

# MAINE STATE LEGISLATURE

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ONE HUNDRED AND EIGHTH LEGISLATURE

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**Legislative Document**

**No. 626**

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S. P. 175

In Senate, February 17, 1977

On motion of Senator Speers of Kennebec, referred to the Committee on Judiciary. Sent down for concurrence and 3,000 copies ordered printed.

MAY M. ROSS, Secretary

Presented by Senator Collins of Knox.

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**STATE OF MAINE**

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IN THE YEAR OF OUR LORD NINETEEN HUNDRED  
SEVENTY-SEVEN

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**AN ACT to Establish the Maine Nonprofit Corporation Act.**

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Be it enacted by the People of the State of Maine, as follows:

**Sec. 1.** 5 MRSA § 86, as last amended by PL 1973, c. 730, § 1, is further amended by adding at the end the following new paragraph:

For filing, copying, comparing or authenticating any document required or permitted to be filed under Title 13-B, that fee specified in Title 13-B, chapter 14.

**Sec. 2.** 5 MRSA § 191, 2nd and 3rd ¶¶ from the end, as amended, are further amended to read:

For certificate that any corporation has ceased to transact business and is excused from filing annual returns, as authorized in Title 13-A, section 1301, subsection 4, §5. For certificate that any nonprofit corporation has ceased to carry on activities and is excused from filing annual returns, as authorized in Title 13-B, section 1301, subsection 4, §5.

For advance approval of any document required or permitted to be filed under Title 13-A, that fee specified in Title 13-A, section 108. For advance approval of any document required or permitted to be filed under Title 13-B, that fee specified in Title 13-B, section 108.

**Sec. 3.** 12 MRSA § 4505, sub-§ 1, as repealed and replaced by PL 1971, c. 439, § 10, is amended by adding at the end the following new paragraph:

If the corporation is a foreign nonprofit corporation, it may be served on the corporation's registered agent appointed under Title 13-B, section 1213; or

upon the Secretary of State as provided in Title 13-B, section 1217, under the conditions set out in Title 13-B, sections 1213 and 1214; or in any other manner permitted by statute or rule of court for the service of civil summons upon a foreign corporation.

Sec. 4. 13 MRSA § 901, as last amended by PL 1975, c. 487, § 1, is further amended by adding at the end the following new sentence:

**This section shall not apply to corporations which must be organized under Title 13-B.**

Sec. 5. 13 MRSA § 931, as last amended by PL 1975, c. 635, § 2, is further amended by adding at the end the following new sentence:

**This section shall not apply to corporations organized under or electing to be governed by Title 13-B.**

Sec. 6. 13 MRSA § 932, as last amended by PL 1975, c. 770, § 74, is further amended by adding at the end the following new sentence:

**This section shall not apply to corporations organized under or electing to be governed by Title 13-B.**

Sec. 7. 13 MRSA § 934, as last amended by PL 1973, c. 409, is further amended by adding at the end the following new sentence:

**This section shall not apply to corporations organized under or electing to be governed by Title 13-B.**

Sec. 8. 13 MRSA § 936 is amended to read:

**§ 936. Facilities for winter sports**

Any corporation organized under this chapter or under Title 13-B, and which owns, operates and maintains facilities for recreation for the benefit of the people of the State not as a commercial proposition, may enclose so much of the surface of any great pond, not exceeding 5 acres in area, during the time when said area is covered with ice, as is not being used for ice cutting operations, for the purpose of maintaining on said area facilities for winter sports of any kind; and shall have the right to exclude from said area persons not contributing to the financial support of said corporation, and may make and enforce rules and regulations for the use of said area for the purpose of insuring the use and enjoyment thereof and the protection of persons using said facilities.

Sec. 9. 13 MRSA § 937, as enacted by PL 1971, c. 373, § 2, is amended by adding at the end the following new sentence:

**This section shall not apply to corporations organized under or electing to be governed by Title 13-B.**

Sec. 10. 13 MRSA § 938, as enacted by PL 1971, c. 373, § 3, is amended by adding at the end the following new sentence:

**This section shall not apply to corporations organized under or electing to be governed by Title 13-B.**

**Sec. 11.** 13 MRSA § 940, as enacted by PL 1975, c. 439, § 2, is amended by adding at the end the following new sentence:

**This section shall not apply to corporations organized under or electing to be governed by Title 13-B.**

**Sec. 12.** 13 MRSA § 961, as last amended by PL 1971, c. 544, § 41, is further amended by adding at the end the following new sentence:

**This section shall not apply to corporations organized under or electing to be governed by Title 13-B.**

**Sec. 13.** 13 MRSA § 938, is amended by adding at the end the following new sentence:

**This section shall not apply to corporations organized under or electing to be governed by Title 13-B.**

**Sec. 14.** 13-B MRSA is enacted to read:

**TITLE 13-B**  
**MAINE NONPROFIT CORPORATION ACT**  
**CHAPTER 1**  
**GENERAL PROVISIONS**

**§ 101. Short title**

**This Act shall be known and may be cited as the “Maine Nonprofit Corporation Act.”**

**Comment**

The present collection of laws regulating corporations not regulated by the Maine Business Corporation Act (hereinafter referred to as the “MBCA,” or the “Business Act”) should be termed “nonstock” corporation laws; the term “nonstock” corporation is not used in the Maine statutes.

Most states, however, use the term “nonprofit” to describe similar legislation. That term was chosen as the popular name of the present statute primarily because it is in common use.

New York has chosen a technically more accurate term for its comprehensive legislation — the “not-for-profit” corporation act, to emphasize that while corporations may engage in profit-making activities, they may not do so “for profit” — that is, with the ultimate purpose of distributing the profits to members or owners. The New York title, however, has not been adopted by other states.

**§ 102. Definitions**

**As used in this Act, unless the context otherwise requires, the following words shall have the following meanings.**

1. Articles of incorporation. "Articles of incorporation" means the original or restated articles of incorporation and all amendments thereto. It includes the certificate of incorporation, articles of merger, articles of consolidation and, in the case of a corporation created by special Act of the Legislature, the special Act and any amendments thereto.

2. Board of directors. "Board of directors" means the group of persons vested with the management of the affairs of the corporation irrespective of the various names, such as board of trustees or board of managers, by which such group is designated.

3. Bylaws. "Bylaws" means the code or codes of rules adopted for the regulation or management of the affairs of the corporation irrespective of the name or names by which such rules are designated and includes the corporation's constitution unless the constitution is filed as the articles of incorporation or enacted by the Legislature in a special Act.

4. Corporation. "Corporation" or "domestic corporation" means a non-profit corporation subject to this Act, except a foreign corporation, but shall not include any corporation subject to the laws regulating banking and insurance companies.

5. Director. "Director" means one member of the board of directors.

6. Foreign corporation. "Foreign corporation" means a nonprofit corporation organized under laws other than the laws of this State.

7. Insolvent. "Insolvent" means inability of a corporation to pay its debts as they become due in the usual course of its affairs.

8. Member. "Member" includes persons by whatever name designated, including incorporators, and means one having membership rights in a corporation in accordance with the provisions of its articles of incorporation or bylaws.

9. Nonprofit corporation. "Nonprofit corporation" means a corporation, no part of the income or profit of which is distributable to its members, directors or officers.

10. President. "President" means the chief executive officer by whatever name known.

11. Secretary or clerk. "Secretary or clerk" means the officer responsible for the keeping of records.

12. Treasurer. "Treasurer" means the chief fiscal officer.

#### Comment

This section, along with many other sections, is based on a section of the Model Nonprofit Corporation Act, drafted by the Committee on Corporate Laws, of the American Bar Association, Section of Corporation, Banking and Business Law. The Model Nonprofit Act (hereinafter referred to as the "Model Act") was originally published in 1952, and has been subsequently revised in 1957 and 1964.

No change has been made in the definitions suggested in the Model Act, except for the exclusionary language in subsection 4 dealing with mutually owned institutions. The reasons for the exclusion are discussed in the comment to section 104. The Model Act alternative to section 102, subsection 4, however, was adopted since a large number of nonstock corporations in Maine have been established by special Act of the Legislature.

§ 103. **Applicability**

1. **Domestic corporations.** The provisions of this Act relating to domestic corporations shall apply to:

A. All corporations organized hereunder;

B. All nonstock corporations heretofore organized under any prior general Act or under any Act providing for the creation of special classes of corporations and for a purpose or purposes for which a corporation might be organized under this Act; and

C. All nonstock corporations created by special Act of the Legislature for a purpose or purposes for which a corporation may be organized under this Act.

2. **Foreign corporations.** The provisions of this Act relating to foreign corporations shall apply to all foreign nonprofit corporations conducting affairs in this State for a purpose or purposes for which a corporation might be organized under this Act.

3. **Class of corporations.** Subject to the provisions of section 201, this Act shall not apply to any class of corporations to the extent that any provision of any other public law is specifically applicable to such class of corporations and is inconsistent with any provision of this Act, in which case such other provision shall prevail; and shall not apply to any corporation created by special Act of the Legislature, to the extent that this Act is inconsistent with such special Act; Nor shall the Act apply to any mutual insurer, as defined in Title 24-A, section 401, nor to any financial institution incorporated by special Act of the Legislature or pursuant to general law.

4. **Enactment not to affect existence of certain corporations.** The enactment of this Act shall not affect the existence of any corporation existing on the effective date of this Act.

5. **Other provisions not affected.** The enactment of this Act shall not affect any cause of action, liability, penalty or action which on the effective date of this Act is accrued, existing, incurred or pending, but the same may be asserted, enforced, prosecuted or defended as if this Act had not been enacted.

6. **Validity.** The validity of any corporate act and of any incorporation, prior to the effective date of this Act, shall be determined with reference to the law then in effect.

7. **Validity of provisions of articles or bylaws.** The validity of any provision of the articles or the bylaws of a corporation existing on the effective

date of this Act shall be determined with reference to the law which was in effect at the time when the same was adopted, or with reference to this Act, whichever supports the validity of such provision. A provision of the articles or the bylaws which was valid under the law in existence at the time the same was adopted shall remain in effect, notwithstanding a contrary provision of this Act, until repealed or amended by voluntary act of the corporation; but any amendment thereof shall be adopted by the procedures set out in this Act and the provision, as amended, shall conform to the requirement of this Act.

### Comment

Some changes were made in the language of subsections 1 and 2 as proposed in the Model Act to conform to the counterpart section in the MBCA, Subsection 1, paragraph C was added to deal with corporations organized by special charter. The change in the last sentence of subsection 7 is not intended to alter the MBCA language, but is offered only as a clarification.

In addition, the last 5 subsections of the section have been added, based on comparable provisions in the M.B.C.A. to deal with the effects of the repeal of former legislation in one place. *In toto*, the various sections protect legal corporate acts, articles and bylaws done or executed prior to the effective date of the new legislation but require subsequent amendments to conform to the new legislation.

The status of corporations formed under the old acts is protected as well. These corporations will not have to reincorporate, but will have to observe the provisions of the new law in conducting activities subsequent to the passage of the new law. If the old corporations, for example, fail to file annual reports, they may have their authority to carry on activities revoked by the Secretary of State.

The problem of mutual insurers has been dealt with, albeit unsatisfactorily, by specifically excluding them from coverage in subsection 3. Under present law, mutual insurers do not appear to be covered by the Maine Business Corporation Act, see section 102 (8) and (18) MBCA and may not even be covered by the statutes regulating non-stock corporations, see Title 13, section 901. It is true, of course, that all insurance companies are regulated in their dealings with the public, see Title 24-A, section 401, et seq. In addition, incorporation procedures for mutual insurers are set out in Title 24-A, sections 3306-3309, but it is not clear which law, if any, regulates the internal affairs of mutual insurers.

Although mutual insurers are technically "nonprofit," the nonprofit act here proposed is not designed to regulate their affairs. It is unsatisfactory to leave the issue of their legal status unresolved, but an amendment to the MBCA or a special law tailored to their needs is the only appropriate solution.

**§ 104. Execution of documents**

Whenever any provision of this Act specifically requires any document to be executed by the corporation in accordance with this section, unless otherwise specifically stated in this Act and subject to any additional provisions of this Act, such requirements shall mean that:

1. Signature required. The document shall be signed:
  - A. In the case of articles of incorporation, by the incorporator or incorporators;
  - B. In the case of other documents:
    - (1) By the clerk or secretary;
    - (2) By the president or a vice-president and by the secretary or an assistant secretary, or such other officer as the bylaws may designate as a 2nd certifying officer;
    - (3) If there are no such officers, then by a majority of the directors or by such directors as may be designated by a majority of directors then in office; or
    - (4) If there are no such directors, then by the members or such of them as may be designated by the members at a lawful meeting.
2. Name typed or printed. Any person signing a document shall, either opposite or beneath his signature, clearly and legibly print or type his name and the capacity in which he signs.
3. Title set forth. The document shall set forth the title of the document at the head of the document.
4. Current complete address. The document shall set forth the current address of the registered office of the corporation, including the street or rural route address, post office box, if any, town or city, county and state.
5. Failure to comply. If the document is accepted for filing and filed, a failure to comply with the requirements of subsections 2, 3 or 4 shall have no effect on the validity of the document, and the document shall have the same legal effect as though those subsections had been complied with fully.

**Comment**

This section is based upon section 104 of the MBCA. It represents an attempt to duplicate exactly for nonprofit corporations the filing requirements of the MBCA. The purpose of using a duplicative filing system is to facilitate the task of the Secretary of State's office of processing the increased number of forms submitted to it pursuant to the NPCA. The use of the same filing system will also enable attorneys familiar with the MBCA to adapt easily to the procedural requirements of the Nonprofit Corporation Act.

**§ 105. Verification of documents**

1. Oath not required. Unless required by some other law, no document required or permitted to be filed under any provision of this Act need be under oath or acknowledged.



2. Signature is verification. The signature of any person on a document required or permitted to be filed under any provisions of this Act constitutes that person's representation that:

- A. He has read and understood the meaning and purport of the statements contained in the document;
- B. Such statements are true, either by personal knowledge or according to his information and belief; and
- C. If he signed in a representative capacity or as a corporate officer, that he had the authority so to sign. If any of the above representations is false, the person who signed the document shall be liable as specified in section 1303.

#### Comment

This section is modeled on section 105 of the MBCA, except for subsection 3 of the MBCA which was deleted because it added nothing to the statement in subsection 1.

#### § 106. Filing of documents

1. Meaning of filing. Whenever any provision of this Act requires any document to be delivered for filing, or filed in accordance with this section, unless otherwise specifically stated in this Act and subject to any additional provisions of this Act, such requirement shall mean that:

- A. The original or a duplicate original of the document shall be delivered to the Office of the Secretary of State;
- B. If the document records, reflects or depends upon any action taken by a vote or the consent of the members, the document shall include or be accompanied by a certificate of the clerk, the secretary or an assistant secretary of the corporation stating that he has in his custody minutes properly reflecting such action by the members;
- C. All fees required for filing the document shall be tendered to the Secretary of State;
- D. Upon delivery of the document and upon tender of the required fees, if the Secretary of State finds that the document conforms to the requirements of this Act, he shall certify that the document has been filed in his office by endorsing thereon the word "filed" and the day, month and year thereof, and by signing or initialing such endorsement in person or by agent; if the person delivering the document for filing so requests, such endorsement shall further include the hour and minute of the filing of the document. Such endorsement shall be known as the "filing date" of the document and shall be conclusive of the date, and the time if included in the endorsement, of filing in the absence of actual fraud. The Secretary of State shall thereafter file and index the original;
- E. The Secretary of State shall promptly make a copy of the original and shall certify the copy by making upon it the same endorsement which is

required to appear upon the original, together with a further endorsement that the copy is a true copy of the original document; and

F. The copy, so certified, shall be returned to the person or persons delivering the documents to the Secretary of State and it shall be retained as a part of the permanent records of the corporation.

2. Fully effective. Any document required to be filed shall be fully effective as of the filing date of the document.

3. Microfilmed. If he so determines by rule, the Secretary of State may copy, on microfilm, any document filed by him under this Act or under any predecessor of this Act and retain such microfilm copy in lieu of retaining the original as required by subsection 1, paragraph D; and he may thereafter destroy the original document or return it to the person who delivered the same to him for filing.

4. Inaccurate record filed. Whenever any document authorized to be filed with the Secretary of State under any provision of this Act has been so filed and is an inaccurate record of the corporate action therein referred to, or was defectively or erroneously executed, sealed or acknowledged, such document may be corrected by filing with the Secretary of State a certificate of correction of such document which shall be executed and delivered for filing in accordance with section 104 and this section. The certificate of correction shall specify the inaccuracy or defect to be corrected and shall set forth the portion of the instrument in corrected form. The corrected instrument shall be effective as of the date the original instrument was filed, except as to those persons who are substantially and adversely affected by the correction, and as to those persons the corrected instrument shall be effective from the filing date.

#### Comment

Section 106 closely parallels section 106 of the Business Act. It ensures that the Secretary of State's office will be able to use the same filing system for nonprofit corporations as it uses for business corporations.

#### § 107. Effect of corporate seal on document

1. Seal of corporation. The seal of the corporation may, but need not, be affixed to any document executed in accordance with section 104, and its absence therefrom shall not impair the validity of the document or of any action taken in pursuance thereof or in reliance thereon.

2. Corporate seal prima facie evidence. The presence of the corporate seal on a document purporting to be executed by authority of a domestic or foreign corporation shall be prima facie evidence that the document was so executed.

#### Comment

Section 107 is based on the same numbered sections in the MBCA. It permits, but does not require, the use of the corporate seal to validate official documents.

**§ 108. Advance approval of documents by Attorney General**

1. **Attorney General may approve form.** When any person contemplates filing a document in accordance with section 106, he may submit such document to the Attorney General for approval as to form prior to the intended filing thereof.

2. **Attorney General's requirements for approval.** The person seeking such approval as to form shall submit to the Attorney General:

A. A written request for a statement as to whether the document is in proper form for filing;

B. The intended document, which shall be in its final form, except that signatures, dates, results of votes and other contingent future facts may be omitted; and

C. A fee of \$20, which shall be remitted to the Treasurer of State.

3. **Attorney General to send written statement.** Within a reasonable time thereafter, the Attorney General shall send the person who made the request a written statement in which he:

A. States that upon completion of any omissions, the document shall be entitled, as to its form, to be filed by the Secretary of State; or

B. States that the document shall not be entitled to be so filed, in which case he shall specify wherein it is defective.

4. **Written statement binding.** A written statement by the Attorney General that a document shall be entitled, as to its form, to be filed shall be binding upon the Secretary of State.

5. **Judicial relief.** Nothing in this Act shall impair the right of any person who has submitted a document for filing with the Secretary of State which the Secretary of State has refused to accept, whether or not the Attorney General has written a statement concerning the document, to seek judicial relief compelling the Secretary of State to accept the document.

**Comment**

Section 108, based on section 108 of the MBCA, makes it possible to obtain advance approval by the Attorney General of any document filed with the Secretary of State pursuant to section 106. This prophylactic measure avoids a situation where the Secretary of State is forced to make quasi-legal judgments concerning the sufficiency of legal documents.

**§ 109. Computation of time for giving notice**

In computing the period of time for the giving of any notice required or permitted under this Act, or under the articles, the bylaws of the corporation, or a resolution of its members or directors, the day on which the notice is given shall be excluded, and the day when the act for which notice is given to be done shall be included, unless the instrument calling for the notice otherwise specifically provides.

### Comment

The computation formula, which is self-explanatory, is based on section 109 of the Business Act.

### § 110. Reservation of power

Acts of incorporation passed since March 17, 1831, including this Act, may be amended, altered or repealed by the Legislature, as if express provision therefor were made in them, unless they contain an express limitation. This section shall not deprive the courts of any power which they have at common law over a corporation or its officer.

### Comment

Section 110 authorizes the Legislature to amend and repeal special acts of incorporation. It is the same as the same numbered section in the MBCA.

### § 111. Effect of invalidity

If any provision of this Act or any application of any provision to any person or circumstances is held unconstitutional or otherwise invalid, such invalidity shall not nullify or otherwise impair the remainder of this Act or any other provision or application thereof, but the effect shall be confined to the specific provision or application thereof held invalid, and for this purpose the provisions of this Act are declared to be severable.

### Comment

Section 111, the separability clause, is taken from section 111 of the MBCA.

## CHAPTER 2

### CORPORATE PURPOSES AND POWERS

#### § 201. Purposes

1. Corporations organized. Except as provided in subsections 2 and 3, all nonprofit corporations shall be organized under this Act and may be organized for any lawful purpose or purposes, including without being limited to any of the following purposes:

A. Charitable, benevolent, eleemosynary, educational, civic, patriotic, political, social, fraternal, literary, cultural, athletic, scientific, agricultural, horticultural and animal husbandry;

B. Professional, commercial, industrial, trade association or collective bargaining; and

C. Land development condominiums, homesteads, unit owners or home owners.

2. Corporations not organized. The following types of corporations may not be organized under this Act:

A. Parishes and societies, as that term is used in Title 13, section 2861 et seq; independent local churches, as that term is used in Title 13, section 3021 et seq; meeting houses, as that term is used in Title 13, section 3101 et seq.

If any of the foregoing corporations files an annual report pursuant to section 1301 of this chapter, the filing of the report shall be deemed an election by that corporation to be governed by all of the provisions of this chapter, unless clearly inapplicable.

B. Cooperatives, as that term is used in Title 13, section 1771 et seq; credit unions, as that term is used in Title 9, section 2601 et seq; rural electrification cooperatives, as that term is used in Title 35, section 2801 et seq; consumers' cooperatives, as that term is used in Title 13, section 1501 et seq; and fish marketing associations, as that term is used in Title 13, section 2001 et seq.

3. Corporations which may elect to be organized under this chapter. The following types of corporations may elect to be organized under and governed by applicable provisions of this chapter or under any other applicable statutory provisions:

A. County law libraries, as that term is used in Title 27, section 221 et seq;

B. Proprietors of lands and wharves, as that term is used in Title 13, section 2691 et seq;

C. Fraternal beneficiary associations, as that term is used in Title 24-A, section 4101 et seq;

D. Cemetery corporations which do not issue shares, as that term is used in Title 13, section 1031 et seq; and

E. County and local agricultural societies, as that term is used in Title 7, section 61 et seq.

If any of the foregoing corporations are organized under applicable provisions of this chapter, they shall be governed by the provisions of this chapter, unless clearly inapplicable; provided further that if any of the foregoing corporations files an annual report pursuant to section 1301 of this chapter, the filing of the report shall be deemed an election by that corporation to be governed by all of the provisions of this chapter unless clearly inapplicable.

#### Comment

Section 201 lists the purposes for which a corporation may be organized under the Act. Some changes were made in the language of the first paragraph as proposed in the Model Act. First, "collective bargaining" was added as one of the purposes for which a corporation may be organized, and "labor union" was eliminated as one of the impermissible organizations listed in the last sentence. Since labor unions cannot incorporate under the MBCA, but can incorporate under the nonstock sections, see Title 13, section 901, the exclusion of unions

under this Act would change the present law and make it impossible for labor organizations to incorporate. It is difficult to perceive why unions should be excluded from coverage under the Act. Perhaps it was assumed by the draftsmen of the Model Act that labor unions would be covered and governed by a comprehensive labor statute. No such statute exists in Maine. Finally, since the employers' equivalent of a labor organization, the "trade association," is allowed to incorporate, the exclusion of unions would appear especially unfair.

Subsections 2 and 3 are designed to give certain options to several unique classes of corporations in this State. First, the various kinds of religious corporations may not be organized under this statute, but they may elect to have their internal affairs governed by its provisions; these corporations will signify their election by filing an annual report. Second other types of cooperatives and corporations may elect to be organized under this law or under previously existing legislation. If they are organized under this law, they will be subject to all of its provisions. Even if one of these corporations is not organized under this law, it may elect to have its activities regulated by its provisions by filing an annual report; or it may choose to do nothing and continue to be governed by previously existing statutory law.

#### § 202. General powers

1. Powers. Subject to any limitations contained in this Act or in any other law, each corporation shall have power:

- A. To exist perpetually. No corporation formed under this Act may specify a lesser period of existence, but this shall not limit the power of a corporation to terminate its existence as provided by law;
- B. To sue and be sued in its corporate name, and to participate in any judicial, administrative, arbitrate or other proceeding;
- C. To adopt and alter a corporate seal and to use the same or a facsimile thereof;
- D. To elect, appoint or hire officers, agents and employees of the corporation, and to define their duties and fix their compensation;
- E. To make and alter bylaws, not inconsistent with its articles of incorporation or with the laws of this State, for the administration and regulation of the activities of the corporation;
- F. To cease its corporate activities and surrender its corporate franchise;
- G. To make donations irrespective of corporate benefit for any charitable, scientific, educational or welfare purpose; and contributions for political candidates, parties and issues, to the extent permitted by law;
- H. To establish and carry out pension plans, pension trusts, other incentive plans for any or all of its directors, officers and employees; and to pay pensions and similar payments to its directors, officers or employees, and their families;

I. With respect to any property of any description or interest therein, wherever situated, including, but not limited to, real property:

- (1) To acquire, by purchase, lease, gift, will or otherwise;
- (2) To own, hold, use, improve and otherwise deal in; and
- (3) To sell, convey, encumber, mortgage, pledge, lease, exchange or otherwise dispose of all or any part of such property;

J. To make contracts and incur liabilities, borrow money on such terms and conditions as it may determine, issue its notes and bonds and other obligations and secure any of its obligations by mortgage, pledge or other encumbrance of all or any part of its property, franchises and income;

K. To enter into contracts of guaranty or suretyship, unless in doing so the corporation would be engaging in an activity prohibited to corporations, organized under Title 13-A, section 401;

L. To lend money, invest its funds from time to time, and take and hold any property including, but not limited to, real property, as security for payment of funds so loaned or invested, unless in doing so the corporation would be engaging in a business prohibited to corporations organized under Title 13-A, section 401;

M. To lend money to its employees other than its officers and directors and otherwise to assist its employees, officers and directors;

N. To conduct its activities, carry on its operations and have offices and exercise the powers granted by this Act in any state, territory, district or possession of the United States or in any foreign country;

O. To purchase, take, receive, subscribe for or otherwise acquire, own, hold, vote, use, employ, sell, mortgage, lend, pledge or otherwise use and deal in and with:

- (1) The shares or other interests in or obligations of domestic business or foreign business corporations, associations, partnerships or individuals; and
- (2) The obligations of the United States or any other government, state, territory, municipality or governmental district, or of any instrumentality thereof;

P. To form, or acquire the control of, other corporations or business corporations;

Q. To participate with others in any corporation, partnership, transaction, arrangement, operation, organization or venture which the corporation has power to conduct by itself, even if such participation involves sharing or delegation of control with or to others;

R. To reimburse and indemnify litigation expenses of directors, officers and employees, as provided for in section 714; and

S. To have and exercise all powers necessary or convenient to effect the purposes for which the corporation is organized, or to further the activities in which the corporation may lawfully be engaged.

2. **Limitation.** The articles of incorporation of any corporation subject to this Act may limit the powers conferred by subsection 1, except to the extent that any such limitation is inconsistent with any provision of this Act or with any other law of this State.

3. **Powers enumerated.** It shall not be necessary to set forth in the articles of incorporation any of the powers enumerated in this section; but unless expressly excluded by the articles or limited by statute, each corporation shall have all the powers enumerated in this section whether or not some or all of them are also enumerated in the articles.

#### Comment

This is a modified version of the comparable section in the MBCA, selected in preference to the somewhat more expansive section suggested in the Model Act because of the presumed familiarity acquired by lawyers and judges with the MBCA.

#### § 203. Defense of ultra vires

1. **Beyond legal powers.** No act of a corporation and no conveyance or transfer of real or personal property to or by a corporation shall be invalid by reason of the fact that the corporation was without capacity or power to do such act or to make or receive such conveyance or transfer, but such lack of capacity or power may be asserted:

A. In a proceeding by a member or a director against the corporation to enjoin the doing or continuation of unauthorized acts, or the transfer of real or personal property by or to the corporation. If the unauthorized acts or transfer sought to be enjoined are being, or are to be, performed pursuant to any contract to which the corporation is a party, the court may, if all of the parties to the contract are parties to the proceeding and if it deems the same to be equitable, set aside and enjoin the performance of such contract, and in so doing may allow to the corporation or the other parties to the contract, as the case may be, compensation for the loss or damage sustained by either of them which may result from the action of the court in setting aside and enjoining the performance of such contract, but anticipated profits to be derived from the performance of the contract shall not be awarded by the court as a loss or damage sustained;

B. In a proceeding by the corporation, whether acting directly or through a receiver, trustee or other legal representative, or through members in a representative suit, against the officers or directors of the corporation for exceeding their authority; or

C. In a proceeding by the Attorney General, as provided in this Act, to dissolve the corporation, or in a proceeding by the Attorney General to enjoin the corporation from performing unauthorized acts, or in any other proceeding by the Attorney General.



### Comment

This section goes a bit further than the counterpart section in the MBCA, by allowing a suit based on an ultra vires act or conveyance by a corporate director, the corporation and the Attorney General, as well as by a member.

## CHAPTER 3

### CORPORATE NAME; REGISTERED OFFICE AND AGENT; SERVICE OF PROCESS

#### § 301. Corporate name

##### 1. Name. The corporate name:

A. Shall not contain any word or phrase which indicates or implies that it is organized for any purpose for which a corporation may not be organized under this Act; and

B. Shall not be the same as, or deceptively similar to, the name of any domestic business or nonprofit corporation existing under the laws of this State or any foreign business or nonprofit corporation authorized to carry on activities in this State, or a name the exclusive right to which is, at the time, reserved in the manner provided in this Act, or the name of a business or nonprofit corporation which has in effect a registration of its corporate name as provided in this Act, unless such other corporation executes and files with the Secretary of State proof of a resolution of its board of directors authorizing the use of a similar name by the corporation seeking to use such similar name.

2. Violations of this section. If a corporation has in other respects complied with this Act and its articles of incorporation have been filed, or if a foreign corporation has in other respects satisfied this Act and has been authorized to carry on activities in this State, subsequent discovery of a violation of the foregoing provisions of this section shall not invalidate its corporate existence or authority; but the courts of this State may, upon application of the State or of any interested or affected person, enjoin such violation and grant any other appropriate relief.

3. Grants. Any corporation may grant to any domestic business or nonprofit corporation or any foreign business or nonprofit corporation authorized to carry on activities in this State, by executing and filing with the Secretary of State as provided in sections 104 and 106 proof of a resolution of its board of directors making such grant, the exclusive right thereafter to authorize the use of a name similar to that of the granting corporation by any other corporation or corporations. Any such resolution shall be revocable unless by its terms it is irrevocable. No proof of a subsequent resolution by the board of directors of the granting corporation shall thereafter be required under subsection 1, paragraph B, until and unless the granting corporation shall, in the case of a revocable resolution, revoke the grant by executing and filing in the manner provided under this section proof of a further resolution of its board of directors revoking the grant.

### Comment

This section is a modified version of section 301 of the MBCA; it is similar to the Model Code's section except for subsection 2 which the Model Code did not include. Subsection 3 adds a provision which was recently submitted to the Legislature by the corporation section as an amendment to section 301 of the MBCA.

#### § 302. Reserved name

1. **Exclusive right.** The exclusive right to the use of a corporate name may be reserved by:

- A. Any person intending to organize a corporation under this Act;
- B. Any domestic corporation intending to change its name;
- C. Any foreign corporation intending to make application for a certificate of authority to carry on activities in this State;
- D. Any foreign corporation authorized to carry on activities in this State and intending to change its name; or
- E. Any persons intending to organize a foreign corporation and intending to have such corporation make application for a certificate of authority to carry on business in this State.

2. **Execution of reservation.** The reservation shall be made by executing and delivering for filing, in accordance with sections 104 and 106, an application to reserve a specified corporate name; if the applicant is not a corporation, it shall be executed by the applicant. If the Secretary of State finds that the name is available for corporate use, he shall reserve the same for the exclusive use of the applicant for a period of 120 days.

3. **Right of exclusive use of name transferred.** The right to the exclusive use of a specified corporate name so reserved may be transferred to any other person or corporation by filing in accordance with section 106 a notice of such transfer, executed by the applicant and, if a corporation, in accordance with section 104 for whom the name was reserved, and specifying the name and address of the transferee.

4. **Revocation of reservation.** The Secretary of State may revoke any reservation if, after hearing, he finds that the application therefor or any transfer thereof was not made in good faith.

5. **Reservation not renewed.** The reservation may not be renewed, but after the expiration thereof, the same name may be reserved by the same or another applicant.

### Comment

This section is adopted from section 307, MBCA. It was deemed advisable, from the point of view of attorneys representing a nonprofit corporation, as well as from the point of view of the Secretary of State's office that the same procedures be used for reserving nonprofit corporation names as are used in reserving business corporation names.

**§ 303. Registered name and renewal**

1. **Name registered.** Any corporation organized and existing under the laws of any state or territory of the United States may register its corporate name under this Act, provided its corporate name is not the same as, or deceptively similar to, the name of any domestic business or nonprofit corporation existing under the laws of this State, or the name of any foreign business or nonprofit corporation authorized to carry on activities in this State, or any corporate name reserved or registered under Title 13-A or this section or section 302.

2. **Application.** The registration shall be made by delivering for filing an application for registration setting forth the name of the corporation, the state or territory under the laws of which it is incorporated, the date of its incorporation, a statement that it is actually engaged in corporate activities, a brief statement of the activities in which it is engaged and a certificate setting forth that such corporation is in good standing under the laws of the state or territory wherein it is organized, executed by the Secretary of State of such state or territory or by such other official as may have custody of the records pertaining to corporations.

3. **Registration effective.** Such registration shall be effective until the close of the calendar year in which such application is filed.

4. **Renewal of registration.** A corporation which has in effect a registration of its corporate name may renew such registration from year to year by annually filing an application for renewal setting forth the facts required to be set forth in an original application for registration and a certificate of good standing as required for the original registration. A renewal application may be filed between the first day of October and the 31st day of December in each year, and shall extend the registration for the following calendar year.

**Comment**

The comments made with respect to section 302 are also applicable to this section.

**§ 304. Registered office and registered agent**

Each corporation shall have and continuously maintain in this State:

1. **Office.** A registered office which may be, but need not be, the same as its principal office; and

2. **Agent.** A registered agent, which agent may be either an individual resident of this State whose business office is identical with such registered office or a domestic corporation, whether for profit or not for profit, or a foreign corporation, whether for profit or not for profit, authorized to transact business or conduct activities in this State, having an office identical with such registered office.

**Comment**

The provisions dealing with the appointment of an agent for a non-profit corporation are less complex than similar sections dealing with

the appointment of a clerk under the MBCA. Since the clerk is the equivalent of the secretary, an officer of a corporation, the MBCA **requires** that he or she be a natural person and requires the first clerk to be named in the articles of incorporation.

The registered agent of a nonprofit corporation, on the other hand, is named primarily to ensure the existence of a legal entity within the State for service of process. Consequently, the agent is appointed by a board of directors' resolution and may be a corporation as well as a natural person.

**§ 305. Change of registered office or registered agent**

**1. Statement for change of office or agent.** A corporation may change its registered office or change its registered agent, or both, by executing and delivering for filing, as provided by sections 104 and 106, a statement setting forth:

- A. The name of the corporation;
- B. The address of its then registered office;
- C. If the address of its registered office is changed, the address to which the registered office is to be changed;
- D. The name of its then registered agent;
- E. If its registered agent is changed, the name of its successor registered agent;
- F. That the address of its registered office and the address of the office of its registered agent, as changed, will be identical; and
- G. That such change was authorized by resolution duly adopted by its board of directors.

**2. Resignation of agent.** Any registered agent of a corporation may resign as such agent upon filing a written notice thereof with the Secretary of State and by mailing a copy thereof to the corporation in care of an officer who is not the resigning registered agent, at the address of such officer as shown by the most recent annual report of the corporation. The appointment of such agent shall terminate upon the expiration of 30 days after receipt of such notice by the Secretary of State.

**3. Agent's change of address.** If a registered agent changes his or its business address from the registered office appearing on the record in the office of the Secretary of State, he or it may change such address and the address of the registered office of any corporations of which he or it is a registered agent by filing a statement as required above except that it need be signed only by the registered agent and need not be responsive to subsection 1, paragraph E or G, and shall recite that a copy of the statement has been mailed to each such corporation.

**Comment**

The section closely tracks the Model Act's section and is very similar to the counterpart provision of the MBCA.

### § 306. Service of process on corporation

1. Agent of corporation may be served notice. The registered agent of each corporation shall be an agent of such corporation upon whom any process, notice or demand required or permitted by law to be served upon the corporation may be served and such service shall be binding upon the corporation.

2. Failure to appoint or maintain agent. Whenever a corporation shall fail to appoint or maintain a registered agent in this State or whenever its registered agent cannot with reasonable diligence be found at the registered office, then the Secretary of State shall be an agent of such corporation upon whom any such process, notice or demand may be served. Service on the Secretary of State of any such process, notice or demand shall be made as provided by the Maine Rules of Civil Procedure, rule 4 (d) (8), as the same may hereafter be amended.

Nothing herein contained shall limit or affect the right to serve any process, notice or demand required or permitted by law to be served upon a corporation in any other manner now or hereafter permitted by law.

#### Comment

The Model Code section has been changed to conform to the language of section 305 of the MBCA and to tie into the pertinent sections of the Maine Rules of Civil Procedure.

### § 307. Service on nonresident directors of domestic corporations

1. Nonresident directors. Each director of a domestic corporation who is a nonresident of this State at the time of his election or who becomes a nonresident during his term of office shall, by his acceptance of election or by continuing in office as director, be deemed to have appointed the Secretary of State as an agent to receive service of process upon him in any action or proceeding relating to actions of such corporation and arising while he held office as director of such corporation.

2. Service of process. Service of such process upon the Secretary of State shall be made in the same manner as is provided by the Maine Rules of Civil Procedure, rule 4 (d) (8), as amended, in the case of service upon the Secretary of State as an agent of a corporation. The copy of the process therein provided for shall be mailed to the nonresident director at the address of such director shown on the most recent annual report of the corporation.

3. Other service of process. Service under this section may also be made by delivery of a copy of the process of the nonresident director at his address outside the State. Proof of such delivery shall be made by affidavit of the person making delivery and the affidavit shall be filed with the clerk of courts in which the action or proceeding is pending.

4. Termination of application. The resignation of any nonresident director shall, effective as of the date of filing in accordance with section 106 a notice of his resignation signed by such former director, terminate the application to him of the provisions of this section, except for any cause of action already accrued.

### Comment

This section has been borrowed from the MBCA to permit service on a nonresident director. There will certainly be occasions when a suitor will want to bring an action against a nonresident director of a non-profit corporation. This section simplifies service of process on the nonresident.

## CHAPTER 4

### ORGANIZATION OF NONPROFIT CORPORATIONS

#### § 401. Incorporators

1. **Incorporate.** One or more persons may incorporate a corporation by executing and filing, in accordance with sections 403 and 404, articles of incorporations for such corporation.

2. **Need not be residents.** Incorporators need not be residents of this State.

### Comment

This section provides for the same method of incorporation as is used for business corporations. It is a relatively simple procedure and should present no major obstacles to the ordinary layperson.

“Persons,” as that word is used, assumes the definition in Title I, section 72, and includes a “body corporate.”

#### § 402. Members

1. **Classes of members.** A corporation may have one or more classes of members or may have no members. If the corporation has one or more classes of members, the designation of such class or classes, the manner of election or appointment and the qualifications and rights of the members of each class shall be set forth in the articles of incorporation. If the corporation has no members, that fact shall be set forth in the articles of incorporation. A corporation may issue certificates evidencing membership therein.

2. **Directors, officers, employees and members not liable.** The directors, officers, employees and members of the corporation shall not, as such, be liable on its obligations.

### Comment

The somewhat arcane question of just who “is” a nonprofit corporation receives at least a partial answer in this section. Given the diversity of organizations eligible for incorporation under this Act, sections regulating the internal affairs of such groups must be as flexible as possible. Some nonprofit corporations will be comprised exclusively of boards of directors; others will have boards of directors as well as members; and still others will have members, probationary members, affiliated members and nonvoting members. This section permits the widest possible diversity consistent with provisions in the articles and bylaws.

Although the members are not really equivalent to shareholders under the MBCA, they are shielded from personal liability by the last subsection.

**§ 403. Articles of incorporation**

1. **Form of articles of incorporation.** The articles of incorporation shall set forth:

- A. The name of the corporation ;**
- B. The purpose or purposes for which the corporation is organized or a statement that it is organized for all purposes permitted under the Act ;**
- C. Any provisions, not inconsistent with law, which the incorporators elect to set forth in the articles of incorporation for the regulation of the internal affairs of the corporation, including any provision for distribution of assets on dissolution or final liquidation ;**
- D. The address of its initial registered office and the name of its initial registered agent at such address ;**
- E. The number of directors constituting the initial board of directors if they have been designated or elected ;**
- F. The maximum and minimum, not less than 3, number of directors if they differ from the initial board ; and**
- G. The name and address of each incorporator.**

2. **Corporate powers not set forth in incorporation.** It shall not be necessary to set forth in the articles of incorporation any of the corporate powers enumerated in this Act.

3. **Controlling amendment to bylaws.** Unless the articles of incorporation provide that a change in the number of directors shall be made only by amendment to the articles of incorporation, a change in the number of directors made by amendment to the bylaws shall be controlling. In all other cases, whenever a provision of the articles of incorporation is inconsistent with a bylaw, the provision of the articles of incorporation shall be controlling.

**Comment**

The articles which shall be filed under this section are less complex than the articles filed for a business corporation. The subsections dealing with shares and capital structure that occupy a large part of section 403 are, of course, unnecessary for the nonprofit corporation.

The section does require the articles to state the purposes for which it is organized. The MBCA, § 404, on the other hand, makes it unnecessary, in most cases, to state the business or businesses in which the corporation will engage. The requirement of a statement of purposes under the NPA is retained to ensure an early determination that the incorporators are not organizing for a proscribed purpose.

**§ 404. Filing of articles of incorporation**

1. Filing. When the articles of incorporation are delivered for filing by the Secretary of State, he shall, before filing them, determine that the articles:

- A. Comply with the requirements of sections 104 and 106;
- B. Set forth the information required by sections 402 and 403;
- C. Do not adopt as the name of the corporation a name which is in violation of section 301; and
- D. Appear in all other respects to conform to the requirements of this Act and to law.

2. Secretary of State to file articles of incorporation. Upon making such determination, the Secretary of State shall file the articles of incorporation.

**Comment**

This section is based upon a similar provision of the MBCA. The purpose of the section is to provide a filing system which parallels that of the MBCA. Such a duplicative filing system should facilitate the Secretary of State and attorneys familiar with the MBCA in processing articles of incorporation for nonprofit corporations.

**§ 405. Beginning of corporate existence; filing as conclusive evidence of incorporation; exceptions**

1. Filed articles constitute charter and authority. The filed articles constitute the corporation's charter and authority to carry on activities.

2. Beginning of corporate existence. The existence of the corporation shall begin as of the filing date of the articles of incorporation, endorsed by the Secretary of State upon the articles filed as provided by section 106.

3. Filing of articles of incorporation; conclusive evidence. The fact that the articles of incorporation have been filed by the Secretary of State shall be conclusive evidence that all conditions required by this Act to be performed by the incorporators have been complied with, that the corporation has been incorporated and that its corporate existence has begun. Nothing in this subsection shall be construed to prohibit the State from instituting proceedings to:

- A. Cancel or revoke the articles of incorporation;
- B. Enjoin any person from acting as a corporation within this State without being duly incorporated; or
- C. Compel dissolution of the corporation; and in any such proceeding by the State, this section shall not give rise to any presumptions against the State.

4. Fact of filing. The fact of filing the articles may be proved by production of a certified copy thereof or in any other manner permitted by law.

**Comment**

The MBCA section with respect to the beginning of corporate existence is here substituted for the Model Act version. The former is more



precise and congruent with the articles dealing with filing requirements, also borrowed from the MBCA.

**§ 406. Powers of incorporators; organizational meeting**

1. **Management of affairs until first annual meeting.** If the persons who are to serve as directors until the first annual meeting of the members have not been named in the articles of incorporation, the incorporator or incorporators, until the directors are elected, shall manage the affairs of the corporation and may do whatever is necessary and proper to perfect the organization of the corporation, including the adoption of the original bylaws of the corporation and the election of directors. If the persons who are to serve as directors until the first annual meeting have been named in the articles of incorporation, the power of the incorporator or incorporators to act for the corporation shall terminate upon filing of the articles. If the initial directors have not been named in the articles, the power of the incorporator or incorporators shall terminate upon the election and qualification of at least one director.

2. **Organizational meeting.** At any time before or after the filing date of the articles of incorporation, an organizational meeting of the incorporator or incorporators, or of the board of directors if the initial directors were named in the articles of incorporation, shall be held, either within or without this State, to adopt bylaws of the corporation, to elect directors if the meeting is of the incorporators, to serve or hold office until the first annual meeting of the members, to elect officers if the meeting is of the directors, to do any other or further acts to complete the organization of the corporation and to transact such other business as may come before the meeting. Such meeting may be held without call, upon the unanimous agreement of the incorporators or directors, as the case may be, or upon call as provided in subsection 3.

3. **Meeting; how called.** If the organizational meeting is of the incorporators, it shall be held at the call of a majority of the incorporators. If the organizational meeting is of the directors named in the articles of incorporation, it shall be held at the call either of a majority of the incorporators or of a majority of the directors named in the articles. The person or persons calling the meeting shall give to each other incorporator or director, as the case may be, at least 3 days' written notice thereof by any usual means of communication. The notice shall state the time, place and purposes of the meeting.

4. **Waiver of notice.** The provisions of section 705 pertaining to waiver of notice shall apply to the organizational meeting.

**Comment**

This section is essentially the same as section 407 of MBCA.

One disadvantage of allowing the incorporators to name directors and adopt the bylaws is that the members are denied this opportunity of choosing the initial director and setting up their own governance framework. Since the problem experienced by nonprofit corporations, however, is often finding a board of willing directors rather than choosing from a multitude of applicants, the disadvantage is probably not significant.

**§ 407. Shares of stock and dividends prohibited**

**A corporation shall not have or issue shares of stock. No dividend shall be paid and no part of the income or profit of a corporation shall be distributed to its members, directors or officers. A corporation may pay compensation in a reasonable amount to its members, directors, or officers for services rendered, may confer benefits upon its members in conformity with its purposes and upon dissolution or final liquidation may make distributions to its members as permitted by this Act, and no such payment, benefit or distribution shall be deemed to be a dividend or a distribution of income or profit.**

**Comment**

This section attempts to ensure the nonprofit character of organizations incorporated under this Act. No shares may be issued, no dividend paid and no income or profit may be distributed to its members.

Despite this straightforward statement, some ambiguity necessarily inheres in the section. Although profits may not be distributed, the corporation "may confer benefits upon its members in conformity with its purpose." Would it be permissible for a fraternal benefit society to engage in "incidental" but extensive business activities, real estate development, for example, and dispose of the profit by providing free housing, insurance and medical care for its members? Would it also be possible for the same benefit society to permit members to sell their memberships?

Since the section permits distribution of assets to members upon dissolution, would it be possible for a "nonprofit" organization engaged in profit making enterprises to form, dissolve and distribute assets once each year?

It might well be that state and federal securities laws, as well as provisions in the Internal Revenue Code are sufficient deterrants to discourage these potential abuses, but it behooves attorneys to be aware of the occasional difficulty in distinguishing between a nonprofit and business corporation.

**CHAPTER 6****BYLAWS AND VOTING****§ 601. Bylaws**

**The initial bylaws of a corporation shall be adopted by its incorporators or its board of directors. The power to alter, amend or repeal the bylaws or adopt new bylaws shall be vested in the board of directors unless otherwise provided in the articles of incorporation or the bylaws. The bylaws may contain any provisions for the regulation and management of the activities or a corporation not inconsistent with law or the articles of incorporation.**

**Comment**

This section is considerably less complex than the MBCA sections 601 and 602. The latter section deals in considerable detail with the

relative power of incorporators, boards of directors and shareholders over the adoption and subsequent amendment of corporate bylaws. In addition, the MBCA authorizes the adoption of emergency bylaws in the event of armed attack or nuclear disaster. Although it might be useful in some cases to imitate the MBCA and permit the incorporators to adopt initial bylaws and to detail the relative powers of the board of directors and members in relation to subsequent amendments, the simplicity of the Model Act's section has much to recommend it.

### § 602. Meetings of members

1. **Where held.** Meetings of members, if any, may be held at such place, either within or without this State, as may be provided in the bylaws. In the absence of any such provision, all meetings shall be held at the registered office of the corporation in this State.

2. **Annual meetings.** A meeting shall be held annually at such time as may be provided in the articles of incorporation or bylaws. If there shall be a failure, for whatever reason, to hold the annual meeting for a period of 30 days after the date for such meeting specified in the bylaws or articles of incorporation, or if no date has been specified, for a period of 13 months after the organization of the corporation or after its last annual meeting, a substitute annual meeting may be called by any person or persons entitled to call a special meeting of the members.

3. **Special meetings.** Special meetings of the members may be called by the president or by the board of directors. Special meetings of the members may also be called by such other officers or persons or number or proportion of members as may be provided in the articles of incorporation or the bylaws. In the absence of a provision fixing the number or proportion of members entitled to call a meeting, a special meeting of members may be called by members having  $\frac{1}{20}$  of the votes entitled to be cast at such meeting.

#### Comment

This section is substantially the same as its counterpart in the MBCA.

### § 603. Notice of members' meetings

1. **Written notice of meetings.** Unless otherwise provided in the articles of incorporation or the bylaws, written notice stating the place, day and hour of the meeting and, in case of a special meeting, the purpose or purposes for which the meeting is called, shall be delivered not less than 10 nor more than 50 days before the date of the meeting, either personally or by mail, by or at the direction of the president or the secretary, or the officers or persons calling the meeting, to each member entitled to vote at such meeting. If mailed, such notice shall be deemed to be delivered when deposited in the United States mail addressed to the member at his address as it appears on the records of the corporation, with postage thereon prepaid.

2. **Affidavit of designated officer prima facie evidence of facts stated therein.** An affidavit of the officer designated under subsection 1, or of such other person who gave notice as required by this section, that such notice has been

given shall in the absence of fraud be prima facie evidence of the facts stated therein.

3. Notice of adjourned meeting. When a meeting is adjourned, for whatever reason, for 30 days or more, notice of the adjourned meeting shall be given as provided by this section. Notice of a meeting adjourned for less than 30 days need not be given if the time and place of the adjourned meeting are announced at the meeting at which the adjournment is taken. At the adjourned meeting, the corporation may transact any business which might have been transacted at the meeting at which the adjournment was taken.

#### Comment

The first subsection is taken from the Model Act. It contains essentially the same language as appears in section 604 of the MBCA. The 2nd and 3rd subsections are modeled on similar provisions in the MBCA.

#### § 604. Voting

1. Members entitled to vote. The right of the members or any class or classes of members to vote may be limited, enlarged or denied to the extent specified in the articles of incorporation. Unless so limited, enlarged or denied, each member, regardless of class, shall be entitled to one vote on each matter submitted to a vote of members.

2. Members to vote in person or by proxy; validity. A member entitled to vote in person or, unless the articles of incorporation or the bylaws otherwise provide, may vote by proxy executed in writing by the member or by his duly authorized attorney-in-fact. No proxy shall be valid after 11 months from the date of its execution, unless otherwise provided in the proxy. Where directors or officers are to be elected by members, the bylaws may provide that such elections may be conducted by mail.

3. Cumulative voting for directors not permitted. The articles of incorporation or the bylaws shall not permit cumulative voting for directors. Any provision purporting to permit cumulative voting shall be void.

4. Corporations with no right to vote. If a corporation has no members or its members have no right to vote, the directors shall have the sole voting power.

#### Comment

The voting rights of members and directors are stated in a simple and straightforward manner.

The Nonprofit Corporation Act provides that the articles may establish different voting rights for different classes of members, to the extent of denying the right to vote to all members. Unless the articles otherwise provide, however, each member is entitled to one vote on each matter submitted to a vote of the members. The NCA departs from the MBCA by not permitting cumulative voting in the election of directors.

### § 605. Quorum

1. Members entitled to vote. The bylaws may provide the number or percentage of members entitled to vote represented in person or by proxy, or the number or percentage of votes represented in person or by proxy, which shall constitute a quorum at a meeting of members. In the absence of any such provision, members holding  $\frac{1}{10}$  of the votes entitled to be cast on the matter to be voted upon represented in person or by proxy shall constitute a quorum. A majority of the votes entitled to be cast on a matter to be voted upon by the members present or represented by proxy at a meeting at which a quorum is present shall be necessary for the adoption thereof unless a greater proportion is required by this Act, the articles of incorporation or the bylaws.

2. Meeting with less than a quorum. The members present at a duly called or held meeting at which a quorum was once present may continue to do business at the meeting or at any adjournment thereof, notwithstanding the withdrawal of enough members to leave less than a quorum.

#### Comment

Unless the bylaws provide a different percentage either lesser or greater, section 605 establishes that  $\frac{1}{10}$  of the votes entitled to be cast shall constitute a quorum. The 10% is considerably below the  $\frac{1}{3}$  of the shares minimum established by the MBCA. The difference is probably justified. Their financial self interest motivates a high percentage of shareholders either to attend meetings or assign proxies. That motivation is either not present at all or not present to the same extent in the case of nonprofit corporate members. Given the difficulties commonly experienced by nonprofit membership corporations in getting members to attend meetings, the 10% requirement is not unusual. It can be raised or lowered in the bylaws.

The 2nd subsection, clarifying the not uncommon situation that arises when the initial quorum dissolves, is based on the MBCA.

### § 606. Unanimous action by members without a meeting

Any action required or permitted under this Act to be taken at a meeting of the members may be taken without a meeting if written consents, setting forth the action so taken, are signed by all the members entitled to vote on such action and are filed with the clerk of the corporation as part of the corporate records. Such written consents shall have the same effect as a unanimous vote of the members and may be stated as such in any certificate or document required or permitted to be filed with the Secretary of State, and in any certificate or document prepared or certified by any officer of the corporation for any purpose.

#### Comment

This section is modeled after the similar provision in the MBCA.

**CHAPTER 7**  
**DIRECTORS AND OFFICERS**

**§ 701. Board of directors**

The activities of a corporation shall be managed by a board of directors. Directors need not be residents of this State or members of the corporation unless the articles of incorporation or the bylaws so require. The articles of incorporation or the bylaws may prescribe other qualifications for the directors.

**Comment**

This section states the usual rule respecting the authority and responsibility of a corporate board of directors. Aside from several paragraphs in the MBCA dealing with the unique problems of the close corporation, the present section tracks quite closely the language of its counterpart section in the MBCA.

**§ 702. Number and election of directors**

1. Number of directors fixed by bylaws. The number of directors of a corporation shall not be less than 3. Subject to such limitation, the number of directors or a maximum and minimum number of directors shall be fixed by the bylaws or articles of incorporation. The number of directors may be increased or decreased from time to time by amendment to the bylaws, unless the articles of incorporation provide that a change in the number of directors shall be made only by amendment of the articles of incorporation. If the articles of incorporation or bylaws set a maximum and minimum number of directors, the number of directors may be increased or decreased by a resolution of the members, or by a resolution of the directors, if the articles authorize such a resolution. No decrease in number shall have the effect of shortening the term of any incumbent director. In the absence of a bylaw fixing the number of directors, the number shall be the same as that stated in the articles of incorporation.

2. First board of directors named in articles of incorporation. The directors constituting the first board of directors shall either be named in the articles of incorporation or elected by the incorporators and shall hold office until the first annual meeting of members or for such other period as may be specified in the articles of incorporation or the bylaws. Thereafter, directors shall be elected or appointed in the manner and for the terms provided in the articles of incorporation or by the bylaws. In the absence of a provision fixing the term of office, the term of office of a director shall be for one year.

3. Directors divided into classes. Directors may be divided into classes and the terms of office of the several classes need not be uniform. Each director shall hold office for the term to which he is elected or appointed and until his successor shall have been elected or appointed and qualified.

**Comment**

This section requires at least 3 directors for a nonprofit corporation.

The number may be increased by amendments to the bylaws. Directors may be divided into classes and elected by different classes of members, see subsection 3. The provisions relating to classifications of directors are not as detailed as similar provisions in MBCA. The complex control problems resulting from a business corporation's capital structure are not present to the same degree in the case of non-profit corporations.

### § 703. Vacancies

1. **Vacancies filled.** Any vacancy occurring in the board of directors and any directorship to be filled by reason of an increase in the number of directors may be filled by the affirmative vote of a majority of the remaining directors, though less than a quorum of the board of directors, unless the articles of incorporation or the bylaws provide that a vacancy or directorship so created shall be filled in some other manner, in which case such provision shall control.

2. **Director to fill unexpired term of predecessor.** A director elected to fill a vacancy shall be elected for the unexpired term of his predecessor in office.

3. **Limited directorship.** Unless otherwise provided by the articles of incorporation or by the bylaws, the directorship to be filled by reason of an increase in the number of directors may be filled by the board of directors for a term of office continuing only until the next election of directors.

#### Comment

Vacancies on the board of directors are filled by vote of the remaining directors, unless the articles or bylaws prescribe an alternative method. This section differs slightly from section 706, MBCA which requires that vacancies created by an increase in the number of directors must be filled at a special or annual meeting of the shareholders unless the articles or bylaws provide otherwise. Since power struggles within boards of directors of nonprofit corporations are less likely than on boards governing business corporations, the presumption of responsibility on the part of a nonprofit corporate board is probably justified.

### § 704. Removal of directors

1. **Removal for cause.** At a special meeting of members called expressly for that purpose, the entire board of directors or any individual director may be removed, with or without cause, by a vote of the members as provided in this section.

2. **Vote of  $\frac{2}{3}$  of membership required for removal.** Subject to the limitation in subsection 4, if the corporation does not have a board of directors so classified that different classes of members elect different directors, such removal may be accomplished by the affirmative vote of  $\frac{2}{3}$  of the members entitled to vote for directors. The articles of incorporation may provide that such removal be accomplished by a lesser vote, but in no case by a vote of less than a majority of members voting on the proposed removal.

3. Articles of incorporation may provide removal by lesser vote. Subject to the limitation in subsection 4, if the directors are so classified that different classes of members elect different directors, a director may be removed only by the affirmative vote of  $\frac{2}{3}$  of the members of that class which elected him. The articles of incorporation may provide that such removal may be accomplished by a lesser vote of the members of that class, but in no case by a vote of less than a majority of the members of that class voting on the proposed removal.

4. All directors removed at meeting. If any or all directors are removed at such meeting of the members, new directors may be elected at the same meeting without express notice being given of such election.

5. Action in court for removal from office. Notwithstanding the foregoing provisions, if  $\frac{2}{3}$  of the directors then in office resolve that individual directors should be removed from office for cause, the corporation may bring an action in any court having equity jurisdiction to remove such directors from office. If the court finds, by a preponderance of the evidence, that any such director has been guilty of fraudulent or dishonest acts, to the detriment of the corporation or any substantial group of its members, or has been guilty of gross abuse of authority or discretion in discharge of his duties to the corporation, the court shall order him removed from office and may bar him from reelection for a period of time prescribed by the court, and may make such other orders as are just and equitable.

#### Comment

The procedure for removal of directors of nonprofit corporations is identical to that provided for business corporations in section 707 of the MBCA. Although the section would permit removal by vote of  $\frac{2}{3}$  of the membership entitled to vote, the articles of incorporation may provide for removal by a majority of these members voting on the proposed removal. Subsection 5 authorizes " $\frac{2}{3}$  of the directors then in office" to seek the ouster of a director whose fraudulent or dishonest acts have caused harm to the corporation or a substantial group of its members.

The procedure for removal of directors is considerably more complex than that provided for in the Model Act, which would permit removal pursuant to any procedure provided for in the articles of incorporation. See Model Act Section 18. The elaborate removal procedure is necessary, however, if the right of the minority to class voting is to be meaningful. Should a corporation desire a more simple method for removal, it is free to provide so in the articles of incorporation (provided at least a majority of the members voting is required for removal).

#### § 705. Place and notice of directors' meetings

1. Purpose of meeting; business transacted not specified in notice. Meetings of the board of directors, regular or special, may be held either within or without this State, and upon such notice as the bylaws may prescribe. Attendance of a director at any meeting shall constitute a waiver of notice



of such meeting, except when a director attends a meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the board of directors need be specified in the notice or waiver of notice of such meeting, unless the articles, the bylaws or this Act so requires.

2. Participation at meetings by conference telephone. Unless otherwise restricted by the certificate of incorporation or bylaws, members of the board of directors of any corporation, or any committee designated by such board, may participate in a meeting of such board or committee by means of a conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other and participation in a meeting pursuant to this subsection shall constitute presence in person at such meeting.

#### Comment

This section allows considerable flexibility to a corporation in fixing the time and place of special or regular directors' meetings.

#### § 706. Quorum and vote of directors

1. Quorum fixed by bylaws. A majority of the number of directors fixed by the bylaws, or in the absence of a bylaw fixing the number of directors, then of the number stated in the articles of incorporation, shall constitute a quorum for the transaction of business, unless otherwise provided in the articles of incorporation or the bylaws, but in no event shall a quorum consist of less than  $1/5$  of the number of directors so fixed or stated. The act of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors, unless the act of a greater number is required by this Act, the articles of incorporation or the bylaws.

2. Special meetings. Special meetings of the directors may be called by the chairman of the board, the president, or if he is absent or is unable to act, by any vice-president, by any 2 directors, or by any other person or persons authorized by the bylaws.

#### Comment

A majority of the number of directors fixed by the articles constitute a quorum, unless otherwise provided in the articles or bylaws, but the quorum figure cannot be fixed at less than  $1/5$ .

Subsection 2, authorizing special meetings of the board, was taken from section 709 (6) of the MBCA.

#### § 707. Unanimous action by directors without a meeting

Unless otherwise provided by the articles of incorporation or bylaws, any action required by this Act to be taken at a meeting of the directors of a corporation, or any action which may be taken at a meeting of the directors or of a committee of the directors, may be taken, without a meeting if all of the directors, or all of the members of the committee, as the case may be, sign written consents setting forth the action taken or to be taken, at any

time before or after the intended effective date of such action. Such consents shall be filed with the minutes of directors' meetings or committee meetings, as the case may be, and shall have the same effect as a unanimous vote.

#### Comment

This section has been taken in its entirety from the MBCA. It allows directors to take action as a board without a formal meeting, if all of the directors sign written consent to the action proposed to be taken. It has proved a useful device for the business board, and should prove equally useful to the nonprofit corporate board.

#### § 708. Informal or irregular action by directors

1. Action taken without a meeting. Action taken without a meeting by agreement of a majority of directors, or by agreement of such larger percentage as the articles of incorporation or the bylaws may require, shall be deemed action of the board of directors:

A. If the corporation has no members and all directors know of the action taken and no director makes prompt objection to such action;

B. If all members know of the action taken and no member makes prompt objection to such action; or

C. If the directors take informal action pursuant to a custom of that corporation known generally to its members and all directors know of the action taken, and no director makes prompt objection thereto.

2. Meeting ratified by a director. If a meeting otherwise valid of the board of directors or of any committee is held without call or notice where such is required, any action taken at such meeting shall be deemed ratified by a director or committee member who did not attend, unless, after learning of the action taken and of the impropriety of the meeting, he makes prompt objection thereto.

3. Objections in writing to secretary of corporation. Objection by a member, director or committee member shall be effective only if written objection to the holding of the meeting or to any specific action so taken is filed with the clerk or the secretary of the corporation.

#### Comment

This section, modeled on a similar provision in the MBCA, prescribes steps for the ratification of informal acts by the board of directors. Given the sometimes informal structure and customs of nonprofit corporation, the addition of this section is desirable.

#### § 709. Committees

1. Executive and other committees. If the articles of incorporation or the bylaws so provide, the board of directors, by a resolution adopted by a majority of the full board of directors, may designate from among its members an executive committee and other committees, each consisting of 2 or more directors, and may delegate to such committee or committees all the

authority of the board of directors, except that no such committee or committees shall have or exercise the authority of the board of directors to:

- A. Amend the articles of incorporation;
  - B. Adopt a plan of merger or consolidation;
  - C. Recommend to the members the sale or other disposition of all or substantially all of the property and assets of the corporation other than in the usual course of its business;
  - D. Recommend to the members voluntary dissolution of the corporation or revocation of such dissolution; or
  - E. Amend the bylaws of the corporation.
2. Designation to committee. The designation of any such committee and the delegation to it of authority shall not relieve the board of directors, or any member thereof, of any responsibility imposed by law.
  3. Conduct of meetings. So far as applicable, the provision of this chapter relating to the conduct of meetings of the board of directors shall govern meetings of the executive or other committees.
  4. Board of directors may appoint alternate. At the time an executive committee or any other committee is created, or at any time thereafter, the board of directors may designate from among its members one or more alternate members of such committee, and may specify their order of preference. Each such alternate member may attend all meetings of the committee, but shall be without vote unless one or more of the regularly designated members of such committee fails to attend a meeting. In the absence of one or more of the regular members of the committee, such alternate member or members may be counted toward a quorum and may vote as though they were regular members of the committee. In the event that there are more alternate committee members present than there are absent regular committee members, the alternate members shall have the right to vote in the order of preference specified by the directors in designating them or, if no order of preference was specified, in the order of their appointment or their listing in a single appointment.

#### Comment

This section authorizes the appointment of an executive committee with the same qualifications placed on its powers as are stated in section 713, the comparable section in the MBCA.

Subsection 3, a useful addendum given the traditional importance of executive committees, was adopted from the MBCA.

#### § 710. Officers

1. Officers elected or appointed. The officers of a corporation shall consist of a president, a secretary or clerk, a treasurer and such other officers and assistant officers as may be deemed necessary, each of whom shall be elected or appointed at such time and in such manner and for such term as may be

prescribed in the articles of incorporation, in the bylaws or in a resolution of the board of directors. In the absence of such provision, all officers shall be elected or appointed annually by a board of directors. Any 2 or more offices may be held by the same person unless otherwise provided in the articles of incorporation or bylaws.

2. **Authority to make contracts.** Unless they have reason to believe otherwise, persons dealing with a corporation are entitled to assume that its president has authority to make, on its behalf, all contracts which are within the ordinary course of those activities in which the corporation is already engaged.

#### Comment

The corporation must have 3 officers—a president, a secretary or clerk and a treasurer. The Model Act section also required the appointment or election of a vice-president, but this was eliminated as an unnecessary requirement. The corporation may, of course, appoint or elect one or more vice-presidents if it so desires.

The term “secretary” was used in place of the more familiar “clerk” used in the MBCA on the ground that it has traditionally been used in nonbusiness corporations and will be more familiar to the people involved with nonprofit corporations. In addition, the nonprofit secretary does not have the official duties of a business corporation clerk and it might create confusion to use the term “clerk” in the nonprofit act.

Subsection 2, a useful statement of the common law rules of agency in the business corporation area, has been adopted from the MBCA. The phrase “ordinary course of those **activities**” was substituted for “ordinary course of those **businesses**.” The addition of this subsection creates the presumption that people dealing with nonprofit corporations usually assume the president has the power to bind the corporation.

#### § 711. Removal of officers

1. **Removal.** Any officer elected or appointed as provided in the articles of incorporation or bylaws may be removed by the persons authorized to elect or appoint such officer whenever in their judgment the best interests of the corporation will be served thereby. The removal of an officer shall be without prejudice to the contract rights, if any, of the officer so removed.

2. **Contract rights not created by appointment.** Election or appointment of an officer or agent shall not of itself create contract rights.

3. **Vacancy.** Any vacancy, however occurring, in any office may be filled by the directors, unless the articles of incorporation shall have specifically reserved such power to the members.

#### Comment

This section restates the usual rule that the appointing authority has the right to remove an officer in the interests of the corporation.

Subsection 3, authorizing the board to fill a vacancy in any office unless restricted by the articles was adopted from the MBCA.

**§ 712. Loans to directors and officers prohibited**

No loans shall be made by a corporation to its directors or officers. Any director or officer who assents to or participates in the making of any such loan shall be liable to the corporation for the amount of such loan until the repayment thereof.

**Comment**

The Model Act, in a departure from the MBCA, absolutely forbids corporate loans to directors and officers. Given the potential for abuse, in such cases, especially in the case of charitable organizations with a board of directors and no members, prudence dictates this absolute prohibition.

**§ 713. Transactions between a corporation and its directors and officers**

1. **Transactions voided.** No transaction in which a director or officer has a personal or adverse interest, as defined in subsection 2, shall be void or voidable solely for this reason or solely because he is present at or participates in the meeting of the board, or of a committee thereof, which approves such transaction, or because his vote is counted, if:

A. The material facts as to his interest and as to the transaction are disclosed or are known to the board of directors or committee, and are noted in the minutes, and the board or committee authorizes, approves or ratifies the transaction by a vote sufficient for such purpose without counting the vote of the interested director or directors;

B. Although the vote of the interested director or directors is decisive of approval or disapproval of the transaction, the material facts as to his interest and as to the transaction are disclosed or known to the members, and the transaction is specifically approved by vote of the members, whether or not the votes of interested members are necessary for such approval; or

C. Although the requirements of paragraphs A and B have not been satisfied, the transaction is fair and equitable as to the corporation at the time it is authorized or approved, and the party asserting the fairness of the transaction establishes fairness.

2. **Personal or adverse interest.** A transaction in which a director or officer has a personal or adverse interest shall include:

A. A contract or any other transaction between the corporation and such director or officer; and

B. A contract or any other transaction between a corporation and any corporation, partnership or association in which one or more of its directors or officers are directors, or officers or partners, or have a financial interest, direct or indirect; but the ownership of not over 10% of any class of stock issued by a corporation whose shares are traded on any national securities

exchange or are regularly quoted by any member of a national or regional association of securities dealers shall not be considered "a financial interest."

3. **Unfairness shall be established.** No contract or other transaction by a corporation with any of its subsidiary corporations, or with another corporation in which there is a common director, shall be void or voidable solely for this reason, if the contract or other transaction is fair and equitable as of the date it is authorized, approved or ratified. The party asserting the unfairness of any such contract or transaction shall establish unfairness.

4. **Determining presence of quorum.** Common or interested directors may always be counted in determining the presence of a quorum at a meeting of the board of directors or of a committee which authorizes, approves or ratifies a transaction.

5. **Authority to fix compensation.** Except to the extent that the articles of incorporation or bylaws otherwise provide, the board of directors or the executive committee shall, without regard to this section, have authority to fix the compensation of directors for their services as directors, officers or in any other capacity.

#### Comment

The Model Act provides no guidelines for determining the legality or propriety of dealings between a nonprofit corporation and an interested director. Some statement on this subject is essential for the protection of both nonprofit corporations and their directors. It is not uncommon for the directors of charitable organizations to be drawn from the business community, and not unusual for those directors to provide goods or services to the corporation. To ensure that the directors have available a clear procedure for approving such relationships, this section, based on section 717 of the MBCA, provides clear guidelines.

#### § 714. Indemnification of officers, directors, employees and agents; insurance

1. **Power to indemnify.** A corporation shall have power to indemnify, or if so provided in the bylaws shall in all cases indemnify, any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative, by reason of the fact that he is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses, including attorneys' fees, judgments, fines and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit or proceeding; provided that no indemnification shall be provided for any person with respect to any matter as to which he shall have been finally adjudicated in any action, suit or proceeding not to have acted in good faith in the reasonable belief that his action was in the best interests of the corporation or, with respect to any criminal action or proceeding, had reasonable cause to believe that his conduct was unlawful. The termination of any action,

suit or proceeding by judgment, order or conviction adverse to such person, or by settlement or plea of nolo contendere or its equivalent, shall not of itself create a presumption that such person did not act in good faith in the reasonable belief that his action was in the best interests of the corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that his conduct was unlawful.

2. Indemnity against expenses. Any provision of subsection 1 or 3 to the contrary notwithstanding, to the extent that a director, officer, employee or agent of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in subsection 1, or in defense of any claim, issue or matter therein, he shall be indemnified against expenses, including attorneys' fees, actually and reasonably incurred by him in connection therewith. The right to indemnification granted by this subsection may be enforced by a separate action against the corporation, if an order for indemnification is not entered by a court in the action, suit or proceeding wherein he was successful on the merits or otherwise.

3. Indemnity made by corporation. Any indemnification under subsection 1, unless ordered by a court or required by the bylaws, shall be made by the corporation only as authorized in the specific case upon a determination that indemnification of the director, officer, employee or agent is proper in the circumstances because he has met the applicable standard of conduct set forth in subsection 1. Such determination shall be made by the board of directors by a majority vote of a quorum consisting of directors who were not parties to such action, suit or proceeding, or if such a quorum is not obtainable, or even if obtainable, if a quorum of disinterested directors so directs, by independent legal counsel in a written opinion, or by the shareholders. Such a determination, once made by the board of directors may not be revoked by the board of directors, and upon the making of such determination by the board of directors, the director, officer, employee or agent may enforce the indemnification against the corporation by a separate action notwithstanding any attempted or actual subsequent action by the board of directors.

4. Expenses incurred in civil or criminal action. Expenses incurred in defending a civil or criminal action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding as authorized by the board of directors in the manner provided in subsection 3 upon receipt of an undertaking by or on behalf of the director, officer, employee or agent to repay such amount, unless it shall ultimately be determined that he is entitled to be indemnified by the corporation as authorized in this section.

5. Provisions of indemnification. The indemnification provided by this section shall not be deemed exclusive of any other rights to which those indemnified may be entitled under any bylaw, agreement, vote of stockholders or disinterested directors or otherwise, both as to action in his official capacity and as to action in another capacity while holding such office, and shall continue as to a person who has ceased to be a director, officer, employee or agent and shall inure to the benefit of the heirs, executors and administrators of such a person. A right to indemnification required by the bylaws may be

enforced by a separate action against the corporation, if an order for indemnification has not been entered by a court in any action, suit or proceeding in respect to which indemnification is sought.

6. **Power to purchase and maintain insurance.** A corporation shall have power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against any liability asserted against him and incurred by him in any such capacity, or arising out of his status as such, whether or not the corporation would have the power to indemnify him against such liability under this section.

#### Comment

This section is taken verbatim from the revised section 719 of the Business Act.

#### § 715. Books and records

Each corporation shall keep correct and complete books and records of account and shall keep minutes of the proceedings of its members, board of directors and committees having any of the authority of the board of directors; and shall keep at its registered office or principal office in this State a record of the names and addresses of its members entitled to vote. All books and records of a corporation may be inspected by any officer, director, member, or his agent or attorney, for any proper purpose at any reasonable time.

#### Comment

This section, regulating the keeping of books and records, might have far-reaching effects. To the extent it is taken seriously by directors or members, it will certainly complicate the corporate existence of many of the fraternal benefit societies, membership corporations and religious organizations currently functioning as nonstock corporations. It is highly unlikely that many of these organizations "keep" books, records and minutes as that word is used and understood in section 625, MBCA.

If the organization attempts to abide by the section it may well be forced to retain an accountant or an attorney, or both. To the extent an organization does not comply with the section, its directors risk a law suit by a member or, perhaps, the Attorney General. Widespread disregard of the section, which is more than a remote possibility, might reduce it to a dead letter.

In one sense, therefore, the section might require too much; in another sense, in comparison with its counterpart section in the MBCA, it requires too little. Section 625, MBCA, goes into considerable detail with respect to the bookkeeping objectives of corporations and the access rights of members to the corporate records. In addition, the uses to which the books and records can be put, especially in judicial proceedings, are carefully detailed.



On the other hand, section 625, MBCA, might also be viewed as a useful compromise. By requiring the maintenance of accurate records, it will encourage at least some nonprofit corporations to adopt more careful internal procedures. Where appropriate, the Attorney General might even bring an action to compel the keeping of records in the case, for example, of large charitable organizations relying on public contributions. However, by not specifying any specific sanction for its failure to maintain the necessary records, it will allow many smaller, informal corporations to continue the old ways without a serious threat of legal action being taken against them.

## CHAPTER 8

### AMENDMENT OF ARTICLES OF INCORPORATION

#### § 801. Right to amend articles of incorporation

A corporation may amend its articles of incorporation from time to time in any and as many respects as may be desired, so long as its articles of incorporation, as amended, contain only such provisions as might lawfully be contained in original articles of incorporation on the effective date of such amendment.

#### Comment

This section is taken from the MBCA. It authorizes a corporation to amend its articles, provided the amendment would be lawful if filed in original articles of incorporation filed on the effective date of the amendment.

Section 801 of the MBCA, which specifies those corporations which can amend their articles under the MBCA, seems repetitious and unnecessarily confusing; it is, therefore, not adopted into a NPA section.

#### § 802. Procedure to amend articles of incorporation

1. **Amendments.** Amendments to the articles of incorporation shall be made in the following manner.

**A.** If there are members entitled to vote thereon, the board of directors shall adopt a resolution setting forth the proposed amendment and directing that it be submitted to a vote at a meeting of members entitled to vote thereon, which may be either an annual or a special meeting. Written notice setting forth the proposed amendment or a summary of the changes to be effected thereby shall be given to each member entitled to vote at such meeting within the time and in the manner provided in this Act for the giving of notice of meetings of members. The proposed amendment shall be adopted upon receiving at least a majority of the votes which members present at such meeting or represented by proxy are entitled to cast.

**B.** If there are no members, or no members entitled to vote thereon, an amendment shall be adopted at a meeting of the board of directors upon receiving the vote of a majority of the directors in office.

C. Upon adoption, articles of amendment shall be executed and delivered for filing as provided in sections 104 and 106.

2. Number of amendments. Any number of amendments may be submitted and voted upon at any one meeting.

3. Provision prescribing amendment of articles. The articles of incorporation may contain a provision prescribing for amendment of the articles a vote greater than, but in no event less than, that prescribed by subsection 1.

4. Articles of incorporation amended. The articles of incorporation may be amended by written consent of all members entitled to vote on such amendment, as provided by section 606. If such unanimous written consent is given, no resolution of the board of directors proposing the amendment is necessary.

#### Comment

Subsections one and 2 are based on the Model Act. One important change was made in the Model Act version: The number of votes required for approval of an amendment was changed from  $\frac{2}{3}$  to a simple majority. Subsection 3, borrowed from the MBCA, was added to allow a requirement of greater than a simple majority to be included in the article.

#### § 803. Articles of amendment

1. Executed by corporation. The articles of amendment shall be executed by the corporation and shall set forth:

A. The name of the corporation;

B. The amendment so adopted;

C. The date of adoption of the amendment;

D. If there are members entitled to vote thereon, (1) a statement setting forth the date of the meeting of members at which the amendment was adopted, that a quorum was present at such meeting, and that such amendment received at least a majority of the votes which members present at such meeting or represented by proxy were entitled to cast, or (2) where the articles require a vote of more than a majority of the votes which members present at such meeting or represented by proxy were entitled to cast, a statement that such amendment received at least the percentage of such votes required by the articles, or (3) a statement that such amendment was adopted by a consent in writing signed by all members entitled to vote with respect thereto; and

E. If there are no members, or no members entitled to vote thereon, a statement of such fact, the date of the meeting of the board of directors at which the amendment was adopted, and a statement of fact that such amendment received the vote of a majority of the directors in office.

2. Determination by Secretary of State. When the articles of amendment are delivered for filing by the Secretary of State, he shall, before filing them,

make the same determination provided in section 404 in the case of original articles, to the extent applicable to a given amendment or amendments.

#### Comment

This section is a modified version of the Model Act's section; it is substantially the same as section 807 of the MBCA.

#### § 804. Effect of amendment

1. **Effective date.** An amendment shall take effect as of the date of filing the articles of amendment by the Secretary of State as provided by section 106.

2. **Prejudice of claims of creditors; corporation liability.** No amendment shall prejudice any claims of creditors or relieve the corporation of any liability already created or assumed, or effect any existing cause of action in favor of or against the corporation, or any pending suit to which the corporation shall be a party, or the existing rights of persons other than members, but for all such purposes the corporation, although operating under the amended articles of incorporation, shall be regarded as the same corporation. In the event the corporate name shall be changed by amendment, no suit brought by or against such corporation under its former name shall abate because of the change of name.

#### Comment

Section 804 is adopted from section 808 of the MBCA. It ensures again that the same, simple procedures for filing articles of amendment are used under the NPA and MBCA.

#### § 805. Restated articles of incorporation

1. **Restatement of articles adopted.** A corporation may at any time adopt a restatement of its articles of incorporation which shall integrate into a single document the text of its original articles of incorporation, merger or consolidation, together with all amendments theretofore adopted and, if authorized, further amendments.

2. **Method of restatement of articles of incorporation.** A corporation may restate its articles of incorporation by submitting to the members for their approval the proposed restatement thereof, with or without any new amendments which under section 802 or under the articles of incorporation require the vote of the members. The procedure specified in, and the vote or votes required by, this chapter for amendment of the articles of incorporation shall be applicable. If the restatement includes new amendments not theretofore voted upon by the members, the notice of the meeting at which it is to be voted upon shall specifically refer to such new amendments and summarize the changes to be effected thereby, whether or not the full text of the restatement accompanies such notice. If the directors in good faith believe that the restatement includes no such new amendments, the notice of the meeting shall so state and shall be accompanied by a copy of the proposed restatement of articles of incorporation.

3. Form. Upon adoption of the restatement, a form entitled "Restated Articles of Incorporation" shall be executed in accordance with section 104, which shall set forth the same information as is required by section 803 in the case of articles of amendment substituting, wherever applicable, the word "restatement" for the word "amendment" and shall have the restatement attached thereto as an exhibit. Upon filing the restated articles with the restatement by the Secretary of State, in accordance with section 106, the original articles of incorporation as amended and supplemented shall be superseded, and the restatement, including any further amendments and changes made thereby, shall be the articles of incorporation of the corporation.

4. Changes effected subject to this chapter. Any amendment or change effected in connection with the restatement of the articles of incorporation shall be subject to any other provision of this chapter, not inconsistent with this section, which would apply, if separate articles of amendment were filed to effect such amendment or change.

5. Omitted statements. The restatement may omit statements as to the incorporator or incorporators and the initial directors. In all other respects, the restatement shall contain the same information and provisions as are required by this Act for original articles.

6. Determination by Secretary of State; restated articles. When the restated articles with the restatement are delivered for filing by the Secretary of State, he shall, before filing them, make the same determinations as provided in section 404 in the case of original articles.

#### Comment

The procedures for executing and filing restated articles are based on similar procedures contained in section 809 of the MBCA.

### CHAPTER 9

#### MERGERS AND CONSOLIDATION

##### § 901. Procedure for merger

1. Domestic corporations may merge. Any 2 or more domestic corporations may merge into one of such corporations pursuant to a plan of merger approved in the manner provided in this Act.

2. Plan of merger. Each corporation shall adopt a plan of merger setting forth:

A. The names of the corporations proposing to merge, and the name of the corporation into which they propose to merge, which is hereinafter designated as the surviving corporation;

B. The terms and conditions of the proposed merger;

C. A statement of any changes in the articles of incorporation of the surviving corporation to be effected by such merger; and

D. Such other provisions with respect to the proposed merger as are deemed necessary or desirable.

### Comment

The section dealing with mergers, as well as the following section dealing with consolidations, follows the Model Act's recommendations. The 2 sections are very similar in form and language to section 901 of the MBCA.

The procedure for merger is initiated by both corporations involved drafting a "plan of merger" which contains a statement of the terms and conditions of the merger as well as a statement of the changes that will have to be made in the articles of incorporation.

The provisions in the NPCA are somewhat simpler than comparable sections in the MBCA which must deal with conversions of the shareholders' proprietary interests.

#### § 902. Procedure for consolidation

1. Consolidation plan. Any 2 or more domestic corporations may consolidate into a new corporation pursuant to a plan of consolidation approved in the manner provided in this Act.

2. Consolidation plan. Each corporation shall adopt a plan of consolidation setting forth:

A. The names of the corporations proposing to consolidate and the name of the new corporation into which they propose to consolidate, which is hereinafter designated as the new corporation;

B. The terms and conditions of the proposed consolidation;

C. With respect to the new corporation, all of the statements required to be set forth in articles of incorporation for corporations organized under this Act, including the names of each member of the new board of directors; and

D. Such other provisions with respect to the proposed consolidation as are deemed necessary or desirable.

### Comment

The same comments made with respect to the foregoing section apply to this section dealing with consolidations.

#### § 903. Approval of merger or consolidation

1. Plan of merger. A plan of merger or consolidation shall be adopted in the following manner.

A. If the members of any merging or consolidating corporation are entitled to vote thereon, the board of directors of such corporation shall adopt a resolution approving the proposed plan and directing that it be submitted to a vote at a meeting of members entitled to vote thereon, which may be either an annual or a special meeting. Written notice setting forth the proposed plan or a summary thereof shall be given to each

member entitled to vote at such meeting within the time and in the manner provided in this Act for the giving of notice of meetings of members. The proposed plan shall be adopted upon receiving at least a majority of the votes which members present at each meeting or represented by proxy are entitled to cast.

B. If any merging or consolidating corporation has no members, or no members entitled to vote thereon, a plan of merger or consolidation shall be adopted at a meeting of the board of directors of such corporation upon receiving the vote of a majority of the directors in office.

2. **Vote on merger.** The articles of incorporation of any corporation may contain a provision prescribing for approval of a plan of merger or consolidation, a vote greater than, but in no event less than, that prescribed by subsection 1, paragraphs A and B.

3. **Merger abandoned.** After such approval, and at any time prior to the filing of the articles of merger or consolidation, or pursuant to a majority vote of the members of any participating corporation entitled to vote thereon, or if the corporation has no members entitled to vote pursuant to a majority vote of the board of directors of that corporation, the merger or consolidation may be abandoned.

4. **Plan of merger approved.** A plan of merger or consolidation may be approved by written consent of all members of a participating corporation entitled to vote by the articles of incorporation or bylaws, as provided by section 606. If such unanimous written consent is given, no resolution of the board of directors of such participating corporation approving, proposing, submitting, recommending or otherwise respecting such plan of merger or consolidation is necessary, and no members of such participating corporation shall be entitled to notice of, or to dissent from, such plan of merger or consolidation.

#### Comment

This section, still based primarily on Model Act's version, continues the merger-consolidation scenario using basically the same approach as the MBCA.

With respect to those corporations with members, the directors adopt a resolution approving the proposed plan and submit it to the members for their approval. An affirmative vote of a majority of the members present or represented by proxy, is necessary to approve the plan.

The requirement of majority approval was taken from the MBCA, as was subsection 2, authorizing a higher percentage for approval to be included in the articles. The Model Act required  $\frac{2}{3}$  of the members voting to approve and did authorize any variation from that requirement to be included in the articles.

The MBCA was thought preferable, both to achieve uniformity and also in acknowledgment of the corporation's usual right to direct its own affairs in a manner consonant with basic procedural fairness.

**§ 904. Articles of merger or consolidation**

1. Form of articles of merger or consolidation. Upon such approval, articles of merger or articles of consolidation shall be executed by each corporation and shall be delivered for filing pursuant to sections 104 and 106. The articles of merger or consolidation shall set forth:

A. The plan of merger or the plan of consolidation;

B. If the members of any merging or consolidating corporation are entitled to vote thereon, then as to each such corporation (1) a statement setting forth the date of the meeting of members at which the plan was adopted, that a quorum was present at such meeting and that such plan received at least a majority of the votes which members present at such meeting or represented by proxy were entitled to cast, or (2) a statement that such amendment was adopted by a consent in writing signed by all members entitled to vote with respect thereto;

C. If any merging or consolidating corporation has no members, or no members entitled to vote thereon, then as to each such corporation a statement of such fact, the date of the meeting of the board of directors at which the plan was adopted and a statement of the fact that such plan received the vote of a majority of the directors in office; and

D. When the articles of merger or consolidation are delivered for filing by the Secretary of State, he shall, before filing them, make the same determinations, to the extent applicable, as provided in section 404 in the case of original articles.

**Comment**

This section prescribes the filing procedures to be followed if the articles of merger or consolidation are approved pursuant to the prescribing sections. In that event, the articles must be executed and filed with the Secretary of State. The articles must contain the plan of merger, and a summary statement indicating that statutory requirements have been complied with.

The Model Act's version is used here; it follows closely the comparable section in the MBCA.

**§ 905. Effect of merger or consolidation**

1. Effect. Any merger or consolidation under this section shall take effect when the articles of merger or consolidation are filed with the Secretary of State, or on the date specified in the articles of merger or consolidation, not to exceed 60 days after the filing date, if the articles of merger or consolidation so provide.

2. Merger or consolidation effected. When such merger or consolidation has been effected:

A. The several corporations' parties to the plan of merger or consolidation shall be a single corporation, which, in the case of a merger, shall be that corporation designated in the plan of merger as the surviving corpora-

tion and, in the case of a consolidation, shall be the new corporation provided for in the plan of consolidation;

B. The separate existence of all corporations' parties to the plan of merger or consolidation, except the surviving or new corporation, shall cease;

C. The surviving or new corporation shall have all the rights, privileges, immunities and powers and shall be subject to all the duties and liabilities of a corporation organized under this Act;

D. The surviving or new corporation shall possess all the rights, privileges, immunities and franchises, of a public nature as well as of a private nature, of each of the merging or consolidating corporations; and all property, real, personal and mixed, and all debts due on whatever account, and all other choses in action, and all and every other interest, of or belonging to or due to each of the corporations so merged or consolidated, shall be taken and deemed to be transferred to and vested in such single corporation without further act or deed; and the title to any real estate, or any interest therein, vested in any of such corporations shall not revert or be in any way impaired by reason of such merger or consolidation; and

E. In the case of a merger, the articles of incorporation of the surviving corporation shall be deemed to be amended to the extent, if any, that changes in its articles of incorporation are stated in the plan of merger; and in the case of a consolidation, the statements set forth in the articles of consolidation and which are required or permitted to be set forth in the articles of incorporation of corporations organized under this Act shall be deemed to be the articles of incorporation of the new corporation.

#### Comment

The effects of consolidation or merger, in terms of the rights and liabilities created in the surviving or new corporation, are set out in some detail in this section.

Although the Model Act's version is used, it differs hardly at all from section 905 of the MBCA. Neither version presents new or novel problems.

#### § 906. Merger or consolidation of domestic and foreign corporations

1. **Manner of merger.** One or more foreign corporations and one or more domestic corporations may be merged or consolidated in the following manner, if such merger or consolidation is permitted by the laws of the state under which each such foreign corporation is organized.

A. Each domestic corporation shall comply with the provisions of this Act with respect to the merger or consolidation, as the case may be, of domestic corporations and each foreign corporation shall comply with the applicable provisions of the laws of the state under which it is organized.

B. If the surviving or new corporation, as the case may be, is to be governed by the laws of any state other than this State, it shall comply with the provisions of this Act with respect to foreign corporations if it is to conduct activities in this State, and in every case it shall execute and deliver to the Secretary of State of this State a document setting forth:



- (1) The name of the surviving or new corporation;
- (2) An agreement that it may be served with process in this State in any proceeding for the enforcement of any obligation of any domestic corporation which is a party to such merger or consolidation; and
- (3) An irrevocable appointment of the Secretary of State of this State as its agent to accept service of process in any such proceeding.

2. Provisions of effect of merger. The effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of domestic corporations, if the surviving or new corporation is to be governed by the laws of this State. If the surviving or new corporation is to be governed by the laws of any state other than this State, the effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of domestic corporations, except insofar as the laws of the other state provide otherwise.

3. Articles delivered for filing. Whether the surviving or new corporation is or is to be a domestic corporation or a foreign corporation, articles of merger or consolidation shall be executed and delivered for filing as is provided in this Act for mergers and consolidations of domestic corporations.

4. Date of effect. Any merger or consolidation under this section shall take effect when the articles of merger or consolidation are filed with the Secretary of State, or on the date specified in the articles of merger or consolidation, not to exceed 60 days after the filing date, if the articles of merger or consolidation so provide.

5. Abandonment. After approval by the members, and at any time prior to the filing of the articles of merger or consolidation, or pursuant to a majority vote of the members of any participating corporation entitled to vote thereon, or if the corporation has no members entitled to vote pursuant to a majority vote of the board of directors of that corporation, the merger or consolidation may be abandoned pursuant to provisions therefor, if any, set forth in the plan of merger or consolidation.

#### Comment

This section outlines the procedures for the merger or consolidation of a foreign and domestic corporation, generally requiring that each of the involved states' laws be complied with in effectuating the merger or consolidation. Whether the new or surviving corporation is to be a foreign or domestic corporation, subsection 3, borrowed from the MBCA, requires that articles be filed in this State.

### CHAPTER 10

#### SALE AND OTHER DISPOSITIONS OF CORPORATE ASSETS

##### § 1001. Sale, lease, exchange or mortgage of assets

1. Terms and conditions. Sale, lease, exchange, mortgage, pledge or other disposition of all, or substantially all, the property and assets of a corporation may be made upon such terms and conditions and for such consideration,

which may consist in whole or in part of money or property, real or personal, including shares of any corporation for profit, domestic or foreign, as may be authorized in the following manner.

A. If there are members entitled to vote thereon, the board of directors shall adopt a resolution recommending such sale, lease, exchange, mortgage, pledge or other disposition and directing that it be submitted to a vote at a meeting of members entitled to vote thereon, which may be either an annual or a special meeting. Written notice stating that the purpose, or one of the purposes, of such meeting is to consider the sale, lease, exchange, mortgage, pledge or other disposition of all, or substantially all, the property and assets of the corporation shall be given to each member entitled to vote at such meeting, within the time and in the manner provided by this Act for the giving of notice of meetings of members. At such meeting, the members may authorize such sale, lease, exchange, mortgage, pledge or other disposition and may fix, or may authorize the board of directors to fix, any or all of the terms and conditions thereof and the consideration to be received by the corporation thereto. Such authorization shall require at least a majority of the votes which members present at such meeting or represented by proxy are entitled to cast. After such authorization by a vote of members, the board of directors, nevertheless, in its discretion, may abandon such sale, lease, exchange, mortgage, pledge or other disposition of assets, subject to the rights of 3rd parties under any contracts relating thereto, without further action or approval by members.

B. If there are no members, or no members entitled to vote thereon, a sale, lease, exchange, mortgage, pledge or other disposition of all, or substantially all, the property and assets of a corporation shall be authorized upon receiving the vote of a majority of the directors in office.

C. If all members entitled to vote by the articles of incorporation authorize by written consent a sale, lease, exchange, mortgage, pledge or other disposition of all, or substantially all, the property and assets of a corporation, no resolution of the board of directors, approving, proposing, submitting, recommending or otherwise respecting such sale is necessary.

2. Provision prescribing for approval of sale. The articles of incorporation of any corporation may contain a provision prescribing for approval of any sale of assets a vote greater than, but in no event less than, that prescribed by subsection 1.

#### Comment

This Model Act section tracks very closely the language of MBCA, section 1003. As in previous sections raising the same issue, the Model Act's requirement of approval by  $\frac{2}{3}$  of the members voting before the directors may sell, lease, exchange or mortgage assets was changed to a majority requirement. In addition, subsection 2 was added permitting that percentage requirement to be increased.

The MBCA provision, contained in section 1004, permitting directors to mortgage or pledge assets of the corporation without members' approval unless explicitly required by the articles, was not deemed appropriate for a nonprofit corporation.

**CHAPTER 11**  
**DISSOLUTION**

**§ 1101. Voluntary dissolution**

1. **Manner of dissolution.** A corporation may dissolve and wind up its activities in the following manner.

**A.** If there are members entitled to vote thereon, the board of directors shall adopt a resolution recommending that the corporation be dissolved, and directing that the question of such dissolution be submitted to a vote at a meeting of members entitled to vote thereon, which may be either an annual or a special meeting. Written notice, stating that the purpose, or one of the purposes, of such meeting is to consider the advisability of dissolving the corporation, shall be given to each member entitled to vote at such meeting, within the time and in the manner provided in this Act for the giving of notice of meetings of members. A resolution to dissolve the corporation shall be adopted upon receiving at least a majority of the votes which members present at such meeting or represented by proxy are entitled to cast.

**B.** If there are no members, or no members entitled to vote thereon, the dissolution of the corporation shall be authorized at a meeting of the board of directors upon the adoption of a resolution to dissolve by the vote of a majority of the directors in office.

**C.** If all the members entitled to vote by the articles of incorporation authorize the dissolution of the corporation by written consent, upon the execution of such written consent, a statement of intent to dissolve shall be executed and delivered for filing, as provided by sections 104 and 106 and shall set forth the name of the corporation, the names and respective addresses of its officers and directors, a copy of the written consent signed by all the members of the corporation, and a statement that such written consent has been signed by all members of the corporation entitled to vote. Voluntary dissolution pursuant to this section does not require any vote or action of the directors.

2. **Cessation of activities; notice.** Upon the adoption of such resolution by the members, or by the board of directors if there are no members, or no members entitled to vote thereon, the corporation shall cease to conduct its activities except insofar as may be necessary for the winding up thereof, shall immediately cause a notice of the proposed dissolution to be mailed to each known creditor of the corporation, and shall proceed to collect its assets and apply and distribute them as provided in this Act.

3. **Provision for prescribing dissolution.** The articles of incorporation of any corporation may contain a provision prescribing for approval of any resolution to dissolve the corporation a vote greater than, but in no event less than, that prescribed by subsection 1.

4. **Statement of intent.** Upon the adoption of such resolution, a statement of intent to dissolve shall be executed and delivered for filing, as provided by sections 104 and 106, and shall set forth:

- (1) The name of the corporation;
- (2) The names and respective addresses of its officers and directors;
- (3) A copy of the resolution adopted by the members or directors authorizing the dissolution of the corporation;
- (4) The number of members entitled to vote; and
- (5) The number of members voted for and against the resolution, respectively.

5. Cessation of activities. Upon the filing by the Secretary of State of a statement of intent to dissolve, the corporation shall cease to carry on its activities, except insofar as may be necessary or appropriate for the winding up thereof, but its corporate existence shall continue until the filing date of the articles of dissolution, or until a decree dissolving the corporation has been entered by a court of competent jurisdiction.

#### Comment

This section continues the now familiar pattern of initiating a dissolution decision by a resolution of the board, effectuating it by a majority vote of the members voting and allowing the articles to require a greater percentage for approval.

The MBCA provides several different and somewhat complicated routes for initiating or effectuating dissolution, including a resolution proposing dissolution filed with the board of directors by at least 25% of the shareholders. Until experience proves a need for these complex dissolution procedures, it seems prudent to use a simpler model.

The subsections requiring the corporation to file notice of intent to dissolve were borrowed from the MBCA, section 1103. A similar step was not a prerequisite to dissolution in the Model Act.

#### § 1102. Revocation of voluntary dissolution proceedings

A corporation may, at any time prior to the filing of the articles of dissolution by the Secretary of State, revoke the action theretofore taken to dissolve the corporation, in the following manner.

1. Notice. If there are members entitled to vote thereon, the board of directors shall adopt a resolution recommending that the voluntary dissolution proceedings be revoked, and directing that the question of the revocation be submitted to a vote at a meeting of members entitled to vote thereon, which may be either an annual or a special meeting. Written notice stating that the purpose, or one of the purposes, of the meeting is to consider the advisability of revoking the voluntary dissolution proceedings, shall be given to each member entitled to vote at such meeting, within the time and in the manner provided in this Act for the giving of notice of meetings of members. A resolution to revoke the voluntary dissolution proceedings shall be adopted upon receiving at least a majority of the votes which members present at the meeting or represented by proxy are entitled to cast.

2. When no members entitled to vote on revocation. If there are no members, or no members entitled to vote thereon, a resolution to revoke the voluntary dissolution proceedings shall be adopted at a meeting of the board of directors upon receiving the vote of a majority of the directors in office.

3. Statement of revocation of voluntary dissolution proceeding. If all the members entitled to vote revoke voluntary dissolution proceeding previously authorized by written consent at any time prior to the date of filing the articles of dissolution by the Secretary of State, upon execution of the written consent, a statement of revocation of voluntary dissolution proceeding shall be executed and delivered for filing as provided by sections 104 and 106, and this statement shall set forth the name of the corporation, the names and respective addresses of its officers and directors, a copy of the written consent signed by all members of the corporation, revoking the voluntary dissolution proceedings, that the written consent has been signed by all members of the corporation.

#### Comment

This section provides for a resolution of the board, approved by a majority of the members voting, to revoke a prior dissolution decision. If there are no members, or no members entitled to vote on the revocation question, a simple majority of the directors in office may approve revocation of articles of dissolution. The section follows the Model Act, but only requires a simple majority of members voting to override a dissolution decision, whereas the Model Act would require a  $\frac{2}{3}$  vote of members voting.

#### § 1103. Effect of statement of revocation of voluntary dissolution proceedings

Upon the filing by the Secretary of State of a statement of revocation of voluntary dissolution proceedings, whether by resolution of the board approved by the members or by action of the board in the absence of any members, or any members entitled to vote thereon, the revocation of the voluntary dissolution proceedings shall become effective, and the corporation may again carry on its activities.

#### Comment

The section is similar to the procedure for effectuating a revocation of voluntary dissolution proceedings authorized by section 1109 of the MBCA. The Model Act would permit a corporation to resume its activities upon the adoption of the statement of revocation without the necessity of a filing with the office of Secretary of State. This filing is necessary because section 1101 of the NPCA requires a corporation to file a statement of intent to dissolve with the Secretary of State.

#### § 1104. Articles of dissolution

1. Certification provided. If voluntary dissolution proceedings have not been revoked, then when all debts, liabilities and obligations of the corporation have been paid and discharged, or adequate provision has been made

therefor, and all remaining property and assets of the corporation have been distributed as provided in paragraph D, articles of dissolution shall be executed and delivered for filing as provided by sections 104 and 106 and shall be accompanied by a written statement from the Bureau of Taxation certifying that the corporation is not indebted to the State for any taxes, and such articles shall set forth:

- A. The name of the corporation ;
  - B. That the Secretary of State has previously filed a statement of intent to dissolve the corporation and the date on which such statement was filed ;
  - C. That all debts, obligations and liabilities of the corporation have been paid and discharged or that adequate provision has been made therefor ;
  - D. That all remaining property and assets of the corporation have been distributed among its members in accordance with their respective rights and interests, or have been otherwise distributed pursuant to the articles or bylaws of the corporation, provided that the assets of a corporation whose purposes and activities have been primarily charitable, religious, eleemosynary, benevolent or educational shall be transferred or conveyed only to one or more domestic or foreign corporations, societies or organizations engaged in activities substantially similar to those of the dissolving or liquidating corporation ; and
  - E. That there are no suits pending against the corporation in any court or that adequate provision has been made for the satisfaction of any judgment, order or decree which may be entered against it in any pending suit.
2. Existence of corporation ceased. Upon the filing date of the articles of dissolution, the existence of the corporation shall cease, except for the purpose of suits, other proceedings and appropriate corporate action by and against the members, directors and officers as provided in this Act.

#### Comment

The section adopts the procedure for voluntary dissolution outlined in the MBCA and Model Act. Once the articles of dissolution are filed with the Secretary of State, the corporate existence ceases, except for "suits, other proceedings and appropriate corporate action" involving directors, officers and members.

#### § 1105. Dissolution pursuant to court order

Courts of equity shall have full power to decree the dissolution of, and to liquidate the assets and affairs of, a corporation :

- 1. Action by member or director. In an action by a member or director when it is made to appear :
  - A. That the directors are deadlocked in the management of the corporate affairs and that irreparable injury to the corporation is being suffered or is threatened by reason thereof, and either that the members are unable to break the deadlock or there are no members having voting rights :
  - B. That the acts of the directors or those in control of the corporation are illegal or fraudulent ;

C. That the members entitled to vote in the election of directors are deadlocked in voting power and have failed for at least 2 years to elect successors to directors whose terms have expired or would have expired upon the election of their successors;

D. That the corporate assets are being misapplied or wasted; or

E. That the corporation is unable to carry out its purposes;

2. Action by creditor of corporation. In an action by a creditor of the corporation:

A. When the claim of the creditor has been reduced to judgment and an execution thereon has been returned unsatisfied and it is established that the corporation is insolvent; or

B. When the corporation has admitted in writing that the claim of the creditor is due and owing and it is established that the corporation is insolvent;

3. Complaint. Upon complaint by a corporation to have its dissolution continued under the supervision of the court;

4. Liquidation of affairs precedes entry of decree. When an action has been filed by the Attorney General to dissolve a corporation and it is established that liquidation of its affairs should precede the entry of a decree of dissolution; and

5. Proceedings brought in county where registered. Proceedings under this section shall be brought in the county in which the registered office or the principal office of the corporation is situated. It shall not be necessary to make directors or members parties to any such action or proceedings unless relief is sought against them personally.

#### Comment

This section is virtually identical with section 1115 of the MBCA, save for one provision in the MBCA which authorizes an action for dissolution by a shareholder or creditor when it appears there is serious danger that the persons in control of the corporation will fail to make provision for payment of corporate debts or proper distribution of property to shareholders.

Given the more specific and completely adequate grounds available to both members and shareholders, the added protection provided in the MBCA was thought unnecessary.

#### § 1106. Procedure in liquidation of corporation by court

1. Court's power. In proceedings to liquidate the assets and activities of a corporation, the court shall have the power to issue injunctions, to appoint a receiver or receivers pendente lite, with such powers and duties as the court, from time to time, may direct, and to take such other proceedings as may be requisite to preserve the corporate assets wherever situated, and carry on the activities of the corporation until a full hearing can be had.

2. Court to appoint liquidating receiver. After a hearing and upon such notice as the court may direct to be given to all parties to the proceedings and to any other parties in interest designated by the court, the court may appoint a liquidating receiver or receivers with authority to collect the assets of the corporation. Such liquidating receiver or receivers shall have authority, subject to the order of the court, to sell, convey and dispose of all or any part of the assets of the corporation wherever situated, either at public or private sale. The order appointing such liquidating receiver or receivers shall state their powers and duties. Such powers and duties may be increased or diminished at any time during the proceedings.

3. Assets of corporation. The assets of the corporation or the proceeds resulting from a sale, conveyance or other disposition thereof shall be applied and distributed as the court may order, after taking into account the following standards.

A. All cost and expenses of the court proceedings and all liabilities and obligations of the corporation shall, to the extent that unencumbered assets are available therefore, be paid first toward the payment of costs and expenses of court proceeding, and then toward other liabilities and obligations of the corporation.

B. Assets held by the corporation upon condition requiring return, transfer or conveyance, which condition occurs by reason of the dissolution or liquidation, shall be returned, transferred or conveyed in accordance with such requirements.

C. Assets received and held by the corporation subject to limitations permitting their use only for charitable, religious, eleemosynary, benevolent, educational or similar purposes, but not held upon a condition requiring return, transfer or conveyance by reason of the dissolution or liquidation, shall be transferred or conveyed to one or more domestic or foreign corporations, societies or organizations engaged in activities substantially similar to those of the dissolving or liquidating corporation as the court may direct.

D. Other assets, if any, shall be distributed in accordance with the provisions of the articles of incorporation or the bylaws to the extent that the articles of incorporation or bylaws determine the distributive right of members, or any class or classes of members, or provide for distribution to others.

E. Any remaining assets may be distributed to such persons, societies, organizations or domestic or foreign corporations, whether for profit or not for profit, specified in the plan of distribution adopted as provided in this Act, or where no plan of distribution has been adopted, as the court may direct.

4. Court to direct payments. The court shall have power to allow, from time to time, as expenses of the liquidation, compensation to the receiver or receivers and to attorneys in the proceeding, and to direct the payment thereof out of the assets of the corporation or the proceeds of any sale or disposition of such assets.



5. Receiver to have power to sue and defend. A receiver of a corporation appointed under the provisions of this section shall have authority to sue and defend in all courts in his own name as receiver of such corporation. The court appointing such receiver shall have exclusive jurisdiction of the corporation and its property, wherever situated.

6. Receiver to be a citizen of the United States. A receiver shall in all cases be a citizen of the United States and shall in all cases give such bond as the court may direct with such sureties as the court may require.

#### Comment

Section 1106 confers very general equitable powers upon courts to protect corporate assets pending a final order in liquidation proceedings. To that extent, it closely resembles sections 1116 and 1117 of the MBCA. In addition, however, section 1106 also creates specific priorities with respect to the distribution of corporate assets upon dissolution. These directions to the courts, especially 1106, subsection 3, paragraph C, dealing with the redistribution of charitable or religious bequests are very useful and predictive guides. They perhaps only state what the law would otherwise require, but their collection in one section of the statute should help to eliminate uncertainty.

Subsection 6 was adopted from a separate section of the nonprofit act and changed somewhat to conform in language and approach to the comparable provision of the MBCA.

#### § 1107. Filing of claims in liquidation proceedings

1. Proceedings to liquidate assets and affairs. In proceedings to liquidate the assets and affairs of a corporation, the court may require all creditors of the corporation to file with the clerk of the court or with the receiver, in such form as the court may prescribe, proofs under oath of their respective claims. If the court requires the filing of claims, it shall fix a date, which shall be not less than 4 months from the date of the order, as the last day for the filing of claims, and shall prescribe the notice that shall be given to creditors and claimants of the date so fixed. Prior to the date so fixed, the court may extend the time for the filing of claims. Creditors and claimants failing to file proofs of claims on or before the date so fixed may be barred, by order of court, from participating in the distribution of the assets of the corporation.

2. Attachments dissolved. If it is determined in the course of such proceedings that the assets of the corporation, after subtracting the expenses of liquidating them and the expenses of the proceeding, will be less than the debts of the corporation, all attachments made within 4 months before the commencement of the action shall be dissolved.

#### Comment

Subsection 1 of section 1107 was taken from the Model Act; subsection 2 was copied verbatim from section 1118 (2) of the MBCA. The latter was added as a useful provision and also to preserve conformity with the MBCA.

The substantive content of the provisions is relatively easy to understand and should present no major interpretive problems.

§ 1108. Discontinuance of liquidation proceedings

The liquidation of the assets and activities of a corporation may be discontinued at any time during the liquidation proceedings when it is established that cause for liquidation no longer exists. In such event, the court shall dismiss the proceedings and direct the receiver to redeliver to the corporation all its remaining property and assets.

Comment

This section is taken from the Model Act. It is similar to the comparable section 1119 in the MBCA.

§ 1109. Decree of voluntary dissolution

1. Decree. In proceedings to liquidate the assets and activities of a corporation, when the costs and expenses of such proceedings and all debts, obligations and liabilities of the corporation shall have been paid and discharged and all of its remaining property and assets distributed in accordance with the provisions of this Act, or in case its property and assets are not sufficient to satisfy and discharge such costs, expenses, debts and obligations, and all the property and assets have been applied so far as they will go to their payment, the court shall enter a decree dissolving the corporation, whereupon the existence of the corporation shall cease.

2. Certified copy of decree to Secretary of State. In case the court shall enter a decree dissolving a corporation, it shall be the duty of the clerk of such court to cause a certified copy of the decree to be filed with the Secretary of State. No fee shall be charged by the Secretary of State for the filing thereof.

Comment

This section, taken from the Model Act, differs from the MBCA only to the extent that the MBCA permits the judicial dissolution of a corporation prior to its liquidation or its final distribution of assets. Since no compelling reason is perceived for the inclusion of this provision in the nonprofit act, this section retains the simple statement of the Model Act.

Subsection 2 appeared in section 160 of the Model Act. The 2 sections have been consolidated here.

§ 1110. Deposit with Treasurer of State of undistributed assets

1. Distributive portions not received. Upon the voluntary or involuntary dissolution of a corporation, the portion of the assets distributable to any person who is unknown or cannot be found, or who is under disability and for whom there is no person legally competent to receive such distributive portion, or who fails or refuses to accept his distribution, shall be reduced to cash and deposited with the Treasurer of State, along with a statement set-

ting forth the name, last known address, amount due to and other pertinent information concerning each such distributee.

2. **Deposit with Treasurer of State.** Such deposit with the Treasurer of State shall, to the extent thereof, absolutely discharge the persons having control and supervision over the distribution of the corporation's assets from liability to such unknown, unlocated, legally disabled or nonaccepting persons. If the dissolution is under the supervision of the Superior Court pursuant to section 1105, no such deposit shall be made with the Treasurer of State, except pursuant to order of the court, on such terms as the court may order.

3. **Proof required.** The Treasurer of State shall pay over such sums deposited with him to the person entitled thereto, or to his legal representative, upon proof satisfactory to the Treasurer of State of his right thereto.

4. **Civil action.** If the Treasurer of State is not satisfied as to the right of any claimant to such funds, the claimant may bring a civil action in the Superior Court against the Treasurer of State; if the court is satisfied as to the claimant's right to the funds, it shall issue an order directing the Treasurer of State to pay the same to such claimant. Such action may not be brought after the expiration of 20 years from the time of deposit of such funds with the Treasurer of State. At the end of such 20-year period, any such funds remaining in the State Treasury shall escheat to the State. Any income earned on such funds shall be paid into the General Fund as compensation for administration.

#### Comment

The MBCA version of this section is recommended in preference to section 61 of the Model Act. The former is more directive and is keyed in to other sections and provisions of Maine law.

#### § 1111. Survival of remedy after dissolution; liquidating trustees

1. **Survival of remedy.** The dissolution of a corporation, either by the filing by the Secretary of State of the articles of dissolution or by a decree of court, shall not take away or impair any remedy available to or against such corporation, its directors, officers or members for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within 2 years after the date of such dissolution. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name. The members, directors and officers shall have power to take such corporate or other action as shall be appropriate to protect such remedy, right or claim.

2. **Liquidating trustees.** After dissolution of a corporation, the directors as of the date of dissolution, or the survivors of such directors, shall be deemed liquidating trustees of the corporation with authority to take all action necessary or appropriate to dispose of any undistributed property of the corporation.

#### Comment

The MBCA version of this section is recommended primarily because the Model Act version contains extraneous material dealing with dis-

solution occurring by expiration of its period of duration, a possibility that has been eliminated by adopting the MBCA policy of conferring perpetual duration on all corporations organized under the chapter. In addition, subsection 2, a useful clarification of existing law, was not contained in the Model Act.

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### Introductory Comment to Chapter 12

This chapter on foreign corporations involves somewhat elaborate registration requirements and punitive provisions for those foreign corporations carrying on activities without authorization. Both the Model Act and the MBCA contain substantially the same kinds of sections regulating foreign corporations and exactly the same sorts of penalties for failures to comply. The necessity for devoting so much attention to the operations of foreign nonprofit corporations derives from the potential mischief that could be caused by allowing possibly irresponsible out-of-state corporations to engage in activities in this State without close supervision. The provisions do little more than attempt to ensure that any foreign corporation engaging in activities in this State is apprised of the permissible bounds of those activities.

The MBCA accomplishes this regulatory task with a more organized and logical sequence of provisions than does the Model Act. For that reason alone, its design would be preferred. More importantly perhaps, the MBCA chapter presents a better model for adoption since the numerous registration requirements for foreign nonprofit corporations can be more easily dovetailed with the registration requirements for foreign business corporations, thereby eliminating the possible confusion and expense arising from duplicative procedures.

## CHAPTER 12

### FOREIGN CORPORATIONS

§ 1201. Authorization of foreign corporations to carry on activities in this State; certain activities not deemed carrying on affairs

1. Authorization needed. Except as provided in section 1215, no foreign corporation shall carry on activities in this State until it shall have been authorized to do so as provided in this chapter, or as provided by some other public law of this State. A foreign corporation shall not be denied authority to carry on activities in this State solely because the laws of the jurisdiction of its incorporation differ from the laws of this State with respect to the organization and internal affairs of the corporation.

2. Activities not deemed carrying on affairs. Without excluding other activities which may not constitute carrying on activities in this State, a foreign corporation shall not be deemed to be carrying on activities in this State, for purposes of this chapter, solely by reason of carrying on in this State any one or more of the following activities:

- A. Maintaining, defending or participating in any action or proceeding whether judicial, administrative, arbitratve or otherwise, or effecting the settlement thereof or the settlements of claims or disputes;
  - B. Holding meetings of its directors or members or carrying on other activities concerning its internal affairs;
  - C. Maintaining bank accounts;
  - D. Securing or collecting debts or enforcing any rights in property covering the same;
  - E. Effecting a transaction in interstate or foreign commerce;
  - F. Conducting within this State an isolated transaction which is completed within a period of 30 days and which is not in the course of a series or number of repeated transactions; or
  - G. Owning real estate.
3. Standard for activities not established. This section shall not be deemed to establish a standard for activities which may subject a foreign corporation to service of process under this chapter or any other statute of this State.

#### Comment

This section is adapted from section 1201 of the MBCA. It provides generally that no foreign corporation may "carry on activities" in Maine unless authorized by this chapter or some other public law. The section goes on to indicate what minimal activities are not deemed to be "carrying on activities" for the purposes of this chapter. These exceptions to the registration requirements will permit temporary or incidental activities to be carried on by a foreign corporation without putting the foreign corporation in violation of the registration requirements.

1. Application. A foreign corporation may apply for authority to carry on activities in this State by executing and delivering for filing, as provided by sections 104 and 106, an application setting forth:
- A. The name of the corporation;
  - B. The jurisdiction of its incorporation;
  - C. The date of incorporation and the period of duration of the corporation;
  - D. A statement of the purpose or purposes which it is authorized to pursue under the laws of its jurisdiction of incorporation; and a statement of the purpose or purposes which it seeks authority to pursue in this State if it does not ask authority to pursue all of the purposes authorized under the laws of its jurisdiction of incorporation;
  - E. The address of the registered or principal office of the corporation in the jurisdiction of its incorporation; and
  - F. The address of its proposed registered office in this State and the name of its proposed registered agent in this State at such address.

**2. Certificate of good standing.** The application of the corporation for authority shall be accompanied by a certificate of good standing or its equivalent from the proper officer of its jurisdiction of incorporation. Such certificate of good standing shall have been made not more than 90 days prior to the delivery of the application for filing.

#### Comment

The "application for authority" provision is based on section 1202, MBCA, and follows the same filing system and sequence developed under the MBCA, thereby simplifying the tasks of attorneys, applicants and the Secretary of State's office.

The "certificate of good standing" requirement in subsection 2 might cause some difficulty for those corporations incorporated in states which do not distribute such certificates. The phrase "or its equivalent" was added to give the Secretary of State's office some flexibility in terms of documents offered to evidence the corporation's "good standing."

### § 1203. Effect of authorization to carry on affairs in State

**1. Filing of application authorization to carry on activities.** Upon filing by the Secretary of State of the application for authority, the foreign corporation shall be authorized to carry on activities in this State, and may carry on any activities:

**A.** Which it is authorized to carry on in the jurisdiction of its incorporation; and

**B.** Which may be carried on by a domestic corporation organized under this Act, unless in its application for authority, the corporation expressly limited itself to a lesser number or type of activities, in which case the corporation may carry on the affairs to which it so limited its application if such affairs qualify under this paragraph and paragraph A.

**2. Continuation of authority.** Such authority shall continue so long as the corporation retains its authority to carry on such affairs in its jurisdiction of incorporation, and so long as its authority to carry on affairs in this State has not been revoked or otherwise terminated as provided in this chapter.

#### Comment

This section, based on section 1203 of the MBCA, provides that the authorization to carry on activities becomes effective when "filed by the Secretary of State."

The Secretary of State's function in filing the application is purely ministerial. If the applicant provides the required supporting documents and correctly fills out the form, the application must be filed. At that point, the foreign corporation is authorized to carry on activities.

The ministerial nature of the filing process reflects the fact that this State is not chartering or approving the corporation; it is merely au-

thorizing a corporation that has been created by official action in some other state to carry on activities in this State.

**§ 1204. Powers of foreign corporation**

A foreign corporation authorized to carry on activities in this State shall, until such authority is revoked or otherwise terminated, have the same, but no greater, powers, rights and privileges as a domestic corporation organized under this Act, and except as otherwise provided in this Act, shall be subject to the same duties, restrictions, liabilities and penalties now or hereafter imposed upon a domestic corporation of like character.

**Comment**

This section, taken almost verbatim from section 1204, MBCA, notes that foreign corporations have the same, but no greater, rights and duties as domestic corporations.

**§ 1205. Corporate name of foreign corporation**

1. **Name.** No foreign corporation shall be authorized to carry on activities in this State unless the name of the corporation complies with the requirements of section 301.

2. **Change of name.** If a foreign corporation authorized to carry on activities in this State shall change its name in its jurisdiction of incorporation, it shall, within 30 days after the effective date thereof, amend its application for authority, as provided by section 1207.

3. **Unavailable name.** If the name to which the foreign corporation has changed would be unavailable to it on an original application for authority, the corporation shall not thereafter carry on any activities in this State until it has adopted or assumed a name which is available to it under the laws of this State.

**Comment**

This section, taken from section 1205 of the MBCA, details the procedures to be followed by a foreign corporation in adopting a new name or changing its old name.

**§ 1206. Merger of foreign corporation authorized to carry on activities in State**

Whenever a foreign corporation authorized to carry on activities in this State shall be the surviving corporation in a statutory merger permitted by the laws of its jurisdiction of incorporation, it shall, within 30 days after the effective date of the merger, deliver to the Secretary of State for filing, as provided by section 106, a copy of the articles of merger duly authenticated by the proper officer of the jurisdiction of its incorporation. It shall not be necessary for such corporation to secure either new or additional authority to carry on activities in this State unless the name of such corporation is changed, or unless the corporation proposes to carry on other or additional activities than those which it is then authorized to carry on in this State.

### Comment

This section is taken from section 1206, MBCA and simply requires a foreign corporation authorized to carry on activities in this State to file articles of merger with the Secretary of State when it is the surviving corporation in a statutory merger permitted by the laws of the jurisdiction in which it is incorporated.

#### § 1207. Amended application for authority

1. Provisions for amendment. A foreign corporation authorized to carry on activities in this State shall amend its application for authority if it shall:

A. Change its corporate name, provided that such change has been effected under the laws of its jurisdiction of incorporation; or

B. Enlarge, limit or otherwise change the kinds of activities which it seeks authority to engage in in this State.

2. Filing with Secretary of State. Such amendment shall be executed and delivered for filing to the Secretary of State, as provided by sections 104 and 106, and shall set forth:

A. The name of the foreign corporation as it appears on the index of names of authorized foreign corporations in the office of the Secretary of State;

B. The jurisdiction under the laws of which it is incorporated;

C. The date on which it was authorized to carry on activities in this State;

D. The proposed amendment to its application of authority;

E. If the name of the corporation is to be changed, a statement that the change of name has been effected under the laws of its jurisdiction of incorporation, and the date the change was effected; and

F. If the activities which it is to be authorized to engage in in this State are to be enlarged, limited or otherwise changed, a statement that it is authorized to carry on those activities under the laws of its jurisdiction of incorporation.

### Comment

Based on section 1207, MBCA, this provision indicates that a foreign corporation must amend its application for authority if it changes its name in the jurisdiction in which it was incorporated or if it enlarges or changes the kinds of activities in which it has authority to engage in this State. The filing of the amendments follows the usual filing procedures.

#### § 1208. Surrender of foreign corporation's authority to carry on activities in State

1. Surrender of authority. A foreign corporation authorized to carry on activities in this State may surrender its authority by executing and deliver-



ing for filing, as provided in sections 104 and 106, an application for surrender of authority which shall set forth:

- A. The name of the foreign corporation as it appears on the index of names of authorized foreign corporations in the office of Secretary of State;
- B. The jurisdiction of its incorporation;
- C. The date on which it was authorized to carry on activities in this State;
- D. That the corporation is not as of the date of application carrying on activities in this State;
- E. That it surrenders its authority to carry on activities in this State;
- F. That it revokes the authority of its registered agent in this State to accept services of process and consents that process in any action, suit or proceeding based upon any cause of action arising in this State before the date of filing the application may be served on the Secretary of State after the filing by the Secretary of State of the application; and
- G. A post office address to which the Secretary of State shall mail a copy of any process served upon him against the corporation.

2. Termination of authority. The authority of the foreign corporation to carry on activities in this State shall terminate as of the date of filing by the Secretary of State of the application for surrender of authority.

#### Comment

This provision provides a procedure whereby a foreign corporation authorized to carry on activities in Maine can, in effect, eliminate its presence in the State by filing a formal surrender of authority to carry on activities with the Secretary of State. The surrender application, however, protects against possible abuse by providing that the corporation consents to appointment of the Secretary of State to accept service of process for a suit arising out of activities carried on in the State prior to the surrender of authority.

The section is based on section 1208, MBCA.

§ 1209. Foreign corporation's termination of existence in jurisdiction of its incorporation; effect upon authority in this State

1. Termination of existence. When a foreign corporation authorized to carry on activities in this State shall be dissolved, or its authority or existence otherwise canceled or terminated in its jurisdiction of incorporation, or when the corporation is merged or consolidated into another foreign corporation which is not authorized to carry on activities in this State, the corporation or its successor or trustee shall deliver for filing with the Secretary of State a certificate of the appropriate official of its jurisdiction of incorporation attesting to, or a certified copy of an order or decree of a court of its jurisdiction of incorporation directing the dissolution of such foreign corporation, the termination of existence, the cancellation or revocation of its authority, or its merger into or consolidation with another foreign corporation.

2. **Effect on authority.** The authority of the foreign corporation to carry on activities in this State shall terminate on the effective date of its dissolution, or of the cancellation of its existence or authority in its jurisdiction of incorporation, or of its merger or consolidation into another foreign corporation not authorized to carry on activities in this State, as the case may be. If those persons in charge of the foreign corporation's affairs in this State continue to function in this State under the name of the foreign corporation after such effective date, the effect shall be the same as that provided for in this Act for foreign corporations carrying on activities in this State without authority; and the persons in charge of its business in this State shall, if they know of such cause for termination of authority, be personally liable for the penalties against the corporation provided for in section 1214. Termination of authority for such cause shall not affect the accrual of or enforcement of any cause of action against the foreign corporation, its assets in this State, or its successors in interest, nor the usual means of serving summons upon it, until the certificate or other document required by subsection 1 to be filed is delivered for filing to the Secretary of State; and thereafter summons may only be served in the manner and in those cases mentioned in subsection 3.

3. **Agent.** The Secretary of State shall be the agent of the foreign corporation for service of process in any action, suit, or proceeding based upon any cause of action arising in this State before the date of filing the certificate, order or decree. Service of summons and proof of service shall be as provided in section 1217.

#### Comment

This section covers the procedures which must be observed in this State if a foreign corporation is dissolved or otherwise terminates its existence in the state of its incorporation. Unless the notification requirements are followed, agents who continue to function on behalf of the now defunct corporation may be personally liable for penalties under section 1214. In addition, the section provides that any action what has accrued against the foreign corporation prior to its dissolution shall not be affected by the termination of its authority to carry on activities in the State.

#### § 1210. Revocation of foreign corporation's authority to carry on affairs in State

1. **Secretary of State may revoke authority.** The authority of a foreign corporation to carry on activities in this State may be revoked by the Secretary of State, as provided by subsections 2 and 3, when:

- A. The corporation has failed to file its annual report within the time specified by this Act, or has failed to pay any fees or penalties prescribed by this Act, when they have become due and payable;
- B. The corporation has failed to appoint and maintain a registered agent in this State as required by section 1212;
- C. The corporation has failed, after change of its registered office or registered agent, to file in the office of the Secretary of State a statement of such change as required by section 1212;

**D. The corporation has failed to file in the office of the Secretary of State within the required time any articles of merger as required by section 1206 or amended application for authority as required by section 1207; or**

**E. A misrepresentation has been made of a material fact in any application, report, affidavit or other document required by this Act.**

2. **Secretary of State to mail revocation of authority.** The authority of a foreign corporation shall be revoked only after the Secretary of State shall have mailed to the corporation's last registered office in this State and to its last registered or principal office in its jurisdiction of incorporation at least 60 days' notice of impending revocation of its authority to carry on activities in this State, including a specification of the default, and the corporation shall fail, prior to revocation, to cure the default specified in such notice.

3. **Certificate revoked.** After the expiration of the 60-day period, if the foreign corporation has not cured the default or, as to the ground for revocation specified in subsection 1, paragraph E, convinced the Secretary of State, by affidavit or otherwise, that there was no such misrepresentation, the Secretary of State shall issue and file his certificate revoking the foreign corporation's authority to carry on activities in this State, and shall mail copies thereof to the corporation's last registered office in this State and to its last registered or principal office in its jurisdiction of incorporation.

4. **Action appealable.** Such action of the Secretary of State in revoking the authority of a foreign corporation is appealable to the Superior Court in Kennebec County. Such appeals shall be governed by Rule 80B of the Rules of Civil Procedure or by such amendment or replacement thereof as may from time to time be adopted.

5. **Authority ceased.** The authority of the corporation to carry on activities in this State shall cease as of the date of filing of the certificate of revocation, unless on appeal such effective date is stayed by the court.

#### Comment

This section specifies the grounds upon which the Secretary of State may revoke a foreign corporation's permission to conduct activities in the State. These are the same as the grounds in section 1210 of the MBCA and include the failure to pay necessary fees, the failure to inform the Secretary of State of a change in its registered office or to file amendments to its articles, the failure to maintain a registered agent or the making of a misrepresentation of a material fact in any application or document filed with the Secretary of State.

#### § 1211. Suits by Attorney General against foreign corporations

The Attorney General may bring an action to restrain a foreign corporation from carrying on in this State without authority any activity for which authority is required by this chapter; any activity which it is not authorized to carry on in its jurisdiction of incorporation, or which it is not authorized to do under this Act, or which it is engaging in without securing any license or other authority required under the laws of this State; any activity, authority

for which was obtained through fraud, misrepresentation or concealment of a material fact. A certified copy of any order or judgment restraining or enjoining any such corporation from carrying on activities or a particular activity in this State shall be filed with the Secretary of State.

#### Comment

Based on section 1211, MBCA, this section authorizes the Attorney General to bring an action to restrain a foreign corporation from engaging in activities without authority.

#### § 1212. Service of process on authorized foreign corporations; registered office and registered agent

1. Procedures in selecting agent and office. Every foreign corporation authorized to carry on activities in this State shall have and continuously maintain in this State:

A. A registered office which may be, but need not be, the same as its principal office in this State; and

B. A registered agent, which agent may be either an individual resident in this State, whose office is identical with the corporation's registered office, or a domestic or foreign corporation authorized to carry on activities in this State and having an office identical with such registered office.

2. Change in registered office or agent. A foreign corporation may change its registered office or its registered agent, or both, by executing and filing, in accordance with sections 104 and 106, a statement setting forth:

A. The name of the corporation;

B. Its jurisdiction of incorporation;

C. The date of its authorization to carry on activities in this State;

D. The address of its then registered office;

E. If its registered office is to be changed, the address to which the registered office is to be changed;

F. The name of its then registered agent;

G. If its registered agent is to be changed, the name of its successor registered agent;

H. That the registered agent has a business office at the registered office, after giving effect to the changes stated; and

I. That each change therein stated was authorized by the board of directors.

In the alternative, if the registered agent for one or more foreign corporations changes the address of his or its office from the registered office appearing on the record in the office of the Secretary of State, the registered agent may change the registered office of such corporation by filing, in accordance with

section 106, a statement executed by the registered agent and setting forth, for each foreign corporation for which he or it is such registered agent, the information required by paragraphs A, B, D, E and H and reciting that notice of such change has been sent to each of such foreign corporations.

3. **Written notice of resignation.** Any registered agent of a foreign corporation may resign as such agent by filing a written notice of resignation with the Secretary of State, and by mailing a copy thereof to the corporation at its last registered or principal office in its jurisdiction of incorporation, as filed with the Secretary of State. The appointment of such agent shall terminate 30 days after the filing of such notice by the Secretary of State.

4. **Death of registered agent.** If any registered agent dies, becomes incapacitated, resigns or is otherwise unable to perform his duties, the foreign corporation shall promptly appoint another registered agent, and shall execute and file a statement thereof as provided in subsection 2. For whatever reason filed, the statement provided for in subsection 2 is effective, from the time it is filed by the Secretary of State, to appoint the new agent named therein and to terminate the appointment of the former agent, if any.

5. **Registered agent served process.** The registered agent appointed by a foreign corporation authorized to carry on activities in this State shall be an agent of such corporation for service of any process, notice or demand required or permitted by law to be served, and such service shall be binding upon the corporation.

6. **Service of process.** Whenever a foreign corporation authorized to carry on activities in this State shall fail to appoint or maintain a registered agent in this State, or whenever any such registered agent cannot with reasonable diligence be found at the registered office, or whenever the certificate of authority of a foreign corporation shall be revoked, then the Secretary of State shall be an agent of such corporation upon whom any such process, notice or demand may be served. Service on the Secretary of State of any such process, notice or demand shall be made as provided in section 1217.

7. **Right to serve process not limited.** Nothing herein contained shall limit or affect the right to serve any process, notice or demand required or permitted by law to be served upon a corporation in any other manner now or hereafter permitted by statute or rule of court.

#### Comment

This section details the procedures to be followed by a foreign corporation in selecting a registered office and registered agent, as well as the notification procedures for filing changes in either. This section is based on section 1212, MBCA.

#### § 1213. Service of process on foreign corporation not authorized to carry on activities in State

1. **Limited jurisdiction.** Every foreign corporation which carries on any activities in this State without having been authorized to carry on activities in this State thereby submits itself to the jurisdiction of the courts of this

State, with respect to any action arising out of or in connection with activities actually carried on in this State, and also thereby designates the Secretary of State as its agent upon whom any process, notice or demand upon it may be served in any action or proceeding arising out of or in connection with the carrying on of any activities in this State.

2. **Other methods of service.** In addition to other methods of service which may be authorized by statute or by rule, service of such process may be made as provided in section 1217.

#### Comment

Based on section 1213, MBCA, this provision states that a foreign corporation conducting activities in this State impliedly consents to the assertion of jurisdiction over it by the courts of this State. To avoid a possible challenge, however, a clause was added in this section limiting the jurisdiction to actions "arising out of or in connection with activities actually carried on in this State."

In addition, this section authorizes the Secretary of State to receive process on behalf of the unauthorized foreign corporation.

#### § 1214. Effect of foreign corporation carrying on activities in State without authority

1. **Corporation liable.** A foreign corporation which carries on activities in this State without authority, when such authority is required by this Act, shall be liable to this State for all fees and penalties which would have been imposed under this Act upon such corporation had it duly applied for and received authority under this chapter, for the years or parts thereof during which it carried on activities in this State without authority. In addition, such corporation shall be liable to the State in the sum of \$25 per day for each day it fails to pay such fees and penalties. The Attorney General shall bring proceedings to recover all such amounts due under this section.

2. **Corporation may be sued.** A foreign corporation carrying on activities in this State without authority, when such authority is required by this Act, shall not maintain any action, suit or proceeding in this State unless and until such corporation shall have been authorized to carry on activities in this State and shall have paid to the State all fees and penalties due under subsection 1. This prohibition shall apply to any assignee except a subrogee; and shall apply to a successor in interest, whether by merger, consolidation or otherwise, and to a purchaser of all or substantially all of the assets of such corporation. If it appears in any pending action that the plaintiff is such a foreign corporation carrying on activities in this State without authority, or is such an assignee, successor or purchaser, the action shall abate until such foreign corporation becomes authorized to carry on activities in this State, or shall be dismissed without prejudice to the right to bring the same after the foreign corporation becomes so authorized.

3. **Failure to obtain authority to carry on activities.** The failure of a foreign corporation to obtain authority to carry on activities in this State shall not impair the validity of any contract or act of such corporation or the

right of any other party to the contract to maintain an action or other proceeding thereon, and shall not prevent such corporation from defending any action, suit or proceeding in this State.

#### Comment

In the event a foreign corporation engages in activity in the State without the proper authorization, the corporation becomes liable for the fees and penalties it failed to pay during the period of its activity, and is disabled from maintaining any action in the courts of the State; no party is prevented from suing the corporation in the courts of the State, however.

The action is based on section 1214, MBCA.

#### § 1215. Application of chapter to corporations previously authorized to carry on activities in State

1. **Continuation of activities.** Every foreign corporation which, on the effective date of this Act, is authorized to carry on activities in this State shall continue to have such authority for any purpose or purposes for which a corporation might secure authority under this chapter. Such foreign corporation shall have the same rights and privileges, and shall be subject to the same duties, limitations, restrictions, liabilities and penalties as a foreign corporation authorized under this chapter.

2. **Qualified to carry on activities.** Every foreign corporation which, on the effective date of this Act, was lawfully carrying on activities in this State, even though not theretofore qualified as a foreign corporation or otherwise expressly authorized to do so, may continue to carry on such activities, and in every other respect such foreign corporation shall be treated as though it were a foreign corporation authorized to carry on activities in this State.

#### Comment

This section "grandfathers" in those corporations which were authorized to carry on activities under prior law. They may continue to carry on activities, subject to the same rights and liabilities as foreign corporations authorized to carry on activities pursuant to the provisions of this chapter without applying for fresh authority to the Secretary of State.

Since no provision of Title 13, chapter 81 expressly permits foreign nonstock corporations to qualify to carry on activities, the practical effect of this section is unclear.

#### § 1216. Members' inspection of records of foreign corporations

1. **Right to inspect corporate records.** Every foreign corporation, authorized to carry on activities in this State and actually keeping or maintaining within this State any books or records, shall afford to its members the same right to inspect books and records kept or maintained in this State, including, but not limited to, records of members as is provided in this Act in the case of domestic corporations.

### Comment

This section is intended to secure for members of foreign corporations the same rights to inspect corporate records as is afforded members of domestic corporations under NPA, section 715. Such rights are extended to shareholders of foreign corporations under MBCA, section 1216. No such right is provided in the Model Act.

#### § 1217. Service of process on Secretary of State for foreign corporation

Whenever any process, notice or demand is to be served on the Secretary of State as the agent of a foreign corporation pursuant to a provision of this chapter:

1. **Process; how served.** The process, notice or demand shall be served by delivering it to the Secretary of State or to any person designated by him to receive such service;

2. **Plaintiff to send duplicate copy to foreign corporation.** The plaintiff shall promptly send a duplicate copy of the process, notice or demand via registered or certified mail, return receipt requested, marked "deliver to addressee only," to the foreign corporation at:

A. Its last registered office in this State on file in the office of the Secretary of State, if any; and

B. Its last registered or principal office in the jurisdiction of its incorporation on file in the office of the Secretary of State, if any; or, if no such office has been listed in the office of the Secretary of State, at the last address of the corporation known to the plaintiff; and

3. **Proof of service.** Proof of service shall be by return of service on the Secretary of State, and by an affidavit of the plaintiff or his attorney setting forth his compliance with subsection 2, to which affidavit shall be appended the return receipt signed by such foreign corporation or other official proof of delivery or, if acceptance was refused or the addressee was not found at the address given, the original envelope bearing the notation of the postal authorities showing the reason for nondelivery. Service is complete when subsections 1 and 2 have been complied with.

### Comment

This section, based on section 1217 of the MBCA, indicates the technical requirements for effective service on the Secretary of State as agent of a foreign corporation.

## CHAPTER 13

### ANNUAL REPORTS; POWERS OF SECRETARY OF STATE; EXCUSE; MISCELLANEOUS

#### § 1301. Annual report of domestic and foreign corporations; excuse

1. **Annual report.** Each domestic corporation, unless excused as provided in subsection 4, and each foreign corporation authorized to carry on activities



in this State shall deliver for filing, within the time prescribed by this Act, an annual report to the Secretary of State setting forth:

- A. The name of the corporation and the jurisdiction of its incorporation;
- B. The address of the registered office of the corporation in this State and the name of its agent for service of process if a domestic corporation, or its registered agent if a foreign corporation, in this State at such address, including the street or rural route number, town or city, county and state; and, in the case of a foreign corporation, the address of its registered or principal office in its jurisdiction of incorporation;
- C. A brief statement of the character of the activities in which the corporation is actually engaged in this State;
- D. The names and business or residence addresses of the directors and officers of the corporation, including the street or rural route number, town city, and state; and
- E. The date and place of the last annual meeting of members to elect directors of the corporation.

2. Information contained in annual report. The information contained in the annual report shall be given as of the close of business on the last day of the calendar year for which the report is filed, including, where applicable, the calendar year in which the corporation is organized. If between such date and the date of execution of the report, any material change has occurred with respect to any fact required to be set forth in the report, such change shall also be stated.

3. Execution. The annual report shall be executed as provided by section 104, except that signing by any one of the president, a vice-president, the secretary, the treasurer or an assistant secretary, without a 2nd signature, shall be deemed valid under section 104, subsection 1, paragraph B, subparagraph (2). Such report shall be delivered for filing between the first day of January and the first day of June of the year next succeeding the calendar year for which the report is to be made. One copy of the report, together with the filing fee required by this Act, shall be delivered for filing to the Secretary of State who shall file the report, if he finds that it conforms to the requirements of this Act.

4. Certificate of fact. The Secretary of State, upon application by any corporation and satisfactory proof that it has ceased to carry on activities, shall file a certificate of the fact and shall give a duplicate certificate to the corporation. Thereupon, such corporation shall be excused from filing annual reports with the Secretary of State so long as the corporation in fact carries on no activities.

5. Vote to carry on activities. The members entitled to vote or, if none, directors of a corporation which has been excused pursuant to subsection 4 may vote to resume carrying on activities at a meeting duly called and held for such purpose. A certificate executed and filed as provided in sections 104 and 106 setting forth that a members or directors' meeting was held, the date

and location of same, and that a majority of the members or directors voted to resume carrying on activities shall authorize such corporation to carry on activities; and after such certificate is filed, it shall be required to file annual reports.

#### Comment

This section is based on section 1301 of the MBCA; it requires corporations subject to this chapter to file a simple annual report containing names and addresses of current directors and officers, as well as the name and address of the agent for service of process, and the location of the corporate office. The report must also include a brief description of the activities engaged in by the corporation.

The requirement of an annual report must be regarded as a significant decision. It may well be the single most difficult obligation imposed on nonprofit corporations by the new law. It will very likely be the occasion for many ad hoc — fraternal organizations losing their authority to function as a corporation. The requirement will also add to the administrative burden of the Secretary of State's office: The annual reports will have to be filed and processed, and delinquent corporations will have to be notified when their authority to carry on activities is revoked.

Is there a point to imposing this obligation on nonprofit corporations? Since the State limits the liability of corporate members, it would seem the State should provide some minimal protection to the creditors and possible tort victims of these corporations by maintaining a file of current names and addresses of directors and agents authorized to receive process. In addition, since many of these organizations solicit funds or depend on public contributions, the public should have access to the names of the individuals responsible for directing the activities of these corporations.

The annual report is not an extraordinarily difficult requirement and would seem an appropriate and minimal form of monitoring by the authority granting the corporate privilege.

#### § 1302. Failure to file annual report; incorrect report; penalties

1. Failure to file annual report. Any corporation which is required to deliver an annual report for filing, as provided by section 1301, and which fails to deliver its properly completed annual report to the Secretary of State, shall pay, in addition to the regular annual report fee, the sum of \$10 for each failure to so file on time. Upon failure to file an annual report and to pay the annual report fee or the penalty, the Secretary of State shall revoke a foreign corporation's authority to carry on activities in this State and suspend a domestic corporation from carrying on activities. He shall use the procedures set forth in section 1210, relative to revoking the right of foreign corporations to carry on activities in this State, for suspending domestic corporations. A foreign corporation whose authority to carry on activities in this State has been revoked under this subsection and which wishes to carry on

activities again in this State must be authorized as provided in section 1202. A domestic corporation which has been suspended under this subsection may be reinstated by filing the current annual report and by paying the penalty for the current year and for each year that it has failed to file an annual report.

2. Nonconformity. If the Secretary of State finds that any annual report delivered for filing does not conform with the requirements of section 1301, he may return the report for correction.

3. Time limit specified. If the annual report of a corporation is not received by the Secretary of State within the time specified in 1301, the corporation shall be excused from the liability provided in this section and from any other penalty for failure to timely file the report, if it establishes, to the satisfaction of the Secretary of State, that its failure to file was the result of excusable neglect, and it furnishes the Secretary of State with a copy of such report within 30 days after it learns of the nondelivery of the original report.

#### Comment

This section provides that a corporation which does not file an annual report shall have its corporate privilege revoked by the Secretary of State. It is modeled on section 1302 of the MBCA.

#### § 1303. False and misleading statements in documents required to be filed with Secretary of State

1. Criminal penalties. Any person who signs any document required or permitted to be delivered for filing with the Secretary of State by any corporation, domestic or foreign, knowing that such document contains any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than \$25.

2. Liable. Any person who violates subsection 1 shall be liable to any person who is damaged thereby.

#### Comment

This section, based on section 1304, MBCA, provides for criminal penalties in the event of a knowing misstatement or omission in any document filed with the Secretary of State.

#### § 1304. Certified copies of documents filed with Secretary of State to be received in evidence

All copies of documents which have been filed in the office of the Secretary of State, as required or permitted by any provision of this Act, shall, when certified by him, be taken and received in all courts, public offices and official bodies as prima facie evidence of the facts therein stated. A certificate by the Secretary of State under the seal of his office as to the non-existence

of a document in the files of his office shall be taken and received in all courts, public offices and official bodies as prima facie evidence of the nonexistence of such document.

#### Comment

This section states that documents filed with the Secretary of State under this chapter shall be prima facie evidence of the facts stated in them. It is based on section 1305 of MBCA.

§ 1305. Certified records of corporation as prima facie evidence of facts stated therein

In addition to any rule of evidence provided by rule of court:

1. Prima facie evidence. When certified under oath of the secretary or an assistant secretary of the corporation to be true and correct, the original or a copy of:

A. The minutes of the proceedings of the incorporators;

B. The minutes of the meetings or other proceedings of the members or any class thereof;

C. The minutes of the meetings or other proceedings of the directors or of any committee thereof;

D. Any written consent, waiver, release or agreement entered into the records of minutes; and

E. A statement that no specified meeting or proceeding was held, or that no specified consent, waiver, release or agreement exists;

shall be prima facie evidence of the facts stated therein. Such certification may be by oral testimony or by affidavit, but after admitting such affidavit into evidence the court shall permit cross-examination of each affiant. A certification shall be sufficient if it is to the effect that a given document is the original, or a true, correct and complete copy, of minutes, consent, waiver or other document contained in the minute book of the corporation, even though the affiant has no personal knowledge of the facts set forth in such document; and the lack of personal knowledge of the certifying officers shall go to the weight, but not the admissibility of such document as evidence.

2. Meeting duly called. Every meeting referred to in such certified original or copy shall be deemed duly called and held, and all motions and resolutions adopted and proceedings had at such meeting shall be deemed duly adopted and had, and all elections of directors and all elections or appointments of officers chosen at such meeting shall be deemed valid, until the contrary is proven.

#### Comment

Based on section 1306, MBCA, this section provides that certain corporate documents shall also be prima facie evidence of the facts stated in them.

§ 1306. Short form certificate of change in corporate identity

1. Secretary of State authorized to issue certificate. The Secretary of State is authorized to issue his certificate in such short form as is adopted by him:

A. Of a change in the name of a domestic or foreign corporation, which change of name is reflected in articles of amendment which have been duly filed in his office. Such certificate shall state the new name of the corporation, its former name and such other information as the Secretary of State deems desirable;

B. Of the consolidation or merger of 2 or more corporations, domestic or foreign or both, which merger or consolidation is reflected in articles of merger or consolidation which have been duly filed in his office. Such certificate shall state the name of the new or surviving corporation, the names of the corporations participating in the merger or consolidation and such other information as the Secretary of State deems desirable.

2. Certificate recorded in registry of deeds. Any certificate issued pursuant to subsection 1 shall be accepted for recording, without acknowledgment, at any registry of deeds in the State. Such certificates shall be indexed and filed as are the items enumerated in Title 33, section 654. The register of deeds shall receive a fee equal to that chargeable for a deed for recording such a certificate.

Comment

Based on section 1306, MBCA, this provision permits the issuance of "short form" certificates by the Secretary of State.

CHAPTER 14

FEEES

§ 1401. Fees for filing documents and services

In addition to any fees required by section 1402, the Secretary of State shall charge the following fees for filing documents required or permitted to be filed in his office by this Act, and for services specified herein:

1. Proof of resolution. Proof of resolution of a corporation's board of directors authorizing the use of a similar name by a new corporation, as provided by section 301, subsection 1, paragraph B, \$5;

2. Application to reserve name. Application to reserve corporate name, as provided by section 302, \$5;

3. Notice of transfer of reserved corporate name. Notice of transfer of a reserved corporate name, as provided by section 302, \$5;

4. Application to register corporate name. Application to register corporate name, as provided by section 303, \$5 per month for the number of months or fraction thereof remaining in the calendar year when first filed;

5. Application to renew registered name. Application to renew the registration of a registered name, as provided by section 303, \$50;

6. Change in registered agent or address of registered agent. Statement changing the registered agent or a statement or change of address of registered agent, as provided by section 305, subsection 1, \$5 for each foreign corporation listed; or when separate statements are filed at one time, \$5 for each separate statement up to but not exceeding 100 statements, \$2 for each separate statement over 100 but not exceeding 200 statements, \$1 for each separate statement over 200 statements;

7. Notice of resignation of registered agent. Notice of resignation of a registered agent of a corporation, as provided by section 305, subsection 2, \$2;

8. Change of registered office. Statement of change of registered office, as provided by section 305 subsection 3, \$5 for each corporation listed; or when separate statements are filed at one time, \$5 for each separate statement up to but not exceeding 100 statements, \$2 for each separate statement over 100 but not exceeding 200 statements, and \$1 for each separate statement over 200 statements;

9. Process on Secretary of State as agent. Accompanying service of process upon the Secretary of State as agent of a domestic corporation, as provided by section 306, or accompanying service of process upon the Secretary of State as agent of nonresident director of a domestic corporation, as provided by section 307, or accompanying service of process upon the Secretary of State as agent of a foreign corporation pursuant to section 1217, \$5 for each such process;

10. Notice of resignation of nonresident director. Notice of resignation of a nonresident director, as provided by section 307, subsection 4, \$2;

11. Articles of incorporation. Articles of incorporation, as provided by section 403, \$25;

12. Articles of amendment. Articles of amendment, as provided by sections 702 and 803, \$5; if the amendment changes the corporation's purposes, a further additional amount of \$15;

13. Restated articles of incorporation. Restated articles of incorporation, as provided by section 805, \$10; and if they change the purposes of the corporation, a further additional amount of \$5;

14. Articles of merger or consolidation. Articles of merger or consolidation pursuant to shareholder approval, as provided by section 904, \$10; and if the merger or consolidation changes the corporation's purposes, a further additional amount of \$5;

15. Articles of merger or consolidation of corporations. Articles of merger or consolidation of domestic and foreign corporations, as provided by section 906, \$10, if the new or surviving corporation is a foreign corporation, plus the appropriate fee for authority to carry on activities in this State, if not previously so authorized; if the new or surviving corporation is a domestic corporation, the same sum as would be required for the merger or consolidation of domestic corporations;

16. Document required. Document required by section 906, subsection 4, in the event that the surviving or new corporation is a foreign corporation, no fee in addition to that specified in the preceding subsection;

17. **Articles of dissolution.** Articles of dissolution, as provided by section 1104, \$5;

18. **Statement of intent.** Statement of intent, to dissolve as provided by section 1101, \$5;

19. **Statement of revocation.** Statement of revocation of voluntary dissolution proceedings, as provided by section 1102, \$5;

20. **Application for authority.** Application of a foreign corporation for authority to carry on activities in this State, as provided by section 1202, \$25;

21. **Articles of merger.** Articles of merger of a foreign corporation, as provided by section 1206, \$10;

22. **Amendment to foreign corporation's application.** An amendment to a foreign corporation's application for authority to carry on activities in this State, as provided by section 1207, \$5;

23. **Application for surrender of authority.** An application of a foreign corporation for surrender of its authority, as provided by section 1208, \$5;

24. **Statement of termination of existence.** Statement of a foreign corporation's termination of existence, as provided by section 1209, \$5;

25. **Annual report.** Annual report of a domestic or foreign corporation, as provided by section 1301, \$5;

26. **Certificate of resumption of activity.** A certificate of resumption of activity, as provided by section 1301, subsection 5, \$25;

27. **Issuing certificate of change.** For issuing a short form certificate of change of name or of consolidation or merger, as provided by section 1306, \$5 per certificate. For issuing a short form certificate of corporate condition, \$5 per certificate. For issuing a long form certificate of corporate condition listing amendments, \$5 per certificate;

28. **Statement of change or registered office or agent.** Statement of change of registered office or registered agent, or both, as provided by section 1212, subsection 2, \$5; and

29. **Other documents.** Any other documents not herein specifically provided for, \$5.

#### Comment

This section is closely patterned after section 1401 of the MBCA which specifies fees for the filing of documents and rendition of services. The Model Act has a similar section.

#### § 1402. Fees for copying, comparing and authenticating documents

1. **Secretary of State to furnish copies.** The Secretary of State shall furnish to any person a copy of any document filed under this Act or retained in file, having been filed under a predecessor to this Act; for locating, copying and certifying a document subsequent to its filing, the Secretary of State shall charge a fee of \$1 per page.

**Comment**

The wording of this section is identical with that of subsection 3 of MBCA, section 1402. A simple fee structure is desirable for nonprofit corporations which are likely to be small and loosely structured.

**§ 1403. Remittance to Treasurer of State**

**All fees collected as provided by this chapter shall be remitted to the Treasurer of State for the use of the State.**

**Comment**

This section corresponds to section 1404 of the MBCA which provides for the remittance of all filing and copying fees to the Treasurer of State. The Model Act has no such provision.

**STATEMENT OF FACT**

The purpose of this bill is to establish the Maine Nonprofit Corporation Act.