformed signature.”

This approach is pragmatic, addresses the vast majority of recurring questions involving electronic transmissions and records, and yet enables parties who wish to do so to consent specifically to use electronic records or transmissions that are merely “retrievable in perceivable form.”

As for the preemption issue under E-Sign, the Model Act electronic technology provisions are consistent in all material respects with E-Sign and UETA. While the Model Act’s basic provision has the additional requirement that electronic records or transmissions be retrievable in paper form through an automated process, section 1.41(j) permits parties to agree to the broader “retrievable in perceivable form” formulation found in E-Sign and UETA, and accordingly the Model Act provisions are consistent with those laws.

Note that corporations desiring to conduct transactions by electronic means must also comply with the requirements of UETA or E-Sign, as applicable, to ensure the legal effect, validity, and enforceability of its transactions and records. For example, E-Sign contains specific provisions regarding accuracy, authenticity, accessibility, and retention of electronic records. Compliance with these statutes will require that corporations address certain technical issues (e.g., system security and procedures).

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1. GENERAL

Under section 1.41(a), notices and other communications must be in English unless otherwise agreed between sender and recipient, and must normally be in writing. Section 1.41(b) then states the general rule that a notice or other com-
munication may be given or sent by any method of delivery. This terminology is used in its generic sense and embraces derivative terms and phrases, such as statutory requirements to “give” or “send” notice, as well as requirements in the Act to “notify” shareholders. In this respect, the phrases to give or to send notice are used interchangeably in the Act.

2. **RULES GOVERNING USE OF ELECTRONIC TRANSMISSIONS**

Electronic records and transmissions are effective under the Model Act if in accordance with section 1.41. The definition of writing in section 1.40(29) includes a document, which is defined in section 1.40(6A) to include an electronic record. Section 1.40(5) then defines the terms “deliver” or “delivery” to include delivery by hand, mail, commercial delivery, or by electronic transmission if authorized in accordance with section 1.41. Authorization of notices or other communications delivered by electronic transmission is governed by section 1.41(d), which requires the consent of the recipient, except as provided in section 1.41(k). This rule applies to shareholders, directors, officers, the corporation, and its registered agent. Thus, electronic notices or communications are valid under the Model Act, but generally only with the consent of the recipient.

Assuming consent, section 1.41 then establishes a number of rules with respect to electronic transmissions and records. Subsection (e) provides that any consent to the use of electronic transmissions may be revoked at any time. Subsection (e) also establishes a default rule in cases of failed electronic deliveries that parallels the rule in section 16.06(a) of the Model Act: a consent under section 1.41(d) is deemed revoked if the corporation is unable to deliver two consecutive electronic transmissions and the inability becomes known to specified corporate officers or agents. Subsection (f), based on UETA § 15(b), establishes basic rules, which can be varied by the sender and recipient, for when an electronic transmission is “received.” An electronic transmission is received, even if the recipient's electronic filters, firewalls, or other similar systems effectively block the transmission, because a recipient who consents to the use of electronic transmissions is responsible for any such filters or firewalls that block access to them. Subsection (g), based on UETA § 15(f), provides legal certainty regarding an electronic acknowledgment, but only addresses the fact of receipt, not the quality of the content or whether it was “opened” or read. Subsection (h), based on UETA § 15(h), establishes that an electronic transmission is received even if the recipient or individual is unaware of its receipt, just as a written notice physically delivered to a person's correct address is duly delivered even if the addressee is not aware of its delivery or declines to open the envelope.

Subsection (j) requires specific consent to the use of the electronic transmissions that are only “retrievable in perceivable form” and that cannot be directly reproduced in paper form through an automated process used in conventional commercial practice. See Official Comment to section 1.40(5). Such a consent between the sender and recipient must be in writing, except with respect to notices to directors, which may be in the articles of incorporation or bylaws.
3. WHEN NOTICES OR OTHER COMMUNICATIONS ARE EFFECTIVE

Section 1.41(i) reorganizes in one place the rules governing when notices and other communications are deemed to be legally effective, serially addressing delivery in physical form, regular mail sent to shareholders and to other recipients, registered or certified mail, electronic transmissions, and oral communications.

2. 4. NOTICE TO THE CORPORATION

Section 1.41(d) provides that a notice or other communication to a corporation may be addressed or delivered to the registered agent of the corporation at its registered office or to the corporation or the secretary of the corporation at the principal office of the corporation as shown in its most recent public filing. An officer, director, or shareholder of a corporation will normally give written notice to the corporation by delivering or mailing a copy of that notice to the corporation or to the secretary of the corporation at its principal office. Such a notice is effective when it is received. Such notice may be given for a variety of purposes under this Act, e.g., giving notice of intent to dissent (section 13.21), notice of a demand to inspect books and records (section 16.02), and notices of resignation (sections 8.07 and 8.43). This method of giving notice to the corporation, however, is not exclusive, and an officer, director, or shareholder may give notice in other ways as well.

Persons who have no prior relationship with the corporation may give notice either to the registered agent of the corporation, or, if they wish, to the corporation or to the corporation's secretary at its principal office.

Section 1.41(d) provides that notice to a corporation may be addressed to the registered agent of the corporation at its registered office or to the secretary of the corporation at the principal office of the corporation as shown in its most recent public filing. An officer, director, or shareholder of a corporation will normally give written notice to the corporation by delivering or mailing a copy of that notice to the corporation or to the secretary of the corporation at its principal office. Such a notice is effective when it is received. Such notice may be given for a variety of purposes under this Act, e.g., giving notice of intent to assert appraisal rights (section 13.21), notice of a demand to inspect books and records (section 16.02), and notices of resignation (sections 8.07 and 8.43). This method of giving notice to the corporation, however, is not exclusive, and an officer, director, or shareholder may give notice in other ways as well.

Persons who have no prior relationship with the corporation may give notice either to the registered agent of the corporation or to the corporation's secretary at its principal office.

3. 5. MISCELLANEOUS PROVISIONS

Section 1.41 also contains a variety of general provisions dealing with notice. It recognizes, for example, that notice on some occasions may be given orally if that
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is reasonable under the circumstances, which would include oral notice through voice mail or other similar means. It also deals with situations where notice may be sought to be given to persons for whom no current address is available, or where personal notice is impractical. Notice delivered to the person’s last known address is effective as described in section 1.41(ei) even though never actually received by the person. Section 1.41(b) also authorizes notice by publication in some circumstances, including radio, television, or other form of public wire or wireless communication.

Section 1.41(gk) recognizes that other sections of the Act prescribe specific notice requirements for particular situations—e.g., service of process on a corporation’s registered agent under section 5.04—and that these specific requirements, rather than the general requirements of section 1.41, control. Finally, the second sentence of subsection 1.41(gk) permits a corporation’s articles of incorporation or bylaws to prescribe the corporation’s own notice requirements, if they are not inconsistent with the general requirements of this section or specific requirements of other sections of the Act.

The rules set forth in section 1.41 permit many other sections of the Model Act to be phrased simply in terms of giving or delivering notice without repeating details with respect to how notice should be given and when it is effective in various circumstances.

§ 5.02. CHANGE OF REGISTERED AGENT OR REGISTERED OFFICE

(b) If a registered agent changes the street address of his or her registered agent’s business office, the agent may change the street address of the registered office of any corporation for which the agent is the registered agent by notifying delivering a signed written notice of the change to the corporation in writing of the change and signing (either manually or in facsimile) and delivering to the secretary of state for filing a signed statement that complies with the requirements of subsection (a) and recites that the corporation has been notified of the change.

OFFICIAL COMMENT

Experience with the change of registered agent and registered office provisions in earlier versions of the Model Act and the statutes of many states revealed several minor problems with these largely formal provisions that are addressed in the revised Model Act.

(3) The procedure by which a registered agent may change the street address of the registered office applies to any location within the state
and the agent is expressly required to notify the corporation of the change. But a facsimile of any form of “signature” of the agent recognized by section 1.40(22A) is acceptable since a corporation service company changing its street address may be required to file a form for each of the thousands of corporations for which it serves as registered agent and to notify each corporation of the change.

§ 6.20. Subscription for Shares Before Incorporation

(d) If a subscriber defaults in payment of money or property under a subscription agreement entered into before incorporation, the corporation may collect the amount owed as any other debt. Alternatively, unless the subscription agreement provides otherwise, the corporation may rescind the agreement and may sell the shares if the debt remains unpaid for more than 20 days after the corporation sends a written demand for payment to the subscriber.

§ 7.02. Special Meeting

Official Comment

1. Who May Call a Special Meeting

Shareholders demanding a special meeting do not have to sign a single piece of paper, but the writings signed must all describe essentially the same purpose or purposes. Revocations of written demands will be effective if delivered to the corporation in the manner contemplated by section 1.41(d) and received before the corporation receives the requisite number of demands requiring that a special meeting be called. However, revocations received after that time will be a nullity and shall be given no effect. Upon receipt of writings evidencing a demand by demands from holders with the requisite number of votes, the corporation (through an appropriate officer) must call the special meeting at a reasonable time and place. The shareholders’ demand may suggest a time and place but the final decision on such matters is the corporation’s. If no meeting is held within the time periods specified in section 7.03, the share-
holders may obtain a summary court order under that section requiring that the meeting be held.

§ 7.04. ACTION WITHOUT MEETING

(h) An electronic transmission may be used to consent to an action, if the electronic transmission contains or is accompanied by information from which the corporation can determine the date on which the electronic transmission was signed and that the electronic transmission was authorized by the shareholder, the shareholder's agent or the shareholder's attorney-in-fact.

(i) Delivery of a written consent to the corporation under this section is delivery to the corporation's registered agent at its registered office or to the secretary of the corporation at its principal office.

OFFICIAL COMMENT

1. FORM OF WRITTEN CONSENT

To be effective, a consent must be in writing, dated and delivered to the corporation's registered agent at its registered office or to its secretary at its principal office. A written consent may be delivered by means of an electronic transmission. See if the applicable conditions of section 1.40(5) are met.

A shareholder or proxy may use an electronic transmission to consent to an action. If an electronic transmission is used to consent to an action, the corporation must be able to determine from the transmission the date of the signature and that the consent was authorized by the shareholder or a person authorized to act for the shareholder. See sections 1.40(7A), 1.40(22A), and 1.41(b).

The phrase “one or more written consents” is included in section 7.04 to make it clear that shareholders do not need to sign the same piece of paper. For actions that do not require prior board action, the record date for determining who is entitled to vote, if not otherwise fixed by or in accordance with the bylaws, is the date the first signed consent is delivered to the corporation. For actions that require prior board action, if not otherwise fixed by the board, the record date is the date the board's prior action is adopted. To minimize the possibility that action by written consent will be authorized by action of persons who may no longer be shareholders at the time the action is taken, section 7.04(c) requires that all
consents be signed within 60 days of the earliest signature date of the consents delivered to the corporation.

§ 7.05. NOTICE OF MEETING

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OFFICIAL COMMENT

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3. RECORD DATE

Section 7.05(d) is a catch-all record date provision for both annual and special meetings. If the record date for notice and for voting entitlement is not otherwise fixed pursuant to sections 7.03 or 7.07, the record date for purposes of determining who is entitled to notice and to vote at the meeting is the day before the notice is mailed to the voting groups of shareholders. If notice is mailed to shareholders over a period of more than one day, the day before the notice is delivered to the first shareholders is the record date.

The selection of the day before the notice is mailed as the catch-all record date is intended to permit the corporation to mail notices to shareholders on a given day without regard to any requests for transfer that may have been received during that day. For this reason, this section is not inconsistent with the general principle set forth in the last sentence of section 7.07(a) that the board of directors may not fix a retroactive record date.

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§ 7.22. PROXIES

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(b) A shareholder, or the shareholder’s agent or attorney in fact, may appoint a proxy to vote or otherwise act for the shareholder by signing an appointment form, or by an electronic transmission. An electronic transmission must contain or be accompanied by information from which one can determine that the shareholder, the shareholder’s agent, or the shareholder’s attorney in fact authorized the transmission.

OFFICIAL COMMENT

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2. APPOINTMENT OF PROXY

A shareholder may appoint a proxy to vote by signing an appointment form, either personally or by the shareholder’s agent or attorney-in-fact. An electronic
transmission which appoints a proxy is deemed the equivalent of a signed appointment form if it contains or is accompanied by information from which it can be reasonably verified that the transmission was authorized by the shareholder or by the shareholder's agent or attorney-in-fact. See section 1.41(d). “Electronic transmission” as used in this section means any form or process of communication not directly involving the physical transfer of paper or other tangible medium that (a) is suitable for the retention, retrieval, and reproduction of information by the recipient through an automated process that is used in conventional commercial practice, and (b) is retrievable in paper form by the recipient, unless otherwise authorized in accordance with section 1.41(j). See section 1.40(7AC). Sections 7.22(b) and 1.41(d) are intended to sanction the practice whereby shareholders who have been provided proxy materials with a personal identification number may call in their vote and identifying number to a person who, acting as the shareholder's agent, causes that information to be transmitted, directly or indirectly, to the inspector of election.

The appointment is effective when an appointment form or an electronic transmission (or documentary evidence thereof, including verification information) is received by the inspector of election or the officer or agent of the corporation authorized to receive and tabulate votes. Subsections 1.41(f)–(i) govern when an electronic transmission is “received” and “effective.” The proxy has the same power to vote as that possessed by the shareholder, unless the appointment form or electronic transmission contains an express limitation on the power to vote or direction as to how to vote the shares on a particular matter, in which event the corporation must tabulate the votes in a manner consistent with that limitation or direction. See section 7.22(h).

§ 7.23. SHARES HELD BY NOMINEES

OFFICIAL COMMENT

The corporation may limit or qualify the procedure as it deems appropriate. For example, the corporation may:

(1) limit the procedure to certain classes of shareholders, such as depositaries, broker-dealers and banks, or their nominees, or make the procedure available to all shareholders;

(2) permit a shareholder to adopt the procedure with respect to some but not all of the shares registered in the shareholder's name (and in that case the shareholder continues to be treated as the shareholder with respect to the balance);

(3) specify the purpose or purposes for which the certification is effective, e.g., for giving notice of, and voting at, shareholders' meetings, for the
distribution of proxy statements and annual reports, or for payment of cash dividends;
(4) specify the form of the certification, e.g., a written list, computer tape, or some other form of compatible input or electronic file;
(5) specify the type of information that must be provided, e.g., the name, address, and taxpayer identification number of the beneficial owner, and the number of shares registered directly in the shareholder's name;
(6) establish deadlines for receipt of the certifications after the establishment of a record date so that the corporation may schedule its mailings—deliveries of notices, proxy statements, and other communications; or
(7) provide that a new certification is required following each record date or that a certification as of a certain date may continue until changed by the certifying shareholder.

§ 7.42. DEMAND
No shareholder may commence a derivative proceeding until:
(1) a written demand has been made upon the corporation to take suitable action; and
(2) 90 days have expired from the date delivery of the demand was made unless the shareholder has earlier been notified that the demand has been rejected by the corporation or unless irreparable injury to the corporation would result by waiting for the expiration of the 90-day period.

OFFICIAL COMMENT
Section 7.42 requires a written demand on the corporation in all cases. The demand must be made delivered at least 90 days before commencement of suit unless irreparable injury to the corporation would result.

§ 8.22 NOTICE OF MEETING

OFFICIAL COMMENT
Regular meetings of the board of directors may be held without notice and special meetings require only two days notice unless other requirements are imposed by the articles of incorporation or bylaws. The notice may be written, or oral if oral notice is reasonable in the circumstances. Section 1.41(a). Also, no statement of the purpose of either a regular or special meeting is necessary unless required by the articles of incorporation or bylaws. These requirements differ from
the requirements applicable to meetings of shareholders because of fundamental
differences in their roles: directors are expected to be more closely involved in
corporate affairs than shareholders, and meetings of directors are held more sys-
tematically and regularly than meetings of shareholders.

§ 8.24 QUORUM AND VOTING

Under section 8.24(d) directors, if they object or abstain with respect to ac-
tion taken by the board of directors or a committee of the board of directors,
must make their position clear in one of the ways described in this subsection.
If objection is made in the form of a written dissent, it may be transmitted by
wire, telecopier, or other medium of delivery authorized by section 1.40(5), including electronic transmission if authorized by section 1.41. This written objection serves the important purpose of forcefully bringing the
position of the dissenting member to the attention of the balance of the board of
directors. The requirement of a written objection also prevents a director from
later seeking to avoid responsibility because of secret doubts about the wisdom
of the action taken. The right of dissent or abstention is not available to a director
who voted in favor of the action taken.

§ 8.53. ADVANCE FOR EXPENSES

(a) A corporation may, before final disposition of a proceeding, advance
funds to pay for or reimburse expenses incurred in connection with the
proceeding by an individual who is a party to the proceeding because
that individual is a member of the board of directors if the director deliv-
ers to the corporation:
(1) a signed written affirmation of the director’s good faith belief that the
relevant standard of conduct described in section 8.51 has been met
by the director or that the proceeding involves conduct for which
liability has been eliminated under a provision of the articles of in-
corporation as authorized by section 2.02(b)(4); and
(2) a signed written undertaking of the director to repay any funds
advanced if the director is not entitled to mandatory indemnification
under section 8.52 and it is ultimately determined under section
8.54 or section 8.55 that the director has not met the relevant stan-
dard of conduct described in section 8.51.
OFFICIAL COMMENT

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Section 8.53(a) requires the director's signed written affirmation as to the good faith belief that the director has met the relevant standard of conduct necessary for indemnification by the corporation and a signed written undertaking by the director to repay any funds advanced if it is ultimately determined that such standard of conduct has not been met. A single undertaking may cover all funds advanced from time to time in connection with the proceeding. Under subsection (b), the undertaking need not be secured and financial ability to repay is not a prerequisite. The theory underlying this subsection is that wealthy directors should not be favored over directors whose financial resources are modest. The undertaking must be made by the director and not by a third party. If the director or the corporation wishes some third party to be responsible for the director's obligation in this regard, either is free to make those arrangements separately with the third party.

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§ 9.20. DOMESTICATION

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(f) If any debt security, note or similar evidence of indebtedness for money borrowed, whether secured or unsecured, or a contract of any kind, issued, incurred or executed signed by a domestic business corporation before [the effective date of this subchapter] contains a provision applying to a merger of the corporation and the document does not refer to a domestication of the corporation, the provision shall be deemed to apply to a domestication of the corporation until such time as the provision is amended subsequent to that date.

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§ 9.30. NONPROFIT CONVERSION

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(f) If any debt security, note or similar evidence of indebtedness for money borrowed, whether secured or unsecured, or a contract of any kind, issued, incurred or executed signed by a domestic business corporation before [the effective date of this subchapter] contains a provision applying to a merger of the corporation and the document does not refer to a nonprofit conversion of the corporation, the provision shall be deemed to apply to a nonprofit conversion of the corporation until such time as the provision is amended subsequent to that date.

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§ 9.50. ENTITY CONVERSION AUTHORIZED; DEFINITIONS

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(e) If any debt security, note or similar evidence of indebtedness for money borrowed, whether secured or unsecured, or a contract of any kind, issued, incurred or executed by a domestic business corporation before [the effective date of this subchapter], applies to a merger of the corporation and the document does not refer to an entity conversion of the corporation, the provision shall be deemed to apply to an entity conversion of the corporation until such time as the provision is amended subsequent to that date.

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§ 11.06. ARTICLES OF MERGER OR SHARE EXCHANGE

(a) After a plan of merger or share exchange has been adopted and approved as required by this Act, articles of merger or share exchange shall be executed on behalf of each party to the merger or share exchange by any officer or other duly authorized representative. The articles shall set forth:

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§ 11.07. EFFECT OF MERGER OR SHARE EXCHANGE

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OFFICIAL COMMENT

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Under section 11.04(h), a merger cannot have the effect of making any shareholder of a domestic corporation subject to owner liability for the debts, obligations or liabilities of any other person or entity unless each such shareholder has executed a separate written consent to become subject to such owner liability.

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§ 11.08. ABANDONMENT OF A MERGER OR SHARE EXCHANGE

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(b) If a merger or share exchange is abandoned under subsection (a) after articles of merger or share exchange have been filed with the secretary of state but before the merger or share exchange has become effective, a statement that the merger or share exchange has been abandoned in accordance with this section, executed on behalf of a party to the
merger or share exchange by an officer or other duly authorized representative, shall be delivered to the secretary of state for filing prior to the effective date of the merger or share exchange. Upon filing, the statement shall take effect and the merger or share exchange shall be deemed abandoned and shall not become effective.

§ 13.20. Notice of Appraisal Rights

(c) Where any corporate action specified in section 13.02(a) is to be approved by written consent of the shareholders pursuant to section 7.04:

(1) written notice that appraisal rights are, are not or may be available must be given to each record shareholder from whom a consent is solicited at the time consent of such shareholder is first solicited and, if the corporation has concluded that appraisal rights are or may be available, must be accompanied by a copy of this chapter; and

§ 13.21. Notice of Intent to Demand Payment and Consequences of Voting or Consenting

(b) If a corporate action specified in section 13.02(a) is to be approved by less than unanimous written consent, a shareholder who wishes to assert appraisal rights with respect to any class or series of shares must not execute a consent in favor of the proposed action with respect to that class or series of shares.

§ 13.22. Appraisal Notice and Form

(a) If a corporate action requiring appraisal rights under section 13.02(a) becomes effective, the corporation must deliver a written appraisal notice and the form required by subsection (b)(1) to all shareholders who satisfy the requirements of section 13.21(a) or section 13.21(b). In the case of a merger under section 11.05, the parent must deliver an appraisal notice and form to all record shareholders who may be entitled to assert appraisal rights.

(b) The appraisal notice must be delivered no earlier than the date the corporate action specified in section 13.02(a) became effective, and no later than 10 days after such date, and must:
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(ii) a date by which the corporation must receive the form, which date may not be fewer than 40 nor more than 60 days after the date the subsection (a) appraisal notice and form are sent, and state that the shareholder shall have waived the right to demand appraisal with respect to the shares unless the form is received by the corporation by such specified date;

§ 15.08. CHANGE OF REGISTERED OFFICE OR REGISTERED AGENT OF FOREIGN CORPORATION

(b) If the street address of a registered agent changes the street address of his or her business office changes, the agent may change the street address of the registered office of any foreign corporation for which he or she is the registered agent by notifying the corporation in writing of the change, and signing (either manually or in facsimile) and delivering to the secretary of state for filing a statement of change that complies with the requirements of subsection (a) and recites that the corporation has been notified of the change.

§ 15.23. TRANSFER OF AUTHORITY

(a) A foreign business corporation authorized to transact business in this state that converts to a foreign nonprofit corporation or to any form of foreign unincorporated entity that is required to obtain a certificate of authority or make a similar type of filing with the secretary of state if it transacts business in this state shall file with the secretary of state an application for transfer of authority executed signed by any officer or other duly authorized representative. The application shall set forth:

(1) the name of the corporation;
(2) the type of unincorporated entity to which it has been converted and the jurisdiction whose laws govern its internal affairs; and
(3) any other information that would be required in a filing under the laws of this state by an unincorporated entity of the type the corporation has become seeking authority to transact business in this state.

§ 16.01. CORPORATE RECORDS

(d) A corporation shall maintain its records in written form, the form of a document, including an electronic record, or in another form capable of conversion into written paper form within a reasonable time.
3. Form of Records

Section 16.01(d) generally authorizes corporations to retain records on microfilm, microfiche, computer memory or disc, or any other method that is convenient or appropriate under the circumstances in the form of a “document,” which includes a writing as well as an “electronic record,” or in another form capable of conversion into paper form in a reasonable time. See subsections 1.40(6A), (7B), and (28). The basic requirement is that the method chosen must be capable of reduction to written paper form within a reasonable time. In addition, in the case of the record of shareholders, the method must permit the development of an alphabetical list of shareholders of record as required by section 16.01(c).

§ 16.02. Inspection of Records by Shareholders

(a) A shareholder of a corporation is entitled to inspect and copy, during regular business hours at the corporation’s principal office, any of the records of the corporation described in section 16.01(e) if the shareholder gives the corporation a signed written notice of the shareholder’s demand at least five business days before the date on which the shareholder wishes to inspect and copy.

(b) A shareholder of a corporation is entitled to inspect and copy, during regular business hours at a reasonable location specified by the corporation, any of the following records of the corporation if the shareholder meets the requirements of subsection (c) and gives the corporation a signed written notice of the shareholder’s demand at least five business days before the date on which the shareholder wishes to inspect and copy:

(1) excerpts from minutes of any meeting of the board of directors, records of any action of or a committee of the board of directors while acting in place of the board of directors on behalf of the corporation, minutes of any meeting of the shareholders, and records of action taken by the shareholders of, board of directors, or a committee of the board without a meeting, to the extent not subject to inspection under section 16.02(a);

(2) accounting records of the corporation; and

(3) the record of shareholders.

Official Comment

1. Section 16.02(a)

Section 16.02(a) provides that every shareholder is entitled to examine, upon delivery of a signed written request, to examine at the principal office of
the corporation all documents described in section 16.01(e). These documents all deal with the shareholder's interest as such in the corporation. While some of these documents may also be a matter of public record in the office of the secretary of state, a shareholder should not be compelled to go to a public office that may be physically distant to examine the basic documents relating to the corporation of which he or she is a shareholder.

§ 16.06. EXCEPTION TO NOTICE REQUIREMENT

(a) Whenever notice would otherwise be required to be given under any provision of this Act to any shareholder, such notice shall not be required to be given if:
   (i) Notice Notices to the shareholders of two consecutive annual meetings, and all notices of meetings during the period between such two consecutive annual meetings, have been sent to such shareholder at such shareholder's address as shown on the records of the corporation and have been returned undeliverable or could not be delivered; or
   (ii) All, but not less than two, payments of dividends on securities during a 12-month period, or two consecutive payments of dividends on securities during a period of more than 12 months, have been sent to such shareholder at such shareholder's address as shown on the records of the corporation and have been returned undeliverable or could not be delivered.

(b) If any such shareholder shall deliver to the corporation a written notice setting forth such shareholder's then-current address, the requirement that notice be given to such shareholder shall be reinstated.

OFFICIAL COMMENT

Section 16.06 balances the requirement that the corporation provide notice to shareholders regarding meetings and the practical need to allow corporations to cease providing notices where notices are being returned undeliverable or cannot be delivered and it is clear that the shareholder no longer is located at the address previously provided to the corporation. Absent such a provision, the corporation technically may be required to continue to attempt to provide a notice to the shareholder in order to satisfy a statutory requirement regarding notices to shareholders or otherwise risk questions concerning the validity of the meeting for which the notice is required. A number of states have adopted statutory provisions eliminating the obligation of the corporation to provide notice under certain circumstances. In addition, the federal proxy rules have adopted a similar provision.

Section 16.06 provides that notice is not required to be given to a shareholder if a notice of two consecutive annual meetings, and all notices required during the
period between the meetings, are returned undeliverable or cannot be delivered. In addition, no notice is required if all dividends required to be paid during a 12-month period (assuming at least two dividends were payable during that period) or two consecutive payments of dividends during a period of more than 12 months, are returned undeliverable or cannot be delivered. In both of these instances, written notice is not required, and any meeting which is held will have the same force and effect as if notice had been given. The notice for a particular shareholder is reinstated if a written notice to the corporation setting forth the shareholder’s then-current address is sent delivered to the corporation.

Based upon these provisions, the corporation generally will be required to continue to provide the notice unless undeliverable items are returned or cannot be delivered over a period that could not be less than 12 months and could extend for up to 24 months. For instance, if the first undeliverable communication were sent to a shareholder six months before the next notice of an annual meeting is required, the corporation would have to wait until the annual meeting notice proves to be undeliverable to commence the nondelivery period, and then would have to wait until the next annual meeting notice after that also proves to be undeliverable before suspending the notification requirement. This amounts to a nondelivery period of 18 months which could extend to two years under the right circumstances. It is believed that this accomplishes the proper balance between protecting the rights of shareholders and eliminating unnecessary notices.

§ 16.20. Financial Statements for Shareholders

Within 120 days after the close of each fiscal year, the corporation shall mail send the annual financial statements to each shareholder within 120 days after the close of each fiscal year. Thereafter, on written request from a shareholder who was not mailed the corporation shall mail send the shareholder the latest financial statements. A public corporation may fulfill its responsibilities under this section by delivering the specified financial statements, or otherwise making them available, in a manner permitted by the applicable rules and regulations of the United States Securities and Exchange Commission.

Official Comment

Section 16.20(c) specifies that annual financial statements are to be mailed sent to each shareholder within 120 days after the close of each fiscal year, further emphasizing that the statements required to be delivered are annual statements and not interim statements. In addition, if a shareholder was not mailed the corpora-
tion's latest annual financial statements were not sent to a shareholder, he may obtain them on written request. See also section 16.01(e)(5).

§ 17.03. SAVINGS PROVISIONS

(c) In the event that any provisions of this Act are deemed to modify, limit, or supersede the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001 et seq., the provisions of this Act shall control to the maximum extent permitted by section 102(a)(2) of that federal Act.

Official Comment

Section 17.03(c) implements section 102(a)(2) of the Electronic Signatures in Global and National Commerce Act ("E-Sign"), 15 U.S.C. § 7002(a)(2), which exempts from the federal preemption provisions of E-Sign certain state laws that modify, limit, or supersede E-Sign, and that also make specific reference to E-Sign.