WEST VIRGINIA CODE CHAPTER 31E ARTICLE 8

WV Legislature

PART 1. BOARD OF DIRECTORS.

§31E-8-801. Requirement for and duties of board of directors.

(a) Each corporation must have a board of directors.

(b) All corporate powers are to be exercised by or under the authority of, and the activities, property and affairs of the corporation managed under the direction of, its board of directors, subject to any limitation set forth in the articles of incorporation.

WV Legislature

§31E-8-802. Qualifications of directors.

(a) The articles of incorporation or bylaws may prescribe qualifications for directors. A director need not be a resident of this state or a member of the corporation unless the articles of incorporation or bylaws require he or she to be a member.

(b) The directors and board of directors may be designated by other names as may be provided in the articles of incorporation or bylaws.

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§31E-8-803. Number and election of directors.

(a) A board of directors must consist of three or more individuals, with the number specified in or fixed in accordance with the articles of incorporation or bylaws.

(b) The number of directors may be increased or decreased from time to time by amendment to, or in the manner provided in, the articles of incorporation or bylaws.

(c) The initial board of directors is to be designated in the articles of incorporation or elected at the organizational meeting of the corporation. Thereafter, if the corporation has members entitled to vote for directors, directors are to be elected at the first meeting of the members held for that purpose and at each subsequent annual meeting, except as provided in section eight hundred four of this article.

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§31E-8-804. Special provisions regarding directors.

(a) The articles of incorporation may provide that the entire membership, or a certain class of members, shall constitute the board of directors.

(b) The articles of incorporation may provide that persons occupying certain positions within or without the corporation are ex officio directors, but, unless otherwise provided in the articles of incorporation or bylaws, ex officio directors may not be counted in determining a quorum nor may they be entitled to a vote. An ex officio director shall continue to be a director so long as he or she continues to hold the office from which his or her ex officio status derives, and shall cease to be an ex officio director immediately and automatically upon ceasing to hold the office, without the need for any action by the corporation, its directors or its members. The provisions of sections eight hundred six and eight hundred eight of this article do not apply to ex officio directors.

(c) In the cases of corporations without members and corporations without members entitled to vote for directors, the articles of incorporation may provide for a self-perpetuating board of directors.

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§31E-8-805. Election of directors by certain classes of members.

If the articles of incorporation authorize classes of members, the articles may also authorize the election of all or a specified number of directors by members in one or more authorized classes of members.

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§31E-8-806. Terms of directors generally.

(a) The terms of the initial directors of a corporation expire at the first members' meeting at which directors are elected or, in the case of a corporation without members entitled to vote for directors, at the first annual meeting of the board of directors, unless their terms are staggered pursuant to section eight hundred seven of this article.

(b) The terms of all other directors expire at the next annual meeting of members or the annual meeting of the directors if the corporation does not have members entitled to vote for directors, as the case may be, following their election unless their terms are staggered under section eight hundred seven of this article.

(c) A decrease in the number of directors does not shorten an incumbent director's term.

(d) The term of a director elected to fill a vacancy expires at the next meeting at which directors are elected.

(e) Despite the expiration of a director's term, he or she continues to serve until his or her successor is elected and qualifies or until there is a decrease in the number of directors.

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§31E-8-807. Staggered terms for directors.

(a) The articles of incorporation may provide for staggering the terms of directors, other than ex officio directors, by dividing the total number of directors, other than ex officio directors, into up to five groups, with each group containing approximately the same percentage of the total number of directors, as possible. In that event, the terms of directors in the first group expire at the first annual meeting of members or, in the case of a corporation without members entitled to vote for directors, at the first annual meeting of the board of directors, after their election, the terms of the second group expire at the second annual meeting of members or directors after their election, the terms of the third group, if any, expire at the third annual meeting of members or directors after their election, the terms of the fourth group, if any, expire at the fourth annual meeting of members or directors after their election, and the terms of the fifth group, if any, expire at the fifth annual meeting of members or directors after their election. At each annual meeting thereafter, directors are to be chosen for a term of two years, three years, four years or five years, as the case may be, to succeed those whose terms expire.

(b) If a corporation has cumulative voting pursuant to section seven hundred twenty-seven, article seven of this chapter, this section applies only if there are at least three directors in each group.

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§31E-8-808. Resignation of directors.

(a) A director may resign at any time by delivering written notice to the board of directors, the chair of the board of directors or the corporation.

(b) A resignation is effective when the notice is delivered unless the board of directors agree to a later effective date.

WV Legislature

§31E-8-809. Removal of directors by members or directors.

(a) The members entitled to vote for the election of directors or, if there are no members entitled to vote for the election of directors, the directors, may remove one or more directors with or without cause unless the articles of incorporation provide that directors may be removed only for cause.

(b) If a director is elected by a class of members only the members of that class may participate in the vote to remove him or her.

(c) If cumulative voting is authorized, a director may not be removed if the number of votes sufficient to elect him or her under cumulative voting is voted against his or her removal. If cumulative voting is not authorized, a director may be removed only if the number of votes cast to remove him or her exceeds the number of votes cast not to remove him or her.

(d) A director may be removed by the members entitled to vote for directors or, if there are no members entitled to vote for directors, the directors, only at a meeting called for the purpose of removing him or her and the meeting notice must state that the purpose, or one of the purposes, of the meeting is removal of the director.

WV Legislature

§31E-8-810. Removal of directors by judicial proceeding.

(a) The circuit court may remove a director of the corporation from office in a proceeding commenced either by the corporation or by its members holding at least ten percent of the voting power of any class if the court finds that: (1) The director engaged in fraudulent or dishonest conduct or gross abuse of authority or discretion, with respect to the corporation; and (2) removal is in the best interest of the corporation.

(b) The court that removes a director may bar the director from serving on the board for a period prescribed by the court.

(c) If members commence a proceeding under subsection (a) of this section, they must make the corporation a party defendant.

WV Legislature

§31E-8-811. Vacancy on board.

(a) Unless the articles of incorporation provide otherwise, if a vacancy occurs on a board of directors, including a vacancy resulting from an increase in the number of directors:

(1) The members entitled to vote for directors may fill the vacancy;

(2) The board of directors may fill the vacancy; or

(3) If the directors remaining in office constitute fewer than a quorum of the board, they may fill the vacancy by the affirmative vote of a majority of all the directors remaining in office.

(b) If the vacant office was held by a director elected by a class of members and if the vacancy is to be filled by the members entitled to vote for directors as provided in subdivision (1), subsection (a) of this section, only the members of that class are entitled to vote to fill the vacancy.

(c) A vacancy that will occur at a specific later date, by reason of a resignation effective at a later date under subsection (b), section eight hundred eight of this article or otherwise, may be filled before the vacancy occurs but the new director may not take office until the vacancy occurs.

(d) If the board of directors ceases to exist and there are no members having the right to vote for the election of directors, members not entitled to vote are entitled to elect a new board of directors.

WV Legislature

§31E-8-812. Compensation of directors.

Unless the articles of incorporation or bylaws provide otherwise, the board of directors may fix the compensation of directors, including reasonable allowance for expenses actually incurred in connection with their duties.

WV Legislature

PART 2. MEETINGS AND ACTION OF THE BOARD.

§31E-8-820. Meetings.

(a) The board of directors may hold regular or special meetings in or out of this state.

(b) Unless the articles of incorporation or bylaws provide otherwise, the board of directors may permit any or all directors to participate in a regular or special meeting by, or conduct the meeting through the use of, any means of communication by which all directors participating may simultaneously hear each other during the meeting. A director participating in a meeting by this means is deemed to be present in person at the meeting.

WV Legislature

§31E-8-821. Action without meeting.

(a) Unless the articles of incorporation or bylaws provide otherwise, action required or permitted by this chapter to be taken at a board of directors' meeting may be taken without a meeting if the action is taken by all members of the board. The action must be evidenced by one or more written consents describing the action taken, signed by each director, and included in the minutes or filed with the corporate records reflecting the action taken.

(b) Action taken under this section is effective when the last director signs the consent, unless the consent specifies a different effective date.

(c) A consent signed under this section has the effect of a meeting vote and may be described as having the effect of a meeting vote in any document.

WV Legislature

§31E-8-822. Notice of meeting.

(a) Unless the articles of incorporation or bylaws provide otherwise, regular meetings of the board of directors may be held without notice of the date, time, place, or purpose of the meeting.

(b) Unless the articles of incorporation or bylaws provide for a longer or shorter period, special meetings of the board of directors must be preceded by at least two days' notice of the date, time, and place of the meeting. The notice need not describe the purpose of the special meeting unless required by the articles of incorporation or bylaws.

WV Legislature

§31E-8-823. Waiver of notice.

(a) A director may waive any notice required by this chapter, the articles of incorporation, or bylaws before or after the date and time stated in the notice. Except as provided by subsection (b) of this section, the waiver must be in writing, signed by the director entitled to the notice, and filed with the minutes or corporate records.

(b) A director's attendance at or participation in a meeting waives any required notice to him or her of the meeting unless the director at the beginning of the meeting or promptly upon his or her arrival objects to holding the meeting or transacting business at the meeting and does not thereafter vote for or assent to action taken at the meeting.

WV Legislature

§31E-8-824. Quorum and voting.

(a) Unless the articles of incorporation or bylaws require a greater number or unless otherwise specifically provided in this chapter, a quorum of a board of directors consists of:

(1) A majority of the fixed number of directors if the corporation has a fixed board size; or

(2) A majority of the number of directors prescribed, or if no number is prescribed the number in office immediately before the meeting begins, if the corporation has a variable-range size board.

(b) The articles of incorporation or bylaws may authorize a quorum of a board of directors to consist of no fewer than one third of the fixed or prescribed number of directors determined under subsection (a) of this section.

(c) If a quorum is present when a vote is taken, the affirmative vote of a majority of directors present is the act of the board of directors unless the articles of incorporation or bylaws require the vote of a greater number of directors.

(d) A director who is present at a meeting of the board of directors or a committee of the board of directors when corporate action is taken is deemed to have assented to the action taken unless: (1) He or she objects at the beginning of the meeting or promptly upon his or her arrival to holding it or transacting business at the meeting; (2) his or her dissent or abstention from the action taken is entered in the minutes of the meeting; or (3) he or she delivers written notice of his or her dissent or abstention to the presiding officer of the meeting before its adjournment or to the corporation immediately after adjournment of the meeting. The right of dissent or abstention is not available to a director who votes in favor of the action taken.

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§31E-8-825. Committees.

(a) Unless the articles of incorporation or bylaws provide otherwise, a board of directors may create one or more committees and appoint members of the board of directors to serve on them. Each committee must have two or more members, who serve at the pleasure of the board of directors.

(b) The creation of a committee and appointment of members to it must be approved by the greater of: (1) A majority of all the directors in office when the action is taken; or (2) the number of directors required by the articles of incorporation or bylaws to take action under section eight hundred twenty-four of this article.

(c) Sections eight hundred twenty, eight hundred twenty-one, eight hundred twenty-two, eight hundred twenty-three and eight hundred twenty-four of this article, which govern meetings, action without meetings, notice and waiver of notice, and quorum and voting requirements of the board of directors, apply to committees and their members as well.

(d) To the extent specified by the board of directors or in the articles of incorporation or bylaws, each committee may exercise the authority of the board of directors under section eight hundred one of this article.

(e) A committee may not, however:

(1) Approve or propose to members action that this chapter requires be approved by members;

(2) Fill vacancies on the board of directors or on any of its committees;

(3) Amend articles of incorporation pursuant to section one thousand two, article ten of this chapter;

(4) Adopt, amend, or repeal bylaws;

(5) Approve a plan of merger;

(6) Approve a sale, lease, exchange or other disposition of all, or substantially all, of the property of a corporation; or

(7) Approve a proposal to dissolve.

(f) The creation of, delegation of authority to, or action by a committee does not alone constitute compliance by a director with the standards of conduct described in section eight hundred thirty of this article.

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§31E-8-826. Court-ordered meeting of directors.

(a) The circuit court of the county where a corporation's principal office is located or, if none, where its registered office is located, or if the corporation has no principal or registered office in this state, the circuit court satisfying the venue requirements found in section one, article one, chapter fifty-six of this code, may summarily order a meeting of the board of directors to be held: (1) On application of any director of the corporation if no meeting of the board of directors has been held for a period of twelve months or more; or (2) on application of a director who signed a demand for a special meeting valid under the bylaws if: (A) Notice of the special meeting was not given within thirty days after the date the demand was delivered to the corporation's secretary; or (B) the special meeting was not held in accordance with the notice.

(b) The circuit court may fix the time and place of the meeting, determine the directors entitled to participate in the meeting, prescribe the form and content of the meeting notice, fix the quorum required for specific matters to be considered at the meeting, or direct that the votes represented at the meeting constitute a quorum for action on those matters, and enter other orders necessary to accomplish the purpose or purposes of the meeting.

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PART 3. DIRECTORS.

§31E-8-830. Standards of conduct for directors.

(a) Each member of the board of directors, when discharging the duties of a director, shall act: (1) In good faith; and (2) in a manner the director reasonably believes to be in the best interests of the corporation.

(b) The members of the board of directors or a committee of the board, when becoming informed in connection with their decision-making function or devoting attention to their oversight function, shall discharge their duties with the care that a person in a like position would reasonably believe appropriate under similar circumstances.

(c) In discharging board or committee duties a director, who does not have knowledge that makes reliance unwarranted, is entitled to rely on the performance by any of the persons specified in subdivisions (1) or (3), subsection (e) of this section to whom the board may have delegated, formally or informally by course of conduct, the authority or duty to perform one or more of the board's functions that are delegable under applicable law.

(d) In discharging board or committee duties a director, who does not have knowledge that makes reliance unwarranted, is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, prepared or presented by any of the persons specified in subsection (e) of this section.

(e) A director is entitled to rely, in accordance with subsection (c) or (d) of this section, on:

(1) One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the functions performed or the information, opinions, reports or statements provided;

(2) Legal counsel, public accountants, or other persons retained by the corporation as to matters involving skills or expertise the director reasonably believes are matters: (A) Within the particular person's professional or expert competence; or (B) as to which the particular person merits confidence; or

(3) A committee of the board of directors of which the director is not a member if the director reasonably believes the committee merits confidence.

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§31E-8-831. Standards of liability for directors.

(a) A director is not liable to the corporation or its members for any decision to take or not to take action, or any failure to take any action, as a director, unless the party asserting liability in a proceeding establishes that:

(1) Any provision in the articles of incorporation authorized by subdivision (4), subsection (b), section two hundred two, article two of this chapter or the protections afforded by section eight hundred sixty of this article or article seven-c, chapter fifty-five of this code, if interposed as a bar to the proceeding by the director, does not preclude liability; and

(2) The challenged conduct consisted or was the result of:

(A) Action not in good faith; or

(B) A decision: (i) Which the director did not reasonably believe to be in the best interests of the corporation; or (ii) as to which the director was not informed to an extent the director reasonably believed appropriate in the circumstances; or

(C) A lack of objectivity due to the director's familial, financial or business relationship with, or a lack of independence due to the director's domination or control by, another person having a material interest in the challenged conduct: (i) Which relationship or which domination or control could reasonably be expected to have affected the director's judgment respecting the challenged conduct in a manner adverse to the corporation; and (ii) after a reasonable expectation has been established, the director does not establish that the challenged conduct was reasonably believed by the director to be in the best interests of the corporation; or

(D) A sustained failure of the director to devote attention to ongoing oversight of the affairs of the corporation, or a failure to devote timely attention, by making or causing to be made appropriate inquiry, when particular facts and circumstances of significant concern materialize that would alert a reasonably attentive director to the need to make inquiry; or

(E) Receipt of a financial benefit to which the director was not entitled or any other breach of the director's duties to deal fairly with the corporation and its members that is actionable under applicable law.

(b) The party seeking to hold the director liable:

(1) For money damages, has the burden of establishing that:

(A) Harm to the corporation or its members has been suffered; and

(B) The harm suffered was proximately caused by the director's challenged conduct; or

(2) For other money payment under a legal remedy, including compensation for the

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unauthorized use of corporate assets, has whatever persuasion burden may be called for to establish that the payment sought is appropriate in the circumstances; or

(3) For other money payment under an equitable remedy, including profit recovery by or disgorgement to the corporation, has whatever persuasion burden may be called for to establish that the equitable remedy sought is appropriate in the circumstances.

(c) Nothing contained in this section may: (1) In any instance where fairness is at issue, including consideration of the fairness of a transaction to the corporation under section eight hundred sixty of this article, alter the burden of proving the fact or lack of fairness otherwise applicable; (2) alter the fact or lack of liability of a director under another section of this chapter, including the provisions governing the consequences of an unlawful distribution under section eight hundred thirty-three of this article or a transactional interest under section eight hundred sixty of this article; or (3) affect any rights to which the corporation or a member may be entitled under another provision of this code or the United States code.

WV Legislature

§31E-8-832. [RESERVED]

WV Legislature

§31E-8-833. Directors' liability for unlawful distributions.

(a) A director who votes for or assents to a distribution in violation of this chapter or the articles of incorporation is personally liable to the corporation for the amount of the distribution that exceeds what could have been distributed without violating this chapter if the party asserting liability establishes that when taking the action the director did not comply with section eight hundred thirty of this article.

(b) A director held liable under subsection (a) of this section for an unlawful distribution is entitled to:

(1) Contribution from every other director who could be held liable under subsection (a) of this section for the unlawful distribution; and

(2) Recoupment from each recipient for the amount the recipient accepted, knowing the distribution was made in violation of this chapter or the articles of incorporation.

(c) A proceeding to enforce the liability of a director under subsection (a) of this section is barred unless it is commenced within two years after the date on which the distribution was made.

(d) For purposes of this section, a director is deemed to have voted for a distribution if the director was present at the meeting of the board of directors at the time the distribution was authorized and did not vote in dissent, or if the director consented to the vote pursuant to section eight hundred twenty-one of this article.

WV Legislature

PART 4. OFFICERS.

§31E-8-840. Required officers.

(a) A corporation has the officers described in its bylaws or appointed by the board of directors in accordance with the bylaws.

(b) A duly appointed officer may appoint one or more officers or assistant officers if authorized by the bylaws or the board of directors.

(c) The bylaws or the board of directors must delegate to one of the officers responsibility for preparing minutes of the directors' and members' meetings and for authenticating records of the corporation.

(d) The same individual may simultaneously hold more than one office in a corporation.

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§31E-8-841. Duties of officers.

Each officer has the authority and shall perform the duties set forth in the bylaws or, to the extent consistent with the bylaws, the duties prescribed by the board of directors or by direction of an officer authorized by the board of directors to prescribe the duties of other officers.

WV Legislature

§31E-8-842. Standards of conduct for officers.

(a) An officer, when performing in his or her official capacity, shall act:

(1) In good faith;

(2) With the care that a person in a like position would reasonably exercise under similar circumstances; and

(3) In a manner the officer reasonably believes to be in the best interests of the corporation.

WV Legislature

§31E-8-843. Resignation and removal of officers.

(a) An officer may resign at any time by delivering notice to the corporation. A resignation is effective when the notice is delivered unless the board of directors agree to a later effective date. If a resignation is made effective at a later date and the corporation accepts the future effective date, its board of directors may fill the pending vacancy before the effective date if the board of directors provides that the successor does not take office until the effective date.

(b) A board of directors may remove any officer at any time with or without cause.

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§31E-8-844. Contract rights of officers.

(a) The appointment of an officer does not itself create contract rights.

(b) An officer's removal does not affect the officer's contract rights, if any, with the corporation. An officer's resignation does not affect the corporation's contract rights, if any, with the officer.

WV Legislature

PART 5. INDEMNIFICATION AND ADVANCE FOR EXPENSES.

§31E-8-850. Part definitions.

In this part:

(1) "Corporation" includes any domestic or foreign predecessor entity of a corporation in a merger.

(2) "Director" or "officer" means an individual who is or was a director or officer, respectively, of a corporation or who, while a director or officer of the corporation, is or was serving at the corporation's request as a director, officer, partner, trustee, employee, or agent of another domestic or foreign corporation, partnership, joint venture, trust, employee benefit plan, or other entity. A director or officer is considered to be serving an employee benefit plan at the corporation's request if his or her duties to the corporation also impose duties on, or otherwise involve services by, him or her to the plan or to participants in or beneficiaries of the plan. "Director" or "officer" includes, unless the context requires otherwise, the estate or personal representative of a director or officer.

(3) "Disinterested director" means a director who, at the time of a vote referred to in subsection (c), section eight hundred fifty-three of this article or a vote or selection referred to in subsection (b) or (c), section eight hundred fifty-five of this article, is not: (A) A party to the proceeding; or (B) an individual having a familial, financial, professional or employment relationship with the director whose indemnification or advance for expenses is the subject of the decision being made, which relationship would, in the circumstances, reasonably be expected to exert an influence on the director's judgment when voting on the decision being made.

(4) "Expenses" includes counsel fees.

(5) "Liability" means the obligation to pay a judgment; settlement; penalty; fine, including an excise tax assessed with respect to an employee benefit plan; or reasonable expenses incurred with respect to a proceeding.

(6) "Official capacity" means:

(A) When used with respect to a director, the office of director in a corporation; and

(B) When used with respect to an officer, as contemplated in section eight hundred fifty-six of this article, the office in a corporation held by the officer. "Official capacity" does not include service for any other domestic or foreign corporation or any partnership, joint venture, trust, employee benefit plan, or other entity.

(7) "Party" means an individual who was, is, or is threatened to be made, a defendant or respondent in a proceeding.

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(8) "Proceeding" means any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, arbitrative, or investigative and whether formal or informal.

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§31E-8-851. Permissible indemnification.

(a) Except as otherwise provided in this section, a corporation may indemnify an individual who is a party to a proceeding because he or she is a director against liability incurred in the proceeding if:

(1) (A) He or she conducted himself or herself in good faith; and

(B) He or she reasonably believed: (i) In the case of conduct in his or her official capacity, that his or her conduct was in the best interests of the corporation; and (ii) in all other cases, that his or her conduct was at least not opposed to the best interests of the corporation; and

(C) In the case of any criminal proceeding, he or she had no reasonable cause to believe his or her conduct was unlawful; or

(2) He or she engaged in conduct for which broader indemnification has been made permissible or obligatory under a provision of the articles of incorporation, as authorized by subdivision (5), subsection (b), section two hundred two, article two of this chapter.

(b) A director's conduct with respect to an employee benefit plan for a purpose he or she reasonably believed to be in the interests of the participants in, and the beneficiaries of, the plan is conduct that satisfies the requirement of subparagraph (ii), paragraph (B), subdivision (1), subsection (a) of this section.

(c) The termination of a proceeding by judgment, order, settlement, or conviction, or upon a plea of nolo contendere or its equivalent, is not, determinative that the director did not meet the relevant standard of conduct described in this section.

(d) Unless ordered by a circuit court under subdivision (3), subsection (a), section eight hundred fifty-four of this article, a corporation may not indemnify a director:

(1) In connection with a proceeding by or in the right of the corporation, except for reasonable expenses incurred in connection with the proceeding if it is determined that the director has met the relevant standard of conduct under subsection (a) of this section; or

(2) In connection with any proceeding with respect to conduct for which he or she was adjudged liable on the basis that he or she received a financial benefit to which he or she was not entitled, whether or not involving action in his or her official capacity.

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§31E-8-852. Mandatory indemnification.

A corporation must indemnify a director who was wholly successful, on the merits or otherwise, in the defense of any proceeding to which he or she was a party because he or she was a director of the corporation against reasonable expenses incurred by him or her in connection with the proceeding.

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§31E-8-853. Advance for expenses.

(a) A corporation may, before final disposition of a proceeding, advance funds to pay for or reimburse the reasonable expenses incurred by a director who is a party to a proceeding because he or she is a director if he or she delivers to the corporation:

(1) A written affirmation of his or her good faith belief that he or she has met the relevant standard of conduct described in section eight hundred fifty-one of this article or that the proceeding involves conduct for which liability has been eliminated under a provision of the articles of incorporation as authorized by subdivision (4), subsection (b), section two hundred two, article two of this chapter; and

(2) His or her written undertaking to repay any funds advanced if he or she is not entitled to mandatory indemnification under section eight hundred fifty-two of this article and it is ultimately determined under sections eight hundred fifty-four or eight hundred fifty-five of this article that he or she has not met the relevant standard of conduct described in section eight hundred fifty-one of this article.

(b) The undertaking required by subdivision (2), subsection (a) of this section must be an unlimited general obligation of the director but need not be secured and may be accepted without reference to the financial ability of the director to make repayment.

(c) Authorizations under this section are to be made:

(1) By the board of directors:

(A) If there are two or more disinterested directors, by a majority vote of all the disinterested directors, a majority of whom constitute a quorum for this purpose, or by a majority of the members of a committee of two or more disinterested directors appointed by a vote; or

(B) If there are fewer than two disinterested directors, by the vote necessary for action by the board in accordance with subsection (c), section eight hundred twenty-four of this article, in which authorization directors who do not qualify as disinterested directors may participate; or

(2) By special legal counsel:

(A) Selected in the manner prescribed in subdivision (1) of this subsection;

(B) If there are fewer than two disinterested directors, selected by the board of directors in which selection directors who do not qualify as disinterested directors may participate; or

(3) By the members, if the members have a right to vote.

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§31E-8-854. Circuit court-ordered indemnification and advance for expenses.

(a) A director who is a party to a proceeding because he or she is a director may apply for indemnification or an advance for expenses to the circuit court conducting the proceeding or to another circuit court of competent jurisdiction. After receipt of an application and after giving any notice it considers necessary, the circuit court shall:

(1) Order indemnification if the circuit court determines that the director is entitled to mandatory indemnification under section eight hundred fifty-two of this article;

(2) Order indemnification or advance for expenses if the circuit court determines that the director is entitled to indemnification or advance for expenses pursuant to a provision authorized by subsection (a), section eight hundred fifty-eight of this article; or

(3) Order indemnification or advance for expenses if the circuit court determines, in view of all the relevant circumstances, that it is fair and reasonable;

(A) To indemnify the director; or

(B) To advance expenses to the director, even if he or she has not met the relevant standard of conduct set forth in subsection (a), section eight hundred fifty-one of this article, failed to comply with section eight hundred fifty-three of this article or was adjudged liable in a proceeding referred to in subdivision (1) or (2), subsection (d), section eight hundred fifty-one of this article, but if he or she was adjudged so liable his or her indemnification is to be limited to reasonable expenses incurred in connection with the proceeding.

(b) If the circuit court determines that the director is entitled to indemnification under subdivision (1), subsection (a) of this section or to indemnification or advance for expenses under subdivision (2), subsection (a) of this section, it shall also order the corporation to pay the director's reasonable expenses incurred in connection with obtaining circuit court-ordered indemnification or advance for expenses. If the circuit court determines that the director is entitled to indemnification or advance for expenses under subdivision (3), subsection (a) of this section, it may also order the corporation to pay the director's reasonable expenses to obtain circuit court-ordered indemnification or advance for expenses.

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§31E-8-855. Determination and authorization of indemnification.

(a) A corporation may not indemnify a director under section eight hundred fifty-one of this article unless authorized for a specific proceeding after a determination has been made that indemnification of the director is permissible because he or she has met the relevant standard of conduct set forth in section eight hundred fifty-one of this article.

(b) The determination is to be made:

(1) If there are two or more disinterested directors, by the board of directors by a majority vote of all the disinterested directors, a majority of whom constitute a quorum for this purpose, or by a majority of the members of a committee of two or more disinterested directors appointed by a vote;

(2) By special legal counsel:

(A) Selected in the manner prescribed in subdivision (1) of this subsection; or

(B) If there are fewer than two disinterested directors, selected by the board of directors in which selection directors who do not qualify as disinterested directors may participate; or

(3) By the members, if the members have a right to vote.

(c) Authorization of indemnification is to be made in the same manner as the determination that indemnification is permissible, except that if there are fewer than two disinterested directors or if the determination is made by special legal counsel, authorization of indemnification is to be made by those entitled under paragraph (B), subdivision (2), subsection (b) of this section to select special legal counsel.

WV Legislature

§31E-8-856. Indemnification of officers.

(a) A corporation may indemnify and advance expenses under this part to an officer of the corporation who is a party to a proceeding because he or she is an officer of the corporation:

(1) To the same extent as a director; and

(2) If he or she is an officer but not a director, to a further extent as may be provided by the articles of incorporation, the bylaws, a resolution of the board of directors, or contract except for:

(A) Liability in connection with a proceeding by or in the right of the corporation other than for reasonable expenses incurred in connection with the proceeding; or

(B) Liability arising out of conduct that constitutes:

(i) Receipt by him or her of a financial benefit to which he or she is not entitled;

(ii) An intentional infliction of harm on the corporation or the members; or

(iii) An intentional violation of criminal law.

(b) The provisions of subdivision (2), subsection (a) of this section apply to an officer who is also a director if the basis on which he or she is made a party to the proceeding is an act or omission solely as an officer.

(c) An officer of a corporation who is not a director is entitled to mandatory indemnification under section eight hundred fifty-two of this article, and may apply to a circuit court under section eight hundred fifty-four of this article for indemnification or an advance for expenses, in each case to the same extent to which a director may be entitled to indemnification or advance for expenses under those provisions.

WV Legislature

§31E-8-857. Insurance.

A corporation may purchase and maintain insurance on behalf of an individual who is a director or officer of the corporation, or who, while a director or officer of the corporation, serves at the corporation's request as a director, officer, partner, trustee, employee, or agent of another domestic or foreign corporation, partnership, joint venture, trust, employee benefit plan, or other entity, against liability asserted against or incurred by him or her in that capacity or arising from his or her status as a director or officer, whether or not the corporation would have power to indemnify or advance expenses to him or her against the same liability under this part.

WV Legislature

§31E-8-858. Variation by corporate action; application of part.

(a) A corporation may, by a provision in its articles of incorporation or bylaws or in a resolution adopted or a contract approved by its board of directors or members, obligate itself in advance of the act or omission giving rise to a proceeding to provide indemnification in accordance with section eight hundred fifty-one of this article or advance funds to pay for or reimburse expenses in accordance with section eight hundred fifty-three of this article. Any obligatory provision is deemed to satisfy the requirements for authorization referred to in subsection (c), section eight hundred fifty-three and in subsection (c), section eight hundred fifty-five of this article. Any provision that obligates the corporation to provide indemnification to the fullest extent permitted by law is deemed to obligate the corporation to advance funds to pay for or reimburse expenses in accordance with section eight hundred fifty-three of this article to the fullest extent permitted by law, unless the provision specifically provides otherwise.

(b) Any provision pursuant to subsection (a) of this section may not obligate the corporation to indemnify or advance expenses to a director of a predecessor of the corporation, pertaining to conduct with respect to the predecessor, unless otherwise specifically provided. Any provision for indemnification or advance for expenses in the articles of incorporation, bylaws, or a resolution of the board of directors or members of a predecessor of the corporation in a merger or in a contract to which the predecessor is a party, existing at the time the merger takes effect, is to be governed by section one thousand one hundred and three, article eleven of this chapter.

(c) A corporation may, by a provision in its articles of incorporation, limit any of the rights to indemnification or advance for expenses created by or pursuant to this part.

(d) This part does not limit a corporation's power to pay or reimburse expenses incurred by a director or an officer in connection with his or her appearance as a witness in a proceeding at a time when he or she is not a party.

(e) This part does not limit a corporation's power to indemnify, advance expenses to or provide or maintain insurance on behalf of an employee or agent.

WV Legislature

§31E-8-859. Exclusivity of part.

A corporation may provide indemnification or advance expenses to a director or an officer only as permitted by this part.

WV Legislature

PART 6. DIRECTORS' CONFLICTING INTEREST TRANSACTIONS.

§31E-8-860. Directors' conflicting interest transactions.

(a) No contract or transaction between a corporation and one or more of its directors or officers, or between a corporation and any other corporation, partnership, association, or other organization in which one or more of its directors or officers are directors or officers, or have a financial interest, is void or voidable solely for this reason, or solely because the director or officer is present at or participates in the meeting of the board or committee thereof which authorizes the contract or transaction, or solely because any director's or officer's votes are counted for the purpose, if:

(1) The material facts as to the director's or officer's relationship or interest and as to the contract or transaction are disclosed or are known to the board of directors or the committee, and the board or committee in good faith authorizes the contract or transaction by the affirmative votes of a majority of the disinterested directors, even though the disinterested directors be less than a quorum; or

(2) The material facts as to the director's or officer's relationship or interest and as to the contract or transaction are disclosed or are known to the members entitled to vote on the contract or transaction, and the contract or transaction is specifically approved in good faith by vote of the members entitled to vote; or

(3) The contract or transaction is fair as to the corporation as of the time it is authorized, approved or ratified, by the board of directors, a committee of the board of directors, or the members.

(b) Common or interested directors may be counted in determining the presence of a quorum at a meeting of the board of directors or of a committee which authorizes the contract or transaction.

WV Legislature