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Jones Walker Welcomes 2015 and the New Louisiana Business Corporation Act

Effective January 1, 2015, the Louisiana Business Corporation Act (the "BCA" or "new law") replaced the old Louisiana Business Corporation Law (enacted in 1968) (the "LBCL" or "old law").

The new law is based on the Model Business Corporation Act (the "MBCA"), which is the source for corporate law in the majority of states (including Alabama, Arkansas, Florida, Georgia, and Mississippi). The MBCA is continuously revised by the American Bar Association's Committee on Corporate Laws in response to developments in state law nationally, especially in Delaware, and in federal law.

Below is a summary of highlighted changes effected by the BCA.

Improved protection of directors from personal liability. Directors of Louisiana corporations are better protected under the new law than under the old law from personal liability in damages for breach of their fiduciary duty as directors. Liability under the old law was based more on general principles; liability under the new law is based on precise rules.

Under the old law, the standard of conduct was the so-called "prudent man" rule: a director was required to act with the diligence, care, judgment, and skill which ordinary prudent men would exercise under similar circumstances. The standard of conduct under the new law is that directors are required to discharge their duties with the care a person in a like position would reasonably believe appropriate under similar circumstances.

The comments under the new law make clear it is intended to de-emphasize the "prudent man" gross negligence standard in favor of encouraging directors to take risks typical of entrepreneurial business activity. Accordingly, directors are better shielded from liability for business decisions involving high risk and reward, which under the old law might be challenged in derivative litigation as not "prudent."

Exculpation of director liability. The new law requires that the articles explicitly accept, limit or reject the default protection against liability of directors, which relieves directors of personal liability in damages for any breach of their duty of care, including their duty of oversight. This approach is more favorable for directors than the old law in that it requires a corporation in its articles to address exculpation of directors; whereas, under the old law a corporation may have inadvertently failed to include an exculpation provision in its articles, in which case the directors would not have been entitled to this protection.

Universal demand for shareholder derivative actions required. Under the new law, no shareholder can bring a derivative suit against a director for damages without first making written demand on the board to take corrective

action. This rule applies regardless of whether the shareholder sues one director, a majority of the directors, or the entire board.

This universal demand rule reversed prior case law, which posited that it would be futile for a shareholder to make a prior written demand that a board sue a majority of its own members, so the failure to make demand was excused. This rule gave dissident shareholders a powerful weapon against directors, because the plaintiff shareholder could sometimes force a board to trial on a groundless derivative claim, so long as the suit was brought against a majority of the board.

Clear rules regarding interested director transactions. The new law provides in substance that a director cannot be liable for breach of his duty of loyalty by reason of his involvement in a conflict of interest transaction, unless the transaction meets the definition of a "director's conflicting interest transaction." Further, a director cannot be liable by reason of involvement in a "director's conflicting interest transaction" if one of the following occurred: (i) the transaction was disclosed to and approved by either the disinterested directors or the disinterested shareholders before or after it became effective, or (ii) the transaction is established to have been fair to the corporation.

Under the old law there were no hard and fast rules regarding conflict of interest transactions. The statute provided that such a transaction was not void or voidable if its terms were disclosed to the board and approved by a disinterested majority. The courts were undecided, however, as to whether a court in a derivative shareholder suit was precluded from reviewing a conflict of interest transaction that had been disclosed to or approved by a disinterested board.

The new law contains a precise definition of a "director's conflicting interest transaction." If a transaction does not fall within the parameters of that definition, then shareholders may not challenge it in a derivative suit on the grounds of unfairness to the corporation. If the transaction *was* a director's conflicting interest transaction and was disclosed to the board and approved by a majority of the disinterested directors, then it is immune to challenge in a shareholder's derivative suit.

Shareholder voting requirement – generally a majority of total voting power. Under the new law, major actions (including amending articles, mergers, and other such actions) generally require approval by a majority of votes entitled to be cast. The old law required approval of two-thirds of the shares *present*. Despite the lower nominal threshold, the new rule is actually more stringent in cases where a significant number of shareholders do not attend the meeting where action is taken. For example, the old law permitted lower quorum requirements, which allowed a minority of shareholders to take significant action at a poorly-attended shareholder meeting. By contrast, the new rule adopts the policy of requiring major actions to be approved by a majority of the shareholder votes entitled to be cast.

Improved protections of minority shareholders. The old law did not afford minority shareholders the right to seek involuntary judicial dissolution on grounds of oppression. As a consequence, oppressed minority shareholders had no means under the old law of monetizing their equity interest, even if directors had consistently acted to oppress them. By contrast, the new law permits an oppressed minority shareholder to withdraw from the corporation and require the corporation to buy all of the shareholder's shares at fair value.[1]

A corporation may convert either a withdrawal proceeding or a proceeding to determine the fair value of the shares into a proceeding for a court-supervised dissolution. The new law is framed to encourage resolution of shareholder complaints of oppression by negotiation of a mutually acceptable purchase price for the shareholder's stock with the corporation, rather than through litigation.

[1] A corporation engages in oppression if the corporation's distribution, compensation, governance, and other practices, considered as a whole over an appropriate period of time, are plainly incompatible with a genuine effort to deal fairly and in good faith with the shareholder.

Alters anti-takeover rules. The new law repeals the Control Share Law and the Fair Price Law; these anti-takeover components of the old law provided protections to minority shareholders in certain control share acquisitions of public corporations and certain corporate conflict-of-interest transactions.

Increased freedom of contract. Shareholders are permitted under the new law to adopt a "unanimous governance agreement." If such an agreement meets statutory requirements, the shareholders may agree upon any matter concerning the corporation even if the result is to override a mandatory statutory rule. For example, the shareholders may unanimously agree pursuant to such an agreement that the corporation will not be managed by a board of directors and shall instead be managed by a shareholder.

Changes to shareholder quorum requirement. The default quorum requirement under the new law remains a majority, as under the old law. However, the new law requires that any changes to the statutory defaults be included in the charter (rather than in charter or the bylaws). The old law permitted a corporation to impose a quorum requirement of as little as one-fourth of the total voting power. The new law does not include a minimum quorum requirement.

Modernized rules governing capital stock. The new law (i) provides new rules for determining the permissibility of shareholder distributions and (ii) permits issuance of shares in exchange for a promissory note or contract to perform future services.

The new law abolishes mandatory equity accounts (based on par or stated value) as a means of determining whether a corporation may make distributions and relies solely on solvency and net worth tests. Under the new regime, a distribution to shareholders may be made so long as it will not render the corporation unable to pay its debts in the ordinary course and will not cause liabilities to exceed the fair value of assets. The shift from capital accounts to balance sheet and solvency tests tethers dividend payment to restrictions with greater economic meaning.

The removal of the prohibition on issuance of shares in exchange for a promissory note or a contract to perform future services creates another possible means for founders or key employees, who may have valuable skills but little available capital, to be issued stock in a corporation.

Inspection of corporate records. The new law curtails shareholder inspection rights by (i) limiting inspection to records directly connected to the inspecting shareholder's announced purpose for demanding inspection, (ii) authorizing courts to deny inspection of confidential matters and impose confidentiality agreements on inspecting shareholders, (iii) eliminating the personal liability of corporate officers for refusal to permit inspection, and (iv) substituting a "reasonable time" in lieu of the former five-day grace period allowed for compliance with a shareholder's inspection demand.

Setup and maintenance of corporations. Under the new law, the information previously included in the initial report under the old law concerning the registered office and registered agent and principal office must be included in the articles, so a separate initial report is no longer required to form a corporation. Additionally, the new law retains the concept of optional bylaws (unlike the MBCA, which requires that all corporations adopt bylaws).

The new law also consolidates the rules regarding certificates issuable by the Secretary of State relating to incorporation, existence, and good standing in a precise manner, which makes the statute easier to read and understand.

— Richard P. Wolfe, Alexandra Clark Layfield, David Bordson-Bozzo

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. Also, these highlights are far from a complete catalog of the changes to Louisiana corporate law resulting from the adoption of the BCA. You should consult with counsel about your individual circumstances. In addition, the new law, which again became effective as of January 1, 2015, applies to existing corporations as well as newly-formed corporations. Questions may arise in the future as to (i) whether there are circumstances in which the new law's

substantive terms will apply to rights, remedies, acts, or omissions that arose or occurred prior to the new law's effective date, and (ii) whether Louisiana courts will apply parts of the new law by analogy to other entities, such as limited liability companies.

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