

CHAPTER 8. INDEMNIFICATION AND INSURANCE

SUBCHAPTER A. GENERAL PROVISIONS

Revised Law:

Sec. 8.001. DEFINITIONS. In this chapter:

(1) "Delegate" means a person who is serving or who has served as a representative of an enterprise at the request of that enterprise at another enterprise. A person is a delegate to an employee benefit plan if the performance of the person's official duties to the enterprise also imposes duties on or otherwise involves service by the person to the plan or participants in or beneficiaries of the plan.

(2) "Enterprise" means a domestic entity or an organization subject to this chapter, including a predecessor domestic entity or organization.

(3) "Expenses" includes:

(A) court costs, a judgment, a penalty, a settlement, a fine, and an excise or similar tax, including an excise tax assessed against the person with respect to an employee benefit plan; and

(B) reasonable attorney's fees.

(4) "Former governing person" means a person who was a governing person of an enterprise.

(5) "Judgment" includes an arbitration award.

(6) "Official capacity" means:

(A) with respect to a governing person, the office of the governing person in the enterprise or the exercise of authority by or on behalf of the governing person under this code or the governing documents of the enterprise; and

(B) with respect to a person other than a governing person, the elective or appointive office, if any, in the enterprise held by the person or the relationship undertaken by the person on behalf of the enterprise.

(7) "Predecessor enterprise" means a sole proprietorship or organization that is a predecessor to an enterprise in:

(A) a merger, conversion, consolidation, or other transaction in which the liabilities of the predecessor enterprise are transferred or allocated to the enterprise by operation of law; or

(B) any other transaction in which the enterprise assumes the liabilities of the predecessor enterprise and the liabilities that are the subject matter of this chapter are not specifically excluded.

(8) "Proceeding" means:

(A) a threatened, pending, or completed action or other proceeding, whether civil, criminal, administrative, arbitrative, or investigative;

(B) an appeal of an action or proceeding described by Paragraph (A); and

(C) an inquiry or investigation that could lead to an action or proceeding described by Paragraph (A).

(9) "Representative" means a person serving as a partner, director, officer, venturer, proprietor, trustee, employee, or agent of an enterprise or serving a similar function for an enterprise.

(10) "Respondent" means a person named as a respondent or defendant in a proceeding.

Source Law:

TBCA 2.02-1.A(1), (2), (3), (4), (5), P, R & T

A. In this article:

(1) "Corporation" includes any domestic or foreign predecessor entity of the corporation in a merger, conversion, or other transaction in which some or all of the liabilities of the predecessor are transferred to the corporation by operation of law and in any other transaction in which the corporation assumes the liabilities of the predecessor but does not specifically exclude liabilities that are the subject matter of this article.

(2) "Director" means any person who is or was a director of the corporation and any person who, while a director of the corporation, is or was serving at the request of the corporation as a director, officer, partner, venturer, proprietor, trustee, employee, agent, or similar functionary of another foreign or domestic corporation, employee benefit plan, other enterprise, or other entity.

(3) "Expenses" include court costs and attorneys' fees.

(4) "Official capacity" means

(a) when used with respect to a director, the office of director in the corporation, and

(b) when used with respect to a person other than a director, the elective or appointive office in the corporation held by the officer or the employment or agency relationship undertaken by the employee or agent in behalf of the corporation, but

(c) in both Paragraphs (a) and (b) does not include service for any other foreign or domestic corporation or any employee benefit plan, other enterprise, or other entity.

(5) "Proceeding" means any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal,

administrative, arbitratve, or investigative, any appeal in such an action, suit, or proceeding, and any inquiry or investigation that could lead to such an action, suit, or proceeding.

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P. A corporation may indemnify and advance expenses to persons who are not or were not officers, employees, or agents of the corporation but who are or were serving at the request of the corporation as a director, officer, partner, venturer, proprietor, trustee, employee, agent, or similar functionary of another foreign or domestic corporation, employee benefit plan, other enterprise, or other entity to the same extent that it may indemnify and advance expenses to directors under this article.

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R. A corporation may purchase and maintain insurance or another arrangement on behalf of any person who is or was a director, officer, employee, or agent of the corporation or who is or was serving at the request of the corporation as a director, officer, partner, venturer, proprietor, trustee, employee, agent, or similar functionary of another foreign or domestic corporation, employee benefit plan, other enterprise, or other entity,

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T. For purposes of this article, the corporation is deemed to have requested a director to serve as a trustee, employee, agent, or similar functionary of an employee benefit plan whenever the performance by him of his duties to the corporation also imposes duties on or otherwise involves services by him to the plan or participants or beneficiaries of the plan. . . .

TNPCA 2.22A.A(1), (2), (3), (4), (5), P, R & T

A. In this article:

(1) "Corporation" includes any domestic or foreign predecessor entity of the corporation in a merger, consolidation, or other transaction in which the liabilities of the predecessor are transferred to the corporation by operation of law and in any other transaction in which the corporation assumes the liabilities of the predecessor but does not specifically exclude liabilities that are the subject matter of this article.

(2) "Director" means any person who is or was a director of the corporation and any person who, while a director of the corporation, is or was serving at the request of the corporation as a director, officer, partner, venturer, proprietor, trustee, employee, agent, or similar functionary of another foreign or domestic corporation, partnership, joint

venture, sole proprietorship, trust, employee benefit plan, or other enterprise.

(3) "Expenses" includes court costs and attorneys' fees.

(4) "Official capacity" means:

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

(b) when used with respect to a person other than a director, the elective or appointive office in the corporation held by the officer or the employment or agency relationship undertaken by the employee or agent in behalf of the corporation; but

(c) in both Paragraphs (a) and (b) does not include service for any other foreign or domestic corporation or any partnership, joint venture, sole proprietorship, trust, employee benefit plan, or other enterprise.

(5) "Proceeding" means any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, arbitrative, or investigative, any appeal in such an action, suit, or proceeding, and any inquiry or investigation that could lead to such an action, suit, or proceeding.

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P. A corporation may indemnify and advance expenses to a person who is not or was not an officer, employee, or agent of the corporation but who is or was serving at the request of the corporation as a director, officer, partner, venturer, proprietor, trustee, employee, agent, or similar functionary of another foreign or domestic corporation, partnership, joint venture, sole proprietorship, trust, employee benefit plan, or other enterprise to the same extent that it may indemnify and advance expenses to directors under this article.

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R. (1) A corporation may purchase and maintain insurance on behalf of any person who is or was a director, officer, employee, or agent of the corporation or who is or was serving at the request of the corporation as a director, officer, partner, venturer, proprietor, trustee, employee, agent, or similar functionary of another foreign or domestic corporation, partnership, joint venture, sole proprietorship, trust, employee benefit plan, or other enterprise

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T. For purposes of this article, the corporation is deemed to have requested a director to serve an employee benefit plan whenever the performance by him of his duties to the corporation also imposes duties on or otherwise involves

services by him to the plan or participants or beneficiaries of the plan. . . .

TREITA 9.20(A)(1), (3), (4), (5), (P), (R) & (T)

(1) "Trust Manager" means any person who is or was a trust manager of the real estate investment trust and any person who, while a trust manager of the real estate investment trust, is or was serving, at the request of the real estate investment trust as a trust manager, director, officer, partner, venturer, proprietor, trustee, employee, agent, or similar functionary of another real estate investment trust, foreign or domestic corporation, partnership, joint venture, sole proprietorship, trust, employee benefit plan, or other enterprise.

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(3) "Official capacity":

(a) when used with respect to a trust manager, means the office of trust manager in the real estate investment trust; and

(b) when used with respect to a person other than a trust manager, means the elective or appointive office in the real estate investment trust held by the officer or the employment or agency relationship undertaken by the employee or agent in behalf of the real estate investment trust; but

(c) in both paragraphs (a) and (b) does not include service for any other real estate investment trust or foreign or domestic corporation or any partnership, joint venture, sole proprietorship, trust, employee benefit plan, or other enterprise.

(4) "Proceeding" means any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, arbitratve, or investigative, any appeal in such an action, suit, or proceeding, and any inquiry or investigation that could lead to such an action, suit, or proceeding.

(5) "Real estate investment trust" includes any domestic or foreign predecessor of the real estate investment trust in a merger, consolidation, or other transaction in which the liabilities of the predecessor are transferred to the real estate investment trust by operation of law and in any other transaction in which the real estate investment trust assumes the liabilities of the predecessor but does not specifically exclude liabilities that are the subject matter of this Section.

* * *

(P) A real estate investment trust may indemnify and advance expenses to persons who are not or were not officers, employees, or agents of the real estate investment trust but who are or were serving at the request of the real estate

investment trust as a trust manager, director, officer, partner, venturer, proprietor, trustee, employee, agent, or similar functionary of another real estate investment trust or of a foreign or domestic corporation, partnership, joint venture, sole proprietorship, trust, employee benefit plan, or other enterprise to the same extent that it may indemnify and advance expenses to trust managers under this Section.

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(R) A real estate investment trust may purchase and maintain insurance or another arrangement on behalf of any person who is or was a trust manager officer, employee, or agent of the real estate investment trust or who is or was serving at the request of the real estate investment trust as a trust manager or a director, officer, partner, venturer, proprietor, trustee, employee, agent, or similar functionary of another real estate investment trust or of a foreign or domestic corporation, partnership, joint venture, sole proprietorship, trust, employee benefit plan, or other enterprise,

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(T) For purposes of this Section, the real estate investment trust is deemed to have requested a trust manager to serve an employee benefit plan whenever the performance by him of his duties to the real estate investment trust also imposes duties on or otherwise involves services by him to the plan or participants or beneficiaries of the plan. . . .

TRLPA 11.01(1), (2), (3), (4), (5), (6) & (7)

(1) "Limited partnership" includes a domestic or foreign predecessor entity of the limited partnership in a merger, consolidation, or other transaction in which the liabilities of the predecessor are transferred to the limited partnership by operation of law and in any other transaction in which the limited partnership assumes the liabilities of the predecessor but does not specifically exclude liabilities that are governed by this article.

(2) "Enterprise" means a foreign or domestic limited partnership, corporation, general partnership, joint venture, sole proprietorship, trust, employee benefit plan, or similar entity.

(3) "Expenses" includes court costs and attorney's fees.

(4) "General partner" includes:

(A) any person who, while a general partner of a limited partnership, is or was serving at the request of the limited partnership as a representative of an enterprise; and

(B) a representative of an enterprise that is a general partner of the limited partnership.

(5) "Official capacity" means:

(A) if used with respect to a general partner, the exercise of authority by or on behalf of a general partner under this Act or the partnership agreement, other than service for another enterprise; and

(B) if used with respect to a limited partner, employee, or agent, the relationship undertaken by the limited partner, employee, or agent on behalf of the limited partnership, other than service for another enterprise.

(6) "Proceeding" means any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, arbitrative, or investigative, any appeal in such an action, suit, or proceeding, and any inquiry or investigation that could lead to such an action, suit, or proceeding.

(7) "Representative" means a person serving as a partner, director, officer, venturer, proprietor, trustee, employee, or agent of an enterprise or serving a similar function for an enterprise.

TRLPA 11.16

Sec. 11.16. A limited partnership may indemnify and advance expenses to persons who are not or were not limited partners, employees, or agents of the limited partnership but who are or were serving at the request of the limited partnership as a representative of another enterprise to the same extent that it may indemnify and advance expenses to a general partner under this article.

TRLPA 11.18

Sec. 11.18. Except as otherwise provided by this article, and unless otherwise provided by the partnership agreement, a limited partnership may purchase and maintain insurance or another arrangement on behalf of any person who is or was a general partner, limited partner, employee, or agent of the limited partnership, or who is or was serving at the request of the limited partnership as a representative of another enterprise,

TRLPA 11.20

Sec. 11.20. For purposes of this article, the limited partnership is considered to have requested a general partner to serve an employee benefit plan if the performance by a general partner of the general partner's duties to the limited partnership also imposes duties on or otherwise involves services by the general partner to the plan or participants in or beneficiaries of the plan. . . .

Revisor's Note:

No substantive change is intended. The Section contains definitions for Chapter 8 but does not include one for "governing person" which is defined in Chapter 1, Section

1.002(41). The term "governing person" substitutes for the source law terms director, trust manager or general partner.

"Delegate" is new; it defines without material change the relationships described but not defined in operative sections TBCA 2.02-1P, R and T, TNPCA 2.22.A.P, R and T, TREITA 9.20(P), (R) and (T), and TRLPA 11.16, 11.18 and 11.20.

"Enterprise" includes "organization," which is defined in Section 1.002(66) to include all these entities in the source law: "corporation, limited or general partnership, limited liability company, . . . real estate investment trust" Other entities included in "organization" and, therefore, in "enterprise" and Chapter 8 - "joint stock company, cooperative, association, bank, insurance company, credit union, savings and loan association, or other organization" - lack express indemnification provisions. However, many entities or organizations, including for example professional associations (Tex. Rev. Civ. Stat. Ann. art. 1528f §25) and banks (Tex. Finance Code §31.006), incorporate corporate law to supplement their governing statutes and thereby already incorporate the existing indemnification provisions contained in the TBCA and the TNPCA.

Chapter 8 does not apply to unincorporated nonprofit associations by virtue of Section _____.

Revised Law:

Sec. 8.002. APPLICATION OF CHAPTER. (a) Except as provided by Subsection (b), this chapter does not apply to a:

- (1) general partnership; or
- (2) limited liability company.

(b) The governing documents of a general partnership or limited liability company may adopt provisions of this chapter or may contain enforceable provisions relating to:

- (1) indemnification;
- (2) advancement of expenses; or
- (3) insurance or another arrangement to indemnify or hold harmless a governing person.

Source Law:

TLLCA 2.20.A

Art. 2.20. A. Subject to such standards and restrictions, if any, as are set forth in its articles of organization or in its regulations, a limited liability company shall have power to indemnify members and managers, officers, and other persons and purchase and maintain liability insurance for such persons.

TRPA 1.03(a)

Art. 6132b-1.03. Effect of Partnership Agreement; Nonwaivable and Variable Provisions

(a) Partnership Agreement Controls. Except as provided by Subsection (b), a partnership agreement governs the relations of the partners and between the partners and the partnership. To the extent that the partnership agreement does not otherwise provide, this Act governs the relations of the partners and between the partners and the partnership.

Revisor's Note:

No substantive change is intended. General partnerships and limited liability companies have no statutory limitations on indemnification, advancement of expenses or insurance for their governing persons.

Revised Law:

Sec. 8.003. LIMITATIONS IN GOVERNING DOCUMENTS. (a) The certificate of formation of an enterprise may restrict the circumstances under which the enterprise must or may indemnify or may advance expenses to a person under this chapter.

(b) The written partnership agreement of a limited partnership may restrict the circumstances in the same manner as the certificate of formation under Subsection (a).

Source Law:

TBCA 2.02-1.M & U

M. A provision for a corporation to indemnify or to advance expenses to a director who was, is, or is threatened to be made a named defendant or respondent in a proceeding, whether contained in the articles of incorporation, the bylaws, a resolution of shareholders or directors, an agreement, or otherwise, except in accordance with Section R of this article, is valid only to the extent it is consistent with this article as limited by the articles of incorporation, if such a limitation exists.

* * *

U. The articles of incorporation of a corporation may restrict the circumstances under which the corporation is required or permitted to indemnify a person under Section H, I, J, O, P, or Q of this article.

TNPCA 2.22A.M & U

M. A provision for a corporation to indemnify or to advance expenses to a director who was, is, or is threatened to be made a named defendant or respondent in a proceeding, whether contained in the articles of incorporation, the bylaws, a resolution of members or directors, an agreement, or otherwise, except in accordance with Section R of this article, is valid only to the extent it is consistent with this article as

limited by the articles of incorporation, if such a limitation exists.

* * *

U. The articles of incorporation of a corporation may restrict the circumstances under which the corporation is required or permitted to indemnify a person under Section H, I, J, O, P, or Q of this article.

TREITA 9.20(M) & (U)

(M) A provision for a real estate investment trust to indemnify or to advance expenses to a trust manager who was, is, or is threatened to be made a named defendant or respondent in a proceeding, whether contained in the declaration of trust, the bylaws, a resolution of shareholders or trust managers, an agreement, or otherwise, except in accordance with Subsection (R) of this Section, is valid only to the extent it is consistent with this Section as limited by the declaration of trust, if such a limitation exists.

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(U) The declaration of trust of a real estate investment trust may restrict the circumstances under which the real estate investment trust is required or permitted to indemnify a person under Subsection (H), (I), (J), (O), (P), or (Q) of this Section.

TRLPA 11.13

Sec. 11.13. A provision for a limited partnership to indemnify or to advance expenses to a general partner who was, is, or is threatened to be made a named defendant or respondent in a proceeding, whether contained in the limited partnership agreement, a resolution of the general partners or the limited partners, an agreement, or otherwise, except in accordance with Section 11.18 of this Act, is valid only to the extent that it is consistent with this article or with the applicable reimbursement provisions of the Texas Uniform Partnership Act (Article 6132b, Vernon's Texas Civil Statutes), or the Texas Revised Partnership Act and its subsequent amendments as limited by the limited partnership agreement, if such a limitation exists.

TRLPA 11.21

Sec. 11.21. The written partnership agreement of a limited partnership may restrict the circumstances under which the limited partnership is required or permitted to indemnify a person under Section 11.08, 11.09, 11.10, 11.15, 11.16, or 11.17.

Revisor's Note:

No substantive change is intended.

Revised Law:

Sec. 8.004. LIMITATIONS IN CHAPTER. Except as provided in Section 8.151, a provision for an enterprise to indemnify or advance expenses to a governing person is valid only to the extent it is consistent with this chapter.

Source Law:

TBCA 2.02-1.M

M. A provision for a corporation to indemnify or to advance expenses to a director who was, is, or is threatened to be made a named defendant or respondent in a proceeding, whether contained in the articles of incorporation, the bylaws, a resolution of shareholders or directors, an agreement, or otherwise, except in accordance with Section R of this article, is valid only to the extent it is consistent with this article as limited by the articles of incorporation, if such a limitation exists.

TNPCA 2.22A.M

M. A provision for a corporation to indemnify or to advance expenses to a director who was, is, or is threatened to be made a named defendant or respondent in a proceeding, whether contained in the articles of incorporation, the bylaws, a resolution of members or directors, an agreement, or otherwise, except in accordance with Section R of this article, is valid only to the extent it is consistent with this article as limited by the articles of incorporation, if such a limitation exists.

TREITA 9.20(M)

(M) A provision for a real estate investment trust to indemnify or to advance expenses to a trust manager who was, is, or is threatened to be made a named defendant or respondent in a proceeding, whether contained in the declaration of trust, the bylaws, a resolution of shareholders or trust managers, an agreement, or otherwise, except in accordance with Subsection (R) of this Section, is valid only to the extent it is consistent with this Section as limited by the declaration of trust, if such a limitation exists.

TRLPA 11.13

Sec. 11.13. A provision for a limited partnership to indemnify or to advance expenses to a general partner who was, is, or is threatened to be made a named defendant or respondent in a proceeding, whether contained in the limited partnership agreement, a resolution of the general partners or the limited partners, an agreement, or otherwise, except in accordance with Section 11.18 of this Act, is valid only to the extent that it is consistent with this article or with the applicable reimbursement provisions of the Texas Uniform Partnership Act (Article 6132b, Vernon's Texas Civil Statutes), or the Texas Revised Partnership Act and its subsequent amendments as limited by the limited partnership agreement, if such a limitation exists.

Revisor's Note:

No substantive change is intended.

(Sections 8.005-8.050 reserved for expansion)

SUBCHAPTER B. MANDATORY AND COURT-ORDERED INDEMNIFICATION

Revised Law:

Sec. 8.051. MANDATORY INDEMNIFICATION. (a) An enterprise shall indemnify a governing person or former governing person against reasonable expenses actually incurred by the person in connection with a proceeding in which the person is a respondent because the person is or was a governing person if the person is wholly successful, on the merits or otherwise, in the defense of the proceeding.

(b) A court that determines, in a suit for indemnification, that a governing person is entitled to indemnification under this section shall order indemnification and award to the person the expenses incurred in securing the indemnification.

Source Law:

TBCA 2.02-1.H & I

H. A corporation shall indemnify a director against reasonable expenses incurred by him in connection with a proceeding in which he is a named defendant or respondent because he is or was a director if he has been wholly successful, on the merits or otherwise, in the defense of the proceeding.

I. If, in a suit for the indemnification required by Section H of this article, a court of competent jurisdiction determines that the director is entitled to indemnification under that section, the court shall order indemnification and shall award to the director the expenses incurred in securing the indemnification.

TNPCA 2.22A.H & I

H. A corporation shall indemnify a director against reasonable expenses incurred by him in connection with a proceeding in which he is a named defendant or respondent because he is or was a director if he has been wholly successful, on the merits or otherwise, in the defense of the proceeding.

I. If, in a suit for the indemnification required by Section H of this article, a court of competent jurisdiction determines that the director is entitled to indemnification under that section, the court shall order indemnification and shall award to the director the expenses incurred in securing the indemnification.

TREITA 9.20(H) & (I)

(H) A real estate investment trust shall indemnify a trust manager against reasonable expenses incurred by him in connection with a proceeding in which he is a named defendant or respondent because he is or was a trust manager if he has

been wholly successful, on the merits or otherwise, in the defense of the proceeding.

(I) If, in a suit for the indemnification required by Subsection (H) of this Section, a court of competent jurisdiction determines that the trust manager is entitled to indemnification under that Subsection, the court shall order indemnification and shall award to the trust manager the expenses incurred in securing the indemnification.

TRLPA 11.08

Sec. 11.08. A limited partnership shall indemnify a general partner against reasonable expenses incurred by the general partner in connection with a proceeding in which the general partner is a named defendant or respondent because the general partner is or was a general partner if the general partner has been wholly successful, on the merits or otherwise, in the defense of the proceeding.

TRLPA 11.09

Sec. 11.09. If, in a suit for the indemnification required by Section 11.08 of this Act, a court of competent jurisdiction determines that the general partner is entitled to indemnification under that section, the court shall order indemnification and shall award to the general partner the expenses incurred in securing the indemnification.

Revisor's Note:

No substantive change is intended.

Revised Law:

Sec. 8.052. COURT-ORDERED INDEMNIFICATION. (a) On application of a governing person, former governing person, or delegate and after notice is provided as required by the court, a court may order an enterprise to indemnify the person to the extent the court determines that the person is fairly and reasonably entitled to indemnification in view of all the relevant circumstances.

(b) This section applies without regard to whether the governing person, former governing person, or delegate applying to the court satisfies the requirements of Section 8.101 or has been found liable:

(1) to the enterprise; or

(2) because the person improperly received a personal benefit, without regard to whether the benefit resulted from an action taken in the person's official capacity.

(c) The indemnification ordered by the court under this section is limited to reasonable expenses if the governing person, former governing person, or delegate is found liable:

(1) to the enterprise; or

(2) because the person improperly received a personal benefit, without regard to whether the benefit resulted from an action taken in the person's official capacity.

Source Law:

TBCA 2.02-1.J

J. If, upon application of a director, a court of competent jurisdiction determines, after giving any notice the court considers necessary, that the director is fairly and reasonably entitled to indemnification in view of all the relevant circumstances, whether or not he has met the requirements set forth in Section B of this article or has been found liable in the circumstances described by Section C of this article, the court may order the indemnification that the court determines is proper and equitable; but if the person is found liable to the corporation or is found liable on the basis that personal benefit was improperly received by the person, the indemnification shall be limited to reasonable expenses actually incurred by the person in connection with the proceeding.

TNPCA 2.22A.J

J. If, upon application of a director, a court of competent jurisdiction determines, after giving any notice the court considers necessary, that the director is fairly and reasonably entitled to indemnification in view of all the relevant circumstances, whether or not he has met the requirements set forth in Section B of this article or has been found liable in the circumstances described by Section C of this article, the court may order the indemnification that the court determines is proper and equitable; but if the person is found liable to the corporation or is found liable on the basis that personal benefit was improperly received by the person, the indemnification shall be limited to reasonable expenses actually incurred by the person in connection with the proceeding.

TREITA 9.20(J)

(J) If, upon application of a trust manager, a court of competent jurisdiction determines, after giving any notice the court considers necessary, that the trust manager is fairly and reasonably entitled to indemnification in view of all the relevant circumstances, whether or not he has met the requirements set forth in Subsection (B) of this Section or has been found liable in the circumstances described by Subsection (C) of this Section, the court may order the indemnification that the court determines is proper and equitable; but if the trust manager is found liable to the real estate investment trust or is found liable on the basis that personal benefit was improperly received by the trust manager, the indemnification shall be limited to reasonable expenses actually incurred by the trust manager in connection with the proceeding.

TRLPA 11.10

Sec. 11.10. If, on application of a general partner, a court of competent jurisdiction determines, after giving notice that the

court considers necessary, that the general partner is fairly and reasonably entitled to indemnification in view of all the relevant circumstances, whether the general partner has met the requirements set forth in Section 11.02 of this Act or has been adjudged liable in the circumstances described by Section 11.03 of this Act, the court may order the indemnification that the court determines is proper and equitable. The court shall limit indemnification to reasonable expenses if the general partner is found liable to the limited partnership or the limited partners or if the general partner is found liable on the basis that personal benefit was improperly received by the general partner, whether or not the benefit resulted from an action taken in the general partner's official capacity.

Revisor's Note:

No substantive change is intended.

(Sections 8.053-8.100 reserved for expansion)

SUBCHAPTER C. PERMISSIVE INDEMNIFICATION AND ADVANCEMENT OF EXPENSES

Revised Law:

Sec. 8.101. PERMISSIVE INDEMNIFICATION. (a) An enterprise may indemnify a governing person, former governing person, or delegate who was, is, or is threatened to be made a respondent in a proceeding to the extent permitted by Section 8.102 if it is determined in accordance with Section 8.103 that:

(1) the person:

(A) acted in good faith;

(B) reasonably believed:

(i) in the case of conduct in the person's official capacity, that the person's conduct was in the enterprise's best interests; and

(ii) in any other case, that the person's conduct was not opposed to the enterprise's best interests; and

(C) in the case of a criminal proceeding, did not have a reasonable cause to believe the person's conduct was unlawful;

(2) with respect to expenses, the amount of expenses other than a judgment is reasonable; and

(3) indemnification should be paid.

(b) Action taken or omitted by a governing person or delegate with respect to an employee benefit plan in the performance of the person's duties for a purpose reasonably believed by the person to be in the interest of the participants and beneficiaries of the plan is for a purpose that is not opposed to the best interests of the enterprise.

(c) Action taken or omitted by a delegate to another enterprise for a purpose reasonably believed by the delegate to be in the interest of the other enterprise or its owners or members is for a purpose that is not opposed to the best interests of the enterprise.

(d) A person does not fail to meet the standard under Subsection (a)(1) solely because of the termination of a proceeding by:

- (1) judgment;
- (2) order;
- (3) settlement;
- (4) conviction; or
- (5) a plea of nolo contendere or its equivalent.

Source Law:

TBCA 2.02-1.B, D, G, P & T

B. A corporation may indemnify a person who was, is, or is threatened to be made a named defendant or respondent in a proceeding because the person is or was a director only if it is determined in accordance with Section F of this article that the person:

- (1) conducted himself in good faith;
- (2) reasonably believed:

(a) in the case of conduct in his official capacity as a director of the corporation, that his conduct was in the corporation's best interests; and

(b) in all other cases, that his conduct was at least not opposed to the corporation's best interests; and

(3) in the case of any criminal proceeding, had no reasonable cause to believe his conduct was unlawful.

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D. The termination of a proceeding by judgment, order, settlement, or conviction, or on a plea of nolo contendere or its equivalent is not of itself determinative that the person did not meet the requirements set forth in Section B of this article. . . .

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G. Authorization of indemnification and determination as to reasonableness of expenses must be made in the same manner as the determination that indemnification is permissible,

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P. A corporation may indemnify and advance expenses to persons who are not or were not officers, employees, or agents of the corporation but who are or were serving at the request of the corporation as a director, officer, partner, venturer, proprietor, trustee, employee, agent, or similar functionary of another foreign or domestic corporation, employee benefit plan, other enterprise, or other entity to the same extent that it may indemnify and advance expenses to directors under this article.

* * *

T. . . . Action taken or omitted by a director with respect to an employee benefit plan in the performance of his duties for a purpose reasonably believed by him to be in the interest of the participants and beneficiaries of the plan is deemed to be for a purpose which is not opposed to the best interests of the corporation.

TNPCA 2.22A.B, D, G, P & T

B. A corporation may indemnify a person who was, is, or is threatened to be made a named defendant or respondent in a proceeding because the person is or was a director only if it is determined in accordance with Section F of this article that the person:

(1) conducted himself in good faith;

(2) reasonably believed:

(a) in the case of conduct in his official capacity as a director of the corporation, that his conduct was in the corporation's best interests; and

(b) in all other cases, that his conduct was at least not opposed to the corporation's best interests; and

(3) in the case of any criminal proceeding, had no reasonable cause to believe his conduct was unlawful.

* * *

D. The termination of a proceeding by judgment, order, settlement, or conviction or on a plea of nolo contendere or its equivalent is not of itself determinative that the person did not meet the requirements set forth in Section B of this article. . . .

* * *

G. Authorization of indemnification and determination as to reasonableness of expenses must be made in the same manner as the determination that indemnification is permissible,

* * *

P. A corporation may indemnify and advance expenses to a person who is not or was not an officer, employee, or agent of the corporation but who is or was serving at the request of the corporation as a director, officer, partner, venturer, proprietor, trustee, employee, agent, or similar functionary of another foreign or domestic corporation, partnership, joint venture, sole proprietorship, trust, employee benefit plan, or other enterprise to the same extent that it may indemnify and advance expenses to directors under this article.

* * *

T. . . . Action taken or omitted by him with respect to an employee benefit plan in the performance of his duties for a purpose reasonably believed by him to be in the interest of the participants and beneficiaries of the plan is deemed to be for a purpose which is not opposed to the best interests of the corporation.

TREITA 9.20(B), (D), (G), (P) & (T)

(B) A real estate investment trust may indemnify a person who was, is, or is threatened to be made a named defendant or respondent in a proceeding because the person is or was a trust manager only if it is determined in accordance with Subsection (F) of this Section that the person:

(1) conducted himself in good faith;

(2) reasonably believed:

(a) in the case of conduct in his official capacity as a trust manager of the real estate investment trust, that his conduct was in the real estate investment trust's best interests; and

(b) in all other cases, that his conduct was at least not opposed to the real estate investment trust's best interests; and

(3) in the case of any criminal proceeding, had no reasonable cause to believe that his conduct was unlawful.

* * *

(D) The termination of a proceeding by judgment, order, settlement, or conviction, or on a plea of nolo contendere or its equivalent is not of itself determinative that the person did not meet the requirements set forth in Subsection (B) of this Section. . . .

* * *

(G) Authorization of indemnification and determination as to reasonableness of expenses must be made in the same manner as the determination that indemnification is permissible,

* * *

(P) A real estate investment trust may indemnify and advance expenses to persons who are not or were not officers, employees, or agents of the real estate investment trust but who are or were serving at the request of the real estate investment trust as a trust manager, director, officer, partner, venturer, proprietor, trustee, employee, agent, or similar functionary of another real estate investment trust or of a foreign or domestic corporation, partnership, joint venture, sole proprietorship, trust, employee benefit plan, or other enterprise to the same extent that it may indemnify and advance expenses to trust managers under this Section.

* * *

(T) . . . Action taken or omitted by him with respect to an employee benefit plan in the performance of his duties for a purpose reasonably believed by him to be in the interest of the participants and beneficiaries of the plan is deemed to be for a purpose which is not opposed to the best interests of the real estate investment trust.

TRLPA 11.02

Sec. 11.02. If provided in a written partnership agreement, a limited partnership may indemnify a person who was, is, or is threatened to be made a named defendant or respondent in a proceeding because the person is or was a general partner only if it is determined in accordance with Section 11.06 of this Act that the person:

(1) acted in good faith;

(2) reasonably believed:

(A) in the case of conduct in the person's official capacity as a general partner of the limited partnership, that the person's conduct was in the limited partnership's best interests; and

(B) in all other cases, that the person's conduct was at least not opposed to the limited partnership's best interests; and

(3) in the case of a criminal proceeding, had no reasonable cause to believe that the person's conduct was unlawful.

TRLPA 11.04

Sec. 11.04. The termination of a proceeding by judgment, order, settlement, conviction, or on a plea of nolo contendere or its equivalent does not alone determine that the person did not meet the requirements provided by Section 11.02 of this Act.

. . .

TRLPA 11.07

Sec. 11.07. Authorization of indemnification and determination of a reasonableness of expenses must be made in the same manner

as the determination that indemnification is permissible,
. . . .

TRLPA 11.20

. . . Action taken or omitted by a general partner with respect to an employee benefit plan in the performance of the general partner's duties for a purpose reasonably believed by the general partner to be in the interest of the participants and beneficiaries of the plan is considered to be for a purpose that is not opposed to the best interests of the limited partnership.

Revisor's Note:

No substantive change is intended.

Revised Law:

Sec. 8.102. GENERAL SCOPE OF PERMISSIVE INDEMNIFICATION. (a) Subject to Subsection (b), an enterprise may indemnify a governing person, former governing person, or delegate against:

(1) a judgment; and

(2) expenses, other than a judgment, that are reasonable and actually incurred by the person in connection with a proceeding.

(b) Indemnification under this subchapter of a person who is found liable to the enterprise or is found liable because the person improperly received a personal benefit:

(1) is limited to reasonable expenses actually incurred by the person in connection with the proceeding;

(2) does not include a judgment, a penalty, a fine, and an excise or similar tax, including an excise tax assessed against the person with respect to an employee benefit plan; and

(3) may not be made in relation to a proceeding in which the person has been found liable for:

(A) wilful or intentional misconduct in the performance of the person's duty to the enterprise;

(B) breach of the person's duty of loyalty owed to the enterprise; or

(C) an act or omission not committed in good faith that constitutes a breach of a duty owed by the person to the enterprise.

(c) A governing person, former governing person, or delegate is considered to have been found liable in relation to a claim, issue, or matter only if the liability is established by an order, including a judgment or decree of a court, and all appeals of the order are exhausted or foreclosed by law.

Source Law:

TBCA 2.02-1.C, D, E & P

C. Except to the extent permitted by Section E of this article, a director may not be indemnified under Section B of this article in respect of a proceeding:

(1) in which the person is found liable on the basis that personal benefit was improperly received by him, whether or not the benefit resulted from an action taken in the person's official capacity; or

(2) in which the person is found liable to the corporation.

D. . . . A person shall be deemed to have been found liable in respect of any claim, issue or matter only after the person shall have been so adjudged by a court of competent jurisdiction after exhaustion of all appeals therefrom.

E. A person may be indemnified under Section B of this article against judgments, penalties (including excise and similar taxes), fines, settlements, and reasonable expenses actually incurred by the person in connection with the proceeding; but if the person is found liable to the corporation or is found liable on the basis that personal benefit was improperly received by the person, the indemnification (1) is limited to reasonable expenses actually incurred by the person in connection with the proceeding and (2) shall not be made in respect of any proceeding in which the person shall have been found liable for willful or intentional misconduct in the performance of his duty to the corporation.

* * *

P. A corporation may indemnify and advance expenses to persons who are not or were not officers, employees, or agents of the corporation but who are or were serving at the request of the corporation as a director, officer, partner, venturer, proprietor, trustee, employee, agent, or similar functionary of another foreign or domestic corporation, employee benefit plan, other enterprise, or other entity to the same extent that it may indemnify and advance expenses to directors under this article.

TNPCA 2.22A.C, D, E & P

C. Except to the extent permitted by Section E of this article, a director may not be indemnified under Section B of this article in respect of a proceeding:

(1) in which the person is found liable on the basis that personal benefit was improperly received by him, whether or not the benefit resulted from an action taken in the person's official capacity; or

(2) in which the person is found liable to the corporation.

D. . . . A person shall be deemed to have been found liable in respect of any claim, issue or matter only after the person

shall have been so adjudged by a court of competent jurisdiction after exhaustion of all appeals therefrom.

E. A person may be indemnified under Section B of this article against judgments, penalties (including excise and similar taxes), fines, settlements, and reasonable expenses actually incurred by the person in connection with the proceeding; but if the person is found liable to the corporation or is found liable on the basis that personal benefit was improperly received by the person, the indemnification (1) is limited to reasonable expenses actually incurred by the person in connection with the proceeding, and (2) shall not be made in respect of any proceeding in which the person shall have been found liable for willful or intentional misconduct in the performance of his duty to the corporation.

* * *

P. A corporation may indemnify and advance expenses to a person who is not or was not an officer, employee, or agent of the corporation but who is or was serving at the request of the corporation as a director, officer, partner, venturer, proprietor, trustee, employee, agent, or similar functionary of another foreign or domestic corporation, partnership, joint venture, sole proprietorship, trust, employee benefit plan, or other enterprise to the same extent that it may indemnify and advance expenses to directors under this article.

TREITA 9.20(C), (D), (E) & (P)

(C) Except to the extent permitted by Subsection (E) of this Section, a trust manager may not be indemnified under Subsection (B) of this Section in respect of a proceeding:

(1) in which the person is found liable on the basis that personal benefit was improperly received by him, whether or not the benefit resulted from an action taken in the person's official capacity; or

(2) in which the person is found liable to the real estate investment trust.

(D) . . . A person shall be deemed to have been found liable in respect of any claim, issue, or matter only after the person shall have been so adjudged by a court of competent jurisdiction after exhaustion of all appeals therefrom.

(E) A person may be indemnified under Subsection (B) of this Section against judgments, penalties (including excise and similar taxes), fines, settlements, and reasonable expenses actually incurred by the person in connection with the proceeding; but if the person is found liable to the real estate investment trust or is found liable on the basis that personal benefit was improperly received by the person, the indemnification (1) is limited to reasonable expenses actually incurred by the person in connection with the proceeding, and (2) shall not be made in respect of any proceeding in which the person shall have been found liable for wilful or intentional

misconduct in the performance of his duty to the real estate investment trust.

* * *

(P) A real estate investment trust may indemnify and advance expenses to persons who are not or were not officers, employees, or agents of the real estate investment trust but who are or were serving at the request of the real estate investment trust as a trust manager, director, officer, partner, venturer, proprietor, trustee, employee, agent, or similar functionary of another real estate investment trust or of a foreign or domestic corporation, partnership, joint venture, sole proprietorship, trust, employee benefit plan, or other enterprise to the same extent that it may indemnify and advance expenses to trust managers under this Section.

TRLPA 11.03

Sec. 11.03. Except to the extent permitted by Section 11.05 of this Act, a general partner may not be indemnified under Section 11.02 of this Act with respect to a proceeding in which:

(1) the person is found liable on the basis that the person improperly received personal benefit, whether or not the benefit resulted from an action taken in the person's official capacity; or

(2) the person is found liable to the limited partnership or the limited partners.

TRLPA 11.04

. . . A person is considered to have been found liable in relation to any claim, issue, or matter only if the person has been adjudged liable by a court of competent jurisdiction and all appeals have been exhausted.

TRLPA 11.05

Sec. 11.05. A general partner may be indemnified under Section 11.02 of this Act against judgments, penalties, including excise and similar taxes, fines, settlements, and reasonable expenses actually incurred by the person in connection with the proceeding, except that if the person is found liable to the limited partnership or the limited partners or is found liable on the basis that the person improperly received personal benefit, the indemnification:

(1) is limited to reasonable expenses actually incurred by the person in connection with the proceeding; and

(2) shall not be made in relation to a proceeding in which the person has been found liable for wilful or intentional misconduct in the performance of the person's duty to the limited partnership or the limited partners.

TRLPA 11.16

Sec. 11.16. A limited partnership may indemnify and advance expenses to persons who are not or were not limited partners,

employees, or agents of the limited partnership but who are or were serving at the request of the limited partnership as a representative of another enterprise to the same extent that it may indemnify and advance expenses to a general partner under this article.

Revisor's Note:

No substantive change is intended.

Revised Law:

Sec. 8.103. MANNER FOR DETERMINING PERMISSIVE INDEMNIFICATION. (a) Except as provided by Subsections (b) and (c), the determinations required under Section 8.101(a) must be made by:

(1) a majority vote of a quorum composed of the governing persons who at the time of the vote are disinterested and independent;

(2) if a quorum described by Subdivision (1) cannot be obtained, a majority vote of a committee of the governing authority of the enterprise designated to act in the matter by a majority vote of the governing persons and composed solely of one or more governing persons who at the time of the vote are disinterested and independent;

(3) special legal counsel selected by the governing authority of the enterprise, or selected by a committee of the board of directors, by vote in accordance with Subdivision (1) or (2) or, if a quorum described by Subdivision (1) cannot be obtained and a committee described by Subdivision (2) cannot be established, by a majority vote of the governing persons of the enterprise;

(4) the owners or members of the enterprise in a vote that excludes the ownership or membership interests held by each governing person who is not disinterested and independent; or

(5) a unanimous vote of the owners or members of the enterprise.

(b) If special legal counsel determines under Subsection (a)(3) that a person meets the standard under Section 8.101(a)(1), the special legal counsel shall determine whether the amount of expenses other than a judgment is reasonable under Section 8.101(a)(2) but may not determine whether indemnification should be paid under Section 8.101(a)(3). The determination whether indemnification should be paid must be made in a manner specified by Subsection (a)(1), (2), (4), or (5).

(c) A provision contained in the governing documents of the enterprise, a resolution of the owners, members, or governing authority, or an agreement that requires the indemnification of a person who meets the standard under Section 8.101(a)(1) constitutes a determination under Section 8.101(a)(3) that indemnification should be paid even though the provision may not have been adopted or authorized in the same manner as the determinations required under Section 8.101(a). The determinations required under Sections 8.101(a)(1) and (2) must be made in a manner provided by Subsection (a).

Source Law:

TBCA 2.02-1.F & G

F. A determination of indemnification under Section B of this article must be made:

(1) by a majority vote of a quorum consisting of directors who at the time of the vote are not named defendants or respondents in the proceeding;

(2) if such a quorum cannot be obtained, by a majority vote of a committee of the board of directors, designated to act in the matter by a majority vote of all directors, consisting solely of two or more directors who at the time of the vote are not named defendants or respondents in the proceeding;

(3) by special legal counsel selected by the board of directors or a committee of the board by vote as set forth in Subsection (1) or (2) of this section, or, if such a quorum cannot be obtained and such a committee cannot be established, by a majority vote of all directors; or

(4) by the shareholders in a vote that excludes the shares held by directors who are named defendants or respondents in the proceeding.

G. Authorization of indemnification and determination as to reasonableness of expenses must be made in the same manner as the determination that indemnification is permissible, except that if the determination that indemnification is permissible is made by special legal counsel, authorization of indemnification and determination as to reasonableness of expenses must be made in the manner specified by Subsection (3) of Section F of this article for the selection of special legal counsel. A provision contained in the articles of incorporation, the bylaws, a resolution of shareholders or directors, or an agreement that makes mandatory the indemnification permitted under Section B of this article shall be deemed to constitute authorization of indemnification in the manner required by this section even though such provision may not have been adopted or authorized in the same manner as the determination that indemnification is permissible.

TNPCA 2.22A.F & G

F. A determination of indemnification under Section B of this article must be made:

(1) by a majority vote of a quorum consisting of directors who at the time of the vote are not named defendants or respondents in the proceeding;

(2) if such a quorum cannot be obtained, by a majority vote of a committee of the board of directors, designated to act in the matter by a majority vote of all directors, consisting solely of two or more directors who at the time of the vote are not named defendants or respondents in the proceeding;

(3) by special legal counsel selected by the board of directors or a committee of the board by vote as set forth in Subsection (1) or (2) of this section, or, if such a quorum cannot be obtained and such a committee cannot be established, by a majority vote of all directors; or

(4) by the members in a vote that excludes the vote of directors who are named defendants or respondents in the proceeding.

G. Authorization of indemnification and determination as to reasonableness of expenses must be made in the same manner as the determination that indemnification is permissible, except that if the determination that indemnification is permissible is made by special legal counsel, authorization of indemnification and determination as to reasonableness of expenses must be made in the manner specified by Subsection (3) of Section F of this article for the selection of special legal counsel. A provision contained in the articles of incorporation, the bylaws, a resolution of members or directors, or an agreement that makes mandatory the indemnification permitted under Section B of this article shall be deemed to constitute authorization of indemnification in the manner required by this section even though such provision may not have been adopted or authorized in the same manner as the determination that indemnification is permissible.

TREITA 9.20(F) & G

(F) A determination to furnish indemnification under Subsection (B) of this Section shall be made only:

(1) by a majority vote of a quorum consisting of trust managers who at the time of the vote are not named defendants or respondents in the proceeding;

(2) if such a quorum cannot be obtained, by a majority vote of a committee of the trust managers, designated to act in the matter by a majority vote of all trust managers, consisting solely of two or more trust managers who at the time of the vote are not named defendants or respondents in the proceeding;

(3) by special legal counsel selected by the trust managers or a committee thereof by vote as set forth in Subdivision (1) or (2) of this Subsection, or, if such a quorum cannot be obtained and such a committee cannot be established, by a majority vote of all trust managers; or

(4) by the shareholders in a vote that excludes the shares of beneficial interest held by trust managers who are named defendants or respondents in the proceeding.

(G) Authorization of indemnification and determination as to reasonableness of expenses must be made in the same manner as the determination that indemnification is permissible, except that if the determination that indemnification is permissible is made by special legal counsel, authorization of indemnification and determination as to reasonableness of

expenses must be made in the manner specified by Subdivision (3) of Subsection (F) of this Section for the selection of special legal counsel. A provision contained in the declaration of trust, the bylaws, or an agreement that makes mandatory the indemnification permitted under Subsection (B) of this Section shall be deemed to constitute authorization of indemnification in the manner required by this Subsection even though such provision may not have been adopted or authorized in the same manner as the determination that indemnification is permissible.

TRLPA 11.06

Sec. 11.06. A determination that indemnification is permissible under Section 11.02 of this Act must be made:

(1) by a majority vote of a quorum consisting of general partners who at the time of the vote are not named defendants or respondents in the proceeding;

(2) by special legal counsel selected by the general partners by vote as provided by Subdivision (1) of this section or, if such a quorum cannot be obtained, by a majority vote of all general partners; or

(3) by a majority in interest of the limited partners in a vote that excludes the interests held by general partners who are named defendants or respondents in the proceeding.

TRLPA 11.07

Sec. 11.07. Authorization of indemnification and determination of a reasonableness of expenses must be made in the same manner as the determination that indemnification is permissible, except that if the determination that indemnification is permissible is made by special legal counsel, authorization of indemnification and determination of reasonableness of expenses must be made in the manner specified by Subdivision (2) of Section 11.06 of this Act governing the selection of special legal counsel. A provision contained in a written partnership agreement, a resolution of the general partners or of a majority in interest of the limited partners, or an agreement that makes mandatory the indemnification permitted under Section 11.02 of this Act, constitutes authorization of indemnification in the manner required by this section even though the provision may not have been adopted or authorized in the same manner as the determination that indemnification is permissible.

Revisor's Note:

In Section 8.103(a)(2), a determination that the standard for indemnification in Section 8.101(a) has been met may be made by a committee of one disinterested director if no quorum of disinterested directors can be obtained. The TBCA and TNPCA require two such directors; TRLPA Sec. 11.06 has no such provision.

Section 8.103(a)(5) has no explicit source in the TBCA, TREITA, TRLPA or TNPCA but is implicit in the general principle that all the owners or members of an enterprise may make any disposition of its assets, including indemnification of a governing person.

Revised Law:

Sec. 8.104. ADVANCEMENT OF EXPENSES. (a) An enterprise may pay or reimburse reasonable expenses incurred by a governing person, former governing person, or delegate who was, is, or is threatened to be made a respondent in a proceeding in advance of the final disposition of the proceeding without making the determinations required under Section 8.101(a) after the enterprise receives:

(1) a written affirmation by the person of the person's good faith belief that the person has met the standard of conduct necessary for indemnification under this chapter; and

(2) a written undertaking by or on behalf of the person to repay the amount paid or reimbursed if the final determination is that the person has not met that standard or that indemnification is prohibited by Section 8.102.

(b) A provision in the governing documents of the enterprise, a resolution of the owners, members, or governing authority, or an agreement that requires the payment or reimbursement permitted under this section authorizes that payment or reimbursement after the enterprise receives an affirmation and undertaking described by Subsection (a).

(c) The written undertaking required by Subsection (a)(2) must be an unlimited general obligation of the person but need not be secured and may be accepted by the enterprise without regard to the person's ability to make repayment.

Source Law:

TBCA 2.02-1.K, L & P

K. Reasonable expenses incurred by a director who was, is, or is threatened to be made a named defendant or respondent in a proceeding may be paid or reimbursed by the corporation, in advance of the final disposition of the proceeding and without the determination specified in Section F of this article or the authorization or determination specified in Section G of this article, after the corporation receives a written affirmation by the director of his good faith belief that he has met the standard of conduct necessary for indemnification under this article and a written undertaking by or on behalf of the director to repay the amount paid or reimbursed if it is ultimately determined that he has not met that standard or if it is ultimately determined that indemnification of the director against expenses incurred by him in connection with that proceeding is prohibited by Section E of this article. A provision contained in the articles of incorporation, the bylaws, a resolution of shareholders or directors, or an agreement that makes mandatory the payment or reimbursement

permitted under this section shall be deemed to constitute authorization of that payment or reimbursement.

L. The written undertaking required by Section K of this article must be an unlimited general obligation of the director but need not be secured. It may be accepted without reference to financial ability to make repayment.

* * *

P. A corporation may indemnify and advance expenses to persons who are not or were not officers, employees, or agents of the corporation but who are or were serving at the request of the corporation as a director, officer, partner, venturer, proprietor, trustee, employee, agent, or similar functionary of another foreign or domestic corporation, employee benefit plan, other enterprise, or other entity to the same extent that it may indemnify and advance expenses to directors under this article.

TNPCA 2.22A.K, L & P

K. Reasonable expenses incurred by a director who was, is, or is threatened to be made a named defendant or respondent in a proceeding may be paid or reimbursed by the corporation, in advance of the final disposition of the proceeding and without the determination specified in Section F of this article or the authorization or determination specified in Section G of this article, after the corporation receives a written affirmation by the director of his good faith belief that he has met the standard of conduct necessary for indemnification under this article and a written undertaking by or on behalf of the director to repay the amount paid or reimbursed if it is ultimately determined that he has not met that standard or if it is ultimately determined that indemnification of the director against expenses incurred by him in connection with that proceeding is prohibited by Section E of this article. A provision contained in the articles of incorporation, the bylaws, a resolution of members or directors, or an agreement that makes mandatory the payment or reimbursement permitted under this section shall be deemed to constitute authorization of that payment or reimbursement.

L. The written undertaking required by Section K of this article must be an unlimited general obligation of the director but need not be secured. It may be accepted without reference to financial ability to make repayment.

* * *

P. A corporation may indemnify and advance expenses to a person who is not or was not an officer, employee, or agent of the corporation but who is or was serving at the request of the corporation as a director, officer, partner, venturer, proprietor, trustee, employee, agent, or similar functionary of another foreign or domestic corporation, partnership, joint venture, sole proprietorship, trust, employee benefit plan, or

other enterprise to the same extent that it may indemnify and advance expenses to directors under this article.

TREITA 9.20(K), (L) & (P)

(K) Reasonable expenses incurred by a trust manager who was, is, or is threatened to be made a named defendant or respondent in a proceeding may be paid or reimbursed by the real estate investment trust, in advance of the final disposition of the proceeding and without the determination specified in Subsection (F) of this Section or the authorization or determination specified in Subsection (G) of this Section, after the real estate investment trust receives a written affirmation by the trust manager of his good faith belief that he has met the standard of conduct necessary for indemnification under this Section and a written undertaking by or on behalf of the trust manager to repay the amount paid or reimbursed if it is ultimately determined that he has not met that standard or if it is ultimately determined that indemnification of the trust manager against expenses incurred by him in connection with that proceeding is prohibited by Subsection (E) of this Section. A provision contained in the declaration of trust, the bylaws, a resolution of shareholders or trust managers, or an agreement that makes mandatory the payment or reimbursement permitted under this Subsection shall be deemed to constitute authorization of that payment or reimbursement.

(L) The written undertaking required by Subsection (K) of this Section must be an unlimited general obligation of the trust manager but need not be secured. It may be accepted without reference to financial ability to make repayment.

* * *

(P) A real estate investment trust may indemnify and advance expenses to persons who are not or were not officers, employees, or agents of the real estate investment trust but who are or were serving at the request of the real estate investment trust as a trust manager, director, officer, partner, venturer, proprietor, trustee, employee, agent, or similar functionary of another real estate investment trust or of a foreign or domestic corporation, partnership, joint venture, sole proprietorship, trust, employee benefit plan, or other enterprise to the same extent that it may indemnify and advance expenses to trust managers under this Section.

TRLPA 11.11

Sec. 11.11. The limited partnership may pay or reimburse, in advance of the final disposition of the proceeding, reasonable expenses incurred by a general partner who was, is, or is threatened to be made a named defendant or respondent in a proceeding, without the determination specified in Section 11.06 of this Act or the authorization or determination specified in Section 11.07 of this Act, after the limited partnership receives a written affirmation by the general partner of the general partner's good faith belief that the general partner has met the standard of conduct necessary for

indemnification under this article, and a written undertaking by or on behalf of the general partner to repay the amount paid or reimbursed if it is ultimately determined that the general partner has not met that standard or it is ultimately determined that indemnification of the general partner against expenses incurred by such general partner in connection with that proceeding is prohibited by Section 11.05 of this Act. A provision contained in a written partnership agreement, a resolution of the general partners or of the limited partners, or an agreement that makes mandatory the payment or reimbursement permitted under this Section shall be deemed to constitute authorization of that payment or reimbursement.

TRLPA 11.12

Sec. 11.12. The written undertaking required by Section 11.11 of this Act must be an unlimited general obligation of the general partner, but need not be secured and may be accepted without reference to financial ability to make repayment.

TRLPA 11.16

Sec. 11.16. A limited partnership may indemnify and advance expenses to persons who are not or were not limited partners, employees, or agents of the limited partnership but who are or were serving at the request of the limited partnership as a representative of another enterprise to the same extent that it may indemnify and advance expenses to a general partner under this article.

Revisor's Note:

No substantive change is intended.

Revised Law:

Sec. 8.105. INDEMNIFICATION OF AND ADVANCEMENT OF EXPENSES TO PERSONS OTHER THAN GOVERNING PERSONS. (a) Notwithstanding any other provision of this chapter but subject to Sections 8.003 and 8.004 and to the extent consistent with other law, an enterprise may indemnify and advance expenses to a person who is not a governing person, including an officer, employee, agent, or delegate, as provided by:

- (1) the enterprise's governing documents;
- (2) general or specific action of the enterprise's governing authority;
- (3) resolution of the enterprise's owners or members;
- (4) contract; or
- (5) common law.

(b) An enterprise shall indemnify and advance expenses to an officer to the same extent that indemnification or advancement of expenses is required under this chapter for a governing person.

(c) A person described by Subsection (a) may seek indemnification or advancement of expenses from an enterprise to the same extent that a governing person may seek indemnification or advancement of expenses under this chapter.

Source Law:

TBCA 2.02-1.0, P & Q

O. An officer of the corporation shall be indemnified as, and to the same extent, provided by Sections H, I, and J of this article for a director and is entitled to seek indemnification under those sections to the same extent as a director. A corporation may indemnify and advance expenses to an officer, employee, or agent of the corporation to the same extent that it may indemnify and advance expenses to directors under this article.

P. A corporation may indemnify and advance expenses to persons who are not or were not officers, employees, or agents of the corporation but who are or were serving at the request of the corporation as a director, officer, partner, venturer, proprietor, trustee, employee, agent, or similar functionary of another foreign or domestic corporation, employee benefit plan, other enterprise, or other entity to the same extent that it may indemnify and advance expenses to directors under this article.

Q. A corporation may indemnify and advance expenses to an officer, employee, agent, or person identified in Section P of this article and who is not a director to such further extent, consistent with law, as may be provided by its articles of incorporation, bylaws, general or specific action of its board of directors, or contract or as permitted or required by common law.

TNPCA 2.22A.0, P & Q

O. An officer of the corporation shall be indemnified as, and to the same extent, provided by Sections H, I, and J of this article for a director and is entitled to seek indemnification under those sections to the same extent as a director. A corporation may indemnify and advance expenses to an officer, employee, or agent of the corporation to the same extent that it may indemnify and advance expenses to directors under this article.

P. A corporation may indemnify and advance expenses to a person who is not or was not an officer, employee, or agent of the corporation but who is or was serving at the request of the corporation as a director, officer, partner, venturer, proprietor, trustee, employee, agent, or similar functionary of another foreign or domestic corporation, partnership, joint venture, sole proprietorship, trust, employee benefit plan, or other enterprise to the same extent that it may indemnify and advance expenses to directors under this article.

Q. A corporation may indemnify and advance expenses to an officer, employee, agent, or person identified in Section P of

this article and who is not a director to such further extent, consistent with law, as may be provided by its articles of incorporation, bylaws, general or specific action of its board of directors, or contract or as permitted or required by common law.

TREITA 9.20(O), (P) & (Q)

(O) An officer of the real estate investment trust shall be indemnified as, and to the same extent, provided by Subsections (H), (I), and (J) of this Section for a trust manager and is entitled to seek indemnification under those Subsections to the same extent as a trust manager. A real estate investment trust may indemnify and advance expenses to an officer, employee, or agent of the real estate investment trust to the same extent that it may indemnify and advance expenses to trust managers under this Section.

(P) A real estate investment trust may indemnify and advance expenses to persons who are not or were not officers, employees, or agents of the real estate investment trust but who are or were serving at the request of the real estate investment trust as a trust manager, director, officer, partner, venturer, proprietor, trustee, employee, agent, or similar functionary of another real estate investment trust or of a foreign or domestic corporation, partnership, joint venture, sole proprietorship, trust, employee benefit plan, or other enterprise to the same extent that it may indemnify and advance expenses to trust managers under this Section.

(Q) A real estate investment trust may indemnify and advance expenses to an officer, employee, agent, or person identified in Subsection (P) of this Section and who is not a trust manager to such further extent, consistent with law, as may be provided by its declaration of trust, bylaws, general or specific action of its trust managers, or contract or as permitted or required by common law.

TRLPA 11.15

Sec. 11.15. A limited partnership may indemnify and advance expenses to a limited partner, employee, or agent of the limited partnership to the same extent that it may indemnify and advance expenses to a general partner under this article.

TRLPA 11.16

Sec. 11.16. A limited partnership may indemnify and advance expenses to persons who are not or were not limited partners, employees, or agents of the limited partnership but who are or were serving at the request of the limited partnership as a representative of another enterprise to the same extent that it may indemnify and advance expenses to a general partner under this article.

TRLPA 11.17

Sec. 11.17. A limited partnership may further indemnify and advance expenses to a limited partner, employee, agent, or person identified in Section 11.16 of this Act and who is not a general partner, to the extent, consistent with law, provided

by its partnership agreement, by general or specific action of its general partner, by contract, or as permitted or required by common law.

Revisor's Note:

Section 8.105(a)(3) has no explicit source in TBCA, TREITA, TNPCA or TRLPA but is implicit in the general principle that the owners or members of an enterprise may make any disposition of its assets for the benefit of a person who is not a governing person. No other substantive change is intended.

Revised Law:

Sec. 8.106. PERMISSIVE INDEMNIFICATION OF AND REIMBURSEMENT OF EXPENSES TO WITNESSES. Notwithstanding any other provision of this chapter, an enterprise may pay or reimburse reasonable expenses incurred by a governing person, officer, employee, agent, delegate, or other person in connection with that person's appearance as a witness or other participation in a proceeding at a time when the person is not a respondent in the proceeding.

Source Law:

TBCA 2.02-1.N

N. Notwithstanding any other provision of this article, a corporation may pay or reimburse expenses incurred by a director in connection with his appearance as a witness or other participation in a proceeding at a time when he is not a named defendant or respondent in the proceeding.

TNPCA 2.22A.N

N. Notwithstanding any other provision of this article, a corporation may pay or reimburse expenses incurred by a director in connection with his appearance as a witness or other participation in a proceeding at a time when he is not a named defendant or respondent in the proceeding.

TREITA 9.20(N)

(N) Notwithstanding any other provision of this Section, a real estate investment trust may pay or reimburse expenses incurred by a trust manager in connection with his appearance as a witness or other participation in a proceeding at a time when he is not a named defendant or respondent in the proceeding.

TRLPA 11.14

Sec. 11.14. Notwithstanding any other provision of this article, a limited partnership may pay or reimburse expenses incurred by a general partner in connection with the general partner's appearance as a witness or other participation in a proceeding involving or affecting the limited partnership at a time when the general partner is not a named defendant or respondent in the proceeding.

Revisor's Note:

No substantive change is intended.

(Sections 8.107-8.150 reserved for expansion)

SUBCHAPTER D. LIABILITY INSURANCE; REPORTING REQUIREMENTS

Revised Law:

Sec. 8.151. INSURANCE AND OTHER ARRANGEMENTS. (a) Notwithstanding any other provision of this chapter, an enterprise may purchase or procure or establish and maintain insurance or another arrangement to indemnify or hold harmless an existing or former governing person, delegate, officer, employee, or agent against any liability:

(1) asserted against and incurred by the person in that capacity; or

(2) arising out of the person's status in that capacity.

(b) The insurance or other arrangement established under Subsection (a) may insure or indemnify against the liability described by Subsection (a) without regard to whether the enterprise otherwise would have had the power to indemnify the person against that liability under this chapter.

(c) Insurance or another arrangement that involves self-insurance or an agreement to indemnify made with the enterprise or a person that is not regularly engaged in the business of providing insurance coverage may provide for payment of a liability with respect to which the enterprise does not otherwise have the power to provide indemnification only if the insurance or arrangement is approved by the owners or members of the enterprise.

(d) For the benefit of persons to be indemnified by the enterprise, an enterprise may, in addition to purchasing or procuring or establishing and maintaining insurance or another arrangement:

(1) create a trust fund;

(2) establish any form of self-insurance, including a contract to indemnify;

(3) secure the enterprise's indemnity obligation by grant of a security interest or other lien on the assets of the enterprise; or

(4) establish a letter of credit, guaranty, or surety arrangement.

(e) Insurance or another arrangement established under this section may be purchased or procured or established and maintained:

(1) within the enterprise; or

(2) with any insurer or other person considered appropriate by the governing authority, regardless of whether all or part of the stock, securities, or other ownership interest in the insurer or other person is owned in whole or in part by the enterprise.

(f) The governing authority's decision as to the terms of the insurance or other arrangement and the selection of the insurer or other person participating in an arrangement is conclusive. The insurance or arrangement is not voidable and does not subject the governing persons approving the insurance or arrangement to liability, on any ground, regardless of whether the governing persons participating in approving the insurance or other arrangement are beneficiaries of the insurance or arrangement. This subsection does not apply in case of actual fraud.

Source Law:

TBCA 2.02-1.R

R. A corporation may purchase and maintain insurance or another arrangement on behalf of any person who is or was a director, officer, employee, or agent of the corporation or who is or was serving at the request of the corporation as a director, officer, partner, venturer, proprietor, trustee, employee, agent, or similar functionary of another foreign or domestic corporation, employee benefit plan, other enterprise, or other entity, against any liability asserted against him and incurred by him in such a capacity or arising out of his status as such a person, whether or not the corporation would have the power to indemnify him against that liability under this article. If the insurance or other arrangement is with a person or entity that is not regularly engaged in the business of providing insurance coverage, the insurance or arrangement may provide for payment of a liability with respect to which the corporation would not have the power to indemnify the person only if including coverage for the additional liability has been approved by the shareholders of the corporation. Without limiting the power of the corporation to procure or maintain any kind of insurance or other arrangement, a corporation may, for the benefit of persons indemnified by the corporation, (1) create a trust fund; (2) establish any form of self-insurance; (3) secure its indemnity obligation by grant of a security interest or other lien on the assets of the corporation; or (4) establish a letter of credit, guaranty, or surety arrangement. The insurance or other arrangement may be procured, maintained, or established within the corporation or with any insurer or other person deemed appropriate by the board of directors regardless of whether all or part of the stock or other securities of the insurer or other person are owned in whole or part by the corporation. In the absence of fraud, the judgment of the board of directors as to the terms and conditions of the insurance or other arrangement and the identity of the insurer or other person participating in an arrangement shall be conclusive and the insurance or arrangement shall not be voidable and shall not subject the directors approving the insurance or arrangement to liability, on any ground, regardless of whether directors participating in the approval are beneficiaries of the insurance or arrangement.

TNPCA 2.22A.R

R. (1) A corporation may purchase and maintain insurance on behalf of any person who is or was a director, officer, employee, or agent of the corporation or who is or was serving

at the request of the corporation as a director, officer, partner, venturer, proprietor, trustee, employee, agent, or similar functionary of another foreign or domestic corporation, partnership, joint venture, sole proprietorship, trust, employee benefit plan, or other enterprise against any liability asserted against him and incurred by him in such a capacity or arising out of his status as such a person, whether or not the corporation would have the power to indemnify him against that liability under this article.

(2)(a) In addition to the powers described in Subsection (1), a corporation may purchase, maintain, or enter into other arrangements on behalf of any person who is or was a director, officer, or trustee of the corporation against any liability asserted against him and incurred by him in such capacity or arising out of his status as such a person, whether or not the corporation would have the power to indemnify him against that liability under this article.

(b) If the other arrangement is with a person or entity that is not regularly engaged in the business of providing insurance coverage, the arrangement may provide for payment of a liability with respect to which the corporation would not have the power to indemnify a person only if coverage for that liability has been approved by the corporation's members, if the corporation has members.

(c) Without limiting the power of the corporation to procure or maintain any kind of other arrangement, a corporation, for the benefit of persons described in Subsection (2)(a) may:

(i) create a trust fund;

(ii) establish any form of self-insurance;

(iii) secure its indemnity obligation by grant of a security interest or other lien on the assets of the corporation; or

(iv) establish a letter of credit, guaranty, or surety arrangement.

(d) For the limited purposes of Subsection (2) of this section only, any liability indemnification arrangement, other than coverage through an insurance carrier, is not considered to be the business of insurance under the Insurance Code, including the Texas Property and Casualty Insurance Guaranty Act (Article 21.28-C, Vernon's Texas Civil Statutes), or any other law of this state.

(3) The insurance may be procured or maintained with an insurer, or the other arrangement may be procured, maintained, or established within the corporation or with any insurer or other person considered appropriate by the board of directors, regardless of whether all or part of the stock or other securities of the insurer or other person are owned in whole or part by the corporation. In the absence of fraud, the judgment of the board of directors as to the terms and conditions of the

insurance or other arrangement and the identity of the insurer or other person participating in an arrangement is conclusive, and the insurance or arrangement is not voidable and does not subject the directors approving the insurance or arrangement to liability, on any ground, regardless of whether directors participating in the approval are beneficiaries of the insurance or arrangement.

TREITA 9.20(R)

(R) A real estate investment trust may purchase and maintain insurance or another arrangement on behalf of any person who is or was a trust manager officer, employee, or agent of the real estate investment trust or who is or was serving at the request of the real estate investment trust as a trust manager or a director, officer, partner, venturer, proprietor, trustee, employee, agent, or similar functionary of another real estate investment trust or of a foreign or domestic corporation, partnership, joint venture, sole proprietorship, trust, employee benefit plan, or other enterprise, against any liability asserted against him and incurred by him in such a capacity or arising out of his status as such a person, whether or not the real estate investment trust would have the power to indemnify him against that liability under this Section. If the insurance or other arrangement is with a person or entity that is not regularly engaged in the business of providing insurance coverage, the insurance or arrangement may provide for payment of a liability with respect to which the real estate investment trust would not have the power to indemnify the person only if including coverage for the additional liability has been approved by the shareholders of the real estate investment trust. Without limiting the power of the real estate investment trust to procure or maintain any kind of insurance or other arrangement, a real estate investment trust may, for the benefit of persons indemnified by the real estate investment trust, (1) create a trust fund; (2) establish any form of self-insurance; (3) secure its indemnity obligation by grant of a security interest or other lien on the assets of the real estate investment trust; or (4) establish a letter of credit, guaranty, or surety arrangement. The insurance or other arrangement may be procured, maintained, or established within the real estate investment trust or with any insurer or other person deemed appropriate by the trust manager(s) regardless of whether all or part of the stock or other securities of the insurer or other person are owned in whole or part by the real estate investment trust. In the absence of fraud, the judgment of the trust manager(s) as to the terms and conditions of the insurance or other arrangement and the identity of the insurer or other person participating in an arrangement shall be conclusive and the insurance or arrangement shall not be voidable and shall not subject the trust manager(s) approving the insurance or arrangement to liability, on any ground, regardless of whether a trust manager participating in the approval is a beneficiary of the insurance or arrangement.

TRLPA 11.18

Sec. 11.18. Except as otherwise provided by this article, and unless otherwise provided by the partnership agreement, a

limited partnership may purchase and maintain insurance or another arrangement on behalf of any person who is or was a general partner, limited partner, employee, or agent of the limited partnership, or who is or was serving at the request of the limited partnership as a representative of another enterprise, against any liability asserted against the person and incurred by the person in that capacity or arising out of the person's status in that capacity, regardless of whether the limited partnership would have the power to indemnify the person against that liability under this article. However, if the insurance or other arrangement is with a person or entity that is not regularly engaged in the business of providing insurance coverage, the insurance or other arrangement may provide for payment of a liability with respect to which the limited partnership would not have the power to indemnify the person only if it includes coverage for the additional liability that has been approved by a majority in interest of the limited partners of the limited partnership. Without limiting the power of the limited partnership to procure or maintain any kind of insurance or other arrangement, a limited partnership may, for the benefit of persons indemnified by the limited partnership, create a trust fund, establish any form of self-insurance, secure its indemnity obligation by grant of a security interest or other lien on the assets of the limited partnership, or establish a letter of credit, guaranty, or surety arrangement. The insurance or other arrangement may be procured, maintained, or established within the limited partnership or with an insurer or other person considered appropriate by the general partner regardless of whether all or part of the stock or other securities of the insurer or other person are owned in whole or part by the limited partnership. In the absence of actual fraud, the judgment of the general partners as to the terms and conditions of the insurance or other arrangement and the identity of the insurer or other person participating in an arrangement is conclusive, and the insurance or other arrangement is not voidable and does not subject the general partners approving the insurance or other arrangement to liability, on any ground, regardless of whether general partners participating in approving the insurance or other arrangement will be beneficiaries.

Revisor's Note:

No substantive change is intended. The source law includes self-insurance but does not explicitly include implementing it by contract to indemnify. A contract to indemnify is within the general power of the enterprise to contract to implement its self-insurance authority.

Revised Law:

Sec. 8.152. REPORTS OF INDEMNIFICATION AND ADVANCES. (a) An enterprise shall report in writing to the owners or members of the enterprise an indemnification of or advance of expenses to a governing person.

(b) Subject to Subsection (c), the report must be made with or before the notice or waiver of notice of the next meeting of the owners or

members of the enterprise and before the next submission to the owners or members of a consent to action without a meeting.

(c) The report must be made not later than the first anniversary of the date of the indemnification or advance.

Source Law:

TBCA 2.02-1.S

S. Any indemnification of or advance of expenses to a director in accordance with this article shall be reported in writing to the shareholders with or before the notice or waiver of notice of the next shareholders' meeting or with or before the next submission to shareholders of a consent to action without a meeting pursuant to Section A, Article 9.10, of this Act and, in any case, within the 12-month period immediately following the date of the indemnification or advance.

TNPCA 2.22A.S

S. Any indemnification of or advance of expenses to a director in accordance with this article shall be reported in writing to the members of the corporation with or before the notice or waiver of notice of the next meeting of members or with or before the next submission to members of a consent to action without a meeting pursuant to Section A, Article 1396-9.10 of this Act and, in any case, within the 12-month period immediately following the date of the indemnification or advance.

TREITA 9.20(S)

(S) Any indemnification of or advance of expenses to any person who is or was a trust manager, officer, employee, or agent of the real estate investment trust or who is or was serving at the request of the real estate investment trust as a trust manager or a director, officer, partner, venturer, proprietor, trustee, employee, agent, or similar functionary of another real estate investment trust or of a foreign or domestic corporation, partnership, joint venture, sole proprietorship, trust, employee benefit plan, or other enterprise in accordance with this Section shall be reported in writing to the shareholders with or before the notice or waiver of notice of the next shareholders meeting or with or before the next submission to shareholders of a consent to action without a meeting pursuant to Section 10.30 of this Act and, in any case, within the 12-month period immediately following the date of the indemnification or advance.

TRLPA 11.19

Sec. 11.19. Any indemnification of or advance of expenses to a general partner in accordance with this article shall be reported promptly in writing to the limited partners. The report must be made not later than six months after the date that the indemnification occurs.

Revisor's Note:

Section 11.19 of TRLPA requires that any indemnification of or advance of expenses by a limited partnership to a general partner is to be reported promptly in writing to the limited partners and, in any event, not later than six months after the date the indemnification occurs. Section 8.152 of the Code requires a standardized reporting deadline of twelve months, which corresponds with the source law in the TBCA, TNPCA and TREITA. No other substantive change is intended.