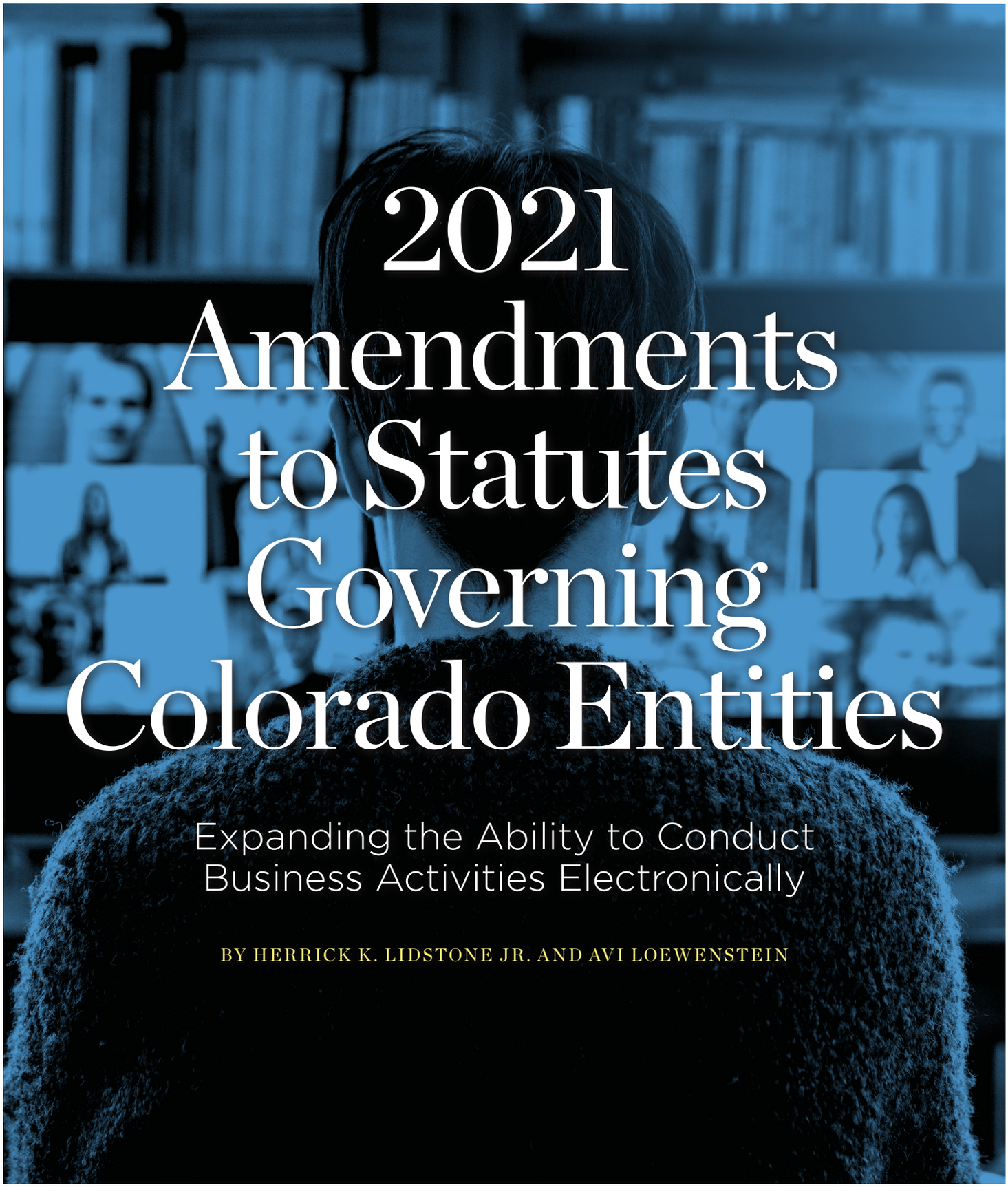

# 2021 Amendments to Statutes Governing Colorado Entities

## Expanding the Ability to Conduct Business Activities Electronically

BY HERRICK K. LIDSTONE JR. AND AVI LOEWENSTEIN

*This article discusses HB 21-1124, which amended the Colorado Corporations and Associations Act and the Colorado Business Corporation Act.*

In anticipation of Colorado's 2021 legislative session, the Business Entities Drafting Committee of the CBA's Business Law Section (Committee) proposed changes to the Colorado Corporations and Associations Act[1] (CCAA) and the Colorado Business Corporation Act[2] (CBCA). The proposed changes, which permit electronic communications and recordkeeping and virtual meetings, were submitted to and approved by both the House and Senate in the form of HB 21-1124.[3] The bill became effective on the Governor's signature[4] on April 19, 2021, and "applies to conduct occurring on or after the effective date of this act."[5]

## Summary of HB 21-1124

The changes to the CCAA and the CBCA that were included in HB 21-1124 are intended to

- update and expand electronic recordkeeping and notice requirements in the CCAA for all covered Colorado entities; and
- permit Colorado corporations to hold virtual shareholders' meetings by eliminating the "at a place" requirement.

While these amendments modernize the CCAA and CBCA, updates to statutes affecting other business entities, such as Colorado nonprofits, limited liability companies, partnerships, and cooperatives, may be warranted. Suggestions for further work in this regard are discussed below.

## CCAA Amendments

The CCAA is an overarching act containing provisions that apply to different entities. As stated in its definitions section, the CCAA is intended to apply to all entities described in CRS Title 7, which include, for example, partnerships and cooperatives, "unless the context otherwise requires."[6] Accordingly, the Committee precisely drafted HB 21-1124 with the CCAA's broad application in mind.

Historically, when considering amendments to the CCAA (and the CBCA), the Business Law Section committees have always looked to the Model Business Corporation Act[7] (MBCA) and Delaware General Corporation Law (DGCL) for guidance. However, the MBCA and DGCL are stand-alone statutes, so they do not draw from a central source for definitions and other provisions that impact other entities. For example, the MBCA addresses solely for-profit corporations (but now has a new chapter 17 for benefit corporations).[8]

In the mid-1990s, Colorado business lawyers recognized that many provisions in the various entity statutes were common to all business entities in Colorado. For example, the Colorado Secretary of State (Secretary) requires each entity registered with that office to file periodic reports with the Secretary. Before the CCAA's enactment, each entity statute addressed this periodic reporting requirement,[9] and this redundancy made little sense. Thus, the periodic reporting requirements for all entities are now housed in the CCAA.[10] Specifically:

- Part 3 discusses the procedures for and effectiveness of filings with the Secretary.
- Part 4 discusses the powers of the Secretary that are applicable to all entities.
- Part 6 discusses the Secretary's requirements for all entity names, including the basic requirement that entity names be distinguishable from every other entity name and name reserved with the Secretary for another person as an entity name.[11]
- Part 7 discusses the requirements for registered agents of domestic entities registered with the Secretary and foreign entities qualified to do business in Colorado.[12]
- Part 8 discusses the Secretary's filing requirements for non-Colorado entities to qualify to do business in Colorado.

The CCAA also has various provisions that apply to all Colorado entities formed under Title 7 for mergers and conversions,[13] delinquencies and dissolution,[14] and reinstatement of dissolved entities.[15]

Thus, when considering changes to the various entity statutes in Colorado, the threshold consideration is whether amendments should be made to the broadly applicable CCAA provisions (and therefore affect all Title 7 entities) or only to the underlying entity statute itself. For example:

- For SB 19-086,[16] the Committee concluded that many of the merger and conversion provisions applicable to corporations under the CBCA should be included with the merger and conversion provisions applicable to all Colorado entities. As a result, the CBCA now has numerous cross-references to the CCAA.[17]
- The Committee concluded that HB 20-1013 (Ratification of Defective Acts) was not necessary for entities generally, so only the CBCA should be so modified.
- In HB 21-1124, the Committee moved the provisions for "notice" under the CBCA from CRS § 7-101-402 to the CCAA (CRS § 7-90-105) and expanded the provisions to be applicable to all entities and to include notices by electronic transmission.[18] This was done because "notice" addresses the important question of when a notice is effective; CRS § 7-90-105(5) provides that notice by electronic transmission is considered to be delivered[19] on the date the electronic transmission is sent.[20]

### *UETA and E-Sign*

Colorado adopted the Uniform Electronic Transactions Act (UETA),[21] which works in conjunction with the federal Electronic Signatures in Global and National Commerce Act (E-Sign)[22] to govern the handling of personal information in electronic records.

HB 21-1124 added CRS § 7-90-106 to the CCAA to tie electronic notices under Title 7 to E-Sign. But as stated in CRS § 7-90-106, the Colorado statute does not modify, limit, or supersede E-Sign § 101(c),[23] which governs consumer disclosures and requires, among other things, affirmative consent from a consumer to electronic delivery of transactional disclosures that are required by state law to be in writing. The Colorado statute also does not authorize electronic delivery of any of the notices described in E-Sign § 103(b), which contains exceptions to the § 101 requirements.[24]

Under E-Sign and UETA, when a state adopts UETA in substantially the same form as the Uniform Act (as occurred in Colorado), UETA controls over E-Sign, with some exceptions.[25] Colorado's version of UETA specifically states that it is not intended to limit, modify, or supersede the requirements of E-Sign sections 101(d), 101(e), 102(c), 103(a), or 103(b), and the consumer disclosures contained in section 101(c) are incorporated by reference and also apply to intrastate transactions.[26]

Thus, with some exceptions, UETA and E-Sign continue to control electronic commerce in Colorado, including under the HB 21-1124 CCAA amendments.[27]

### *Bringing Entities into the Digital Age*

HB 21-1124 is aimed at facilitating business practices for all Colorado entities in the digital age. To allow Colorado business entities to use rapidly evolving new technology for their governance matters, HB 21-1124 updates the definitions of important terms used throughout the CCAA. For example, in the digital world, even the simple term "address" needed expansion, so CRS § 7-90-102(1) now includes "an address for delivery of an electronic transmission." And subsection (10.5) provides that "deliver" includes mail, "hand delivery by courier or otherwise," and "electronic transmission."

HB 21-1124 also added a number of new definitions to the CCAA to address new concepts, including:

- an electronic "document" (a term fundamental to digital exchanges), which includes "any tangible medium on which information is inscribed" and "an electronic record"[28]; and
- an "electronic record," which is defined broadly to include "information that is stored in an electronic or other nontangible medium and is retrievable in paper form through an automated process used in conventional commercial practice, unless otherwise authorized in accordance with section 7-90-105."[29]

"HB 21-1124 is aimed at facilitating business practices for all Colorado entities in the digital age. To allow Colorado business entities to use rapidly evolving new technology for their governance matters, HB 21-1124 updates the definitions of important terms used throughout the CCAA."

Further, CRS § 7-90-105(2) now provides that an electronic record need not "be directly reproduced in paper form by the recipient through an automated process . . . if the electronic transmission is otherwise retrievable in perceivable form" and "the sender and the recipient have consented in writing to the use of that form of electronic transmission."

Definitions were also added for "electronic mail" and "e-mail,"[30] and for "electronic transmission."[31] CRS § 7-90-105(2) gives further substance to the definition of notice and provides that notice can be given in person, or by telephone, electronic transmission, mail, or private carrier. The definitions of "sign" and "signature" were changed to be more general and applicable to electronic documents.[32] The CCAA's new electronic technology provisions align, in all material respects, with the terminology and concepts of UETA and E-Sign.[33] But the Committee chose not to adopt wholesale the vocabulary and concepts of UETA and E-Sign because:

- Such changes would have involved amending black letter law in over 50 CCAA and CBCA sections. The Committee decided to maintain consistency with existing Colorado terminology.
- UETA and E-Sign each use different terminology, and their vocabulary (particularly the definitions of "record" and "sign"), though technically precise, is not written in the same style as that of the CCAA and the CBCA. For example, the CCAA and CBCA contain the term "unanimous written consent." The comparable term under UETA and E-Sign, "consent in the form of a record," is awkward and less intuitively obvious.
- UETA and E-Sign are inconsistent with the MBCA, which rejects the idea that a voicemail or a text message alone should, as a default, have the same status as a paper document.

HB 21-1124 also eliminates redundancies by defining the terms "writing" and "written" by reference to "information in the form of a document."[34] This change amends the phrase "written notice," which appears throughout CCAA Title 7 and the CBCA. For example, CRS § 7-90-911(2) now provides that a dissolved entity "may deliver notice" rather than "may deliver written notice"; CRS § 7-108-401(1) now permits directors to resign by giving "notice"

rather than "written notice"; and CRS § 7-113-201(3)(a) and (b) provide for "notice" rather than "written notice."

However, the term "written notice" was not changed in the provisions governing the Secretary's processes to avoid substantively changing those processes. And the phrase "written notice" appears throughout statutes governing other Title 7 entities, but the Committee decided to defer to other drafting committees to address the notice requirements in those specific statutes.

Another global change made throughout the CCAA and the CBCA struck the term "mail" and substituted the term "deliver." "Mail" was previously defined by reference to the US mail, and this was determined to be too limiting. "Deliver," as now defined in CRS § 7-90-102(10.5), includes "mail" and many other broader means of delivery. However, as with the term "written notice," the term "mail" was not changed in the Secretary's provisions or specific statutes governing other Title 7 entities for the reasons stated above.

To assist Colorado corporations with keeping their records in electronic form, HB 21-1124 amends CRS § 7-116-101(4). Previously, that section required that corporations maintain their records "in written form *or in another form capable of conversion into written form within a reasonable time*." (Emphasis added.) In light of other changes, "written form" is all that should be required, so HB 21-1124 struck the italicized language. The Committee acknowledges that similar changes may be warranted for

- CRS § 7-56-107(3): "A cooperative shall maintain its records in written form or in another form capable of conversion into written form within a reasonable period of time";
- CRS § 7-80-408(4): "A limited liability company may maintain its records in other than a written form if such form is capable of conversion into written form within a reasonable time"; and
- CRS § 7-136-101(4): "A nonprofit corporation shall maintain its records in written form or in another form capable of conversion into written form within a reasonable time."

### *Must Owners Accept Electronic Delivery?*

Must a shareholder of a Colorado corporation or an owner of another form of Colorado entity accept delivery by electronic mail or other electronic means? The answer is clearly no; electronic delivery cannot be accomplished without the recipient's consent. CRS § 7-90-105(5) now provides that delivery to an owner by electronic transmission is only effective where the electronic transmission is directed to such owner's electronic mail address as provided by the owner. This is also made clear in the definition of the term "deliver," which requires that a notice recipient must have designated "an information processing system . . . for the purpose of receiving electronic transmissions of the type delivered."[35] The recipient may notify the entity of its objection to receiving notice by electronic mail.

This is consistent with UETA and E-Sign, which require that the intended recipient of an electronic notice specifically consent to the receipt of notices by electronic transmission and that the issuer of the notice provide information to the recipient on how to withdraw consent.[36] So long as recipients provide an electronic mail address to the entity, they do not have to opt into electronic delivery; rather, the entity must ensure that electronic delivery is not otherwise prohibited in its governance documents and that the recipient has not otherwise objected to receipt of notices by electronic transmission.

Any notice by electronic mail must include a prominent legend that the communication is an important notice regarding the entity.

## CBCA Amendments

The CCAA amendments discussed above resulted in a number of conforming changes to the CBCA. Perhaps most significantly, the definitions of "notice" in CRS § 7-101-402 and "effective date of notice" in CRS § 7-101-401(15) of the CBCA were deleted and are now both contained in the CCAA at § 7-90-105.

HB 21-1124 also amended CRS § 7-107-104 (Action by written consent) to refer to "documents" instead of "writings" and to permit a consent to be delivered by electronic transmission (in addition to other means). Similarly, CRS § 7-107-203(2) and (4) were amended to provide for electronic delivery of proxies and to make other conforming changes.

### *Corporations May Hold Truly Virtual Meetings*

The pandemic has made it clear that gathering a large number of people in closed spaces can be dangerous. For years, the CBCA has required that Colorado corporations hold "annual meetings of shareholders" "at a time and date" fixed in accordance with the bylaws or a resolution of the directors of the corporation.[37] Annual meetings had to be held "at a place,"[38] and the same requirements applied to special meetings of shareholders.[39] Further, CRS § 7-108-201(1) implied that board of directors meetings had to held at a place by stating that such meetings were to be held "in or out of this state."

Even before the pandemic, the Committee believed that the "place" requirement for meetings needed to be clarified. For example, while the CBCA allowed shareholders to attend some meetings by telecommunication,[40] this allowance did not avoid the requirement that the meeting occur "at a place" to begin with.[41] Accordingly, many business lawyers advised their Colorado corporate clients to meet at the corporate office for shareholder meetings but to limit attendance in the meeting notice by inviting shareholders to participate by telecommunication. While this practice seemed to meet statutory requirements, it made some practitioners uncomfortable, so CRS § 7-107-108 was significantly amended to provide for remote attendance by shareholders at shareholders meetings and for "meetings held solely by remote participation."

Where meetings are to be held solely by remote participation, CRS § 7-107-201(2) requires that the list of shareholders be made available

> [o]n a reasonably accessible electronic network if the information required to gain access to such list is provided with the notice of the meeting. If the corporation determines to make the list available on an electronic network, the corporation may take reasonable steps to ensure that the list is available only to shareholders of the corporation.

Conforming amendments were also made to CRS § 7-107-201(3).

CRS § 7-107-101(2) was amended to provide that "[u]nless the board of directors determines to hold the meeting solely by means of remote communication in accordance with section 7-107-108," annual shareholders' meetings may be held within or outside of Colorado "at the place stated in or fixed in accordance with the bylaws, or, if not so stated or fixed in accordance with the bylaws, at a place stated in or fixed in accordance with a resolution of the board of directors," and if no place is so determined, annual meetings must be held at the corporation's principal office. A similar change was made to CRS § 7-107-102(3) for special meetings of shareholders.

CRS § 7-107-105(1) provides that a shareholders meeting notice must set forth "the date, time, and place, *if any*," of the meeting (emphasis added). A similar change was made to CRS § 7-107-105(5) for adjourned meetings. CRS §§ 7-108-201(1) and -203 were amended similarly to specifically permit directors to hold entirely virtual meetings.

CRS § 7-110-203(1) was amended to specifically permit the bylaws to require shareholders meetings to be held at a place (thereby prohibiting solely virtual meetings) and requiring shareholder approval of any amendment to that provision if initially adopted by the shareholders.

As a result of the above-described amendments, there should be no question that Colorado corporations are able, by statute, to hold truly virtual meetings of shareholders and directors without designating any place for the meeting to be held. But whether is it wise to hold an entirely virtual meeting depends on the circumstances; while they are convenient, such meetings may inhibit, or make difficult, robust discussion and debate, which is an important part of any meeting. Accordingly, the corporation's board of directors should decide if and when virtual meetings may be appropriate. Practitioners should also note that many Colorado corporations incorporate statutory provisions in their articles of incorporation or their bylaws, such as requiring that meetings be held "at a place" designated by the board. If the articles or bylaws restrict the corporation's ability to hold a virtual meeting, the corporation will have to amend its articles or bylaws to eliminate those restrictions before it can hold truly virtual meetings.

### *Must Prior "Virtual" Actions be Ratified?*

During 2020 and early 2021, the many general restrictions imposed on in-person meetings similarly affected Colorado corporations and other business associations. As a result, some Colorado corporations held virtual meetings solely by electronic means without naming a place at which the meetings would be held as was required by the statute and as may have been required by the corporation's articles of incorporation or bylaws.

If a Colorado corporation held an entirely virtual meeting before HB 21-1124 was enacted and did not specify a physical "place" for such meeting, such meeting may not have been properly held under CRS § 7-107-101(2). Therefore, there may be uncertainty as to the validity of the actions approved at that meeting. The authors thus recommend that counsel for boards of directors of corporations who held such virtual meetings carefully consider whether a ratification under CRS § 7-103-106 is necessary or advisable for actions taken at the meetings. Among other things, consideration should be given to the nature of the action approved, the consequences of the unauthorized action, the relationship among the shareholders, and the cost of ratification.

## Governing Documents

Given the scope of HB 21-1124's changes, Colorado business entities should review their governance documents—articles of incorporation, articles of organization, bylaws, operating agreements, partnership agreements, and other applicable agreements—to determine whether the entity's use of electronic recordkeeping, electronic communications, and virtual meetings is restricted. Notwithstanding the new statutory authorization for these practices, an entity's underlying governance documents will control, so entities will want to ensure that their governing documents maintain the desired flexibility.

## Future CBA Committee Work

As noted above, the HB 21-1124 changes to the CCAA and the CBCA suggest that similar changes may be warranted for other acts. The needs for electronic recordkeeping, electronic notices, and the ability to hold solely virtual meetings are at least as significant to nonprofit corporations as they are to CBCA corporations. But entities governed by the current Colorado Nonprofit Corporation Act, the Colorado Uniform Limited Cooperative Act,[42] and the Colorado Cooperative Act[43] cannot hold solely virtual meetings regardless of what their governance documents may say. The authors therefore recommend consideration of whether and how the HB 21-1124 amendments might facilitate business practices for these other business entities.

Committee meetings are announced in Business Law Section newsletters. There is always room for further amendments to facilitate the practices of all business entities. In the meantime, practitioners should email the authors with specific ideas for proposed changes (including proposed language) and with feedback regarding any errors or lack of clarity in the as-amended CCAA and CBCA, as well as in the Colorado Limited Liability Company Act and the various partnership acts. The Committee will consider all suggestions for further actions. CL


**Herrick K. Lidstone Jr.** is a shareholder of the Greenwood Village firm of Burns, Figa & Will, P.C., where he has been president and managing director since 2012. Lidstone practices in the areas of business transactions, including partnerships, limited liability companies, and corporate law; federal and state securities compliance; mergers and acquisitions; contract law; tax law; real estate law; and natural resources law. He is a member of the CBA Business Law Section's executive council. Lidstone is the author of *Securities Law Deskbook* (CBA-CLE 2018) and (with Allen Sparkman) *Limited Liability Companies and Partnerships in Colorado* (CBA-CLE 2015–19). **Avi Loewenstein** is a shareholder at Brownstein Hyatt Farber Shreck in Denver. He represents private equity funds, entrepreneurs, family offices, and private companies in complex business transactions, including mergers and acquisitions, leveraged buyouts, growth equity and minority investments, corporate reorganizations, and general corporate matters—aloewenstein@bhfs.com.

**Coordinating Editor:** David Steigerwald, dps@sparkswillson.com

## NOTES

1. CRS §§ 7-90-101 et seq.

2. CRS §§ 7-101-101 et seq.

3. https://leg.colorado.gov/bills/hb21-1124.

4. HB 21-1124 § 33 and Colo. Const. art. V, § 1(3). Section 33 provides that the "general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, or safety." For a more detailed explanation of the safety clause and its legislative alternatives, *see* Lidstone and Schupbach, "How the Colorado General Assembly Works," 45 *Colo. Law.* 33, 35 (Dec. 2016).

5. HB 21-1124 § 32.

6. CRS § 7-90-102.

7. ABA, Corporate Laws Committee of the Business Law Section, https://www.americanbar.org/groups/business_law/committees/corplaws.

8. Similarly, the Uniform Law Commission, www.uniformlaws.org, treats each of its entities in a stand-alone act. *See, e.g.*, the Uniform Limited Liability Company Act.

9. For example, previously the CBCA required a "corporate report to secretary of state" in CRS § 7-116-107 (formerly CRS § 7-10-101 of the Colorado Corporation Code). Now CRS § 7-116-107 states that "Part 5 of article 90 of this title, providing for periodic reports from reporting entities, applies to domestic corporations and applies to foreign corporations that are authorized to transact business or conduct activities in this state."

10. CRS § 7-90-501.

11. CRS § 7-90-601(2).

12. CRS § 7-90-701(1).

13. CRS §§ 7-90-201 to -206.

14. CRS §§ 7-90-901 to -915.

15. CRS §§ 7-90-701 to -710.

16. *See* Loewenstein and Lidstone, "Revising the Colorado Business Corporation Act and the Colorado Corporations and Associations Act," 48 *Colo. Law.* 26 (Nov. 2019) (discussing changes to the CCAA and the CBCA).

17. *See, e.g.*, CRS §§ 7-111-101.5 ("A domestic corporation may convert into any form of entity pursuant to section 7-90-201."); -102 ("A domestic corporation may be party to an exchange of owners' interests with any other entity pursuant to section 7-90-203.1."); and -106.5 ("One or more domestic corporations may merge with one or more foreign entities if: (a) the merger is permitted by section 7-90-203(2) . . . .").

18. In that connection, it should be noted that many entity statutes include requirements for "notice" or "written notice," and occasionally a definition of "notice" that is much more limited than that now included in the CCAA. *See, e.g.*, CRS § 7-121-402.

19. *See* the definition of "deliver" by electronic transmission in CRS § 7-90-102(10.5)(a). Certain conditions precedent to delivery of notices by electronic transmission include that the recipient owner (shareholder, member, or partner) has designated an information processing system for receipt of electronic transmissions (CRS §§ 7-90-102(10.5)(a)(III) and -105(5)(a)) unless the owner has notified the entity in writing of an objection to receiving the notice by electronic transmission, or the notice is prohibited by CRS Title 7 or the entity's constituent documents. CRS § 7-90-105(5)(a)(I) and (II).

20. CRS § 7-90-105(5).

21. Uniform Electronic Transactions Act (Nat'l Conf. of Comm'rs of Uniform State Laws 1999), codified at CRS §§ 24-71.3-101 et seq.

22. 15 USC §§ 7001 et seq. Similar language is contained in CRS § 7-58-1702, which derives from the Uniform Limited Cooperative Association Act (2007) (ULCAA). The comment to the similar ULCAA provision states: "This section responds to specific language of [E-Sign] and is designed to avoid preemption of state law under that federal legislation."

23. 15 USC § 7001(c).

24. 15 USC § 7003(b). Those notices include court orders or notices and other official court documents; notices of the cancellation or termination of utility services; notices of default, acceleration, repossession, foreclosure, or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, a primary residence of an individual; the cancellation or termination of health insurance or benefits or life insurance benefits; recall of a product, or material failure of a product, that risks endangering health or safety; or any document required to accompany any transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials.

25. 15 USC § 7002.

26. CRS § 24-71.3-103(6).

27. For a more detailed discussion of E-Sign and UETA as adopted in Colorado, *see* "An Overview of Electronic Signatures" (Otten Johnson Alert Dec. 2018), https://www.ottenjohnson.com/news-events-resources/otten-johnson-alerts/2018-otten-johnson-alerts/an-overview-of-electronic-signatures.

28. CRS § 7-90-102(10.7).

29. CRS § 7-90-102(19.8).

30. CRS § 7-90-102(19.7).

31. CRS § 7-90-102(19.9).

32. CRS § 7-90-102(60.5).

33. For a broader discussion, *see* the Official Comment to Section 1.41 of the MBCA (2020), "Note on the relationship between Act provisions on electronic technology and UETA and E-Sign."

34. CRS § 7-90-102(66).

35. CRS § 7-90-102(10.5)(a)(III). It is important to note that "[w]hether a person has so designated an information processing system is determined by the constituent documents or from the context and surrounding circumstances, including the parties' conduct."

36. 15 USC § 7001(c)(1) (E-Sign) and CRS § 24-71.3-103(5)(b), incorporating E-Sign.

37. CRS § 7-107-101(1). This requirement for corporate meetings to be held "at a place" dates back to Colorado's first territorial legislature where an act "to incorporate the Colorado and New Mexico Joint Stock Gold, Silver and Copper Mining Company" was approved November 7, 1861. Section 3 of that Act stated that "[w]hen five hundred shares shall be subscribed," the Directors "shall call a meeting of stockholders for the purpose of electing five Directors; and *appoint the time and place of such meeting* and election" (emphasis added). The session laws dating back to 1861 are available from the University of Colorado's William A. Wise Law Library. The referenced 1861 act is available at https://lawcollections.colorado.edu/colorado-session-laws/islandora/object/session%3A3171.

38. CRS § 7-107-101(2).

39. CRS § 7-107-102.

40. CRS § 7-107-108.

41. Directors can also participate in meetings by telecommunications. CRS § 7-108-201(2).

42. CRS §§ 7-58-506, -507, and -508.

43. CRS § 7-56-302.