

SENATE BILL NO. 203—COMMITTEE ON JUDICIARY

FEBRUARY 22, 2017

Referred to Committee on Judiciary

SUMMARY—Revises provisions relating to domestic corporations.
(BDR 7-71)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: No.

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EXPLANATION – Matter in *bolded italics* is new; matter between brackets ~~omitted material~~ is material to be omitted.

AN ACT relating to business associations; expressing the intent of the Legislature concerning the law of domestic corporations; revising the presumption against negligence for the actions of corporate directors and officers; clarifying the factors that may be considered by corporate directors and officers in the exercise of their respective powers; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Under existing law, with certain exceptions, a director or officer of a domestic corporation is presumed not to be individually liable to the corporation or its stockholders or creditors for damages unless: (1) an act or failure to act of the director or officer was a breach of his or her fiduciary duties; and (2) such breach involved intentional misconduct, fraud or a knowing violation of law. (NRS 78.138)

Section 4 of this bill specifies that to establish liability on the part of a corporate director or officer requires: (1) a rebuttal of this presumption; and (2) a breach of a fiduciary duty accompanied by intentional misconduct, fraud or a knowing violation of law. **Sections 4 and 5** of this bill clarify the factors that a director or officer of a domestic corporation is entitled to consider in exercising his or her respective powers in certain circumstances, including, without limitation, resisting a change or potential change in the control of a corporation.

Section 2 of this bill expresses the intent of the Legislature regarding the law of domestic corporations, including that the laws of other jurisdictions must not supplant or modify Nevada law.



THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 78 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 and 3 of this act.

Sec. 2. *The Legislature hereby finds and declares that:*

1. It is important to the economy of this State, and to domestic corporations, their directors and officers, and their stockholders, employees, creditors and other constituencies, for the laws governing domestic corporations to be clear and comprehensible.

2. The laws of this State govern the incorporation and internal affairs of a domestic corporation and the rights, privileges, powers, duties and liabilities, if any, of its directors, officers and stockholders.

3. The plain meaning of the laws enacted by the Legislature in this title, including, without limitation, the fiduciary duties and liability of the directors and officers of a domestic corporation set forth in NRS 78.138 and 78.139, must not be supplanted or modified by laws or judicial decisions from any other jurisdiction.

4. The directors and officers of a domestic corporation, in exercising their duties under NRS 78.138 and 78.139, may be informed by the laws and judicial decisions of other jurisdictions and the practices observed by business entities in any such jurisdiction, but the failure or refusal of a director or officer to consider, or to conform the exercise of his or her powers to, the laws, judicial decisions or practices of another jurisdiction does not constitute or indicate a breach of a fiduciary duty.

Sec. 3. (Deleted by amendment.)

Sec. 4. NRS 78.138 is hereby amended to read as follows:

78.138 1. ~~{Directors}~~ *The fiduciary duties of directors* and officers ~~{shall}~~ *are to* exercise their *respective* powers in good faith and with a view to the interests of the corporation.

2. In ~~{performing}~~ *exercising* their respective ~~{duties,}~~ *powers*, directors and officers *may, and* are entitled to , rely on information, opinions, reports, books of account or statements, including financial statements and other financial data, that are prepared or presented by:

(a) One or more directors, officers or employees of the corporation reasonably believed to be reliable and competent in the matters prepared or presented;

(b) Counsel, public accountants, financial advisers, valuation advisers, investment bankers or other persons as to matters reasonably believed to be within the preparer's or presenter's professional or expert competence; or



(c) A committee on which the director or officer relying thereon does not serve, established in accordance with NRS 78.125, as to matters within the committee's designated authority and matters on which the committee is reasonably believed to merit confidence, but a director or officer is not entitled to rely on such information, opinions, reports, books of account or statements if the director or officer has knowledge concerning the matter in question that would cause reliance thereon to be unwarranted.

3. ~~{Directors}~~ *Except as otherwise provided in subsection 1 of NRS 78.139, directors* and officers, in deciding upon matters of business, are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation. *A director or officer is not individually liable for damages as a result of an act or failure to act in his or her capacity as a director or officer except under circumstances described in subsection 7.*

4. Directors and officers, in exercising their respective powers with a view to the interests of the corporation, may : ~~{consider:}~~

(a) *Consider all relevant facts, circumstances, contingencies or constituencies, including, without limitation:*

(1) The interests of the corporation's employees, suppliers, creditors ~~{and}~~ or customers;

~~{(b)}~~ (2) The economy of the State ~~{and}~~ or Nation;

~~{(e)}~~ (3) The interests of the community ~~{and}~~ or of society; ~~{and}~~

~~{(d)}~~ (4) The long-term ~~{as well as}~~ or short-term interests of the corporation ~~{and its}~~ , *including the possibility that these interests may be best served by the continued independence of the corporation; or*

(5) *The long-term or short-term interests of the corporation's* stockholders, including the possibility that these interests may be best served by the continued independence of the corporation.

(b) *Consider or assign weight to the interests of any particular person or group, or to any other relevant facts, circumstances, contingencies or constituencies.*

5. Directors and officers are not required to consider , *as a dominant factor*, the effect of a proposed corporate action upon any particular group *or constituency* having an interest in the corporation. ~~{as a dominant factor.}~~

6. The provisions of subsections 4 and 5 do not create or authorize any causes of action against the corporation or its directors or officers.

7. Except as otherwise provided in NRS 35.230, 90.660, 91.250, 452.200, 452.270, 668.045 and 694A.030, or unless the articles of incorporation or an amendment thereto, in each case filed



on or after October 1, 2003, provide for greater individual liability, a director or officer is not individually liable to the corporation or its stockholders or creditors for any damages as a result of any act or failure to act in his or her capacity as a director or officer unless ~~that~~ :

(a) The trier of fact determines that the presumption established by subsection 3 has been rebutted; and

(b) It is proven that:

~~(a)~~ (1) The director's or officer's act or failure to act constituted a breach of his or her fiduciary duties as a director or officer; and

~~(b) The~~

(2) Such breach ~~of those duties~~ involved intentional misconduct, fraud or a knowing violation of law.

8. This section applies to all cases, circumstances and matters unless otherwise provided in the articles of incorporation, or an amendment thereto, including, without limitation, any change or potential change in control of the corporation.

Sec. 5. NRS 78.139 is hereby amended to read as follows:

78.139 1. ~~Except as otherwise provided in subsection 2 or the articles of incorporation, directors and officers, in connection with a change or potential change in control of the corporation, have:~~

~~—(a) The duties imposed upon them by subsection 1 of NRS 78.138;~~

~~—(b) The benefit of the presumptions established by subsection 3 of NRS 78.138; and~~

~~—(c) The prerogative to undertake and act upon consideration pursuant to subsections 2, 4 and 5 of NRS 78.138.~~

~~2.~~ If directors or officers take action to resist a change or potential change in control of a corporation, which action impedes the exercise of the right of stockholders to vote for or remove directors:

(a) The directors must have reasonable grounds to believe that a threat to corporate policy and effectiveness exists; and

(b) The action taken which impedes the exercise of the stockholders' rights must be reasonable in relation to that threat.

➤ If those facts are found, the directors and officers have the benefit of the presumption established by subsection 3 of NRS 78.138.

~~3.~~ 2. The provisions of subsection ~~2~~ 1 do not apply to:

(a) Actions that only affect the time of the exercise of stockholders' voting rights; or

(b) The adoption or signing of plans, arrangements or instruments that deny rights, privileges, power or authority to a



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holder of a specified number or fraction of shares or fraction of voting power.

~~{4}~~ 3. The provisions of subsections *1 and 2* ~~and 3~~ do not permit directors or officers to abrogate any right conferred by ~~{statute}~~ *the laws of this State* or the articles of incorporation.

~~{5. Directors}~~

4. *Without limiting the provisions of NRS 78.138, a director* may resist a change or potential change in control of the corporation if the *board of* directors ~~{by a majority vote of a quorum determine}~~ *determines* that the change or potential change is opposed to or not in the best interest of the corporation ~~†~~

~~—(a) Upon~~ *upon* consideration of ~~{the interests of the corporation's stockholders or any of the matters set forth in}~~ *any relevant facts, circumstances, contingencies or constituencies pursuant to* subsection 4 of NRS 78.138 ~~† or~~

~~—(b) Because~~ *, including, without limitation,* the amount or nature of the indebtedness and other obligations to which the corporation or any successor to the property of either may become subject, in connection with the change or potential change, provides reasonable grounds to believe that, within a reasonable time:

~~{(1)}~~ (a) The assets of the corporation or any successor would be or become less than its liabilities;

~~{(2)}~~ (b) The corporation or any successor would be or become insolvent; or

~~{(3)}~~ (c) Any voluntary or involuntary proceeding concerning the corporation or any successor would be commenced by any person pursuant to the federal bankruptcy laws.

Sec. 6. (Deleted by amendment.)

Sec. 7. (Deleted by amendment.)

