PROPOSED MAINE BUSINESS CORPORATION ACT

Prepared by the

Corporations Section of the
MAINE STATE BAR ASSOCIATION
In cooperation with the
UNIVERSITY OF MAINE SCHOOL OF LAW

Printed as a Public Service
by
WEST PUBLISHING CO.
EQUITY PUBLISHING CORPORATION
Publishers of Maine Revised Statutes Annotated

TABLE OF CONTENTS

Proposed
MAINE BUSINESS CORPORATION ACT

Prepared by the Corporations Section of the Maine State Bar Association, in cooperation with the University of Maine School of Law.

Corporations Section (formerly, Committee on Corporate Law Revision)

Charles W. Allen
Kenneth Baird
Daniel T. Drummond, Jr., Chairman
Miles P. Frye
Atherton Fuller
Lynwood E. Hand
Irving Isaacson
Malcolm E. Morrell, Jr.
Leonard M. Nelson
Hugh A. Olore, Jr.
Robert F. Preti
Paul L. Rudman
Frank E. Southard, Jr.
Simon Spill
Frederick G. Taintor
Sidney W. Thaxter
Clinton B. Townsend
Daniel E. Wathen
Robert B. Williamson, Jr.

David J. Halperin
Associate Professor
University of Maine School of Law
Reporter

INTRODUCTION

I. Policy

The corporate form is now the normal structure for business enterprises ranging from one-man retail establishments to conglomerate giants. It would be surprising if a corporation code basically dating from the 19th Century could meet the variety of demands of these diverse businesses, even though it had been amended regularly.

Recognizing that Maine's corporation code was no longer adequate to meet all the needs of modern business, the Maine State Bar Association appointed a Committee on Corporate Law Revision, now known as the Corporations Section of the Association. Fairly early in its deliberations, the Committee retained the author as its consultant and Reporter. The present draft of a proposed Maine Business Corporation Act reflects a series of agreements reached within the Committee during the past two years of work. The following policy considerations have guided the Committee's work:

1. In recognition of the almost universal use of the corporate form, its use should be available with a minimum of conditions and formalities. In particular, false formalities should not be imposed: e. g., it should never be necessary to have "dummy" directors or "paper" meetings. The formalities required of the corporation should be only those necessary for proper State records, and for protection of shareholders and creditors.

2. The corporation should have the greatest possible flexibility in its structure and procedures. Small, closely held corporations should not be bound by procedures designed to protect the shareholders of publicly held corporations.

3. Certainty is always desirable in the law; it is of special importance where large financial commitments are at stake. The corporation and its advisors are entitled to such certainty, e. g., in determining whether a dividend may legally be paid.

4. Neither shareholders nor corporate management should have a dominant position; the statute should be balanced, or neutral. But by giving the corporation sufficient flexibility, each corporation may be structured to create any desired balance between shareholders and management.

II. Major Decisions

The reader may judge to what extent we have succeeded in fulfilling these goals. The Committee believes, however, that any attempt at meeting them must include the following decisions, which form the fundamental basis of this draft:

1. A distinction must be drawn between a permanent (and difficult to amend) "constitution" of the corporation—the articles of incorporation—and the less permanent procedural rules governing the internal affairs of the corporation, which should be relatively easy to amend—the by-laws. By drawing such a distinction sharply, and by permitting a high degree of choice as to which document various provisions appear in, each corporation may be tailored to the individual needs of its creators. If various optional provisions are put in the articles, they will be subject to change only upon shareholder votes; and thus shareholder control will be retained. If the optional provisions are set out in the by-laws, they will normally be easily changed by vote of the directors.

This choice as to structure led the Committee to select, for its basic model, the Model Business Corporation Act promulgated by the American Bar Foundation and the Committee on Corporate Laws of the Section of Corporation, Banking and Business Law of the American Bar Association. That decision, and the desire to enhance certainty by giving a maximum of detail, led to the further conclusion that it was necessary to propose a complete code, rather than a collection of piece-meal amendments.

2. Even greater flexibility of corporate design should be provided than is offered by the Model Act. At one extreme, the corporation with one or a few shareholders should have the characteristics of an "incorporated partnership" or proprietorship; at the other extreme, a public corporation should conform to the usual model. The Committee was particularly concerned with providing greater freedom of choice for small corporations. This has been done in two principal ways: As to the smallest corporations (in number of shareholders), the conventional board of directors may be eliminated, and the shareholders may act directly as managers of the business. But such a structure is likely to be inefficient or impractical in most situations; a less extreme alternative, therefore, permits numerous affairs of the business (e. g., allocation of officerships) to be settled by binding side agreements among shareholders, which may or may not be written into the corporation's articles or by-laws.

3. Faced with this need to go beyond the Model Act, the Committee sought models from a variety of states, and selected and modified those provisions which appeared best designed to accomplish our purposes in Maine. We are indirectly indebted to Professor Ernest L. Folk, III, of the University of North Carolina, who guided the recent complete revision of the Delaware Corporation Code, and played a major role in the recent complete rewriting of the corporation codes of the states of North Carolina and South Carolina. A review of those statutes—each very different from the others—suggests much of the best in recent innovations in corporate law, and particularly much that improves upon the basic structure of the Model Business Corporation Act. Where possible, we have drawn upon these substantive innovations, and upon the better statutory drafting styles.

4. We have tried, however, to create a *Maine* corporation code. No matter what sources have been drawn upon for suggestions as to style or substance, the text has been closely reviewed and repeatedly modified to meet the needs of Maine businessmen and Maine practitioners.

III. Areas of Particular Interest

It would be impossible, in this Introduction, to analyze in detail every provision of the proposed Act; brief Comments have been appended to most sections for that purpose. Some of the major items may be mentioned briefly here.

Uniform, simplified filing method: A single set of sections (§§ 1–4 through 1–6) governs the execution and filing of all documents to be filed with the Secretary of State; verifications have generally been eliminated; double and triple filings have been eliminated by making it unnecessary to consult with the Attorney General's office (except in rare instances), and by eliminating county filings. Documents take effect when accepted for filing by the Secretary of State.

Provision for reserving or registering name: Planning a new corporation is simplified by an optional procedure for reserving a corporate name; corporations in other states may prevent their names being appropriated in Maine by registering those names here.

Corporate purposes assumed to be general unless otherwise stated: It will be unnecessary to specify the corporation's purposes, thus eliminating lengthy statements which must periodi-

cally be amended; in the absence of express limitation, the corporation will be authorized to engage in any lawful business not subject to a special incorporation law. Note that this does not change existing substantive law significantly: banks, for example, can only be incorporated under the special law pertaining to them.

Incorporators: Only one person is needed as an incorporator; corporations may act as incorporators.

Rights of securities: To eliminate uncertainty, the ability to create securities having a wide variety of rights (e. g., convertibility) is expressly set out, as is the power to divide a class into series; some rights of shares issued in series may be set by the directors, if authorized in the articles of incorporation.

Dividends and other distributions: Clear formulae are given for determining when dividends and other distributions may be paid by the corporation, eliminating a major source of uncertainty in the present law. The present special provision for corporations with wasting assets is preserved. Special provisions are also made for dividends by corporations which have acquired other corporations, and holding companies.

Corporate meetings: Detailed provisions are given for the calling and holding of shareholders' and directors' meetings, subject in most cases to modification if the corporation decides to depart from the statutory norm. Most important, however, is the power to dispense with all formalities upon the unanimous agreement of the group concerned: e. g., anything requiring a meeting can be done by unanimous written consent. Certain common law waiver rules are codified for the guidance of both shareholders and officers. Quorum and vote requirements may be increased to assure protection of each person interested in a small corporation. The power of fiduciaries, minors, and others to cast effective votes is clarified, as is the power to grant an irrevocable proxy.

Close corporation provisions: Unlike a few states, we elected not to segregate all provisions pertaining especially to close corporations in a separate statute or chapter, but rather to insert them in their logical order throughout the text of the proposed Act, leaving their use optional for those corporations requiring them. The ability to set abnormally high quorum and voting requirements has already been mentioned. Along the same lines are such provisions as those permitting restrictions on transfer-

ability of shares, permitting side agreements concerning voting of shares, and permitting agreements concerning the allocation of corporate offices, managerial duties, etc. Such provisions will be available for those corporations desiring to use them, but have no effect upon corporations not electing them.

Right of inspection: A frequent source of doubt and litigation in Maine, the right of shareholders to inspect shareholder lists and other corporate records is clarified. An effort has been made to facilitate good faith inspection requests, while deterring frivolous requests and those made in bad faith.

Shareholders' derivative suits: Similarly, deterrents have been imposed to frivolous shareholders' derivative suits; but a suit brought in good faith, upon reasonable grounds, will meet no major obstacles.

Directors: A few close corporations may wholly eliminate the board of directors; one- and two-man corporations may eliminate "dummy" directors. (Note that even where permissible, it may be poor business judgment to utilize these and some other provisions; the proposed Act gives the draftsman the choice of adopting such special provisions, but does not compel their use.)

Indemnification: Following the latest Delaware revision, this Act would not only give the corporation liberal authority to indemnify officers, directors, and employees against expenses incurred by them as a result of their holding office, it would also give such officers, directors and employees an enforceable right to such indemnification when they have been cleared of any claim of wrongdoing.

Mergers and consolidations: Of particular interest is the provision permitting short form (without shareholder vote) mergers of a 95%-owned subsidiary into a parent. Mergers and consolidations may be with domestic or with foreign corporations, if the law of the other jurisdiction permits. Shareholders' right to dissent and be paid the value of their shares is preserved.

Dissolution and deadlock: Procedure for the voluntary dissolution of a corporation is simplified and clarified. In case of deadlock, the court may grant a variety of relief so as to minimize the resultant loss. A provision designed for close corporations would permit the articles of incorporation to give a designated group of shareholders the right to demand dissolution, even though they did not constitute a majority.

IV. Acknowledgements

The work of preparing this proposed Act would not have been possible without the financial assistance of the Maine State Bar Association, and special private contributions to the Association for this purpose; many of our expenses were defrayed by two grants from the Coe Research Fund of the University of Maine. In addition to the work of the entire Committee and its chairman, the author wishes to acknowledge the assistance of Messrs. Patrick E. Maloney and Cary L. Fleisher, each of whom, during his senior year at the University of Maine School of Law, made important contributions to this draft while working as a research assistant.

David J. Halperin
University of Maine School of Law

†

MAINE PROPOSED BUSINESS CORPORATION ACT

CHAPTER 1

GENERAL PROVISIONS

Section

CHAPTER 2

CORPORATE PURPOSES AND POWERS: PROMOTERS' CONTRACTS

CHAPTER 3

CORPORATE NAME; REGISTERED OFFICE, AGENT AND CLERK; SERVICE OF PROCESS

CHAPTER 4

ORGANIZATION OF CORPORATIONS

CHAPTER 5

CORPORATE FINANCE

CHAPTER 6

BY-LAWS, SHAREHOLDERS AND VOTING

CHAPTER 7

DIRECTORS AND OFFICERS

CHAPTER 8

AMENDMENT OF ARTICLES OF INCORPORATION

CHAPTER 9

MERGERS AND CONSOLIDATIONS

CHAPTER 10

SALE AND OTHER DISPOSITION OF CORPORATE ASSETS

CHAPTER 11

DISSOLUTION OF CORPORATIONS AND DEADLOCK

CHAPTER 12

FOREIGN CORPORATIONS

CHAPTER 13

ANNUAL REPORTS; POWERS OF SECRETARY OF STATE; MISCELLANEOUS

CHAPTER 14

FEES AND TAXES

APPENDIX—PROPOSED OFFICIAL FORMS

Form

1. Application for reservation of corporate name.
2. Notice of transfer of reserved corporate name.
3. Application for registration (or renewal of registration) of corporate name.
4. Statement of change of registered office, clerk, or both.
5. Notice of resignation of clerk or of non-resident director.
6. Articles of incorporation.
7. Statement of resolution establishing series of shares.
8. Statement of cancellation of redeemable or other reacquired shares.
9. Articles of amendment before organizational meeting.
10. Articles of amendment.
11. Restated articles of incorporation.
12. Articles of merger or consolidation of domestic or domestic and foreign corporations.
13. "Short form" merger of subsidiary into parent.
14. Statement in connection with merger or consolidation of Maine corporation and foreign corporation where new or surviving corporation is a foreign corporation.
15. Articles of dissolution by incorporators.
16. Statement of intent to dissolve by written consent.
17. Statement of intent to dissolve by resolution (Sec. 11–3).
18. Statement of intent to dissolve by expiration of articles (Sec. 11–4).
19. Revocation of intent to dissolve (Secs. 11–7, 11–8).
20. Articles of dissolution (Sec. 11–10).
21. Application of foreign corporation for authority (Sec. 12–2).
22. Notice of amendment of articles or of merger of foreign corporation (Secs. 12–6, 12–7).
23. Amended application for authority of foreign corporation (Sec. 12–8).
24. Surrender of authority of foreign corporation (Sec. 12–9).
25. Annual report of domestic or foreign corporation.
26. Certificate of change in corporate identity.

CHAPTER 1

GENERAL PROVISIONS

Section

§ 1–1. Short title

This Act shall be known and may be cited as the Business Corporation Act.

§ 1–2. Definitions

As used in this Act, unless the context otherwise requires:

(a) "Corporation" or **"domestic corporation"** means a corporation for profit formed under the laws of this State.

(b) "Close corporation" means a corporation for profit formed under the laws of this State which, at any given time, has less than twenty (20) shareholders of all classes of shares, whether or not entitled to vote.

(c) "Foreign corporation" means a corporation for profit formed under the laws of a jurisdiction other than this State.

(d) "Articles of incorporation" or **"articles"** means the original or restated articles of incorporation and all amendments thereto. It includes articles of merger, articles of consolidation, certificate of incorporation, and what has heretofore been designated as "articles of agreement" for a corporation and certificate of organization, and also includes special acts of the Legislature chartering corporations which could now be organized under general acts.

(e) "Shares" means the units into which the proprietary interests in a corporation are divided.

(f) "Subscriber" means one who subscribes for shares in a corporation, whether before or after incorporation.

(g) "Shareholder" means one who is a holder of record of shares in a corporation.

(h) "Authorized shares" means the shares of all classes which the corporation is authorized to issue.

(i) To **"cancel"** a share means to eliminate it from the authorized shares of the corporation.

(j) To **"retire"** a share means to restore it to the status of an authorized but unissued share.

(k) "Treasury shares" means shares of a corporation which have been issued, have been subsequently acquired by the corporation, and have not, either by reason of the acquisition or otherwise, been cancelled or retired. Such shares shall be deemed to be issued, but they shall not be considered as an asset or liability of the corporation, nor as outstanding for dividend, quorum, voting or any other purposes.

(*l*) "Stated capital" means, at any particular time, the sum of (1) the par value of all issued shares of the corporation having

a par value, (2) the amount of the consideration received by the corporation for all issued shares of the corporation without par value, except such part of the consideration therefor as may have been allocated to capital surplus in a manner permitted by law, and (3) such amounts not included in clauses (1) and (2) of this sentence as have been transferred to stated capital of the corporation, whether upon issue of shares as a share dividend or otherwise, less all reductions from such sum as have been effected in a manner permitted by law.

(m) "Good accounting practices" means the practices followed by reputable certified public accountants; the Accounting Research and Terminology Bulletins, and the Opinions of the Accounting Principles Board, of the American Institute of Certified Public Accountants may be evidence of such practices.

(n) "Assets" means, at any particular time, those properties and rights which are properly entered in the accounts and balance sheets of business enterprises in terms of a monetary value, in accordance with good accounting practices.

(o) **"Debts"** means, at any particular time, all those debts, liabilities and claims which either are known to impose a fixed obligation of payment or, if contingent, have sufficient possibility of becoming fixed as to require an estimate of their probable amount, and which should be entered in the accounts and balance sheets of business enterprises in terms of monetary value under good accounting practices.

(p) "Net assets" means the amount by which the total assets of a corporation, excluding treasury shares, exceed the total debts of the corporation.

(q) "Surplus" means the excess of the net assets of a corporation over its stated capital.

(r) "Earned surplus" means that portion of the surplus of a corporation equal in amount to the balance of its net profits, income, gains, and losses from the date of incorporation, or from the latest date when a deficit was eliminated by application of its capital surplus, after deducting subsequent distributions to shareholders and transfers to stated capital and capital surplus to the extent that such distributions and transfers are made out of earned surplus. Earned surplus shall also include any portion of surplus allocated to earned surplus in mergers or consolidations, and in acquisitions of all or substantially all of the property and assets of another corporation, domestic or foreign, and in acquisition of 75% or more of the voting shares of another cor-

poration incorporated in any state, territory or possession of the United States of America. Unrealized appreciation of assets shall not be included in earned surplus.

(s) "Capital surplus" means the entire surplus of a corporation other than its earned surplus. Unrealized appreciation, if entered on a corporation's books, shall be included in capital surplus.

(t) "Insolvent" means inability of the corporation to pay its debts as they become due in the usual course of its business.

(u) "Fraud," "deceit," and **"defraud"** are not limited to common-law deceit.

(v) "Good faith" means honesty in fact in the conduct or transaction concerned; and in the case of an officer or director, also requires the exercise of reasonable business judgment after reasonable inquiry into the facts. **"Bad faith"** means the lack of such honesty in fact or, in the case of an officer or director, the failure to make such inquiry or exercise such judgment.

(w) "Conspicuous": A term, clause or notation is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: IRREVOCABLE PROXY) is conspicuous. Language in the body of a form (such as a share certificate) is conspicuous if it is in larger or other contrasting type or color. In a telegram any stated term is conspicuous. Whether a term or clause or notation is conspicuous or not is for decision by the court.

(x) "Business" and **"for profit"** include, without limitation, supplying any goods or services, or engaging in any other activity, which is customarily supplied or engaged in by commercial enterprises, even though a given corporation may be designed or required by its articles to supply goods or services to its shareholders or to the general public at cost, or to distribute all of its profits to its shareholders, or is otherwise to be prevented from making or retaining actual profits.

Comment

Based largely on MBCA § 2, modified by South Carolina § 12–11.2, with additions.

(d) "Articles" modified to include prior Maine practice.

(*l*) "Stated capital", last sentence of MBCA, referring to foreign corporations, deleted as unnecessary.

(r) "Earned" and (s) "Capital surplus": Last sentence of neither appears in MBCA.

(n), (*o*) and (u) derived from South Carolina, with modifica-

tions to accommodate to subsection (m), "Good accounting practices", which was added in this draft.

(b), (m), (v), (w) and (x) added in this draft; (v) and (w) based on similar definitions in the UCC. There may be some doubt concerning (v), but it conforms largely to the common law. (x) leaves room for new types of cooperatives, and for commercial activities conducted on a public-service basis (*e. g.*, a coffee house for teen-agers.)

§ 1–3. Applicability

(a) Except as provided in this section, the provisions of this Act shall apply to

(1) all domestic corporations for profit, including corporations organized under any prior general corporation act or under any act providing for the creation of special classes of corporations, and any corporation created by special act of the Legislature to the extent that power has been reserved to repeal, amend, or alter such special act, and

(2) all foreign corporations which do business in this State, whether or not authorized to do so.

(b) The provisions of 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.

(c) The provisions of this Act shall apply to commerce with foreign nations and among the several states, and to corporations formed by or under any act of Congress, only to the extent permitted under the Constitution and laws of the United States.

(d) The enactment of this Act shall not affect the existence of any corporation existing on the effective date of this Act, and its shareholders, directors, and officers shall have the same rights and be subject to the same limitations, restrictions, liabilities and penalties as a corporation organized after the effective date of this Act.

(e) 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.

(f) 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.

Comment

This is substantially the same as 13 M.R.S.A. § 1, with additions suggested by South Carolina § 12–11.3

It includes: in (a) (1) the equivalent of MBCA § 140, in (c) the equivalent of MBCA § 141, and in (d) and (e) the equivalent of MBCA § 143.

Doubts as to (a) (2).

Note: Possible addition—

If there are any significant number of pre-1831 corporations, (check with Secretary of State): Provision for their acceptance of this act.

§ 1–4. 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 requirement shall mean that:

(a) The document shall be signed:

(1) In the case of articles of incorporation, by the incorporator or incorporators:

(2) In the case of other documents:

(A) By the clerk; or

(B) By the president or a vice-president, and by the secretary or an assistant secretary or such other officer as the by-laws may designate as a second certifying officer; or

(C) 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

(D) If there are no such directors, then by the holders, or such of them as may be designated by the holders, of record of a majority of all outstanding shares entitled to vote thereon; or

(E) By the holders of all of the outstanding shares of the corporation.

(b) 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.

(c) The document shall set forth the title of the document at the head thereof.

(d) 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.

§ 1–5. Verification of documents

(a) Unless required by some other law, no document required or permitted to be filed under any provision of this Act need be under oath.

(b) The signature of any person on a document required or permitted to be filed under any provision of this Act constitutes that person's representation that:

(1) he has read and understood the meaning and purport of the statements contained in the document;

(2) such statements are true, either by personal knowledge or according to his information and belief; and

(3) 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 for the penalty specified in § 13–7(a) of this Act.

(c) Except where it is specifically required by a provision of the Act or by any other statute, no document required by this Act need be acknowledged.

§ 1–6. Filing of documents

(a) 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:

(1) The original executed document shall be delivered to the office of the Secretary of State.

(2) If the document records, reflects, or depends upon any action taken by a vote, or the consent, of the shareholders, the document shall include or be accompanied either by:

(A) A certificate of the clerk of the corporation stating that he has in his custody minutes properly reflecting such action by the shareholders; or

(B) A certificate of the secretary or an assistant secretary of the corporation, or a person elected by such meeting as its temporary secretary, stating that

(i) he is the holder of such office,

(ii) he was present at the meeting at which such action of shareholders was taken (or he has in his hands such shareholder consents), and the document properly reflects such action of the shareholders,

(iii) an emergency exists requiring the filing of such document before minutes of the meeting can be transmitted to the clerk, and

(iv) minutes of such meeting will be transmitted to the clerk, or to such place within this State as the records of the corporation are kept, forthwith.

(3) All fees and taxes required for filing the document shall be tendered to the Secretary of State.

(4) Upon delivery of the document and upon tender of the required fees and taxes, if he finds that the document conforms to the requirements of this Act, the Secretary of State 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. Such endorsement shall be known as the "filing date" of the document, and shall be conclusive of the date of filing in the absence of actual fraud. The Secretary of State shall thereafter file and index the original.

(5) The Secretary of State shall promptly make a Xerox or comparable photographic 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.

(6) 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.

(b) Any document required to be filed shall be fully effective as of the filing date of the document, and the transaction

shall be deemed, as of the filing date, to have been completely consummated.

(c) 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 (a) (4); and he may thereafter destroy the original document or return it to the person who delivered the same to him for filing.

Comment

To Sections 1–4, 1–5, and 1–6.

As originally drafted, these sections were drawn almost verbatim from the South Carolina Act, and constitute a desirable innovation in that Act, which now also is found in Delaware, 8 Del.C. § 103. In lieu of repeating filing requirements wherever they appear (for example, in the case of changes in registered office, agent, clerk, original articles, amendments, etc.), this inclusive set of provisions will govern. Although time consuming at this point, this makes for brevity and consistency throughout the balance of the statute, and for a uniform procedure.

Note the addition in § 1–6 to create a standardized procedure for the certification of the clerk—or for a substitute in emergencies. The latter would seem to conform to present (informal) practice.

At the suggestion of the Committee and after informal consultation with the office of the Secretary of State, it was determined that the filing process would be expedited by submitting only a single copy of the document to be filed, and causing a photographic copy to be prepared. Thus, the time and personnel requirements of "comparing" the original with copies submitted is eliminated.

Members of the Committee expressing themselves on the subject are unanimously opposed to verification requirements; they feel that for these documents, the oath is a meaningless formality. This revision of § 1–5, therefore, eliminates verification but cross-refers to the penalty for filing false documents.

Subsection (c) is taken from Pennsylvania. 15 P.S. § 1010; note that it is merely permissive, for future flexibility.

§ 1–7. Effect of corporate seal on document

(a) The seal of the corporation may, but need not, be affixed to any document executed in accordance with § 1–4, and its absence therefrom shall not impair the validity of the docu-

ment or of any action taken in pursuance thereof or in reliance thereon.

(b) 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.

§ 1–8. 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 by-laws of the corporation, or a resolution of its shareholders 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.

§ 1–9. 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 officers.

Comment

13 M.R.S.A. § 2
Equivalent: MBCA § 142.

§ 1–10. 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.

CHAPTER 2

CORPORATE PURPOSES AND POWERS: PROMOTERS' CONTRACTS

Section
2–1. Corporate purposes.
2–2. Powers of corporations.
2–3. Defense of ultra vires.

§ 2–1. Corporate purposes

Except as provided in § 4–1, a corporation may be formed and do business under the provisions of this Act and only under the provisions of this Act, for any lawful business purpose or purposes.

§ 2–2. Powers of corporations

(a) Subject to any limitations contained in any provisions of this Act or in any other law, each corporation shall have power:

(1) To exist perpetually, unless a limited period of duration is expressly stated in its articles.

(2) To sue and be sued in its corporate name, and to participate in any judicial, administrative, arbitrative, or other proceeding.

(3) To adopt and alter a corporate seal and to use the same or a facsimile thereof.

(4) To elect, appoint, or hire officers, agents, and employees of the corporation, and to define their duties and fix their compensation.

(5) To make and alter by-laws, not inconsistent with its articles of incorporation or with the laws of this State, for the administration and regulation of the affairs of the corporation.

(6) To cease its corporate activities and surrender its corporate franchise.

(7) 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.

(8) To establish and carry out pension plans, pension trusts, profit sharing plans, stock option plans, stock bonus plans, and 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.

(9) With respect to any property of any description, or interest therein, wherever situated, including (but not limited to) real property:

(A) To acquire, by purchase, lease, gift, will or otherwise;

(B) To own, hold, use, improve, and otherwise deal in and

(C) To sell, convey, encumber, mortgage, pledge, lease, exchange, or otherwise dispose of all or any part of such property.

(10) 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.

(11) To enter into contracts of guaranty or suretyship, unless in doing so the corporation would be engaging in a business prohibited to corporations organized under this Act under the provisions of § 4–1.

(12) 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 this Act under the provisions of § 4–1.

(13) To lend money to its employees, officers and directors, and otherwise to assist its employees, officers and directors.

(14) To conduct its business, 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.

(15) 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:

(A) The shares or other interests in, or obligations of, other domestic or foreign corporations, associations, partnerships, or individuals; and

(B) The obligations of the United States or any other government, state, territory, municipality, or governmental district, or of any instrumentality thereof.

(16) To form, or acquire the control of, other corporations.

(17) 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.

(18) To provide, for its benefit, insurance on the life of any of its directors, officers or employees, or on the life of any shareholder for the purpose of reacquiring at his death shares owned by such shareholder.

(19) To reimburse and indemnify litigation expenses of directors, officers, and employees, as provided for in § 7–19.

(20) To purchase and otherwise acquire, and to dispose of, its own shares.

(21) At the request or direction of the United States Government or of any of its agencies, to transact any lawful business in time of war or national emergency, or in aid of national defense, notwithstanding the purpose or purposes set forth in its articles of incorporation.

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

(b) The articles of incorporation of any corporation subject to this Act may limit the powers conferred by subsection (a) of this section, except to the extent that any such limitation is inconsistent with any other provision of this Act or with any other law of this State.

(c) 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

A combination of MBCA § 4 and South Carolina § 12–12.2.

South Carolina specifically limits all powers to exercise "in furtherance of its corporate purpose or purposes"; that language is deliberately deleted.

Note particularly:

(7) South Carolina limits donations to those for which there is a Fed. income tax deduction; *political contributions* added in this draft. NOTE: MBCA, New York, and Illinois all *omit* any requirement that donations be tax deductible.

(13) At the direction of the Committee, the limitation on loans to officers & directors in § 7–18 was dropped;

(16) & (17) & (18) not in MBCA but are found, in substance, in New York.

(20) Cross-reference to limitation in § 5–18.

No effort is made here to resolve questions such as the attorney-client privilege or privilege against self-incrimination for corporations, often discussed with reference to the power to sue and be sued.

(2) Follows New York, McKinney's Business Corporation Law § 202 in clarifying the right of a corporation to participate in other proceedings than suits.

(7) "Irrespective of corporate benefit" taken from New York, McKinney's Business Corporation Law § 202.

§ 2–3. Defense of ultra vires

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 shareholder against the corporation to enjoin the doing of any act or 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 or made 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 to 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 de-

rived 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 shareholders in a representative suit, against the incumbent or former officers or directors of the corporation.

(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 the transaction of unauthorized business.

Comment

This is MBCA § 6, unchanged; subcommittee comment: "Approval in general".

Same in substance as New York, McKinney's Business Corporation Law § 203, Illinois S.H.A. ch. 32 § 157.8.

This section deals only with *ultra vires* in the sense of the power of the *corporation* to do the act in question. It does not deal with the authority of an officer or other purported agent of the corporation to act in its name, and the latter question is left to general agency law.

CHAPTER 3

CORPORATE NAME; REGISTERED OFFICE, AGENT AND CLERK; SERVICE OF PROCESS

Section

§ 3–1. Corporate name

(a) The corporate name:

(1) 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.

(2) Shall not be the same as, or deceptively similar to, the name of any domestic corporation existing under the laws of this State or any foreign corporation authorized to transact business 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 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 as provided in §§ 1–4 and 1–6 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.

(b) If a corporation has in other respects complied with the provisions of this Act and its articles of incorporation have been filed, or if a foreign corporation has in other respects satisfied the provisions of this Act and has been authorized to do business 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.

(c) Subparagraph (a) (2) shall not apply to the name of any corporation which subsequent to December 31, 1967 has been excused from filing annual returns, on and after the fifth (5th) anniversary of such excuse, nor to the name of any corporation the charter of which is suspended subsequent to December 31, 1967, on and after the third (3rd) anniversary of such suspension. When an excused or suspended corporation notes to resume business, it shall adopt a new name if another corporation has adopted its old name or if the old name, if proposed for a new corporation, would otherwise violate subparagraph (a) (2).

Comment

As originally drafted, this provision included the requirement found in MBCA and most acts that the name include the words "corporation," "company," "incorporated" or "limited," or an abbreviation of them (except for a "grandfather clause"). Some members of the bar felt that the present freedom in choice of names was an advantage, and the requirement of these words was deleted.

Note, however, that a Maine corporation seeking to qualify in another state will probably be required to have these words in its name, to satisfy the law of the other state.

The subcommittee was undecided, but favorably inclined toward, requirement of special words in name.

Except for the deletion of the requirements of special words, the first two provisions are the same as MBCA § 7, modified to conform to future intended provisions, and with the consent provision for similar name added. The last provision is derived from South Carolina § 12–13.1(d). South Carolina contains two other provisions which are worth considering: Provision requiring Secretary of State to maintain current alphabetical list of corporations; and disclaimer of intent to abrogate or limit laws of unfair competition, etc.

Except for deletion of requirement of special words, (a) is the same in substance as Illinois S. H.A. ch. 32 § 157.9, and as New York, McKinney's Business Corporation Law § 301 (except for enumeration of specific words and phrases prohibited absolutely or conditionally).

Note that this provides more protection of a name than the common law, since there is no requirement that the businesses be similar before use of a similar name is prohibited.

The consent to use of similar name provision is designed particularly for chains, which often have subsidiaries differing only by a number or city designation.

§ 3–2. Reserved name

(a) The exclusive right to the use of a corporate name may be reserved by:

(1) Any person intending to organize a corporation under this Act.

(2) Any domestic corporation intending to change its name.

(3) Any foreign corporation intending to make application for a certificate of authority to transact business in this State.

(4) Any foreign corporation authorized to transact business in this State and intending to change its name.

(5) Any persons intending to organize a foreign corporation and intending to have such corporation make application for a certificate of authority to transact business in this State.

(b) The reservation shall be made by executing and delivering for filing, in accordance with §§ 1–4 and 1–6 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 one hundred and twenty (120) days.

(c) 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 § 1–6 a notice of such transfer, executed by the applicant and, if a corporation, in accordance with § 1–4, for whom the name was reserved, and specifying the name and address of the transferee.

(d) 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.

Comment

The first three sub-sections are identical to MBCA § 8; sub-paragraph (d) is derived from the South Carolina Act § 12–13.2.

Illinois S.H.A. ch. 32 § 157.10 same in substance; New York, McKinney's Business Corporation Law § 303 is the same in substance except it permits extension; and does not permit transfer; neither has the equivalent of (d).

§ 3–3. Registered name and renewal

(a) 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 corporation existing under the laws of this State, or the name of any foreign corporation authorized to transact business in this State, or any corporate name reserved or registered under this Act.

(b) Such registration shall be made by delivering for filing, in accordance with § 1–6, (1) an application for registration executed in accordance with § 1–4, 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 doing business, and a brief statement of the business in which it is engaged, and (2) 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, and

(c) Such registration shall be effective until the close of the calendar year in which such application is filed.

(d) A corporation which has in effect a registration of its corporate name, may renew such registration from year to year by annually filing in accordance with § 1–6, 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 thirty-first day of December in each year, and shall extend the registration for the following calendar year.

Comment

The two provisions above are identical to MBCA §§ 9 & 10.

Neither New York nor Illinois has equivalent.

See filing fees specified in Ch. 14; § 1–6 includes a requirement for filing of the payment of the appropriate fee. Therefore, the fee for name registration is not mentioned here, although it is specified in the corresponding sections of the Model Act.

§ 3–4. Clerk, registered office, and changes thereof

(a) Each domestic corporation to which this Act is applicable shall have and continuously maintain in this State a clerk,

who is a natural person resident in this State. The clerk may be (but is not required to be) one of the directors or hold some other office in the corporation; or he may be a person holding no other position with the corporation.

(b) The clerk shall maintain a registered office at some fixed place within this State, which may be, but need not be, the corporation's place of business, and shall perform those duties required of him by § 7–14 and elsewhere in this Act.

(c) A corporation may change its clerk by executing and delivering for filing as provided by §§ 1–4 and 1–6, a statement setting forth:

(1) The name of the corporation;

(2) The name and address of its then clerk;

(3) The name and address of its successor clerk;

(4) Either: (A) that such change was duly authorized by the board of directors of the corporation, and that the power to appoint the clerk is not reserved to the shareholders by the articles of incorporation, or (B) that such change was duly authorized by the shareholders of the corporation.

(d) Any clerk of a corporation may resign upon filing a written notice thereof, executed in duplicate, with the Secretary of State, who shall forthwith mail a copy thereof to the corporation at its registered office or at its place of business designated by the clerk in his resignation. Such resignation shall be effective upon the filing thereof with the Secretary of State.

(e) If any clerk dies, becomes incapacitated, resigns, or otherwise is unable to perform his duties, the corporation shall promptly appoint another clerk, and shall execute and file in the office of the Secretary of State a written statement of the appointment of the new clerk, as provided in subsection (c).

(f) If the clerk changes his address from the registered office appearing on the record in the office of the Secretary of State, the corporation or its clerk shall promptly execute and deliver for filing, in accordance with §§ 1–4 and 1–6, notice of the new registered office; if such notice is delivered for filing by the clerk, it shall recite that a copy of the notice has been mailed to the corporation.

(g) Filing by a corporation of a statement of a change of its clerk, as provided in subsection (c), shall constitute both an appointment of the new clerk named therein and a termination of the appointment of its former clerk.

(h) (1) The initial clerks of corporations formed under this Act shall be named in the articles of incorporation; such

clerks, and the clerks of corporations existing on the effective date of this Act, shall continue in office until their successors are chosen and qualify, and the statement required by subsection (c) is filed, or until the resignation notice required by subsection (d) is filed.

(2) The articles may provide that changes in the clerk, and election of a new clerk shall be by vote of the shareholders. Unless the articles expressly so provide, changes in the clerk and election of a new clerk shall be by resolution of the board of directors.

Comment

It is arguable that the office of clerk is anachronistic and could well be abolished. It is such an established part of Maine corporation law, however, that the Committee was unanimous in wishing to retain it.

See § 7–14(k) for a specification of his duties.

§ 3–5. Service of process on domestic corporations

(a) The clerk of each domestic corporation 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.

(b) Whenever a corporation shall fail to appoint or maintain a clerk in this State, or whenever its clerk 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 by delivering to and leaving with him, or with any person or persons designated by him to receive such service, duplicate copies of such proxies, notice, or demand. In the event any such process, notice, or demand is served on the Secretary of State, he shall immediately cause one of the copies thereof to be forwarded by registered or certified mail, return receipt requested, with instruction to deliver to addressee only addressed to the corporation at its registered office. Proof of service shall be by affidavit of compliance with this section filed, together with a copy of the process, with the clerk of the court in which the action or proceeding is pending. Any service so had on the Secretary of State shall be returnable in not less than thirty (30) days.

(c) The Secretary of State shall keep a record of all processes, notices and demands served upon him under this section,

and shall record therein the time of such service and his action with reference thereto.

(d) Nothing herein contained shall limit or impair 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

Same as MBCA § 13 and Illinois S.H.A. ch. 32 § 157.13.

New York, McKinney's Business Corporation Law § 304 creates Secretary of State as the normal agent for service of process.

§ 3–6. Service on nonresident directors of domestic corporations

(a) 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.

(b) Service of such process shall be made by delivering to and leaving with the Secretary of State, or with any person designated by him to receive such service, duplicate copies of such process. The Secretary of State shall thereupon immediately cause one of such copies to be forwarded to the nonresident director by registered or certified mail, return receipt requested, with instructions to deliver to addressee only, at the residence address of such director shown on the most recent annual report of the corporation. Proof of service shall be by affidavit of compliance with this section filed, together with a copy of the process, with the clerk of court in which the action or proceeding is pending. Any service so had on the Secretary of State shall be returnable in not less than thirty (30) days.

(c) Service under this section may also be made by delivery of a copy of the process to 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 court in which the action or proceeding is pending.

(d) The resignation in good faith of any nonresident director shall, effective as of the date of filing in accordance with § 1–6 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 provision is drawn from South Carolina § 12–13.7, and is strongly recommended.

No doubt, the initial reaction of many members of the bar to this provision will be negative. The provision is particularly designed to make it feasible, in stockholder derivative suits, to join all directors and the corporation in a single suit in this State. It might appear that such a provision imposes a new and onerous burden upon directors, particularly directors of corporations whose principal place of business is outside this State.

When read in conjunction with the balance of this proposed Act, however, it will be seen that this burden is more apparent than real. First, it should be noted that we provide in this Act a greater right of indemnification than is even given under the present liberal Maine statute. Draft § 7–19 provides not only that the corporation may indemnify its directors against litigation expense, but further provides that the director generally has an affirmative *right* to secure such indemnification from his corporation.

Second, the draft provisions on stockholder derivative suits will greatly limit the availability of such suits to stockholders, and should virtually eliminate frivolous derivative suits. In summary, these provisions will require that unless the plaintiff has a substantial ownership interest in the corporation, he may be required to post bond for expenses; and will also authorize the court to require an unsuccessful plaintiff, who sued without reasonable cause, to reimburse the defendant's expenses, including attorneys fees. Experience in other states has shown that such provisions drastically reduce the number of derivative suits brought.

While adoption of those provisions will make derivative suits a relatively minor question, it must be recognized that the derivative suit is a legitimate remedy—indeed the only remedy—in certain extreme cases of corporate mismanagement, or impropriety by members of management. In those situations, it is desirable that an effective derivative suit remedy be available.

A serious obstacle to bringing a derivative suit is the requirement of making the corporation a party to the action. It is generally held that in such actions, the corporation is a necessary or indispensable party. See, *e. g.*, Hornstein, Corporation Law and Practice, sec. 714. This requirement is, in fact, desirable; the corporation being the party to be benefited by the derivative action, a judgment rendered in the action should be *res judicata* as to the corporation and to all parties who might thereafter consider bring-

ing a similar action. See, Hornstein, *loc. cit.* But if any director resides in a jurisdiction where the corporation is neither incorporated nor doing business, it will be impossible to secure the necessary joinder of parties. This situation will be quite rare:

> The great majority of domestic corporations will have exclusively resident directors.
>
> Most domestic corporations having their principal place of business outside the state will have directors resident in the state where the principal place of business is located.

But there are undoubtedly some few Maine corporations, some of whose directors live in a state where the corporation is not doing business; this might, for example, be the case where a corporation has its principal office in New York City and directors living in New Jersey or Connecticut, or a principal office in Chicago and directors living in Indiana or Wisconsin. In those few cases the proposed provision will make it possible to bring those directors into a derivative suit which will be *res judicata* both as to them and as to the corporation.

It should also be noted that this proposed provision in no way affects actions in which alleged directors' liability is sought to be imposed on behalf of the creditors of the corporation. In such situations, the action will be brought in the right of the corporation by a trustee, receiver or other representative of the creditors, but he will have authority to make the corporation a party plaintiff; the action may, therefore, be brought wherever the defendant director may be found. It is only in the derivative suit situation that the corporation must be made an unwilling defendant, and that the problem of bringing all necessary parties into the same jurisdiction arises.

Various other devices have been proposed to deal with this same problem. It has, for example, been suggested that joinder of the corporation be dispensed with in all cases (note, 44 Yale L.J. 1091, 1092) (1935); or that the plaintiff secure the appointment of ancillary receivers to bring the action where the director may be found (ibid. at 1093); or that, in an action against the director, the corporation be given a stated period of time within which to appear, after which the action could proceed without the corporation (N.Y. Law Revision, Leg.Doc. No. 65 (I) (1941)).

In fact, however, at least eight states have legislation which directly accomplishes the same result as is proposed in this draft § 3–9. Connecticut, North Carolina, North Dakota, and South Carolina have provisions substantially similar to this draft section, with various differences in language. Four other states accomplish the same result by including directors within the scope of the "long arm" provisions of their civil practice acts (Indiana, Montana, Wisconsin and Michigan). It is particularly interesting to notice that Delaware accomplishes a similar result by still another means; 8 Del.C. § 324 of the Delaware Code provides that shares or other rights in stock of a Delaware corporation may be

attached; since the directors are usually shareholders, this device permits a plaintiff to proceed against the director in Delaware, with jurisdiction based upon the attachment.

It has even been suggested that such suits are already possible in Maine against non-resident directors. See Field & McKusick, Maine Civil Practice 48, which states, in commenting on the "long arm" statute, that "it should be stressed that the statute does not necessarily state all the circumstances under which a person has submitted to the jurisdiction of the courts of the state within the meaning of Rule 4 e."—and proceeds to give as an example the non-resident director situation.

In summary, it is submitted that this proposed provision will become operative only in a very few derivative suits, under fairly unusual circumstances. In those few situations, however, the existence of this provision could be a great assistance in assuring that substantial justice can be given by the court; but will in no case be an unfair burden upon a director, because of his right to indemnity.

CHAPTER 4

ORGANIZATION OF CORPORATIONS

Section

§ 4–1. Purposes, statute applicable

(a) Except as otherwise provided in this section, a corporation may be organized under this Act for the purpose of carrying on any business or businesses lawful in the place where the same are to be carried on.

(b) Whenever there is a public law of this State authorizing the organization of a special class of corporations, and setting forth a procedure for their incorporation:

(1) No corporation may be organized under this Act for the purpose of carrying on, within this State, any business included within any such special class; and

(2) No corporation organized under this Act or any preceding general corporation act has the power to carry on, within this State, any business included within any such special class.

(c) Notwithstanding the existence of a public law of this State authorizing the organization of a special class of corporations, and setting forth a procedure for their incorporation, a corporation organized under this or any preceding general corporation act may, if consistent with its articles and by-laws, carry on, outside this State, any business included within any such special class, provided it is authorized to do so under the laws of the place where such business is to be carried on.

(d) Even if the organization thereof may now or hereafter be permitted by the provisions of subsections (a), (b) and (c), no corporation may be organized under this Act for the purpose of issuing contracts of insurance or life insurance, as the same are defined in Title 24 M.R.S.A. § 1, unless in addition to fulfill-

ing all of the other requirements of this Act, the incorporators have secured and present to the Secretary of State, along with the articles of incorporation, a certificate from the Maine Insurance Commissioner stating that he has examined said articles, that he is acquainted with the proposed financial arrangements for such corporation, and that he approves of its incorporation.

Comment

This section is designed to completely eliminate the incorporation of private business corporations by special act, conforming to the intent of the Maine Constitution. The mode of accomplishing this is the same as that used in New York, McKinney's Business Corporation Law § 201, although completely different language is used: If a corporation can be formed under an act applicable to special classes of business (*e. g.*, savings banks, savings and loan associations, railroads, etc.) it must do so under that act; if the business is legal but there is no such special-class incorporation act, it both can and must incorporate under this act.

Subsection (d) is included because there is not now a public act under which life insurance companies may be formed; if such an act is subsequently passed, (d) will become completely inoperative; if the provision for special incorporation of casualty insurance companies is repealed, (d) will become fully operative.

It would be desirable if various acts under which special classes of corporations can be formed were repealed, and thorough regulation of the industry substituted for mere regulation of the incorporation process. Such a sweeping revision of law is beyond the scope of corporation law revision. But this section creates a framework within which such reform could operate: whenever a special-class incorporation provision is repealed in favor of regulation, it will automatically become possible to form corporations of that class under this act.

§ 4–2. Number and qualifications of incorporators

In order to form a corporation under this Act;

(a) One or more persons, acting as incorporators, shall execute and file in accordance with §§ 1–4 and 1–6, articles of incorporation for such corporation.

(b) The incorporator or incorporators may be natural persons, or domestic or foreign corporations, or any combination thereof.

(c) Incorporators need not be residents of this State.

Comment

This is the same in substance as MBCA § 47.

New York, McKinney's Business Corporation Law § 401 permits a single incorporator but requires the incorporator(s) to be natural persons.

There is no logical reason either for requiring more than one incorporator or for requiring that incorporators be natural persons. All such requirements are merely evaded through the use of dummy incorporators.

An age limit for incorporators was deleted to avoid a technical deficiency if a slightly underage person was permitted, by accident, to be an incorporator

§ 4–3. Contents of articles of incorporation

(a) The articles of incorporation shall set forth:

(1) The name of the corporation.

(2) The period of duration, which shall be perpetual unless otherwise specified in the articles.

(3) The address of the initial registered office and the name of the initial clerk.

(4) Either:

(A) The number of directors constituting the initial board of directors and, if they have been selected and the powers of the incorporator or incorporators are to terminate upon filing of the articles, the names and addresses of the persons who are to serve as directors until the first annual meeting of shareholders or until their successors be elected and qualify; or

(B) The following statement, in *haec verbae:* "There shall be no directors initially; the shares of the corporation will not be sold to more than twenty (20) persons; the business of the corporation will be managed by the shareholders."

(5) The relevant information regarding the shares, including classes and series of shares, which the corporation shall be authorized to issue, as provided in subsection (b) of this section.

(6) Any other provisions which the incorporators elect to include in the articles if:

(A) Any section of this Act permits or authorizes the articles to contain such a provision; or

(B) Any section of this Act permits or requires the provision to be set forth in the corporation's by-laws, or in an agreement or other instrument; or

(C) Such provision relates to the business or affairs of the corporation, or the rights or powers of its shareholders, directors, or officers, and, although not specifically authorized by this Act, is not inconsistent with law or contrary to public policy.

(b) (1) If the shares of a corporation are to consist of one class only, the articles shall state

(A) the total number of such shares which the corporation shall have authority to issue, and

(B) the par value of each of such shares, or a statement that all of such shares are to be without par value.

(2) If the shares of a corporation are divided into two or more classes, the articles of incorporation:

(A) shall designate each class of shares;

(B) as to each class, shall specify the total number of such shares which the corporation shall have authority to issue, and the par value, if any, or a statement that the shares are to be without par value; and

(C) shall specify the relative rights, preferences, and limitations of the shares of each class.

(3) If shares of any preferred or special class are to be issued in series, the articles of incorporation shall state whether the shares have par value, or are without par value; and shall either

(A) designate each series within any class of shares, and specify the relative rights, preferences and limitations as among such series, to the extent that such is to be specified in the articles, or

(B) set forth any authority of the board of directors to establish and designate series within any class of shares and determine the relative rights, preferences and limitations as among such series.

(4) In addition, by way of summary, the articles shall state

(A) the aggregate par value of all shares having par value which the corporation shall have authority to issue, and

(B) the total number of shares without par value which the corporation shall have authority to issue.

(c) The articles of incorporation shall be signed by each incorporator, with his name and residence address legibly printed or typed beneath or opposite his signature; if an incorporator is a corporation, the title of the person signing for it shall be stated, and the address of its principal place of business shall be stated.

(d) The articles of incorporation need not set forth any of the corporate powers enumerated in this Act; but no enumeration of some powers shall be deemed to exclude other powers granted by this Act unless the articles expressly exclude such other powers.

Comment

Largely the same as MBCA § 48, with style changes suggested by South Carolina § 12–14.3. Note deletion of any requirements of a statement, in the articles, of corporate purposes.

(a) (4) (A) conforms to Delaware, 8 Del.C. § 102, making naming of the initial Board optional.

§ 4–4. Statement in articles of corporate purposes

(a) Unless expressly required by this Act, it shall not be necessary to specify, in the articles of incorporation, the business or businesses in which the corporation will engage; and in the absence of any such specification, a corporation organized under this Act shall have unlimited power to engage in and to do any lawful act concerning any or all lawful businesses for which corporations may be organized under this Act.

(b) If it is the intention of the incorporators to limit the corporation to engaging in a certain business or businesses, the articles may include a statement of the business or businesses to which the corporation shall be limited; but no mention of specific businesses in the articles shall be deemed a limitation on the corporation's powers to engage in other businesses unless such limitation is expressly stated in the articles.

(c) If a corporation

(1) which is now or may hereafter be permitted by the provisions of subsections (a), (b) and (c) of § 4–1 to be organized under this Act is, notwithstanding the provisions of subsection 4–1(b), authorized to engage in any of the

businesses or activities enumerated in this subsection, either because

(A) the power to engage in such business or activity has been conferred upon the corporation by special act of the Legislature, or

(B) some public law authorizing the organization of a special class of corporations has, subsequent to the effective date of this Act, been repealed, or

(C) one of the businesses enumerated in this subsection is not, on the effective date of this Act, the subject of a public law authorizing the organization of a special class of corporations, or

(2) having been originally organized under a special act of the Legislature, or under a public law authorizing the organization of a special class of corporations, which conferred on such corporation the power to engage in any of the businesses or activities enumerated in this subsection, either

(A) seeks to file either articles of amendment containing any change in its statement of purposes, or restated articles of incorporation, if the filing thereof is permitted under this Act and under the act under which such corporation was organized, or

(B) is a participating corporation in a merger or consolidation, and the surviving or new corporation into which such corporation is merged or consolidated seeks to file articles of merger or consolidation, if filing thereof is permitted under this Act and under the act under which such participating corporation was organized,

then the articles of incorporation, articles of amendment, restated articles of incorporation, or articles of merger or consolidation of such corporation or the surviving or new corporation into which it was merged or consolidated shall expressly state which, if any, of the following-listed businesses or activities the corporation is authorized by law to engage in:

Banking, insurance, construction and operation of railroads or aiding therein, the business of trust companies or corporations intended to derive a profit from the loan or use of money, safe deposit companies, renting of safes and burglar and fire-proof vaults, telegraph and telephone companies, electric or gas light companies, water companies, or exercising the right of eminent domain.

Such statement in the articles is for the guidance of the Secretary of State in correctly assessing the fees payable by such cor-

poration; a statement in the articles that the corporation has such power shall not confer such power on the corporation unless it is otherwise authorized by law to engage in the activity so itemized; but even if otherwise authorized by law to do so, no corporation shall engage in any such business or activity unless the power to do so is expressly mentioned in its articles of incorporation.

Comment

The general scheme of allowing the corporation to engage in any lawful business, unless expressly excluded, and the statutory language used in the second clause of (a), is based on Wyoming § 17–36.46(c). That requires an express statement to that effect in the articles, and an equivalent provision was originally included in § 4–3.

At the informal suggestion of the Attorney General's office, it was concluded that no such statement in the articles was necessary, and this provision was substituted.

Subsection (c) (an earlier version of which was § 4–1(e)) was added as a result of discussions with the office of the Secretary of State, to assure ease in determining the applicable fees. Note that (c) does not imply that corporations may be formed under this Act to engage in the enumerated activities; in fact, most of those activities are excluded from incorporation under this Act by the operation of subsection (b) of § 4–1.

It should be noted, also, that under the express provisions of 35 M.R.S.A. § 2301, "corporations for the operation of telegraphs or telephones, . . . for the transmission of television signals by wire, and corporations for the purpose of making, generating, selling, distributing and supplying gas or electricity, or both" may be organized under the general corporation law, now Title 13 §§ 71–79. Electric power companies have the power of eminent domain, without further action by the legislature (35 M.R.S.A. § 2306); telephone and telegraph companies have the power of eminent domain under § 2357; natural gas pipeline companies have the power of eminent domain under § 2534. In addition, it is clear that special powers of eminent domain may be granted by special act of the legislature; see, for example, 35 M.R.S.A. § 2345, on the grant of power to one utility to take or use the property of a similar utility without the latter's consent.

It thus is apparent that some corporations organized under the general corporation law may be public utilities; and some of these automatically have the power of eminent domain, whereas that power may be given to others by special act of the legislature. Unless it is determined as a matter of taxation policy that such quasi public corporations should be taxed at the same rate as ordinary business corporations, it is necessary that the Secretary of State be appraised of the nature

of their business, so that the appropriate tax rate can be applied.

It does not appear that the suggestion of subsection (c) (1) (A) violates the principle enunciated in Associated Hospital Service v. Mahoney, 213 A.2d 712, 161 Me. 391 (1965). It will be recalled that in that case, AHS was created by special act of the legislature as a non-profit hospital service plan, regulated by the Insurance Commissioner; and a few days later, a public law was enacted authorizing the creation of similar corporations. In 1957, AHS was authorized by special law to issue non-profit contracts covering injury and disease not covered by regular contracts ("extended benefits") if the same were reinsured (the requirement of reinsurance being repealed conditionally in 1963); the public law applicable to similar corporations was not similarly extended. The Insurance Commissioner refused to authorize issuance of the proposed "extended benefits" contracts. The court upheld the Commissioner's action on two grounds: (1) That the public law approved March 30, 1939 included expressly within its regulatory scheme the corporation created twenty-eight days earlier under the special act (AHS), thereby "merging" the special act into the public law—and therefore, under § 14 of the State Constitution, it became impermissible to authorize by special act what could have been (but was not) authorized under the public law. (2) On the ground that the special act authorizing "extended benefit" contracts denied to the intervenors (private insurance companies) the equal protection of the laws, in that the proposed contract was a contract of insurance of the same sort which the intervenors normally wrote in the course of their insurance business, but subject to taxation and to statutory supervision and regulation, whereas AHS would, under the special act, be authorized to engage in the same business free from taxation, and relatively free from regulation.

Given the extraordinary and quasi-public nature of the businesses enumerated in this section, however, the fact that they have historically been treated as state-authorized monopolies, and the extraordinary power of eminent domain, it would seem that the legislature could legitimately, to the extent that it has not provided for these businesses and powers by general law, provide by special act for eminent domain or other special and quasi-public power. There might be an equal protection problem similar to that in the AHS case if corporations substantially similarly situated were not treated equally; that is a problem which does not yet arise and would have to be faced when special legislation was passed; it does not affect the present proposed statute.

§ 4–5. Determinations to be made by Secretary of State before filing articles of incorporation

(a) When the articles of incorporation are delivered for filing by the Secretary of State, he shall, before filing them, determine that the articles

(1) comply with the requirements of §§ 1–4 and 1–6;

(2) set forth the information required by § 4–3;

(3) do not adopt as the name of the corporation a name which is in violation of § 3–1; and

(4) are accompanied by the Insurance Commissioner's certificate required by subsection 4–1(d), if applicable; and

(5) appear in all other respects to conform to the requirements of this Act and to law.

(b) Upon making such determination, the Secretary of State shall file the articles of incorporation.

(c) If the Secretary of State is not satisfied that the articles of incorporation conform to the requirements of this Act so as to entitle them to be filed, he shall forthwith refer them to the Attorney General, who shall give the Secretary of State his opinion on whether the articles are entitled to be filed. Except for nonpayment of the required fees or taxes, the Secretary of State may not refuse to file articles without such referral to the Attorney General, nor thereafter if in the opinion of the Attorney General the articles are entitled to be filed.

Comment

Since the requirements of advance approval by the Attorney General has been omitted, the Secretary of State's office will confirm that the articles as submitted comply with state law. In the vast majority of cases, this will be routine; and the specialized personnel in that office are in the best position to decide most doubtful cases. But (c), added by the Committee, provides insurance against arbitrary action by the Secretary of State.

Note that in no case is there an estoppel against the State to challenge the corporation's existence or powers if, for example, articles were erroneously accepted and filed; § 2–3 (ultra vires), § 4–6 (c) (proceedings by State).

§ 4–6. Beginning of corporate existence; filing as conclusive evidence of incorporation; exceptions

(a) The filed articles constitute the corporation's charter and authority to do business.

(b) 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 original filed copy of the articles, as provided by § 1–6.

(c) 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, except when the State shall institute proceedings to

(1) Cancel or revoke the articles of incorporation;

(2) Enjoin any person from acting as a corporation within this State without being duly incorporated; or

(3) Compel dissolution of the corporation.

(d) 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

This is, in substance, the same as MBCA § 50, modified (per South Carolina § 12–14.5) to eliminate the formality of a certificate of incorporation.

Note that the present requirement of county filing is wholly eliminated. There does not appear to be any useful function served by county filing: it is unreliable in title abstracting, since the corporation is not now required to file in every county where it owns land; it is not useful in serving process or securing information, since changes in the clerk are filed only with the Secretary of State (13 M.R.S.A. § 375).

Unlike MBCA § 48(g) and many states, there is no requirement of "paid in capital" before beginning business. Where such a requirement is imposed the amount (usually $1000) is too small to be of real benefit to creditors. Also note that 13 M.R.S.A. § 72 does not actually require that the minimum $1000 capital stock be paid in.

§ 4–7. Powers of incorporators; organizational meeting

(a) If the persons who are to serve as directors until the first annual meeting of shareholders 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 by-laws 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.

(b) 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 by-laws of the corporation, to elect directors (if the meeting is of the incorporators) to serve or hold office until the first annual meeting of shareholders, 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 (c).

(c) 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 the sole incorporator or 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 three (3) days' written notice thereof by any usual means of communication; the notice shall state the time, place and purposes of the meeting.

(d) The provisions of subsection 7–9(c) pertaining to waiver of notice and of § 7–11 pertaining to unanimous action by directors without a meeting shall apply to the organizational meeting, whether it is a meeting of the directors or a meeting of the incorporators.

Comment

The first sentence of (a) is taken from Del. § 108, and conforms to a Committee decision that it should be possible to file articles without, at that time, disclosing a board of directors. The second sentence makes express that which is implicit in the Dela-

ware plan. In most other respects, the same as MBCA § 52, with stylistic changes in South Carolina § 12–14.7; (c) added by this draftsman to eliminate possibility of the organizational meeting being treated differently than other directors' meetings.

Note that this changes present Maine practice; since the initial directors are named in the articles, there is no need for an organizational meeting of shareholders or subscribers. The directors may act as soon as the articles are filed.

As modified by the Committee, the change from present Maine practice is optional. Probably in a majority of cases, initial directors will be named in the articles; but they need not be so named.

Note also the added provision authorizing the organizational meeting to be held *before or after* filing the articles. This further validates common practice by eliminating a fictitious meeting after filing the articles.

CHAPTER 5

CORPORATE FINANCE

Section

§ 5–1. Authorized shares

(a) Each corporation shall have power to create and issue the number of shares stated in its articles of incorporation. Such shares may be divided into one or more classes, any or all of which classes may consist of shares with par value or shares without par value, with such designations, preferences, limitations, and relative rights as shall be stated in the articles of incorporation. The articles of incorporation may limit or deny the voting rights of, or provide special voting rights for, the

shares of any class to the extent not inconsistent with the provisions of this Act.

(b) Without limiting the authority herein contained, a corporation, when so provided in its articles of incorporation, may issue shares of preferred or special classes:

(1) Subject to the right of the corporation to redeem any of such shares at the price fixed by the articles of incorporation for the redemption thereof.

(2) Entitling the holders thereof to cumulative, noncumulative or partially cumulative dividends.

(3) Having preference over any other class or classes of shares as to the payment of dividends.

(4) Having preference in the assets of the corporation over any other class or classes of shares upon the voluntary or involuntary liquidation of the corporation.

(5) Convertible into shares of any other class or into shares of any series of the same or any other class, except a class having prior or superior rights and preferences as to dividends or distribution of assets upon liquidation.

(c) If shares are divided into two or more classes, the shares of each class shall be so designated as to distinguish them from the shares of all other classes. Shares which are not preferred as to dividends or other distributions, including distributions in liquidation, shall not be designated as preferred shares.

(d) Notwithstanding any denial, limitation or definition of voting rights in the articles, at all times after the issuance of one or more shares there shall be one or more classes of outstanding shares which, singly or in the aggregate, possess full voting rights.

Comment

Same as MBCA § 14, except: Last clause of § 14 deleted, and additions and style changes suggested by South Carolina § 12–15.1.

Subsection (d) taken from New York, McKinney's Business Corporation Law § 501, at the suggestion of the Committee.

§ 5–2. Shares of preferred or special classes in series

If the articles of incorporation so provide, the shares of any preferred or special class may be divided into and issued in series. If the shares of any such class are to be issued in series, then each series shall be so designated as to distinguish the shares

thereof from the shares of all other series and classes. All shares of the same series shall be identical. Any or all of the series of any such class and the variations in the relative rights and preferences as between different series shall be fixed and determined by the articles of incorporation unless the articles vest authority in the board of directors to do so. All shares of the same class shall be identical except as to the following relative rights and preferences, as to which there may be variations between different series:

(a) The rate of dividend.

(b) Whether shares may be redeemed and, if so, the redemption price and the terms and conditions of redemption.

(c) The amount payable upon shares in event of voluntary and involuntary liquidation.

(d) Sinking fund provisions, if any, for the redemption or purchase of shares.

(e) The terms and conditions, if any, on which shares may be converted.

Comment

Substantially the same as MBCA § 15, first half.

Minor drafting changes.

§ 5–3. Authority of directors in certain cases to issue shares of preferred or special classes in series

(a) If the articles of incorporation expressly vest such authority in the board of directors, then, to the extent that the articles have not established series and fixed and determined the variations in the relative rights and preferences as between series, the board of directors shall have authority to divide any or all of such classes into series and, within the limitations set forth in § 5–2 and in the articles, to fix and determine the relative rights and preferences of the shares of any series so established.

(b) In order for the board of directors to establish a series, where authority so to do is contained in the articles of incorporation, the board shall adopt a resolution setting forth the designation of the series and fixing and determining the relative rights and preferences thereof, or so much thereof as shall not be fixed and determined by the articles of incorporation.

(c) Prior to the issue of any shares of a series established by resolution adopted by the board of directors, a statement shall

be executed and delivered for filing, as provided by §§ 1–4 and 1–6, and shall set forth:

(1) The name of the corporation.

(2) A copy of the resolution establishing and designating the series, and fixing and determining the relative rights and preferences thereof.

(3) The date of adoption of such resolution.

(4) That such resolution was duly adopted by the board of directors.

(d) Upon the filing of such statement by the Secretary of State, the resolution establishing and designating the series and fixing and determining the relative rights and preferences thereof shall become effective and shall constitute an amendment of the articles of incorporation.

(e) The board of directors may not be authorized to make any change in the designations, terms, limitations, or relative rights or preferences, although fixed by them as permitted by this section, of any shares after their issuance.

Comment

Substantially the same as second half of MBCA § 15; (e) as added in South Carolina § 12–15.3.

§ 5–4. Rules of construction for preferred shares

(a) Unless otherwise provided by this Act, or by the articles of incorporation, or by resolution of the board of directors in the case of shares whose terms may be fixed as provided by § 5–3:

(1) Shares which are preferred as to dividends shall be deemed cumulative preferred shares.

(2) Shares which are preferred as to dividends shall not be entitled to participate in dividends beyond the amount of the stated dividend preference.

(3) Shares which are preferred as to dividends shall be preferred, on liquidation of the corporation, to the extent of the par or stated value of the shares.

(4) Shares which are preferred as to liquidation shall not be entitled to participate in liquidation payments beyond the amount of the liquidation preference stated in the articles or implied under (3) above.

(5) If preferred shares cumulative as to dividends are entitled to a preferential payment on liquidation, such payment shall also include the amount of dividends accrued but unpaid as of the date of liquidation.

(6) Shares which are preferred as to dividends or as to payments upon liquidation shall not be entitled to vote.

(b) This section does not apply to shares already issued or authorized on the effective date of this Act.

Comment

Not in MBCA. Subsection (a) substantially same as South Carolina § 12–15.4.

§ 5–5. Subscriptions for shares

(a) A written subscription for shares of a corporation (whether existing or to be organized), if signed by the subscriber, shall be irrevocable for a period of six (6) months from its date, unless otherwise provided by the terms of the subscription agreement or unless all of the subscribers consent to the revocation of such subscription.

(b) Unless otherwise expressly provided in the subscription agreement, a written subscription for shares

(1) shall be enforceable, to the extent provided herein, regardless of whether other subscriptions are made, and regardless of the number or amount of other subscriptions, and

(2) shall be unconditional.

(c) Unless otherwise provided in the subscription agreement, subscriptions for shares, whether made before or after the organization of a corporation, shall be paid in full at such time, or in such installments and at such times, as the board of directors shall determine. Any call made by the board of directors for payment on subscriptions shall be uniform as to all shares of the same class or as to all shares of the same series, as the case may be.

(d) (1) In case of default in the payment of any installment or call when such payment is due, the corporation may proceed to collect the amount due and all previously unpaid installments or calls in the same manner as any debt due the corporation, and for such amount due the corporation shall have a lien on the subscribed shares. The by-laws may prescribe other penalties for failure to pay installments or calls that may become due, but

no penalty working a forfeiture of a subscription, or of the amounts paid thereon, shall be declared as against any subscriber unless the amount due thereon shall remain unpaid for a period of twenty (20) days after written demand has been made therefor. If mailed, such written demand shall be deemed to be made when deposited in the United States mail in a sealed envelope addressed to the subscriber at his last post-office address known to the corporation, with postage thereon prepaid.

(2) A subscriber's liability on his subscription shall inure to and may be enforced by the corporation or by any shareholder suing derivatively on behalf of the corporation, or by a receiver, liquidator or trustee in bankruptcy of the corporation.

(e) In the event of the sale of any shares, the delinquent subscriber or his legal representative shall be entitled to be paid the excess of the sale proceeds realized over the sum of

(1) the amount due and unpaid on the subscription, and

(2) the reasonable expenses incurred in selling the shares.

Comment

Similar to MBCA § 16, modified to impose irrevocability only on written, signed subscriptions. A South Carolina provision, § 12–15.5(b), which makes only written subscriptions enforceable under any circumstances, was rejected.

(b) added to reverse old Maine case law. Cf. South Carolina § 12–16.23(a).

§ 5–6. Consideration for shares

(a) Shares having a par value may be issued for such consideration expressed in dollars as shall be fixed from time to time by the board of directors unless the articles of incorporation reserve to the shareholders the right to fix the consideration; but except as otherwise permitted in this Act, such consideration shall not be less than the par value of the shares issued therefor.

(b) Shares without par value may be issued for such consideration expressed in dollars as may be fixed from time to time by the board of directors unless the articles of incorporation reserve to the shareholders the right to fix the consideration.

(c) Treasury shares may be disposed of by the corporation for such consideration expressed in dollars as may be fixed from

time to time by the board of directors, or by the shareholders if the articles of incorporation so provide.

(d) If the articles of incorporation reserve to the shareholders the right to fix the consideration for any shares, the shareholders shall, unless the articles otherwise provide, do so by a vote of the holders of a majority of all shares entitled to vote thereon.

(e) That part of the surplus of a corporation which is transferred to stated capital upon the issuance of shares as a share dividend shall be deemed to be the consideration for the issuance of such shares.

(f) In the event of a conversion or exchange of bonds (which includes debentures and other creditor securities) or shares into or for shares, with or without par value, the consideration for the shares so issued in exchange or conversion shall be the sum of:

(1) either the principal sum of and accrued interest on the bonds so exchanged or converted, or the stated capital then represented by the shares so exchanged or converted; plus

(2) any surplus transferred to stated capital upon the issue of the new shares; plus

(3) any additional consideration paid to the corporation for the new shares; plus

(4) any stated capital not theretofore allocated to any designated class or series which is thereupon allocated to the new shares.

Comment

Same as New York, McKinney's Business Corporation Law § 504 (g).

Largely the same as MBCA § 17, but with (1) greater express authority to reserve to stockholders power to fix consideration for shares, and (2) inclusion of bond conversions in (f).

§ 5–7. Authority of directors to issue or dispose of shares; payment for shares

(a) Except to the extent that the articles of incorporation or the by-laws otherwise provide, the directors of a corporation shall have authority to issue from time to time any part or all of the authorized but unissued shares or dispose of the treasury shares of the corporation, and determine the time when, the

terms and conditions upon which, and the consideration for which, the corporation shall issue or dispose of such shares.

(b) Consideration for the issuance of shares shall be paid, in money or in other property, tangible or intangible, actually received by, or in labor or services actually performed for, the corporation, or in any combination thereof, or in the case of share dividends, by a transfer from surplus to stated capital as elsewhere provided in this Act.

(c) Neither promissory notes nor other obligations, including any endorsement or guaranty of an obligation of the corporation, nor any agreement to perform future services, shall constitute payment or part payment for shares of a corporation, other than its treasury shares.

(1) Even though it was accepted in violation of this subsection, any such obligation shall be enforceable according to its terms in an action by or on behalf of the corporation or its creditors.

(2) If shares are issued, in violation of this subsection, in exchange for unperformed obligations or promises, such shares shall be deemed subscribed-for shares not yet paid for; the liability of the holder thereof shall be as set forth in § 5–5 or such greater liability as is stated in the obligation; and without affecting such liability, such shares may be cancelled, and the holders thereof prevented from exercising the rights of a shareholder, in an action by or in the right of the corporation, its shareholders or its creditors.

(d) In the absence of fraud or bad faith in the transaction, the judgment of the board of directors or shareholders, as the case may be, as to the value of the consideration received for shares shall be conclusive.

(e) Every corporation shall keep a record of the consideration for all shares issued by it, the payment of the consideration and the number and par value, if any, of shares issued by it.

Comment

(a) is taken from South Carolina § 12–15.1:1, and makes express what is assumed to be true.

(b), (c) and (d) are substantially the same as MBCA § 18.

(e) is taken from South Carolina § 12–15.7, and imposes expressly a duty assumed to exist.

(c) (1) and (2) were added in Revision #1. (1) states the common law rule that violation of a provision of this sort does not give a windfall to the shareholder; the provision being designed to benefit the corporation and its creditors, they should not lose as a result of its violation. Brockington v. Scott, 381 F.2d 792 (CA 4 1967).

§ 5–8. Share rights and options

(a) Unless this section or the articles of incorporation otherwise provide, a corporation may create and issue, whether or not in connection with the issue and sale of any of its shares or other securities, rights or options entitling the holders thereof to purchase from the corporation shares of any class or classes, whether authorized but unissued shares, treasury shares, or shares to be purchased or acquired by the corporation. The consideration and payment for shares to be purchased under any such right or option shall comply with the requirements of §§ 5–6 and 5–7.

(b) Such rights or options shall be evidenced by an instrument or instruments in such form as may be approved by the board of directors, which shall set forth or shall incorporate by reference the terms and conditions upon which, the time or times at or within which, and the price or prices at which, such shares may be purchased from the corporation upon the exercise of any such rights or option.

(c) Such rights or options may be issued to directors, officers or employees of the corporation or a subsidiary or affiliate thereof, as an incentive to, or reward for, service or continued service with the corporation, a subsidiary or affiliate thereof, or to a trustee on behalf of such directors, officers, employees, if the issuance of such rights or options has been approved by a majority of all outstanding shares entitled to vote thereon, or if the issuance of such rights or options was authorized by, and is consistent with, a plan previously approved by, such vote of the shareholders. Such plan may specify, without limitation, the terms and conditions upon which rights or options are to be issued, the consideration and the payment for shares, the issue of certificates for shares, any limitations or restrictions upon transferability of rights or options or shares received thereunder, eligibility for participation in the plan, effect of termination of employment upon participation, the maximum number of shares to be reserved under the plan, and whether such shares shall be authorized or unissued shares, treasury shares, or shares to be purchased or acquired by the corporation.

(d) In the absence of fraud or bad faith, the judgment of the board of directors or of the shareholders, as the case may be, shall be conclusive as to the adequacy of the consideration received or to be received by the corporation for such rights or options.

Comment

Substantially the same as MBCA § 18A, with style changes and additions largely the same as South Carolina § 12–15.8.

§ 5–9. When shares are fully paid and nonassessable; liability of subscribers and others

(a) A holder of or subscriber to shares of a corporation shall be under no obligation to the corporation or its creditors with respect to such shares other than the obligation to pay to the corporation the full consideration for which such shares were issued or to be issued.

(b) When the full consideration for which shares are to be issued has been paid to the corporation, such shares shall be deemed fully paid and nonassessable.

(c) As used in this section, a **"bona fide purchaser"** means a purchaser for value in good faith and without notice that less than the full consideration for which shares were to be issued has been paid to the corporation, who takes delivery of a certificate for shares in bearer form or of one in registered form issued to him or indorsed to him or in blank.

(1) A bona fide purchaser of shares shall not be personally liable to the corporation or its creditors for any unpaid portion of the consideration for which such shares were to be issued, nor shall his shares be subject to any claim on account thereof.

(2) An immediate or remote transferee of a bona fide purchaser of a certificate for shares in a corporation has the same rights therein as are stated in this section with reference to a bona fide purchaser, unless the transferee was himself a party to any fraud or illegality in the issuance of the certificate for shares.

(3) A person becoming an assignee or transferee of shares or of a subscription for shares in good faith and without knowledge or notice that the full consideration therefor has not been paid, but not qualifying as a bona fide purchaser thereof nor as a transferee of a bona fide purchaser, shall not be personally liable to the corporation or its creditors for any unpaid portion of the consideration for which such shares were to be issued; but the corporation shall have a lien on such shares in the amount of the unpaid balance of the consideration.

(d) An executor, administrator, conservator, guardian, trustee, assignee for the benefit of creditors, receiver, or other fiduciary shall not be personally liable to the corporation as a holder of or subscriber to shares of a corporation, but the estate and funds in his hands or under his control shall be so liable.

(e) No pledgee or other holder of shares as collateral security shall be personally liable as a shareholder or subscriber.

Comment

(a), (d), and (e) are the same in substance as corresponding provisions of MBCA § 23.

(b) is added, based on South Carolina § 12–15.9. Cf. South Carolina § 12–16.23, generally.

(c) is based upon the second paragraph of MBCA § 23, but it goes further: it adopts the basic philosophy contained in Uniform Commercial Code § 8–302, 11 M. R.S.A. § 8–302, giving absolute ownership rights to a bona fide purchaser. Consistency with the UCC demands that such complete ownership rights be given in the bona fide purchaser situation; but except in that situation, or in the case of a person claiming through a bona fide purchaser, the philosophy of the MBCA is retained; that is, that a transferee in good faith takes the shares without personal liability, but still subject to the lien for the unpaid consideration.

Note the express requirement in draft § 5–11 that "no certificate shall be issued for any share until such share is fully paid;" the protection given a bona fide purchaser is, therefore, no danger to a corporation which complies with the statute.

§ 5–10. Allowance of certain organization expenses

The reasonable charges and expenses of organization or reorganization of a corporation, and the reasonable expenses of and compensation for the sale or underwriting of its shares, may be paid or allowed by such corporation out of the consideration received by it in payment for its shares without thereby rendering such shares not fully paid or assessable.

Comment

Same as MBCA § 20.

§ 5–11. Certificates representing shares

(a) Each shareholder, upon payment in full for his shares, shall be entitled to a certificate certifying the number of shares owned by him in such corporation. No certificate shall be issued for any share until such share is fully paid.

(b) Such certificate representing a share or shares in a corporation shall be signed by the president or a vice-president and the secretary or an assistant secretary of the corporation, or by such other two (2) officers as are designated in the by-laws and may be sealed with the seal of the corporation or a facsimile thereof. The signatures of one or both of the two officers au-

thorized to sign share certificates may be facsimiles if the certificate is countersigned by a transfer agent or any assistant transfer agent, or registered by a registrar, other than the corporation itself or an employee of the corporation. In case any officer who has signed or whose facsimile signature has been placed upon such certificate shall have ceased to be such officer before such certificate is issued, it may be issued by the corporation with the same effect as if he were such officer at the date of its issue.

(c) Every certificate representing shares issued by a corporation which is authorized to issue shares of more than one class shall set forth upon the face or back of the certificate, or shall state that the corporation will furnish to any shareholder upon request and without charge, a full statement of the designations, preferences, limitations, and relative rights of the shares of each class authorized to be issued and, if the corporation is authorized to issue any preferred or special class in series, the variations in the relative rights and preferences between the shares of each such series so far as the same have been fixed and determined, and the authority of the board of directors to fix and determine the relative rights and preferences of other series.

(d) Each certificate representing shares shall state upon the face thereof:

(1) That the corporation is organized under the laws of this State.

(2) The name of the person or persons to whom issued.

(3) The number and class of shares, and the designation of the series, if any, which such certificate represents.

(4) The part value of each share represented by such certificate, or a statement that the shares are without par value.

(e) This section shall not affect the validity of any share certificate of any corporation issued prior to the effective date of this Act.

Comment

First part of (a) added, per South Carolina § 12–15.10(a); balance same as MBCA § 21.

Note:

As to lost certificates, see UCC § 8—405, 11 M.R.S.A. § 8–405.

§ 5–12. Issuance of fractional shares or scrip

(a) A corporation may, but shall not be obliged to, issue a certificate for fractional shares which shall entitle the holder, in proportion to his fractional holdings, to exercise voting rights and receive dividends and other distributions.

(b) As an alternative, a corporation may pay in cash the fair value of fractions of shares as of the time when those entitled to receive such fractions are determined.

(c) As an alternative, a corporation may issue scrip in registered or bearer form over the manual or facsimile signature of an officer of the corporation or of its agents, exchangeable as therein provided for full shares, but such script shall not entitle the holder to any rights of a shareholder except as therein provided. Such scrip may be issued subject to the condition that it shall become void if not exchanged for certificates representing full shares before a specified date, or subject to the condition that the shares for which such scrip is exchangeable may be sold by the corporation and the proceeds thereof distributed to the holders of such scrip, or subject to any other conditions which the board may determine.

(d) A corporation may provide reasonable opportunity for persons entitled to fractions of shares or scrip to sell such fractions of shares or scrip or to purchase such additional fractions of shares or scrip as may be needed to acquire a full share.

Comment

Substantially the same as MBCA § 22.

§ 5–13. Requirement of stated capital and determination thereof

(a) Upon issue by a corporation of shares with a par value, the consideration received therefor, expressed in dollars, shall constitute stated capital to the extent of the par value of the shares, and the excess, if any, of such consideration shall constitute capital surplus.

(b) Upon issue by a corporation of shares without par value, the entire consideration received therefor shall constitute stated capital unless the board of directors, within a period of sixty (60) days after the issuance of such shares, allocates to capital surplus a portion, but not all, of the consideration received for such shares. No such allocation shall be made of any portion of the consideration received for shares without par value having a

preference in the assets of the corporation upon involuntary liquidation except that part of such consideration which is in excess of such preference.

(c) If shares have been or shall be issued by a corporation in a merger or consolidation or in the acquisition of all or substantially all of the outstanding shares or of the property and assets of another corporation, whether domestic or foreign, any amount that would otherwise constitute capital surplus under the foregoing provisions of this section may instead be allocated to earned surplus by the board of directors of the issuing corporation, except that its aggregate earned surplus shall not exceed the sum of the earned surpluses as defined in this Act of the issuing corporation and of all other corporations, domestic or foreign, that were merged or consolidated or of which the shares or assets were acquired.

(d) The stated capital of a corporation may be increased from time to time by resolution of the board of directors transferring all or part of any surplus of the corporation to stated capital. The board may direct that the amount so transferred shall be stated capital in respect of any designated class or series of shares.

(e) If a corporation has issued and outstanding shares of any class or classes having a preference in the assets of the corporation in the event of involuntary liquidation of the corporation, its aggregate stated capital shall at all times be at least equal to the aggregate amount of such preferences on all outstanding shares.

Comment

(a) through (d) same as MBCA § 19; (e) added by draftsman to fill an apparent gap in MBCA.

§ 5–14. Dividends in cash or property

(a) The board of directors of a corporation may, from time to time, declare and the corporation may pay dividends on its outstanding shares in cash or property, including the shares of other corporations, except when the corporation is insolvent or when the payment of the dividend would render the corporation insolvent or when the declaration or payment thereof would be contrary to any restrictions contained in the articles of incorporation, subject always to the following limitations:

(1) Dividends may be declared and paid in cash or property only out of the unreserved and unrestricted earned

surplus of the corporation, except as otherwise provided in this section and in the sections pertaining to dividends and distributions from capital surplus.

(2) Except to the extent that the articles of incorporation otherwise provide, a corporation engaged in the exploitation of natural resources or other wasting assets, may declare and pay in cash or property, dividends out of the depletion reserves of the corporation, but each such dividend shall be identified as a distribution of such reserves and the amount per share paid from such reserves shall be disclosed to the shareholders receiving the same concurrently with the distribution thereof.

Comment

There is considerable confusion at the present time as to the legitimate source or sources from which a Maine corporation may pay dividends.

13 M.R.S.A. § 378 states the apparently simple proposition that "dividends *of profit* may be paid by the directors", but that statement is immediately thrown into question by the additional statement "but the capital shall not thereby be reduced until all debts due from the corporation are paid."

In modern terminology, "profit" would seem to mean "accumulated net earnings". But in George E. Warren Co. v. United States, 76 F.Supp. 587 (D.C.Mass. 1948), that provision and other provisions of Maine corporation law were read together so as to reach a determination that "profit means an excess of assets over liabilities and the par value of the capital stock." (76 F.Supp. at 591). The holding in that case is questionable on many counts: it was a federal tax case, and the issue was whether a Maine corporation which had sustained a substantial unrealized *depreciation* in the value of its assets was prohibited by law from paying a dividend, so as to be entitled to the benefit of a provision relieving "deficit corporations" from the then-tax on undistributed profits. The court may have been inclined toward generosity to the corporation in the light of the harsh result which the tax imposed, and because of the curative purpose of the federal legislation upon which relief was sought and given. As shown by the court's discussion on page 592, it was reading into the Maine statutes, and applying, the "impairment of capital" test for the payment of dividends, rather than a profit test in the sense of accumulated earnings; compare, Randall v. Bailey, 23 N.Y.S.2d 173, affirmed 288 N.Y. 280, 43 N.E.2d 43 (1942).

The above case is not authoritative, for obvious reasons, and the fact remains that on its face, the present Maine statute speaks in terms of "profit" as the test for dividends.

Draft § 5–14 unequivocally adopts the position that profits in the sense of accumulated earnings are the normal source for ordi-

nary dividends (see the definition of "earned surplus" in § 1–2). It also retains the authorization for payment of special dividends from depletion reserves in the case of corporation exploiting wasting resources, which is now a part of Maine law (13 M.R.S.A. § 380). These provisions are substantially identical to the first two provisions in MBCA § 40.

This draft rejects an alternative version proposed in MBCA § 40(a), drawn upon the Delaware Law, which would permit dividends to be paid even though there was no earned surplus, if there were net earnings in the current fiscal year and in the next preceding fiscal year, taking the two periods as a single period.

This alternative provision, and other possible versions of the "instant dividend", are rejected because the draftsman believes that the primary legitimate function of any restriction on dividends (except for the insolvency restriction) is to prevent the shareholders from being misled as to the source of dividend payments. Normally, dividends are assumed by the recipient to be from earnings. Subsequent provisions authorize distributions from capital surplus under certain conditions, but they require specific notice to and, in some cases, authorization of the shareholders, reducing the possibility of anyone being misled. A dividend paid from current earnings even though the corporation might have a large accumulated deficit would seem to be misleading and should, therefore, be impermissible.

This draft departs slightly from the MBCA (but follows present Maine law) in that, in the case of dividends from depletion reserves, such dividends are permissible unless the articles otherwise provide; MBCA § 40(b) requires express authorization in the articles.

Although the source of ordinary dividends, therefore, is earned surplus (which in effect is accumulated earnings) it is clear from the sections that follow that distributions may be made notwithstanding the lack of such earned surplus. Distributions from capital surplus may be authorized; and capital surplus may in most cases be generated by a reduction in stated capital. If the shareholders desire therefore, the only real limitation on corporate distributions is the insolvency test.

§ 5–15. Share dividends and dividends in treasury shares

(a) The board of directors of a corporation may, from time to time, declare and the corporation may pay on its outstanding shares dividends in its own shares, except when the declaration or payment thereof would be contrary to any restrictions contained in the articles of incorporation, subject always to the following limitations:

(1) Dividends may be declared and paid in the corporation's own authorized but unissued shares out of any un-

reserved and unrestricted surplus of the corporation on the following conditions:

(A) If a dividend is payable in its own shares having a par value, such shares shall be issued at not less than the par value thereof, and there shall be transferred to stated capital at the time the dividend is paid an amount of surplus at least equal to the aggregate par value of the shares to be issued as a dividend.

(B) If a dividend is payable in its own shares without par value, the amount of stated capital to be represented by each such share shall be fixed by the board of directors by resolution adopted at the time the dividend is declared, and there shall be transferred to stated capital at the time the dividend is paid an amount of surplus equal to the aggregate stated capital so fixed in respect of such shares.

(C) Nothing herein shall preclude a corporation from making additional or supplementary transfers from surplus to stated capital in connection with a share dividend.

(2) Dividends may be declared and paid by the corporation in its own shares out of any treasury shares that have been reacquired by the corporation. No transfer from surplus to stated capital need be made by a corporation paying a dividend in treasury shares to holders of any class of its outstanding shares.

(b) No dividend payable in shares of any class, whether such shares are authorized but unissued shares or treasury shares, shall be paid to the holders of shares of any other class unless the articles of incorporation so provide or unless such payment is authorized by the affirmative vote or written consent of the holders of at least a majority of the outstanding shares of the class in which the payment is to be made.

(c) A split-up or division of the issued shares of any class into a greater number of shares of the same class without increasing the stated capital of the corporation shall not be construed to be a share dividend within the meaning of this section.

Comment

This is, in substance, the same as the last portion [beginning with sub-paragraph (c)] of MBCA § 40; although the style is modified to conform to South Carolina § 12–15.15, the substance is more nearly identical to that of the Model Act.

The only significant deviations from the Model Act are: in sub-

paragraph (a) (1) (C), a somewhat more detailed reporting requirement is imposed than that contained in MBCA; and in subparagraph (a) (2), which corresponds to MBCA § 40(c), pertaining to dividends payable in treasury shares, the phrase "out of surplus" which appears in the Model Act has been deleted. Under a strict reading of the Model Act it would seem impossible to make a stock dividend payable in treasury shares which had been acquired by gift, bequest, etc.; there seems no reason for such limitation.

Although the MBCA § 40 combines the substance of this section and § 5–14, the South Carolina example of separating the two sets of provisions seems to aid in clarity.

§ 5–16. Dividends from capital surplus in special cases

The board of directors of a corporation may, from time to time, declare and the corporation may pay, out of its unreserved and unrestricted capital surplus, dividends on its outstanding shares in cash or property, including the shares of other corporations, except when the corporation is insolvent or when the payment of the dividend would render the corporation insolvent or when the declaration or payment thereof would be contrary to any restrictions contained in the articles of incorporation, in the following cases:

(a) In the event that the corporation has one or more subsidiaries of which it owns at least 75% of the voting stock, dividends may be declared and paid out of the capital surplus of the corporation to the extent of the net aggregate undistributed, unrestricted and unreserved consolidated earned surplus of the corporation and such of its 75%-owned subsidiaries as are organized under the laws of any state, territory or possession of the United States of America if, at the time of any such dividend, such corporation has, or as a result of such dividend will have no earned surplus. In computing such consolidated earned surplus the financial statements of the corporation and its subsidiaries (as limited above) shall be consolidated after eliminating all inter-company items and there shall be deducted an amount equal to the aggregate of all dividends theretofore paid pursuant to this subsection. Each such dividend when made shall be identified as a payment out of capital surplus not in excess of such consolidated earned surplus.

(b) Dividends may be declared and paid out of capital surplus to the holders of the corporation's outstanding shares having a cumulative preferential right to receive dividends, in discharge

of their cumulative dividend rights, if the corporation has no earned surplus or if its earned surplus would be insufficient to permit payment of such cumulative preferred dividends therefrom. Each such dividend, when made, shall be identified as a payment of cumulative dividends out of capital surplus.

Comment

By its definition of earned surplus [adopted in this draft as § 1–2(r)], the MBCA makes substantial progress in permitting dividends from the earned surplus of corporations acquired through a merger, consolidation, or acquisition of assets. That provision does not, however, make it possible for the parent corporation to pay dividends when its subsidiaries have, subsequent to their creation or acquisition, built up substantial earnings which have not been paid up to the parent corporation in the form of inter-company dividends.

There is no economic reason why such accumulated earnings in the subsidiary should not be available for dividends to the shareholders of the parent, provided the solvency of the parent is not impaired.

For a detailed discussion of this problem, see Hackney, Financial Accounting for Parents and Subsidiaries 25 U. of Pitt.Law Rev. 9 (1963).

The solution adopted in subparagraph (a) above is the Pennsylvania solution discussed in Hackney's article. See Purdon's Pennsylvania Statutes Annotated, Title 15 § 1702(4). One deviation is made from the Pennsylvania provision; it speaks of majority-owned subsidiaries; the draft submitted above speaks of 75% ownership. Although good accounting practice permits consolidation of financial statements as long as there is mere majority ownership, it was felt that this provision should be more closely comparable to the definition of earned surplus which speaks of "substantial ownership".

Note that, as discussed at length in Hackney's article, there is almost certain to be capital surplus available if the subsidiaries do, in fact, have accumulated earnings. This is true because it is preferred accounting to write up the value of the investment in the subsidiary to the extent of the parent's share in the subsidiary's undistributed earnings. Opinion 10 of the Accounting Principles Board, A.I.P.C.A. (December, 1966), paragraph 3 states: "If, in consolidated financial statements, a domestic subsidiary is not consolidated, the Board's opinion is that, unless circumstances are such as those referred to in paragraph 2 of ARB No. 51, the investment in the subsidiary should be adjusted for the consolidated group's share of accumulated undistributed earnings and losses since acquisition. This practice is sometimes referred to as the 'equity' method." Under the definitions of earned surplus and capital surplus, any write-up of such an investment would constitute a credit, not to earned surplus, but to capital surplus.

Only United States-incorporated subsidiaries are included; restrictions on payments of funds from some countries make it undesirable to count, as a dividend source, profits of foreign subsidiaries.

(b) This provision is substantially the same as the last paragraph of MBCA § 41, and is inserted at this point due to the similarity of source and procedure.

§ 5–17. Other distributions from capital surplus

The board of directors of a corporation may, from time to time, distribute to its shareholders out of capital surplus of the corporation a portion of its assets, in cash or property, subject to the following provisions:

(a) No such distribution shall be made at a time when the corporation is insolvent or when such distribution would render the corporation insolvent.

(b) No such distribution shall be made unless the articles of incorporation so authorize, or unless such distribution is authorized by the affirmative vote of the holders of at least a majority of the outstanding shares of each class whether or not entitled to vote thereon by the provisions of the articles of incorporation of the corporation.

(c) No such distribution shall be made to the holders of any class of shares unless all cumulative dividends accrued on all preferred or special classes of shares entitled to preferential dividends shall have been fully paid.

(d) No such distribution shall be made to the holders of any class of shares which would reduce the remaining net assets of the corporation below the aggregate preferential amount payable in event of voluntary liquidation to the holders of shares having preferential rights to the assets of the corporation.

(e) Each such distribution, when made, shall be identified as a distribution from capital surplus and the amount per share disclosed to the shareholders receiving the same concurrently with the distribution thereof.

Comment

Same as MBCA § 41, except:

1—in (b), "articles of incorporation so *authorize,* or *unless* . . ." instead of "articles of incorporation so *provide* or . . ."

2—Last paragraph of MBCA § 41 now appears in § 5–16.

§ 5–18. Corporation's purchase and disposition of its own shares

(a) A corporation may acquire its own shares

(1) by gift, bequest, merger, consolidation, distribution of the assets of another corporation, or exchange of its shares, and

(2) by purchase, as provided in this section;

and it may hold own, pledge, transfer, or otherwise dispose of such shares however acquired.

(b) A corporation may purchase its own shares only to the extent of unreserved and unrestricted earned surplus. If authorized by the articles of incorporation, or by the affirmative vote of at least a majority of the outstanding shares of each class whether or not entitled to vote thereon by the provisions of the articles of incorporation, a corporation may also purchase its own shares to the extent of unreserved and unrestricted capital surplus.

(c) Upon purchase of its own shares, the corporation's earned or capital surplus, as the case may be, shall be reduced by the cost of such shares. Upon sale or other disposition of all or any part of such shares for a consideration, the consideration received for each of such shares:

(1) may be earned surplus, up to an amount not in excess of that portion of the cost of purchasing such shares by which earned surplus was reduced at the time of purchase;

(2) shall be capital surplus, except for such portion of the consideration which the corporation elects, under the authority of clause (1) above, to restore to earned surplus.

Surplus created upon retirement or cancellation of shares reacquired by the corporation, whether by purchase or otherwise, shall be capital surplus. Stated capital shall not be changed by retention of reacquired shares as treasury shares nor by their subsequent distribution to shareholders nor by their disposition for a consideration.

(d) Notwithstanding the limitations of subsection (b), the directors of a corporation may authorize the purchase of its own shares for the following purposes:

(1) To eliminate fractional shares or to avoid their issuance;

(2) To collect, release, or compromise in good faith a debt, claim or controversy;

(3) To satisfy claims of dissenting shareholders who are entitled to payment of the fair cash value of their shares under any provision of this Act;

(4) Subject to the other provisions of this Act, to effect the retirement or cancellation of its redeemable shares by redemption or by purchase at a price not in excess of the redemption price.

(e) A corporation shall in no event purchase its own shares if the corporation is insolvent, or if such purchase or payment would render it insolvent, or would reduce the remaining net assets of the corporation below the aggregate preferential amount payable in event of voluntary liquidation to the holders of shares having preferential rights to the assets of the corporation.

Comment

The general scheme adopted in this section is substantially the same as MBCA § 5. Basically, the philosophy adopted is that a corporation should normally expend its funds for the purchase of treasury shares only out of earned surplus or, under limited circumstances, out of capital surplus.

The purchase of treasury shares is analogous to dividends and other distributions to shareholders; in each case, it involves payment of corporate funds to shareholders; in each case it receives nothing of tangible value in return (treasury shares are not significantly different in value to the corporation than additional authorized but unissued shares). The effect on the shareholders is different, however, in that a dividend or other distribution will be uniform for a class, and therefore will not change proportionate interest among members of the class of shares, whereas the purchase of treasury shares has the simultaneous effect of terminating the interest of a shareholder all of whose shares are purchased, while increasing the proportionate ownership of the corporation held by all other shareholders. It is also possible to have—in form—a purchase of treasury shares allocated proportionately among all members of a class; this is exactly equivalent to a dividend, since the proportionate interests of the members of the class remain unchanged. Because of the basic similarity to dividends it is logically sound to impose analogous restrictions.

It is therefore provided that treasury shares may be purchased from earned surplus. They may also be purchased from capital surplus, if either of two qualifications is satisfied: if authority for such purchase is given in the articles, or by the affirmative vote of a majority of the shares of each class.

The latter restriction differs in two ways from the corresponding provision of MBCA § 5: The MBCA requires the affirmative vote of "at least *two-thirds* of all shares *entitled to vote* thereon". Thus, the Model Act requirement is eased from two-thirds to a

mere majority. The more strict requirement that all shares approve, whether or not normally entitled to vote, is based upon two considerations: (1) one of the principal reasons for all limitations of this sort is to protect minority shareholders and, in particular, to protect the shareholders of one class from oppression by another class; for example, if there were a class of nonvoting preferred stock, the common stockholders could drain away much of the protection of the value of the preferred shares by causing a substantial purchase, by the corporation, of common shares; (2) to make this section consistent with the corresponding provision regarding distributions from capital surplus; if this equivalence does not appear in the statute, then the limitations in § 5–17 could be evaded by causing a purchase of treasury shares, instead of making a simple distribution from capital surplus.

The MBCA states that, upon purchase of treasury shares, surplus "shall be *restricted*" so long as the shares are held by the corporation; in lieu of this provision, it is provided that "surplus . . . shall be *reduced* by the cost" of purchase. It is believed that this provision is simpler and more readily understandable than the "restriction" provision: upon the purchase of treasury shares, assets must be reduced by the amount expended for the shares (since it is generally agreed that treasury shares should not be carried as an asset, and this act specifically so provides); a corresponding deduction must be made on the right side of the balance sheet, therefore. Since the surplus used as the measure of the corporation's ability to purchase the treasury shares would be restricted even under the MBCA, there seems no reason why this restriction should not be reflected in an outright reduction of the surplus account, thereby making it clear that such surplus has been used for the purchase of the treasury shares, and is no longer available for any purpose. The result is both simplicity and uniformity.

Upon sale or other disposition for a consideration of treasury shares, it is only fair that, to the extent that earned surplus was reduced in their acquisition, the same surplus account may be increased so as to reflect the return to the corporation of tangible assets in exchange for the shares.

Note that the effect of the statutory language proposed is to make any "profit" on treasury shares *capital* surplus, whether the shares themselves were acquired from earned surplus or capital surplus. This result is sound, because a profit on the sale of treasury shares is analogous to a premium paid above par for originally issued shares, and has little if anything in common with profit earned on the sale of either fixed or other assets.

Regardless of how acquired, when treasury shares are cancelled or retired a surplus will be generated; this follows from the fact that treasury shares are treated as being issued (though not outstanding) shares, and some portion of stated capital is allocated to them. When they are cancelled or retired, therefore, stated capital is, to that extent,

reduced under the overall scheme of the MBCA, (which is also the overall structure of this proposed act); the reduction in stated capital is properly reflected by an increase in capital surplus.

(e) of the above draft is a further limitation not contained in MBCA § 5, and is a further protection for preferred shareholders. By definition [§ 5-13(e)], stated capital is required to equal at least the aggregate amount of preferences in *involuntary* liquidation; it is therefore permissible for stated capital to be less than the aggregate sum of preferences in the event of *voluntary* liquidation, although that would be unusual. In the latter unusual event, there could be capital surplus, earned surplus, or both. The additional limitation prevents such surpluses from being used to acquire treasury shares as the first step in a planned or unplanned series of steps, the next step which would be a voluntary liquidation in which the assets would be insufficient to satisfy the preferences of the preferred stock.

§ 5-19. Issue and redemption of redeemable shares

(a) The articles of incorporation may authorize the corporation to issue one or more classes or series of shares which are redeemable, in whole or part, at the option of the corporation or, in the case of a preferred or special class or series thereof, at the option of the shareholder. The articles, or the resolution of the board of directors if the board has authority to fix and determine such terms, shall set forth the price at which, the period within which, and the conditions under which such shares may be redeemed.

(b) Except in the case of an open-end investment company, as defined by the Act of Congress entitled "Investment Company Act of 1940," no corporation shall issue any common shares which by their terms purport to grant to any holder thereof the right to require the corporation to redeem such shares.

(c) No redemption or purchase of redeemable shares shall be made by a corporation if it is insolvent, or if such redemption or purchase would render it insolvent, or would reduce the remaining net assets of the corporation below the aggregate preferential amount payable in event of voluntary liquidation to the holders of shares having preferential rights to the assets of the corporation.

(d) When redeemable shares are purchased by the corporation, the purchase price shall not exceed the redemption price stated in the articles of incorporation.

Comment

(c) is the same as MBCA § 60; the remainder was drawn from South Carolina § 12–15.18, and New York, McKinney's Business Corporation Law § 512.

This section permits shares redeemable at the option of the shareholder. It will *rarely* be sound business judgment to issue such shares.

The exclusion of ordinary common from such redemption on shareholder demand is intended to assure some residuum, no matter how small, of permanent investment.

§ 5–20. Retirement or cancellation of redeemable shares by redemption or purchase

(a) The redemption or purchase by a corporation of its redeemable shares shall of itself retire such shares, which shall automatically be restored to the status of authorized but unissued shares, unless the articles of incorporation provide that such shares shall be cancelled and not reissued.

(b) The retirement or cancellation of such shares shall reduce the stated capital of the corporation by that part of the stated capital which was, at the time of such action, represented by those shares.

(c) If the shares are cancelled, a statement of cancellation shall be executed and delivered for filing as provided by §§ 1–4 and 1–6, and shall set forth:

(1) The name of the corporation.

(2) The number of redeemable shares reacquired and cancelled by redemption or purchase, itemized by classes and series.

(3) The number of shares which the corporation has authority to issue, itemized by classes and series, after giving effect to such cancellation, and summarized to show the aggregate par value of shares having par value which the corporation is authorized to issue and the aggregate number of shares without par value which it is authorized to issue.

(d) The filing of the statement of cancellation shall amend the articles to reduce the number of authorized shares by the number of cancelled shares.

(e) Nothing contained in this section shall be construed to forbid a retirement or cancellation of shares or a reduction of stated capital in any other manner permitted by this Act.

Comment

Similar in substance to MBCA § 61, with style changes per South Carolina § 12–15.19 and to conform to uniform method of filing.

Filing requirement deleted in the case of retirement without cancellation, since Maine taxes only on *authorized* shares.

§ 5–21. Disposition or retirement or cancellation of other reacquired shares

(a) Any shares of a corporation reacquired by it, other than redeemable shares redeemed or purchased, may be either held as treasury shares or may be retired or cancelled by the board of directors at the time of reacquisition or at any time thereafter.

(b) The retirement or cancellation of such shares shall reduce the stated capital of the corporation by that part of the stated capital which was, at the time of such action, represented by those shares.

(c) If the shares are cancelled, a statement of cancellation shall be executed and delivered for filing as provided by §§ 1–4 and 1–6, and shall set forth:

(1) The name of the corporation.

(2) The number of reacquired shares cancelled by resolution adopted by the board of directors, itemized by classes and series, and the date of the adoption of the resolution for their cancellation.

(3) The number of shares which the corporation has authority to issue, itemized by classes and series, after giving effect to such cancellation, and summarized to show the aggregate par value of shares having par value which the corporation is authorized to issue and the aggregate number of shares without par value which it is authorized to issue.

(d) The filing of the statement of cancellation shall amend the articles to reduce the number of authorized shares by the number of cancelled shares.

(e) Nothing contained in this section shall be construed to forbid retirement or cancellation of shares or a reduction of stated capital in any other manner permitted by this Act.

Comment

Substantially the same as MBCA § 62; style changed per South Carolina § 12–15.20. Filing requirement deleted in the case of retirement without cancellation, since Maine taxes are based on only *authorized* shares.

§ 5–22. Reduction of stated capital

(a) A corporation may reduce its stated capital, where such reduction is not accompanied by any action requiring an amendment of the articles of incorporation and is not accompanied by retirement or cancellation of shares, by complying with the following procedure:

(1) The board of directors shall adopt a resolution setting forth the amount of the proposed reduction and the manner in which the reduction shall be effected, and directing that the question of such reduction be submitted to a vote at a meeting of shareholders, which may be either an annual or a special meeting.

(2) Written notice, stating that the purpose or one of the purposes of such meeting is to consider the question of reducing the stated capital of the corporation in the amount and manner proposed by the board of directors, shall be given to each shareholder of record within the time and in the manner provided in this Act for the giving of notice of meetings of shareholders.

(3) At such meeting a vote of the shareholders shall be taken on the question of approving the proposed reduction of stated capital, which shall require for its adoption the affirmative vote of the holders of at least a majority of the outstanding shares of each class whether or not entitled to vote thereon by the provisions of the articles of incorporation.

(b) No reduction of stated capital shall be made under the provisions of this section if after such reduction the amount of the aggregate stated capital of the corporation would be an amount equal to or less than the aggregate preferential amounts payable in the event of involuntary liquidation on all issued shares having preferential rights to the assets of the corporation, or an amount less than the aggregate par value of all issued shares having a par value.

Comment

Substantially the same as MBCA § 63, except that it requires only a majority vote of shares *normally* entitled to vote.

Note that § 5–22(a) (3) is more restrictive than the MBCA, so as to be consistent with provisions for payments from capital surplus; the usual purpose of reducing stated capital will be to generate capital surplus for distribution. Excess stated capital is primarily a protection for non-

common shareholders, who normally will have no vote.

Requirement of filing notice of such action deleted, since there is no general requirement that the State know a corporation's stated capital.

---

§ 5–23. Special provisions relating to surplus and reserves

(a) A corporation may, by resolution of its board of directors, apply any part or all of its capital surplus to the reduction or elimination of any deficit arising from losses, however incurred, but only after first eliminating the earned surplus, if any, of the corporation by applying such losses against earned surplus, and only to the extent that such losses exceed the earned surplus, if any. Each such application of capital surplus shall, to the extent thereof, effect a reduction of capital surplus. Each such application of capital surplus shall be disclosed in the next financial statement furnished by the corporation to its shareholders and at its next regular or special meeting of shareholders.

(b) A corporation may, by resolution of its board of directors, create a reserve or reserves out of its earned surplus or capital surplus for any proper purpose or purposes, and may increase, decrease or abolish any such reserves in the same manner. Earned surplus of the corporation to the extent so reserved shall not be available for the payment of dividends or other distributions by the corporation except as expressly permitted by this Act.

(c) After merger, consolidation, or combination of a corporation and one or more domestic or foreign corporations by purchase or otherwise, the amount of the earned surplus of the surviving, new or purchasing corporation shall not exceed the aggregate net earned surplus of the constituent corporations as it existed immediately prior to such merger, consolidation or combination, reduced by such distributions to shareholders and transfers of earned surplus to stated capital or capital surplus as were made in connection with the issue of shares or otherwise at the time of merger, consolidation, or combination.

(d) The capital surplus of a corporation may be increased from time to time by resolution of the board of directors directing that all or a part of the earned surplus of the corporation be transferred to capital surplus.

(e) The surplus, if any, created by or arising out of a reduction of the stated capital of a corporation shall be capital surplus, regardless of whether such reduction is accomplished as provided in § 5–22, or by the retirement or cancellation of reac-

quired or surrendered shares, or by an amendment to the articles reducing the par value of shares, or in any other manner.

Comment

(a) is same, in substance, as third paragraph of MBCA § 64, with the addition of the notice requirement in the last sentence.

(b) is the same in substance, as fourth paragraph of MBCA § 64.

(c) is added; source, South Carolina § 12–15.22. It parallels the definition of earned surplus in § 1–2.

(d) is same as the second paragraph of MBCA § 64.

(e) is same, in substance, as first paragraph of MBCA § 64.

§ 5–24. Convertible securities

(a) A corporation may, if authorized by the articles of incorporation, issue shares convertible, at the option of the holder only, into shares of any other class or into shares of any series of the same or any other class, except a class or any series having prior or superior rights and preferences as to dividends or distribution of assets upon liquidation. The period within which and the terms and conditions upon which shares may be converted shall be stated in the articles of incorporation, or in a resolution of the board of directors if the board of directors has authority to fix and determine that right. Shares without par value shall not be converted into shares with par value, unless that part of the stated capital of the corporation represented by such shares without par value is, at the time of conversion, at least equal to the aggregate par value of the shares into which the shares without par value are to be converted.

(b) A corporation may, if authorized by the articles of incorporation, issue bonds or debentures convertible into other bonds or debentures of the corporation within such period and upon such terms and conditions as shall be fixed by the board of directors.

(c) A corporation may, if authorized by the articles of incorporation, issue bonds or debentures convertible into shares within such period and upon such conditions as shall be fixed by the board of directors.

(d) At the time of authorizing any securities convertible into shares, the corporation shall provide for and at all times thereafter retain sufficient authorized but unissued shares of all classes necessary to satisfy the conversion of all issued outstanding securities convertible into shares.

(e) When shares are converted, they shall be cancelled. Conversion of shares shall not reduce the aggregate stated capital of the corporation, but the effect, if any, of conversion upon stated capital shall be stated in the next financial statement furnished to shareholders.

Comment

First sentence of (a) parallels § 5-1(b) (5).

Last sentence of (a) is same as last part of MBCA § 14.

(b) through (e) added; source, South Carolina § 12-15.24.

§ 5–25. Unclaimed dividends and other distributions to shareholders

(a) Whenever a dividend or other distribution to shareholders has been declared by a corporation and the check in payment thereof has not been presented for payment within 20 years from the date of issue thereof, and, in the exercise of due diligence, the shareholder entitled thereto cannot be located, then said corporation may stop payment on said check, if it has not theretofore done so, and pay said dividend or dividends or other distribution to the Treasurer of State to be held by him for said shareholder as provided, and cancel on its books the certificate, whether or not in its possession, evidencing the shares in respect of which said dividend or dividends or other distributions were declared, issue a duplicate certificate for said shares in the name of the Treasurer of State and deliver said duplicate certificate to the Treasurer of State.

(b) The Treasurer of State shall, prior to January 31st of each year, cause notice, in such form as he shall approve, to be published in the state paper, at least once each week for 2 successive weeks, of all dividends and distributions and shares of stock received by him during the preceding calendar year pursuant to this section, with the name, if known, and the last known address, if any, of each person appearing to be the owner of any such dividend or dividends or distributions and of any such shares of stock. After March 1st and prior to March 31st of each year the Treasurer of State shall sell in the open market or at public sale all shares of stock represented by duplicate certificates delivered to him pursuant to this section during the preceding calendar year except for such as may be the subject of applications then pending in the Superior Court pursuant to this section. All funds received by the Treasurer of State from the

sale of shares of stock for any such shareholder shall be held by him for said shareholder as provided.

(c) Any claimant to any dividend or dividends or other distributions paid to the Treasurer of State pursuant to this section and any claimant to any shares of stock, or to the proceeds of the sale of any shares of stock, paid to the Treasurer of State pursuant to this section shall make application therefor, within 20 years after the first publication of the notice in respect thereof provided for in the preceding paragraph of this section, to the Treasurer, who shall pay the same upon satisfactory proof that the claimant is entitled thereto. If the Treasurer is not satisfied as to the right of any claimant to such funds, the claimant may bring a civil action against the Treasurer in the Superior Court for Kennebec County, which, if satisfied as to the claimant's legal right thereto, shall issue an order directing the Treasurer of State to pay the same to the claimant, and the same shall be paid as directed in said order. At the expiration of said 20-year period any unclaimed funds received by the Treasurer of State pursuant to this section shall escheat to the State. Any income earned on any funds received by the Treasurer of State pursuant to this section during said 20-year period shall be paid into the General Fund of the State as compensation to the State for administration.

Comment

Source: 13 M.R.S.A. § 379. Compare § 11–21.

CHAPTER 6

BY-LAWS, SHAREHOLDERS AND VOTING

Section

§ 6–1. By-laws generally

(a) The by-laws of a corporation may contain any provisions for the regulation and management of the business and affairs of the corporation which are not inconsistent with law or with the articles of incorporation. Any provision which could properly appear in the by-laws may be included in the articles of incorporation.

(b) Unless otherwise provided in the articles, the initial by-laws of a corporation shall be adopted by its board of directors or, if the initial directors were not named in the articles of incorporation, by the incorporator or incorporators.

(c) Thereafter, the board of directors shall have the power to alter, amend or repeal the by-laws, and to adopt new by-laws, unless such power is expressly reserved to the shareholders by the articles of incorporation.

(d) The articles of incorporation may exclusively vest in the shareholders the power to adopt, amend and repeal the by-laws generally or a particular by-law or class of by-laws. Even though no such power is reserved to and vested in the shareholders, the holders of shares entitled to vote to elect directors may amend or repeal a by-law adopted by the directors, in which case the directors may not, for two (2) years thereafter, amend or readopt the by-law thus amended or repealed by the shareholders.

(e) Action by the incorporators or directors with respect to by-laws shall be taken by a vote of a majority of those voting thereon, and action by the shareholders with respect to by-laws shall be taken by a vote of a majority of shares voting thereon, unless this Act or the articles of incorporation shall require such action to be taken by a greater number of incorporators, directors, or shareholders.

(f) Any notice of a meeting of the incorporators, directors, or shareholders at which by-laws are to be adopted, amended or repealed shall include notice of such proposed action; when the initial by-laws are to be adopted, it shall be sufficient for the notice to so state; subsequent to the adoption of the initial by-laws, notice of a meeting at which by-laws are to be adopted, amended or repealed shall either set out the text of the proposed new by-law, amendment, or by-law to be repealed, or shall summarize the changes to be effected by such adoption, amendment or repeal.

Comment

Subsection (a)

The first sentence is substantially identical to the last sentence of MBCA § 25. New York, McKinney's Business Corporation Law § 601(c) and Illinois S.H.A. ch. 32, § 157.25 are the same in substance. It is intended to make it clear that, in addition to matters which may be specifically mentioned in the statute as appropriate for by-laws, any other provision may be included.

The second sentence is intended to make it clear that the articles of incorporation may be expanded to include matters otherwise appropriate for treatment in the by-laws. Neither Illinois nor New York has this expressly.

This provision is integrally related to the scheme of this proposed statute, the MBCA, and most other modern corporation laws: the articles of incorporation may be treated as analogous to a constitution, which may be changed only with relative difficulty; the by-laws are analogous to statutes, which may be changed with relative ease by the more limited governing body, the directors. Although many matters, for example meeting dates and quorum requirements, are usually put in the by-laws so that they may be readily changed, there should be no doubt that the same matters may be put in the articles of incorporation, thereby insulating them from change except by the more difficult procedure for amendment of the articles.

Subsection (b)

This is identical to the first sentence of MBCA § 25, except for the optional reservation of right in the shareholders. Illinois does not mention initial by-laws; New York, McKinney's Business Corporation Law § 601 (a) provides they are adopted by the incorporators. Now modified to follow Delaware optional Procedure; see 8 Del.C. § 109; this Act § 4–7.

Subsection (d)

The first sentence makes clear what is implicit in the preceding subsections, that the power to make by-laws may be reserved exclusively to the shareholders.

The second sentence preserves, in modified form, a feature of present Maine law, 13 M.R.S.A. § 145; shareholder power to override the directors on by-laws. Under present law, the power to make and alter by-laws is in the shareholders unless expressly vested in the directors; this draft changes that so as to vest the power in the directors unless reserved to the shareholders. In the interest of philosophical "shareholder democracy", the shareholders are nevertheless given a power to override or veto director-adopted by-laws. It is difficult to believe that this power will be exercised in a significant number of cases, particularly considering the vote requirement in subsection (e). Illinois is similar, only lacking some of the detail here; New York is just the opposite with the power to make and alter the by-laws vesting in the shareholders unless expressly vested in the directors.

Subsection (e)

This imposes a more stringent requirement than a mere majority of those voting or attending the meeting, and is intended to prevent a minority group from taking such serious action through the inattention of the majority.

General Comment

This by-laws section substantially changes present Maine law by eliminating an enumeration of possible provisions of the by-laws. This is intentional; it is intended to provide generally that any matter concerning the internal management of the corporation may be covered by by-laws, as is set forth in subparagraph (a). However, in the sections which follow, certain specific matters are mentioned as to which by-laws will usually be adopted; even in

those cases, however, provision usually will be made for a general rule in the absence of a by-law to the contrary.

Similarly, the proposed section deviates substantially from MBCA § 25 by supplying greater detail as to various rights of amendment, etc. Illinois has no comparable provisions to (e) and (f) while New York is very similar with a few minor exceptions. *E. g.*, New York generally does not have to include notice of the proposed change unless the shareholder meeting is called specially, or a by-law regulating an impending election of directors is up for change. (McKinney's Business Corporation Law § 605).

§ 6–2. By-laws and other powers in emergency

(a) The board of directors of any corporation may adopt emergency by-laws, subject to repeal or change by action of the shareholders, which shall, notwithstanding any different provision elsewhere in this Act or in the articles of incorporation or by-laws, be operative during any emergency in the conduct of the business of the corporation resulting from an attack on the continental United States or any nuclear or atomic disaster. The emergency by-laws may make any provision that may be practical and necessary for the circumstances of the emergency, including provisions that:

(1) A meeting of the board of directors may be called by any officer or director in such manner and under such conditions as shall be prescribed in the emergency by-laws;

(2) The director or directors in attendance at the meeting, or any greater number fixed by the emergency by-laws, shall constitute a quorum; and

(3) The officers or other persons designated on a list approved by the board of directors before the emergency, all in such order of priority and subject to such conditions, and for such period of time (not longer than reasonably necessary after the termination of the emergency) as may be provided in the emergency by-laws or in the resolution approving the list, shall, to the extent required to provide a quorum at any meeting of the board of directors, be deemed directors for such meeting.

(b) The board of directors, either before or during any such emergency, may provide, and from time to time modify, lines of succession in the event that during such an emergency any or all officers or agents of the corporation shall for any reason be rendered incapable of discharging their duties.

(c) The board of directors, either before or during any such emergency, may, effective in the emergency, change the head

office or designate several alternative head offices or regional offices, or authorize the officers so to do.

(d) To the extent not inconsistent with any emergency by-laws so adopted, the by-laws of the corporation shall remain in effect during any such emergency and upon its termination the emergency by-laws shall cease to be operative.

(e) Unless otherwise provided in emergency by-laws, notice of any meeting of the board of directors during any such emergency may be given only to such of the directors as it may be feasible to reach at the time and by such means as may be feasible at the time.

(f) To the extent required to constitute a quorum at any meeting of the board of directors during any such emergency, the officers of the corporation who are present shall, unless otherwise provided in emergency by-laws, be deemed, in order of rank and within the same rank in order of seniority, directors for such meeting.

(g) No officer, director or employee acting in accordance with any emergency by-laws shall be liable except for willful misconduct. No officer, director or employee shall be liable for any action taken by him in good faith in such an emergency, in furtherance of the ordinary business affairs of the corporation, even though not authorized by the by-laws then in effect.

(h) If emergency by-laws have not been adopted by a corporation, action taken in good faith by its shareholders, directors, officers, and employees during any such emergency shall be valid if it is substantially in compliance with this section, or if it is otherwise reasonably necessary and practical for the emergency operation and management of the business.

Comment

This is identical to MBCA § 25A, except for (h), which was added.

For a background discussion on the reason for such provisions, see Gibson, Corporate Management Under Nuclear Attack, 17 Business Lawyer 249 (1962).

Despite one's pessimism about the possible mootness of such a provision if its essential precondition comes into operation, many major business corporations are in fact taking steps to assure some continuity of business by placing essential records on microfilm which is stored in bomb-proof vaults, etc.

The provision hurts no corporation; it is a benefit for those corporations which elect to make contingency plans.

Illinois has a similar provision, S.H.A. ch. 32, § 157.25a; New York authorizes emergency by-laws, McKinney's Business Corporation Law § 201(11).

§ 6–3. Meetings of shareholders; when held; how called

(a) Meetings of shareholders shall be held at such place as may be specified by or in the manner provided for in the by-laws, consistent with the articles and this Act. In the absence of any such provision, all meetings shall be held at the registered office of the corporation. The articles of incorporation may provide that meetings may be held outside this State, either generally or at specified places outside this State; in the absence of any such provision in the articles, all meetings of the shareholders shall be held within this State.

(b) A meeting of shareholders shall be held annually for the election of directors and the transaction of other business on a date specified in the by-laws. A failure to hold the annual meeting at the designated time or to elect a sufficient number of directors to conduct the business of the corporation shall not affect otherwise valid corporate acts or work a forfeiture or dissolution of the corporation.

(c) If there shall be a failure, for whatever reason, to hold the annual meeting for a period of thirty (30) days after the date for such meeting specified in the by-laws, or if no date has been specified, for a period of thirteen (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 shareholders.

(d) Special meetings of the shareholders may be called by any one of the following:

(1) The president;

(2) The chairman of the board of directors;

(3) A majority of the board of directors;

(4) The holders of not less than ten per cent (10%) of the shares entitled to vote at the meeting, unless the articles of incorporation or by-laws provide for a smaller percentage or unless any section of this Act otherwise provides; or

(5) Such other officers or persons as may be provided in the articles of incorporation, or in the by-laws.

Comment

(a) is same as first paragraph of MBCA § 26.

(b) is same as second paragraph of MBCA § 26, with some elaboration.

(c) is added, based on South Carolina § 12–16.3.

(d) is substantially the same as third paragraph of MBCA § 26, with some minor additions.

Illinois is similar except it does not make provision for failure to hold annual meeting. Also as to d(4), Illinois requires 20% as compared to 10%. (S.H.A. ch. 32, § 157.26). New York is practically the same with less elaboration on the (d) subsections. (McKinney's Business Corporation Law § 603).

§ 6–4. Notice of shareholders' meetings

(a) Written notice stating the place, day and hour of the meeting and, in case of a special meeting or when otherwise required by this Act, the purpose or purposes for which the meeting is called, shall be delivered not less than seven (7) nor more than fifty (50) days before the date of the meeting, either personally or by mail, by or at the direction of the president, the secretary, or the officer or persons calling the meeting, to each shareholder of record entitled to vote at such meeting. If mailed, such notice shall be deemed delivered when deposited with postage prepaid in the United States mail, addressed to the shareholder at the address appearing on the stock transfer books of the corporation.

(b) Upon written request transmitted in person or by registered or certified mail to the president or secretary by any person entitled under subsection (c) or (d) of § 6–3 to call a meeting of shareholders, such officer shall deliver to the shareholders entitled thereto notice, as provided by this section, of a meeting to be held on a date fixed by such officer, which date shall not be less than seven (7) nor more than fifty (50) days after receipt of such request. If notice of the meeting is not given within fifteen (15) days after transmission of the request therefor to the president or secretary, the person or persons calling the meeting may fix the time of meeting and give or cause to be given notice thereof as provided by this section.

(c) An affidavit of the officer designated under subsection (a) 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.

(d) When a meeting is adjourned, for whatever reason, for thirty (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 thirty (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, unless a new record date is fixed for the adjourned meeting. 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

(a) is the same as MBCA § 27, with an addition to cover the cases where notice of specific propositions must be given, even for annual meetings.

(b) and (d) are added, based on South Carolina § 12–16.4.

(c) is added based on New York McKinney's Business Corporation Law § 605(a).

Both Illinois (S.H.A. ch. 32 § 157.27) and New York McKinney's Business Corporation Law § 605) are practically the same in effect, Illinois differing only in the time period in which notice should or can be sent (10–40 or 20–40 in case of merger or consolidation).

Note: Notice may, of course, be waived expressly or by implication; See § 6–5.

§ 6–5. Waiver of notice and call

(a) Notice of a meeting of shareholders need not be given to any shareholder who signs a waiver of notice, in person or by proxy, either before or after the meeting. Unless required by the by-laws, neither the business transacted nor the purpose of the meeting need be specified in the waiver.

(b) Such signed waiver of notice shall also constitute a waiver of formal call of the meeting.

(c) Attendance of a shareholder at a meeting, in person or by proxy, shall of itself constitute waiver of notice and call, and of any defects therein, except when the shareholder attends a meeting solely for the purpose of stating his objection, at the beginning of the meeting, to the transaction of any business on the ground that the meeting is not lawfully called or convened, or that insufficient notice thereof was given.

(d) In the case of specific items of business which this Act, the articles or the by-laws require to be specifically mentioned in the notice of meeting, attendance of a shareholder at a meeting shall also constitute a waiver of such specific notice, and of any defect or deficiency therein, unless the shareholder (1) states his objection to the transaction of that item of business, on the ground of insufficiency of notice thereof, when the item of business is first brought before the meeting, and (2) refrains from voting on such item of business.

Comment

Based on South Carolina § 12–16.5.

(a) is similar to MBCA § 137 and Illinois S.H.A. ch. 32, § 157.-145.

(d) was added by draftsman.

New York is practically the same less provision (d). (McKinney's Business Corporation Law § 606).

Cross-reference: § 6–20, informal or irregular action.

This section is designed primarily to establish the waiver against individual shareholders.

§ 6–20 establishes the validity of the corporate action.

§ 6–6. Fixing record date for determining shareholders

(a) For the purpose of determining shareholders entitled to notice of or to vote at any meeting of shareholders or any adjournment thereof, or entitled to receive payment of a dividend or other distribution, or in order to make a determination of shareholders for any other proper purpose, the board of directors may, in accordance with the by-laws or by resolution in the absence of an applicable by-law, fix in advance a record date for any such determination of shareholders. Such date shall not in any case be more than fifty (50) days and, in the case of a meeting of shareholders, not less than seven (7) full days, prior to the date on which the particular action, requiring such determination of shareholders, is to be taken.

(b) If no record date is fixed for determination of shareholders entitled to notice of or to vote at a meeting of shareholders, or shareholders entitled to receive payment of a dividend or other distribution, the date on which notice of the meeting is mailed, or the date on which the resolution of the board of directors declaring such dividend is adopted, as the case may be, shall be the record date for determination of shareholders.

(c) If a meeting of the shareholders is called by any person entitled to do so pursuant to § 6–3(c) or (d), and if the directors fail or refuse to fix a record date for the purpose of determining shareholders entitled to notice of and to vote at such meeting, then the persons calling such meeting may fix a record date in accordance with subsection (a) of this section.

(d) If the by-laws so provide, the directors may, in lieu of fixing a record date as provided in subsection (a), close the stock transfer books for a stated period. Such period shall not in any case exceed fifty (50) days and, in case of a meeting of share-

holders, the books shall be closed for at least seven (7) full days immediately preceding the date of such meeting.

(e) When a meeting of the shareholders is adjourned for less than thirty (30) days, the determination of shareholders entitled to vote at the original meeting, made as provided in this section, shall apply to the adjourned meeting unless the directors fix a new record date for such adjourned meeting in accordance with subsection (a) and cause new notice of the adjourned meeting to be given as for an original meeting. When a meeting of the shareholders is adjourned for thirty (30) days or more, a new record date shall be fixed for the adjourned meeting in accordance with subsection (a).

Comment

Substantially the same as South Carolina § 12–16.6.

(a) (b) (d) and (e) are substantially the same as MBCA § 28, except that the alternate procedure of closing the stock transfer books is relegated to a secondary alternative in (d); a record date is the more modern procedure and should be the first alternative.

By means of (c), along with § 6–4(c), persons making a call are given power to make it fully effective, thereby eliminating the need for judicial intervention. Thus, there is no equivalent for 12 M.R.S.A. § 102.

New York (McKinney's Business Corporation Law § 604) and Illinois (S.H.A. ch. 32, § 157.29) are very similar, New York not including (c) and (d) and Illinois not including (c). Illinois differs only in the time periods (10–40, or 20–40 in mergers or consolidations) and New York when no record date is fixed, sets the date for shareholders entitled to notice or to vote at the close of business on the day *next preceding* the day on which notice is given; or if no notice is given, the day on which the meeting is held. For any purpose other than that mentioned, it is set at close of business on the day on which the resolution of the board is adopted.

§ 6–7. List of shareholders entitled to vote at meeting

(a) The officer or agent having charge of stock transfer books for shares of a corporation shall, in advance of each meeting of shareholders, prepare a complete list of the shareholders entitled to vote at that meeting of shareholders and any adjournment thereof. Such list shall be arranged in alphabetical order, with the address of and the number of shares held by each shareholder. The requirement of a list may be satisfied by a card index showing the required information and alphabetically ar-

ranged; and the list may be classified by classes and series of stock held.

(b) For a period commencing upon the record date or the date when the stock transfer books are closed and in no event less than seven (7) days prior to the date of the meeting, such list of shareholders shall be kept on file at the office of the clerk of the corporation, and at the office of its transfer agent or registrar, if any, and shall be subject to inspection by any shareholder at any time during usual business hours.

(c) The list required by subsection (a) shall also be produced and kept open at the time and place of the meeting and shall be subject to the inspection of any shareholder during the whole time of the meeting.

(d) The original stock transfer books shall be prima facie evidence as to the shareholders who are entitled to examine the list required by subsection (a) or the transfer books or to vote at any meeting of shareholders.

(e) Failure to comply with the requirements of this section shall not affect the validity of any action taken at any meeting.

(f) If the requirements of this section have not been substantially complied with, the meeting shall, on the demand in person or by proxy of any shareholder who sought to inspect the required list, be adjourned until the requirements are complied with.

Comment

(a) and (b) are analogous to MBCA § 29, first paragraph; (e) is identical to the second paragraph of MBCA § 29.

There is no equivalent of the third paragraph of MBCA § 29 or Illinois S.H.A. ch. 32, § 157.3a, providing for damages for a stockholder in case of violation; but see § 6–26, providing generally for a remedy in case inspection is refused.

Added to the MBCA are the requirements that the list be open in advance of the meeting, the evidentiary provision (d), and the remedy of adjournment (f). Based on South Carolina § 12–16.7. Clerk provision added to conform to Maine practice. New York (McKinney's Business Corporation Law § 607) only provides that a voting list of shareholders entitled to vote is available and that the list is used as a check when anyone's right to vote is challenged. Illinois (S.H.A. ch. 32, § 157.32) is substantially the same with the exception of a damages clause subjecting the officer or agent in charge of maintenance of the list to liability for failure to maintain as required.

§ 6–8. Quorum of shareholders

(a) (1) Unless otherwise provided in the articles of incorporation, a majority of the shares entitled to vote thereat shall constitute a quorum at a meeting of shareholders; when a specified item of business is required to be voted on by a class or classes, a majority of the shares of each such class or classes shall constitute a quorum for the transaction of such items of business.

(2) The articles may specify a quorum requirement of less than a majority, but in no event may a quorum consist of less than one-third of the shares entitled to vote.

(3) The articles of incorporation may require any greater number or percentage than a majority, and may require unanimous attendance, to constitute a quorum.

(b) In the absence of a quorum, any meeting of shareholders may be adjourned from time to time by vote of a majority of the shares present.

(c) The shareholders 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 shareholders to leave less than a quorum.

(d) Shares shall not be counted towards a quorum for a meeting of shareholders if voting of such shares has been enjoined or if for any reason they may not lawfully be voted at such meeting.

(e) Failure or refusal of a shareholder to attend a meeting of shareholders shall in no event estop or bar such shareholder from challenging any action taken at such meeting on the ground that the meeting was improperly called, that a quorum was not present, or on any other legitimate ground.

Comment

(a) is substantially the same as MBCA § 30 (excluding the vote requirement provision in § 30), and Illinois S.H.A. ch. 32, § 157.31.

(b)–(d) are based on South Carolina § 12–16.8, and would seem to codify common law principles.

(e) is added to prevent a decision like that in Gearing v. Kelly, 11 N.Y.2d 201, 182 N.E.2d 391 (1962), in which a stockholder-director was held foreclosed from challenging an election because one associated with her deliberatedly prevented a quorum.

Except for (d) and (e) New York is the same (McKinney's Business Corporation Law § 608). It also provides in a separate action (§ 616) that the by-laws or articles may vary the requirement.

§ 6–9. Voting inspectors

(a) Except as provided in subsection (b), the clerk of the corporation, or in his absence the secretary or an assistant secretary of the corporation, or a person elected by a meeting as its temporary secretary, shall act as voting inspector at each meeting of the shareholders.

(b) The by-laws may provided that the holder of some other office, or that some other person or persons, shall be the voting inspectors; or the by-laws may specify how voting inspectors shall be designated. Unless the by-laws otherwise provide, the person presiding at a meeting may designate the person or persons, whether or not including one of the officers named in subsection (a), as the voting inspectors for that meeting.

(c) The inspectors shall determine the number of shares outstanding and the voting power of each, the shares represented at the meeting, the existence of a quorum and the authenticity, validity and effect of proxies; they shall receive votes, hear and determine all challenges and questions arising in connection with the right to vote, count and tabulate all votes, determine and announce the result, and otherwise see that the vote or election is conducted with fairness to all shareholders.

(d) Upon request of the person presiding at the meeting or of any shareholder entitled or claiming to be entitled to vote thereat, the inspectors shall report in writing on any challenge, question, or matter determined by them and execute a certificate of any fact found by them.

(e) Any report or certificate made by the inspectors shall be prima facie evidence of the facts stated therein and of the vote as certified by them.

Comment

Based on South Carolina § 12–16.17, modified to use Maine clerks.

New York is similar, McKinney's Business Corporation Law §§ 610 and 611.

Illinois has no comparable.

§ 6–10. Definition of vote

(a) The term "vote" as used in this chapter with respect to action of shareholders of a corporation, shall include, without limitation, votes, waivers, releases, consents, writings signed by shareholders in lieu of taking action at a meeting of shareholders, and objections or dissents to the foregoing.

(b) The principles applicable to determination of shareholders or representatives of shareholders entitled to vote shall apply, so far as possible to (1) ascertaining the presence of a quorum at a meeting of shareholders, and (2) determining the shareholders or representatives of shareholders entitled to give a proxy to vote.

Comment

Same as South Carolina § 12–16.9.

Not in MBCA, New York or Illinois.

§ 6–11. Required vote of shareholders

(a) Except to the extent that the vote of a greater number of shares or voting by classes of shares is required by this Act or by the articles of incorporation, at any meeting of shareholders which has been duly called, or notice and call of which has been unanimously waived, and at which a quorum is present,

(1) Any corporate action shall be authorized by a majority of the votes cast at the meeting by the holders of shares entitled to vote on the subject matter;

(2) In elections of directors, those candidates who receive the greatest number of votes cast at the meeting by the holders of shares entitled to vote to elect directors, even though not receiving a majority of the votes cast, shall be deemed elected.

(b) The articles or by-laws may require a vote greater than a majority, and may require a unanimous vote, either as to specific issues or as to all issues which may come before the shareholders.

Comment

(a) based on South Carolina § 12–16.10. Note that the requirement is given in terms of votes *cast*, whereas MBCA § 30 speaks of a majority of shares *represented at the meeting*. While abstentions are rare, it seems better to remove them from the category of implied negative votes.

(b) is added for clarity, compare MBCA § 136.

New York similar; McKinney's Business Corporation Law §§ 614 and 616(b); Illinois S.H.A. ch. 32, § 146 is similar to (b).

§ 6–12. Qualification of voters

(a) Each outstanding share, regardless of class, shall entitle the holder thereof to one vote on each matter, submitted to the

shareholders, except as otherwise provided in this Act, or in the articles of incorporation as permitted by this Act.

(b) The articles of incorporation may, either absolutely or conditionally, deny or limit the voting rights of, or provide special voting rights for, or otherwise define the voting powers of, any designated class or classes of shares.

(c) The articles of incorporation may specify that any class or classes of shares or any series thereof shall vote as a class or series in connection with the transaction of any business or of any specified item of business at a meeting of shareholders, including amendments to the articles of incorporation.

(d) The articles of incorporation may grant, either absolutely or conditionally to the holders of bonds, debentures or other obligations of the corporation, the power to vote on specified matters, including the election of directors. Such power shall not be terminated except upon written assent of the holders of two-thirds (⅔) in aggregate face amount of the bonds or debentures. When such power has been granted to holders of obligations of a corporation, the term "*shareholder*" whenever used in this Act, shall include holders of such obligations, to the extent necessary to give effect to their voting power so granted.

Comment

Based on South Carolina § 12–16.11.

(a) is same as first paragraph of MBCA § 30.

(b) and (c) merely elaborate on previous authorization for such provisions, § 5–1.

(d) codifies common practice.

Illinois S.H.A. ch. 32, § 157.28 and New York McKinney's Business Corporation Law § 612(a) are similar to (a); (b), (c) and (d) are not expressly stated, but implicit in enumeration of possible provisions of articles.

§ 6–13. Voting by corporations, fiduciaries, and others

(a) Except when held by the corporation in a fiduciary capacity, no corporation shall directly or indirectly vote any shares issued by it including, without limitation, (1) treasury shares and (2) shares held by another corporation if a majority of the shares entitled to vote for the election of directors of such other corporation is held by the corporation. No shares so disqualified from voting shall be counted in determining the total number of outstanding shares at any given time.

(b) Shares standing in the name of another domestic or foreign corporation of any type or kind (referred to in this sub-

section as the "shareholder-corporation") may be voted by the officer, agent, or proxy designated by the by-laws of the shareholder-corporation; or, in the absence of any applicable by-law, by such person as the board of directors of the shareholder-corporation may designate. The chairman of the board, president, any vice-president, secretary, and treasurer of the shareholder-corporation shall be presumed to possess, in that order, authority to vote such shares, unless prior to such vote it appears by a certified copy of the by-laws or other instrument of the shareholder-corporation that such authority does not exist or is vested in some other officer or person. In case of conflicting representation of the shareholder-corporation, the shares shall be voted by the senior officer, in the order stated.

(c) Any fiduciary may vote shares which stand of record in his name, and a corporate fiduciary may, without limitation, vote its own shares held by it in a fiduciary capacity.

(d) Shares held by an executor, administrator, guardian, committee, or conservator may be voted by him upon proof of his appointment, without transfer of such shares into his name. Any other fiduciary, upon proof satisfactory to the corporation of his authority to vote, may vote shares which stand of record in the name of the person for whom he is such fiduciary.

(e) A minor may vote shares which stand of record in his name, and may not thereafter disaffirm or avoid such vote.

(f) Shares held by a person as custodian for a minor under the Maine Uniform Gifts to Minors Act (Title 33 M.R.S.A., chapter 19) or a similar act of any other state may be voted by the custodian subject to applicable provisions of that act.

(g) Shares held by or under the control of a trustee in bankruptcy, or receiver or liquidator, may be voted by him without the transfer thereof into his name if authority to do so is conferred by statute or is authorized by the court which appointed such receiver or trustee. An assignee for the benefit of creditors may vote shares standing in the name of the assignor, unless otherwise provided in the instrument of assignment.

(h) A shareholder whose shares are pledged shall be entitled to vote such shares until the shares have been transferred on the records of the corporation into the name of the pledgee or a nominee of the pledgee, and thereafter the pledgee shall be entitled to vote the shares so long as they stand of record in the pledgee's name.

(i) Shares standing in the name of a partnership may be voted by any partner and shares standing in the name of a limited partnership may be voted by any general partner.

(j) Shares standing in the name of a person as life tenant may be voted by him.

(k) Redeemable shares which have been called for redemption shall not be entitled to vote on any matter nor be deemed outstanding shares on and after the date on which written notice of redemption has been sent to holders thereof and a sum sufficient to redeem such shares has been deposited with a bank or trust company with irrevocable instructions and authority to pay the redemption price to the holders of the shares upon surrender of certificates therefor.

Comment

Subparagraph (a) includes the substance of the second paragraph of MBCA § 31. This subsection presents two problems which require some discussion:

1—The basic proposition of subsection (a) is that a corporation's management should not be able to use the corporation's ownership of its own shares to perpetuate themselves in office. As to directly owned shares (*i. e.*, treasury shares), this is simply resolved. The problem arises when the parent-corporation (P) controls a subsidiary (S), which in turn owns shares of P. Can the S-owned shares in P be voted?

If P genuinely controls S, S should not be permitted to vote its shares in P, because the S votes are controlled by P's management, and may be used to perpetuate themselves in control. In this proposed statute, an objective test of "majority ownership" is used for disqualification from voting, rather than "control".

For a discussion of the problem, see The Voting of Stock Held in Cross Ownership, 76 Harv.L.R. 1642 (1963), which questioned the fairness of the formula forbidding voting of shares of P held by S only if P owns more than a majority of the voting shares of the subsidiary (this draft and MBCA § 31, par. 2). The comment considers the formula "overly permissive" contending that "control of a subsidiary can often be obtained by less than a majority of shares". It goes on to state that "as little as ten per cent is enough to control it." A parent may also have "working control" through a combination of its shares and its director's personally owned shares in S.

If the test were to be changed to meet this problem, the formula would have to be subjective. Whether a subjective test is feasible within a corporation statute is a matter of policy. The English Companies Act employs a subjective test to determine the amount of control the parent has over the subsidiary. If a company is subsidiary it is subject to the ban on "cross ownership". A company is a subsidiary if "either the appointment or removal of a majority of . . . [its] board of directors" is controlled by the parent

company. (English Companies Act, 1948, 11 & 12 Geo. 6, c. 38, § 154.)

The comment also stated that total disenfranchisement of the minority or outside stockholders of the subsidiary would be unfair, suggesting that the courts pass the voting rights in some manner directly through to the subsidiary's outside shareholders. This obviously is subject to many practical problems in carrying out the remedy.

In view of the difficulties, the objective "majority ownership" test is used, to furnish a clear guide for voting inspectors. But the general ban on voting any shares indirectly owned, and the fiduciary duty of the directors, would furnish a basis for equitable relief in case of abuse.

2—The second problem is the corporate fiduciary. What happens when a trust company holds, in a trust or estate, shares in itself; may it vote the shares registered to it as trustee or executor? It would seem that this should be permitted. If the vote is used for an improper purpose, the fiduciary capacity of the trust company should make it relatively easy to secure a remedy.

Illinois (S.H.A. ch. 32, § 157.-28), Wisconsin (W.S.A. 180.25 (2)), and Oklahoma (18 Okl.St. Ann. § 1.65(b)) broadly permit voting of fiduciary owned shares. Kentucky permits it also by decisional law; Graves v. Security Trust Co., 369 S. W.2d 114 (Ky.1963).

Virginia permits it but requires a second independent fiduciary (§ 13.1–32), and North Carolina similarly requires a court to appoint an independent and disinterested trustee on a showing of necessity for voting the shares (§ 55–67b).

One commentator states that "if a restriction is in order it would seem best simply to create a co-trustee or, perhaps two co-trustees who would then have a majority vote. Falk, Corporation Statutes, 1966 Duke Law Journal 875, 919.

2(b): This is in substance the same as the fifth paragraph of MBCA § 31, but considerably elaborated in order to resolve possible conflicts.

(d) is largely the same as the sixth paragraph of MBCA § 31, except that the latter provides that no trustee shall be entitled to vote without a transfer of shares into his name, whereas this draft proposes that any fiduciary be entitled to vote upon proof of his authority to do so.

(e) clarifies a point as to which the law is now uncertain.

(g) is largely the same as the seventh paragraph of MBCA § 31.

(h) is the same as the eighth paragraph MBCA § 31.

(i) and (j) are added for clarification.

(k) is substantially the same as the last paragraph of MBCA § 31.

New York (McKinney's Business Corporation Law §§ 612,

625) and Illinois (S.H.A. ch. 32, §§ 157.28 and 157.30) have substantially similar statutes. Neither have provisions similar to (i) and (j).

§ 6–14. Voting, execution of proxies and other action as to shares owned jointly

If two or more persons take or are permitted or required to take action with respect to the same shares, including, but not limited to,

(a) Fiduciaries who have the same fiduciary relationship to the same shares;

(b) Holders of record of the same shares, including but not limited to joint tenants and tenants in common;

(c) Shareholders who execute or are to execute proxies as to the same shares;

then, whenever shares are voted, proxies are executed, or other action is taken,

(1) By one of such persons, his act shall bind all;

(2) By more than one of such persons, the act of a majority of those acting shall bind all;

(3) By more than one of such persons but there is an even division among those acting, each fraction shall be entitled to vote or otherwise act proportionally, unless the agreement, order of court, or other instrument which created such joint power shall provide otherwise.

Comment

Based on South Carolina § 12–16.13.

This frees the corporation of uncertainty and litigation in relying on the act of less than all.

New York McKinney's Business Corporation Law § 612 has practically the same provision though less detailed. Also North Carolina § 55–69(f) and Ohio § 1701.46(E) have provisions to the same effect. Illinois has no similar provision.

§ 6–15. Proxies and irrevocable proxies

(a) Every shareholder entitled to vote may do so either in person or by proxy. Executors, administrators, guardians, receivers, trustees and all other fiduciaries, agents and representatives may give proxies whenever they would be entitled to vote in person. The appointment of one or more agents to vote on

behalf of the shareholder shall be by a written proxy executed by the shareholder or by his duly authorized attorney-in-fact; a telegram or cablegram appearing to have been transmitted by the shareholder shall satisfy this requirement.

(b) No proxy shall be valid after eleven months from the date of its execution, unless otherwise expressly and conspicuously provided in the proxy. Every proxy, except as otherwise provided in this section or by operation of law, shall be revocable at the pleasure of the person executing it; and a proxy may be revoked, without limitation, by an istrument which in terms revokes the proxy, or by a duly executed proxy subsequent in time. The authority of a proxyholder shall not be revoked by death or supervening incapacity of the shareholder executing the proxy unless, before such authority is exercised, written notice of such death or incapacity is filed with the corporate officer responsible for maintaining the list of shareholders. The presence at a shareholders' meeting of the shareholder appointing a proxy shall not of itself revoke the proxy, but such shareholder may revoke the appointment by giving notice to the corporate officer responsible for maintaining the list of shareholders, or by giving notice in open meeting of the shareholders.

(c) Unless a proxy otherwise specifically provides, any proxyholder shall have the power to appoint in writing a substitute to act in his place.

(d) No proxy shall be solicited by means of any proxy statement, form of proxy, notice of meeting, or other communication, written or oral, containing any statement which was, at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact or which omitted to state any material fact necessary in order to make the statements therein not false or misleading.

(e) A proxy which specifically and conspicuously states that it is irrevocable, shall be irrevocable when it is held by any of the following or by a nominee of any of the following:

(1) the holder of a security interest (as defined in Title 11 M.R.S.A. § 1–201) in the shares which are the subject of the proxy;

(2) a person who has contracted to purchase the shares which are the subject of the proxy;

(3) a creditor or creditors of the corporation who extend or continue credit to the corporation in consideration of the proxy, if such proxy specifically states that it was given in consideration of such extension or continuation of

credit, and sets forth the amount of, and the name of the person extending or continuing credit;

(4) an officer of the corporation under an employment contract which required a proxy, if the proxy states that it was given in consideration of the contract, the name of the employee, and the period of employment contracted for;

(5) a person, including an arbitrator, designated by or under a shareholders' agreement as provided by § 6–17.

Any such proxy shall become revocable after the security interest terminates, or the contract of purchase has been performed and the purchaser has become a shareholder of record, or the debt of the corporation is paid, or the period of employment stipulated in the contract of employment has been terminated, or the agreement under § 6–17 has terminated.

(f) As between a proxyholder and a purchaser of shares, a proxy may be revoked, notwithstanding a provision making it irrevocable, by a purchaser of shares without knowledge of the existence of such provision, unless notice of the proxy and of its irrevocability is conspicuously noted on the face or back of the certificate representing such shares. The corporation and its officers and agents may in good faith give effect to an irrevocable proxy appearing on its face to conform to this section, notwithstanding a claim by the shareholder that it has validly been revoked.

(g) The foregoing provisions shall be applicable to proxies given by the holders of a corporation's bonds, debentures or other obligations where a right to vote is conferred upon such holders by the articles of incorporation as permitted by subsection (d) of § 6–12.

(h) The provisions of § 6–13 shall be applicable in determining persons entitled to give a proxy under this section.

(i) Nothing in this section shall be deemed to negate the power of a court, when required by law and equity, to construe an agreement not denominated as such as giving a proxy or irrevocable proxy.

Comment

The third paragraph of § 31 of MBCA contains a very brief reference to proxy voting. All of the substance of the MBCA is picked up in subsection (a) of this draft. Illinois S.H.A. ch. 32, § 157.28 is the same as MBCA.

But the MBCA provision is completely inadequate to solve the many problems which may arise with reference to proxies. The balance of the section, as drafted, seeks to resolve some of these problems.

This draft deliberately avoids the highly restrictive provisions concerning proxies which appear in some statutes; see, *e. g.*, South Carolina § 12–16.14. For example, it might be provided that all revocable proxies must expire after eleven months or a year from the date of issue; or that only the itemized classes of proxies may be irrevocable; or that even irrevocable proxies must expire at the termination of a given period of years.

There is common law to the effect that fiduciaries may not redelegate—and voting is, theoretically, an exercise of discretion. Even though the point is covered by subsection (h), therefore, it was felt that such common law should be negated expressly.

This draft adopts the philosophy that shareholders should be free to make proxies of such duration as they see fit; and that circumstances may arise in which a court may properly read irrevocability into a proxy, even though it is not so denominated and does not fall within one of the enumerated clauses. These circumstances will generally be analogous to the enumerated ones, will involve what has been called a proxy "coupled with an interest", and should arise only where the proxy-holder's interests coincide with the good of the corporation. See the discussion in Thomas, Comment, Irrevocable Proxies, 43 Tex.L.R. 773 (1965).

Subsection (d), however, imposes a new requirement analogous to that of the developing "Federal Corporation Law". It is believed that no reasonable objection can be raised to the prohibition against false or misleading proxy solicitations; since no other remedy is expressly stated, this would presumably give right, at most, to have the vote set aside at which the proxies so solicited were exercised.

Sub-paragraph (f) is inserted to give consistency with the approach of the Uniform Commercial Code.

New York McKinney's Business Corporation Law § 609 is similar in scope but does not have sections similar to (c), (d), (g), (h), and (i). New York merely states that proxies are revocable at pleasure as in (b) but does not state how it may be revoked. New York, like South Carolina, makes the enumerated classes of irrevocable proxies exclusive.

§ 6–16. Agreements or other provisions restricting transferability of shares

(a) Any agreement between two or more shareholders, if in writing and signed by the parties thereto, may impose reasonable restrictions upon the transferability of the shares held by one or more of the parties including, without limitation, the duty to offer such shares to one of the parties or his designee, at a fixed or ascertainable price, before selling them to any other person.

(b) The articles of incorporation of a corporation, or a by-law adopted by vote of its shareholders, may provide reasonable

restrictions on the transferability of its shares including, without limitation, the duty to offer the same to the corporation, or to its board of directors, or to both in succession, at a fixed or ascertainable price, before selling them to any other person. Such a provision of the articles shall apply uniformly to all shares of a class or series.

(c) Unless noted conspicuously on the face or back of the share certificates representing such shares, a restriction on transfer imposed either by agreement under subsection (a) or by the articles or by-laws under subsection (c) shall be ineffective except against a person who had actual knowledge of it at the time he acquired the shares. This subsection shall be construed in the light of Title 11 M.R.S.A. § 8-204, and the statutory definitions applicable thereto.

(d) Any such agreement or provision in the articles or by-laws restricting the transferability of shares may, but need not, include a procedure for arbitration concerning the value of such shares; and such provision, if included therein, shall be valid.

Comment

The general rule expressed in this section seems to accord with present Maine law. Searles v. Bar Harbor Banking & Trust Co., 128 Maine 34, 145 A. 391 (1929) was generally favorable to reasonable restrictions on the transferability of stock, if the stock was accepted subject to the restriction, on the basis of agreement (although not necessarily pursuant to by-laws). But the same case, by way of dictum, indicated that to be effective as a by-law, there must be express statutory authority authorizing such restrictions, and further held that statutes then in effect gave no such authority. It is, therefore, highly desirable to expressly grant this authority; and to go further and authorize side-agreements to this effect among less than all of the shareholders.

The requirement of notice on the certificate conforms to the Uniform Commercial Code, as indicated in the above text.

New York and Illinois have no comparable provisions.

§ 6-17. Agreements by shareholders respecting voting of shares

(a) An agreement between two or more shareholders, if in writing and signed by the parties thereto, may provide that in exercising any voting rights of shares held by the parties, including any vote with respect to directors, such shares shall be voted as provided by the agreement, or as the parties may agree, or as determined in accordance with a procedure agreed upon

by the parties including, without limitation, an arbitration procedure.

(b) When such an agreement specifies how the shares shall be voted, or provides a clear formula for ascertaining how the shares shall be voted, in case of a breach or anticipatory breach thereof by one or more parties thereto, the agreement shall, unless it specifically provides otherwise, be deemed to constitute an irrevocable proxy to the parties not in breach to vote all shares subject to the agreement in accordance with the terms of the agreement.

(c) When such an agreement provides for a procedure such as the appointment of an arbitrator or umpire in the event of dispute, unless the agreement expressly otherwise provides, it shall be deemed to constitute an irrevocable proxy to such arbitrator or umpire, to vote all shares subject to the agreement in accordance with his determination on the matters properly submitted to him under the terms of the agreement.

(d) No purchaser for value of shares subject to such an agreement shall be bound thereby if he purchased the same in good faith and without knowledge of the agreement, unless the agreement was conspicuously noted on the face or the back of the certificates representing such shares.

Comment

Illinois has no comparable provision while New York McKinney's Business Corporation Law § 620(a) just establishes that such agreements may be made as in (a) here.

Most of this section is new in this proposed statute.

§ 6–18. Agreements among shareholders respecting management of corporation and relations of shareholders

(a) No agreement among shareholders respecting the management and affairs of their corporation or the relations of shareholders among themselves shall be deemed invalid solely because the agreement purports to treat the affairs of the corporation as if it were a partnership and the shareholders as if they were partners.

(b) No written agreement, whether contained in the articles of incorporation or by-laws or in a written side agreement, and

which relates to any phase of the affairs of the corporation, including, but not limited to, the following:

(1) Management of the business of the corporation; or

(2) Declaration and payment of dividends or division of profits; or

(3) Who shall be officers or directors, or both, of the corporation; or

(4) Voting requirements, including requirements for unanimous voting of shareholders or directors; or

(5) Employment of shareholders by the corporation; or

(6) Arbitration of issues as to which the stockholders are deadlocked in voting power or as to which the directors are deadlocked and the shareholders are unable to break the deadlock,

shall be deemed invalid because the agreement contains any such provision, or because it limits or restricts the powers or discretion of the directors of the corporation, or because it transfers to one or more shareholders or to one or more persons or corporations to be selected by him or them all or part of the management of the corporation, if the following conditions are satisfied:

(1) Either (A) the agreement is set forth, or its existence is clearly referred to, in the articles of incorporation, and if in an amendment to the articles, such amendment was adopted by the unanimous vote of all outstanding shares, whether or not entitled to vote by the provisions of the articles; or (B) the agreement has been expressly assented to in writing by all shareholders of the corporation, whether or not entitled to vote; and

(2) Subsequent to the making of the agreement or its adoption in the articles or by-laws, shares are transferred or issued only to persons who have notice or actual knowledge thereof, or assent in writing thereto.

(c) To the extent that it contains provisions which would not be valid but for subsection (b), an agreement authorized by subsection (b) shall be valid only so long as no shares of the corporation are traded on any national securities exchange or regularly quoted in any over-the-counter market by one or more members of a national or affiliated securities association.

(d) The text of any agreement authorized by subsection (b) shall be set forth in full, or a conspicuous reference shall be made to the agreement, upon the face or back of each certificate for shares issued by the corporation.

(e) A transferee of shares in a corporation whose shareholders have entered into an agreement authorized by subsections (a) or (b) shall be deemed to have notice thereof if the text of the agreement was set forth, or if the agreement was conspicuously noted, on the face or back of the certificate for such shares when he took them.

(f) The effect of an agreement authorized by subsection (b) shall be to relieve the director or directors of, and to impose upon the shareholders consenting to the agreement, the liability for managerial acts or omissions that is imposed by law upon directors to the extent that and so long as the discretion or powers of the directors in their management of corporate affairs is controlled by any such provision.

Comment

Illinois has no comparable provision while New York McKinney's Business Corporation Law § 620 has substantially the same but in less detail. The draft proposed is based primarily on South Carolina § 12–16.22, with substantial modifications giving greater liberality, and to a lesser extent on New York McKinney's Business Corporation Law § 620.

Any arrangement the shareholders make for the affairs of the corporation should be valid *inter se*, so long as outsiders are not adversely affected.

A modification not considered or passed upon by the Committee, which would give even greater flexibility, would be to add a subsection reading:

> Even though the conditions set out in subsection (b) are not satisfied due to a lack of unanimous assent, any agreement of the sort mentioned in subsection (b) shall be valid and enforceable as between the parties thereto and the corporation, unless the operation thereof is affirmatively shown to be detrimental to the interests of other shareholders, or of creditors, who intervene in the action to enforce such agreement.

§ 6–19. Voting trusts

(a) Any shareholder or shareholders may create a voting trust, revocable or irrevocable, for the purpose of conferring upon a trustee or trustees the right to vote or otherwise represent their shares, for a period not exceeding twenty-one (21) years, by executing a written agreement specifying the terms and conditions of the voting trust, and by transferring the shares to such trustee or trustees for the purposes stated in the agreement. The certificates or shares so transferred may be

(1) surrendered by the trustee to the corporation which shall thereupon cancel the shares and issue new certificates

therefor to the trustee or trustees stating that they are issued under the voting trust agreement, or

(2) in lieu thereof, retained by the trustee.

In either case, the corporation shall specifically enter into its records the fact that such shares are subject to the voting trust agreement. In any case, trust certificates shall be issued by the trustees to the shareholders who transfer their shares in trust.

(b) A fully conformed copy of the voting trust agreement (including any amendments to or changes in the agreement) shall be deposited by the trustee at the corporation's registered office, and shall be subject to the same examination by a shareholder of the corporation as are the books and records of the corporation, and shall be subject to examination by any holder of a voting trust certificate, in person or by attorney or other agent, during normal business hours.

(c) The holder of a voting trust certificate shall be considered to be a shareholder of the shares represented by his trust certificate with respect to his right to inspect corporate books and records.

(d) At any time within one year before the expiration of a voting trust agreement as originally created or as extended under this subsection, one or more holders of voting trust certificates may, by agreement in writing, extend the duration of such agreement, nominating the same or substitute trustee or trustees, for an additional period not to exceed twenty-one (21) years from the date of such extension. Such extension agreement shall not affect the rights or obligations of persons not parties to the agreement, and such persons shall be entitled to remove their shares from the trust and promptly to have their share certificates reissued to them. The extension agreement shall comply with all provisions of this section applicable to the original voting trust agreement.

(e) The validity of a voting trust agreement, otherwise lawful, shall not be affected during a period of twenty-one (21) years from the date of its creation or extension, by the fact that by its terms it will or may last beyond such twenty-one-year period; but it shall, after the expiration of such twenty-one-year period, be inoperative.

(f) The trustee or trustees under a voting trust agreement shall, unless otherwise provided by the agreement, vote upon all matters which come before the shareholders including, without limitation, amendments of the articles and proposed mergers, consolidations, dissolution, sales of assets or reductions of stated capital of the corporation.

Comment

Same in substance as MBCA § 32, with some elaboration suggested by South Carolina § 12–16.16.

Both Illinois S.H.A. ch. 32, § 157.30a and New York McKinney's Business Corporation Law § 621 have substantially similar but shorter provisions. Also in New York the trustee is required to keep a copy of agreement and records available for examination.

Modified to allow 21 year life.

§ 6–20. Informal or irregular action by shareholders

(a) Action taken at any meeting of the shareholders, however called and with whatever notice, if any, shall be deemed action of the shareholders taken at a meeting duly called and held on proper notice, if:

(1) All shareholders entitled to vote at the meeting are present in person or by proxy, and no one objects, at the time and in the manner specified in § 6–5, to the holding of the meeting or the transaction of business thereat; or

(2) If a quorum is present either in person or by proxy, no one present objects, at the time and in the manner specified in § 6–5, to the holding of the meeting or the transaction of business thereat, and each absent shareholder entitled to vote at the meeting signs, either before or after the meeting, a written waiver of notice, or consent to the holding of the meeting, or approval of the action taken as shown by the minutes thereof. All such waivers, consents, and approvals shall be filed with the corporate records or made a part of the minutes of the meeting. The absence from the minutes of any indication that a shareholder objected to holding the meeting shall prima facie establish that no such objection was made.

(3) If a quorum is present either in person or by proxy, no one present objects, at the time and in the manner specified in § 6–5, to the holding of the meeting or the transaction of business thereat, each absent shareholder entitled to vote at the meeting receives actual knowledge of the actions taken at the meeting, and no such absent shareholder objects in writing, within seven (7) days after receiving such knowledge, to the actions so taken. Such objection shall be addressed to the president, the secretary or the clerk; and if mailed postage prepaid and properly addressed within the time specified above, shall be timely. The certificate of the

clerk that no such written objection was received shall be prima facie evidence that none was made.

(b) Any action required or permitted under this Act to be taken at a meeting of the shareholders may be taken without a meeting if written consents, setting forth the action so taken, are signed by the holders of all outstanding shares 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 shareholders and may be stated as such in any certificate or document required to be filed with the Secretary of State.

Comment

(b) is the same as MBCA § 138, Illinois S.H.A. ch. 32, § 157.-147 and New York, McKinney's Business Corporation Law § 615.

(a) is common law waiver rule, codified and clarified, based on South Carolina § 12–16.18.

New York, McKinney's Business Corporation Law § 615 also validates informal action where there are no shareholders of record, just subscribers or incorporators; note that in New York, incorporators adopt initial by-laws, while in this proposed statute that action is taken by the directors named in the articles.

Cross-reference:

§ 6–5, Waiver of notice and call.

§ 6–21. Judicial review of election of directors and appointment of officers

(a) Any shareholder or any director of a domestic corporation may initiate an appropriate action, including an action for declaratory judgment, to determine any controversy with respect to an election or appointment of a director or officer of the corporation. The action shall be brought in the Superior Court in the county in which the principal place of business or the registered office of the corporation is located in this State; or if it has neither, in the County of Kennebec.

(b) In any such action, process shall be served upon

(1) the corporation,

(2) the person whose title to office is contested,

(3) shareholders whose votes or right to vote are contested, and

(4) the person, if any, claiming the contested office;

for purpose of such action only, all such persons shall be deemed to have submitted to the jurisdiction of the courts of this State,

and process shall be served on them as provided by Rule of Court. The court may designate additional persons to be made parties or receive notice of the action.

(c) In any such action, the court may compel the production of books, papers, and records of the corporation relevant to the issue or issues presented. The court may, upon application, issue an interlocutory order restraining the directors or officers whose election or appointment is contested from acting, and may make such other order as the court may deem proper pending the determination of the matter in controversy.

(d) The cause shall be heard as expeditiously as possible, upon affidavits or oral testimony, as the court shall direct. Upon completion of the hearing, the court may:

(1) Declare the result of the contested election or appointment;

(2) Direct a new election or appointment, including in such order, if the court finds it appropriate,

(A) Provisions relating to the director or officer who shall hold the challenged office until a new election is held or appointment is made; and

(B) A provision appointing a special master to conduct any election ordered by the court;

(3) Determine the voting rights of shareholders and of persons claiming to own shares or otherwise entitled to vote;

(4) Determine alleged breaches of voting agreements under § 6–17 and agreements or arrangements made under § 6–18, and the remedy therefor; and

(5) Direct such other relief as may be just and proper.

Comment

Not in MBCA or in Illinois statutes; based on South Carolina § 1–16.19. New York, McKinney's Business Corporation Law § 619 is substantially the same.

Replaces present Maine provisions.

Note the terminology in (b) referring by implication to Rule 4 (e), Rules of Civil Procedure.

§ 6–22. Cumulative voting

The articles of incorporation may provide that there shall be cumulative voting for directors. If the articles expressly so provide:

(a) Each holder of shares entitled to vote at an election of directors shall have the right to as many votes as shall equal the

number of directors who are to be elected and for whose election he has a right to vote, multiplied by the number of shares owned by such holder. Each such shareholder may either give all of his votes, so computed, to one candidate, or he may distribute his votes on the same principle among any number of candidates.

(b) A shareholder who intends to cumulatively vote his shares as provided in subsection (a) shall either

(1) give written notice of such intention to the president or other officer of the corporation not less than forty-eight hours before the time fixed for the meeting, or

(2) announce his intention in such meeting before the voting for directors shall commence;

and all shareholders entitled to vote at such meeting shall without further notice be entitled to cumulate their votes. If a shareholder intending to cumulate his votes gives notice at the meeting, the person presiding may, and if requested by any shareholder shall, recess the meeting not to exceed two hours.

Comment

This conforms to the first alternative provision of MBCA § 31, fourth paragraph. It reflects the unanimous view of the drafting committee that cumulative voting should be permissible, but that it should neither be mandatory nor should there be a presumption in favor of it.

(b) is added, based on South Carolina § 12–16.20, and is designed to prevent surprise, and allow shareholders time to compute the most advantageous way to cumulate.

Both New York McKinney's Business Corporation Law § 618 and Illinois S.H.A. ch. 32, § 157.-28 have substantially similar provisions, lacking a provision such as (b); since cumulative voting is constitutionally required in Illinois, it is not comparable.

§ 6–23. Pre-emptive rights

(a) As used in this section,

(1) the term **"pre-emptive right"** means the the right of existing shareholders to acquire shares, securities, options, and rights as provided by this section, the articles of incorporation or the by-laws; and there shall be no other pre-emptive rights.

(2) the term **"shares of the same class"** includes shares, however designated, which will have either the same voting power as the existing shares, or an equal right to dividends, or both.

(b) The articles of incorporation may expand without limitation, exclude or limit any or all of the pre-emptive rights granted by this section. A statement in the articles that "there are no pre-emptive rights", or any words of like import, shall be sufficient to wholly exclude the rights provided for in this section.

(c) Except as otherwise provided in the articles of incorporation or in this section, the holders of shares of any class having voting rights under the articles shall, in the event of

(1) the proposed sale or exchange by the corporation of additional shares of the same class; or

(2) the grant by the corporation of any options or rights to purchase shares of the same class; or

(3) the proposed sale or exchange by the corporation of any securities convertible into or carrying an option to purchase shares of the same class,

have the right to acquire such securities, as nearly as practicable, in proportion to their holding of shares of such class. The pre-emptive right shall exist whether or not the shares which are to be sold or which are subject to any options or rights are authorized but unissued shares, treasury shares, or other shares. The price to each holder shall be no less favorable than the price at which such shares, securities, options, or rights are to be offered to other holders. The holders of shares entitled to the pre-emptive right, and the number of shares for which they have a pre-emptive right, shall be determined by fixing a record date in accordance with § 6–6.

(d) The holders of shares of any non-voting class may be granted the pre-emptive right if and to the extent that the articles of incorporation so provide.

(e) Except as otherwise provided in the articles of incorporation, if the corporation is a close corporation (as defined in this Act) at the time of the proposed sale or exchange of securities or issuance of options or rights, there shall be no pre-emptive right with respect to:

(1) Shares or other securities issued under a plan of reorganization approved in a proceeding under any applicable act of Congress relating to the reorganization of corporations under the supervision of a court;

(2) Shares or other securities issued to satisfy conversion or option rights previously granted by the corporation;

(3) Shares or other securities issued or optioned to directors, officers, or employees as provided in § 5–8.

(4) Shares released by waiver from their pre-emptive rights;

(5) Shares or other securities which have been offered to shareholders to satisfy their pre-emptive rights but not purchased by them within the prescribed time, and (A) have either been reoffered to the existing shareholders who did exercise their pre-emptive right or by the terms of the notice to shareholders were otherwise made available to such existing shareholders, and which remain unsold after such existing shareholders have had a reasonable opportunity to purchase the same, and (B) are thereafter issued, sold or optioned to any other person or persons at a price not less than the price at which they were offered and reoffered or otherwise made available to the existing shareholders.

(f) Except as otherwise provided in the articles of incorporation, if the corporation is not a close corporation (as defined in this Act) at the time of the proposed sale or exchange of securities or issuance of options or rights, there shall be no pre-emptive right with respect to:

(1) Any of the situations set forth in paragraphs (1), (2), (3), and (4) of subsection (e) above;

(2) Shares issued as a share dividend;

(3) Shares issued for consideration other than cash;

(4) Shares issued to effect a merger or consolidation or purchase of assets;

(5) Shares authorized in the corporation's original articles of incorporation, or any amendment thereto, and sold or optioned within two years of the date of filing the articles of incorporation or articles of amendment, as the case may be;

(6) Shares which have been offered to shareholders to satisfy their pre-emptive rights but not purchased by them within the prescribed time, and which are thereafter sold or optioned to any other person or persons at a price not less than the price at which they were offered to such shareholders.

(g) Except as provided in this section or as otherwise provided in the articles of incorporation no holder of shares of any class shall have any pre-emptive right with respect to shares or securities of the same or any other class which may be sold or optioned by the corporation.

(h) The sale or other disposition by the corporation of shares or securities not subject to the pre-emptive right under this

section or under the articles of incorporation as permitted by this section, shall not impair any remedy which any shareholder may have for a breach of duty by the board of directors.

(i) The holders of shares entitled to the pre-emptive right shall be given prompt notice setting forth the time within which and the terms and conditions upon which such shareholders may exercise their pre-emptive right. Such notice shall be given personally or by mail at least thirty (30) days prior to the expiration of the period during which the right may be exercised. In the case of a close corporation, (1) such notice may set forth any reasonable procedure whereby shares or other securities not purchased by the existing shareholders having a prior right to do so under their pre-emptive right will be made available equitably to the existing shareholders who do exercise their pre-emptive right, or (2) the shares or other securities not purchased by the existing shareholders having a prior right to do so under their pre-emptive right shall be reoffered equitably to the existing shareholders who do exercise their pre-emptive right, with such notice and time limitation as are reasonable in the circumstances; in either case, so that existing shareholders of the close corporation entitled to the pre-emptive right shall have a reasonable opportunity to purchase all of the shares or securities to be sold before any such shares or securities are issued, sold or optioned to any other person.

(j) As used in subparagraph (e) (5) (A) and subsection (i) (2) of this section, the requirement of a "reasonable opportunity" shall always be satisfied by the passage of two (2) business days after the giving of notice of such opportunity; but a lesser period of time may be reasonable under the circumstances in a particular case.

(k) Nothing in this section shall detract from or take away the pre-emptive rights heretofore pertaining to any shares of a corporation which were issued and outstanding on the effective date of this Act.

Comment

When originally considered by the subcommittee, it was indicated that there was a preference for no pre-emptive rights, except to the extent that such right is provided for in the articles.

Under either version of MBCA § 24, the problem is essentially one of draftsmanship in the articles, since under either alternative it is possible for the articles to create the desired results. It is submitted, however, that this is one of the points upon which draftsmen, particularly of the articles of smaller corporations, may tend toward inadvertence.

It is also submitted that, as a matter of policy, there probably should be pre-emptive rights as

the general rule (subject to express limitation or exclusion) in the case of smaller, closely-held corporations; and as a general rule, there should be no pre-emptive rights in the case of more widely held corporations.

The section as drafted seeks to achieve that result by providing that there are pre-emptive rights unless expressly limited or excluded in the articles. In the case of corporations whose size and importance leads to careful draftsmanship, the articles will undoubtedly exclude pre-emptive rights and thereby achieve the desired results.

Thus the proposed section conforms to present Maine law (13 M.R.S.A. § 201).

But note that subsection "f" sharply curtails the pre-emptive right for non-close corporations even in the case where they are not expressly limited by the articles; in particular, under (f) (4), there are no pre-emptive rights when shares are issued to effect a merger or other combination;

Illinois S.H.A. ch. 32, § 157.24 is substantially the same as MBCA § 24 (first alternative), which follows the policy adopted in this draft.

New York takes the same approach as this draft (giving each corporation the right to limit or deny pre-emptive rights) but is more generous overall to pre-emptive rights. Both New York and this draft have a similar list of exclusions from the rights. The draft act includes, in addition to the exclusions stated in the New York provision, "shares issued as a share dividend", and shares released by waiver from their pre-emptive rights. The New York act differs primarily in that it defines two classes of shares as having pre-emptive rights generally: "Equity shares"—shares of any class, whether or not preferred as to dividends or assets, which have unlimited dividend rights; and "voting shares"—shares of any class which have voting rights. This draft presumes pre-emptive rights in favor of only essentially common shares. The statutes differ also in the extent that shareholders can acquire stock under their pre-emptive rights. New York's statute conforms to the two classes of shares entitled to pre-emptive rights: *e. g.*, entitled to purchase such proportions as would preserve the relative unlimited dividend rights or voting rights. Thus the draft act is much less burdensome on corporations than the New York act.

§ 6–24. Liability of shareholders receiving improper distributions

Any shareholder who receives any distribution or payment from a corporation, whether by dividend, purchase or redemption of shares, by distribution in liquidation or reduction of capital, or otherwise, either at a time when the corporation is or will thereby be rendered insolvent, or when the shareholder knows or has reason to know that such distribution or payment is contrary to

this Act or to the articles of incorporation, shall be liable for the amount of such payment or value of such distribution which is in excess of the amount of value which could have been paid or distributed without violation of this Act or of the articles. Such liability shall inure to and may be enforced by the corporation or by any shareholder suing derivatively on behalf of the corporation, and by a receiver, liquidator, or trustee in bankruptcy of the corporation.

Comment

Neither New York nor Illinois has a similar provision.

§ 6–25. Books and records required to be kept by corporation; financial statements

(a) Each corporation shall keep accurate books and records of account, which shall be in written form or in any other form capable of being converted into written form within a reasonable time; and shall keep written minutes of the proceedings of its shareholders, board of directors, and committees of directors.

(b) (1) Each corporation shall keep at its principal place of business or at the office of its clerk or of its transfer agent or registrar, a record of its shareholders, giving the name and address of each shareholder, the number and class of the shares held by each, and the date or dates when each respectively became the owner of record of such shares; if the original record of its shareholders is maintained outside this State, the corporation shall maintain at one of the foregoing offices within this State a list of shareholders containing the information specified in this subsection.

(2) Said list, if the original record of shareholders is not maintained in this State, shall be the most recent list prepared pursuant to § 6–7 or, at the corporation's option, a more recent list.

(3) If the corporation maintains its stockholder records by means of electronic data processing equipment it may, in the alternative to keeping the record or list in this State required by subsection (b) (1), keep at the places mentioned in this State a written undertaking of its president and secretary to produce at those places a current list of shareholders containing the information required by (b) (1), within five (5) working days after demand therefor by any proper person.

(c) Not later than five (5) months after the close of each fiscal year, each corporation shall prepare, in accordance with

good accounting practices, a balance sheet showing the financial condition of the corporation as of the close of its fiscal year, and a profit and loss statement respecting its operation for the fiscal year.

(d) The books and records specified in subsection (a) shall be prima facie evidence of the facts stated therein, in favor of the plaintiff in any action or special proceeding against the corporation or any of its officers, directors, or shareholders.

Comment

(a) and (b) are the same, in substance, as MBCA § 46, first paragraph, with additions; note that the originals need not be kept in this State, but that a reasonably current shareholder list must be maintained here.

(f) is taken from New York, McKinney's Business Corporation Law § 624(g).

§ 6–26. Right of shareholders to inspect corporate records

(a) Except as otherwise indicated in this section, a "shareholder" entitled to inspect the books of and records of a corporation, as provided by this section, shall mean:

(1) Any person who shall have been a holder of record of shares of any class, or of voting trust certificates representing such shares, for at least six (6) months immediately preceding his demand for inspection; or

(2) Any person who shall be the holder of record of, or any persons whose aggregate holdings of record shall equal, at least ten per cent (10%) of the outstanding shares of any class regardless of when they were acquired; or

(3) Any person or persons who hold voting trust certificates representing shares aggregating at least ten per cent (10%) of the outstanding shares of that class; or

(4) An attorney, accountant or other agent of any of the foregoing persons.

(b) Any such shareholder shall have the right to inspect during normal business hours, for any proper purpose, the corporation's books and records of account, minutes of meetings, and list or record of shareholders, and to copy them or make extracts therefrom. If the corporation, in lieu of a list or record of shareholders maintains in this State an undertaking to produce a list on demand as permitted by § 6–25(b) (3), it shall produce such

list for examination at the office where it was demanded within five (5) working days after such demand. If the corporation maintains its books of account by electronic data processing equipment or similar methods, it shall produce written accounts within a reasonable time after a proper demand for inspection thereof.

(c) If the "shareholder" seeking inspection is an agent of the sort mentioned in subsection (a) (4), the corporate officer, agent or employee receiving the demand for inspection may, if he in good faith doubts the authority of such agent, refuse to permit such inspection until the agent produces a written authorization or general power of attorney signed by a person qualifying as a "shareholder" under subsection (a) (1), (a) (2) or (a) (3); and upon presentation of such a written authorization, the corporate officer, agent or employee may, if he in good faith doubts or has no knowledge of the validity of the signature thereon, take not more than three (3) business days to verify the signature thereon. If the corporate officer, agent or employee receiving a demand for inspection does not at the time of the demand ask for proof of the agency of the person making the demand, the corporation may not later rely on a lack of such proof to excuse its refusal to permit inspection. Demands for inspection may be oral or in writing.

(d) A corporation, its officers, agents and employees may deny the inspection authorized by subsection (b) if the shareholder refuses, upon request, to furnish an affidavit that the inspection is not sought for a purpose which is in the interest of a business or object other than the business of the corporation, that he has not within the five (5) years preceding the date of the affidavit sold or offered for sale and does not now intend to sell or offer for sale, any list of shareholders of the corporation or of any other corporation, and that he has not aided or abetted any other person in procuring any list of shareholders for such purpose.

(e) (1) If the corporation, or an officer or agent of the corporation, refuses to permit the inspection authorized by subsection (b), the shareholder demanding inspection may bring an action in the Superior Court in the county in which the corporation's principal place of business or registered office is located for an order directing the corporation, its officers and agents to permit such inspection by the shareholder.

(2) The court shall hear the parties summarily, and if the shareholder establishes that he is qualified and entitled to such inspection, the court shall grant an order permitting such inspection, subject to any limitations which the court may pre-

scribe, and grant such other relief as to the court may seem just and proper. In such a proceeding, the burden shall be upon defendant to show, by a preponderance of the evidence, that the applicant sought such inspection for an improper purpose. Inspection may be limited when, without limitation, the shareholder's requests constitute an undue burden on the corporation.

(3) If the plaintiff is successful, the court may award him, as part of his costs, such reasonable expenses and attorney's fees as he incurred in bringing the proceeding; and if the court finds that the refusal to permit inspection was in bad faith or without any reasonable justification, it shall also award, as penal damages, a sum equal to ten per cent (10%) of the value of the shares owned by the applicant.

(4) The court may deny or restrict inspection if it finds that the shareholder has improperly used information secured through any prior examination of the books and records of account, or minutes, or record of shareholders, of such corporation or of any other corporation, or that he was not acting in good faith or for a proper purpose in making his demand.

(f) In any proceeding to which a domestic corporation is a party, the court may, upon notice fixed by the court and after hearing and proper cause shown, and upon such terms and conditions as the court in its discretion may prescribe, order books, documents and records of such corporation, pertinent extracts therefrom, or duly authenticated copies thereof, to be brought within this State and kept in such place in this State and for such time and purposes as the order may prescribe.

(g) Nothing herein contained shall impair the power of any court of competent jurisdiction, upon proof of proper purpose by a shareholder, irrespective of the period of time during which he has been a shareholder of record and irrespective of the number of shares held by him, to compel the production and inspection of any of the corporation's books and records, wherever located, as the court in its discretion shall determine to be appropriate for inspection.

(h) Irrespective of the period of time that a person may have been a shareholder of record or holder of voting trust certificates, and irrespective of the number of shares or voting trust certificates held by him, upon written demand of any shareholder, the corporation shall mail to him a copy of the most recent balance sheet and profit and loss statement prepared pursuant to § 6–25(c). If the corporation fails or refuses to mail such statements within a reasonable time after such written demand, the corporation shall be liable to the shareholder who made the de-

mand in the penal sum of fifty dollars ($50.00) for each such failure or refusal, recoverable in a civil action. In such an action, it shall be an affirmative defense that the shareholder sought such statements for an improper purpose or in the interest of a business other than the corporation, or that the shareholder has in the past used such statements or similar information for improper purposes or in the interests of other businesses.

Comment

(a) and (b) include the limitations and rights contained in MBCA § 46, second paragraph.

The subcommittee approved of the establishment of a definite measure of damages for refusal of inspection, contained in the third paragraph of MBCA § 46. It was felt by the draftsman, however, that a statutory penalty of this sort should be imposed only in cases of bad faith. The section has, accordingly, been so drawn. On the other hand, express provision for attorney's fees and expenses is inserted; and the burden of proof of an improper purpose is placed on the defendant. This would seem to be reasonably beneficial to shareholders, without over-balancing in their favor; and affords the court the broadest possible discretion as to remedies.

The defenses contained in MBCA § 46 are retained and even broadened, since the two-year period for sale of lists of shareholders is not expressly stated; if any time period applies, it would be the five-year period required to be mentioned in the affidavit which may be called for under subparagraph (c); here, too, the court would have the broadest discretion.

(g) is the same as the fourth paragraph of MBCA § 46.

New York, McKinney's Business Corporation Law, § 46 and Illinois S.H.A. ch. 32, § 157.45 are substantially the same generally and in their statements of shareholders entitled to inspection and those to whom inspection may be refused.

(h) was, in substance, formerly part of § 6–25. Note that this section, in effect, divides shareholders into two classes as to their inspection rights:

a—*small, new* shareholders: Entitled *only* to balance sheet & P & L under (g).

b—*large or old* shareholders: Entitled to *general* inspection.

This is more restrictive than common law, and eliminates the person who buys one share and immediately uses it as an excuse to go fishing through the records.

§ 6–27. Shareholders' actions

(a) No action may hereafter be instituted in this State in the right of any domestic or foreign corporation by the holder or holders of shares, or of voting trust certificates representing

shares, of such corporation unless each of the following conditions exist:

(1) The plaintiff alleges in the complaint that he was a holder of record of shares, or the holder of voting trust certificates, in the corporation at the time of the transaction or any part thereof of which he complains, or that at such time the holder of record thereof was a bank, trust company, or member of a national or regional securities exchange which held the same for his benefit, or that his shares or voting trust certificates thereafter devolved upon him by operation of law from a person who was a holder thereof at the time of the transaction or any part thereof complained of; and

(2) The plaintiff alleges in the complaint, with particularity, his efforts to secure from the board of directors such action as he desires, and further alleges that at least ten (10) days before instituting the action he either informed the corporation or such board of directors in writing of the ultimate facts of each cause of action against each defendant or delivered to the corporation or such board of directors a true copy of the complaint which he proposes to file; or alleges with particularity the reasons why such efforts to secure action from the board of directors would have been futile; and

(3) If the corporation in whose right he is instituting the action is a close corporation (as defined in this Act), the plaintiff alleges in the complaint with particularity his efforts to secure from the shareholders such action as he desires, or alleges with particularity the reasons why such efforts would have been futile.

Except in the case of a close corporation (as defined in this Act), it shall not be necessary for the plaintiff in any action instituted in the right of any domestic or foreign corporation to allege or prove that he made demand upon the other shareholders for relief.

(b) In any action hereafter instituted in the right of any domestic or foreign corporation by the holder or holders of shares, or of voting trust certificates representing shares, of such corporation, upon final judgment therein:

(1) If the court finds in favor of one or more of the defendants, and further finds that the action was brought against such defendant without reasonable cause, it may require the plaintiff or plaintiffs to pay to such defendant the reasonable expenses, including fees of attorneys, incurred by such defendant in the defense of the action;

(2) If the court finds in favor of the plaintiff or plaintiffs, or approves a settlement in favor of the plaintiff or plaintiffs, the court shall allow to the plaintiff or plaintiffs a reasonable sum for their expenses, including fees of attorneys, incurred by them in bringing the action, which sum shall be paid as the court may, in its discretion, order.

(c) In any action hereafter instituted in the right of any domestic or foreign corporation by the holder or holders of shares, or of voting trust certificates representing shares, of such corporation:

(1) At any time after service of process upon it, the corporation in whose right such action is brought may move the court for an order, upon notice and hearing, requiring the plaintiff or plaintiffs to give security for the reasonable expenses, including fees of attorneys, that may be incurred by it in connection with such action, or that may be incurred by other parties named as defendant for which it may become legally liable pursuant to § 7–19.

(2) The plaintiff or plaintiffs shall be required to furnish such security unless, at such hearing, they establish that:

(A) They are the holders of shares, or of voting trust certificates representing shares, amounting to at least fifteen per cent (15%) of the outstanding shares of any class of the corporation; or

(B) They are the holders of shares, or of voting trust certificates representing shares, having a market value of at least twenty-five thousand dollars ($25,000), which market value shall be determined as of the date that the plaintiff instituted the action or, in the case of an intervenor, as of the date he became a party to the action; or

(C) There is a reasonable probability that the cause of action alleged in the complaint will be successful, and that the prosecution thereof will benefit the corporation or its security holders.

(3) At the hearing upon such motion, the court shall consider such evidence, written or oral, by witnesses or affidavit, as may be material either to whether security should be furnished or to a determination of the probable reasonable expenses, including attorney's fees, of the corporation and of defendants for whose expenses it may become liable, which will be incurred in the defense of the action. Unless the plaintiff or plaintiffs establish at such hearing that they meet

one or more of the qualifications set forth in the preceding paragraph of this subsection, the court shall fix the nature and amount of security to be furnished by the plaintiff or plaintiffs. A determination by the court that security either shall or shall not be furnished shall not be deemed a determination of any one or more issues in the action or of the merits thereof. The amount of such security may thereafter from time to time be increased or decreased in the discretion of the court upon showing that the security provided has or may become inadequate, or is excessive.

(4) If the court, upon any such motion, makes a determination that security shall be furnished by the plaintiff or plaintiffs, the action shall be dismissed unless the security required by the court shall have been furnished within such reasonable time as may be fixed by the court. Dismissal for failure to post such security shall be without prejudice.

(5) If any such motion is filed, no pleading need be filed by the corporation or any other defendant, and the prosecution of such action, except for discovery proceedings and the taking of depositions, shall be stayed until ten (10) days after such motion shall have been disposed of.

Comment

Based on a combination of MBCA [optional] § 43A, and California, West's Ann.Corp.Code, § 834. (The probable cause test for security for expenses is based on California, but the burden of proof is placed on the plaintiff rather than the defendant).

The MBCA test, based solely on percent or value of shares owned, has been severely criticized as unrelated to probable cause, and unduly restrictive of derivative suits.

Demand on shareholders of any but close corporations is eliminated as being, in almost all cases, both burdensome and useless.

Subsection (b) (2) restates existing law; it seemed necessary to make this rule express in the light of the provision added by subsection (a) (1) that expenses might be charged against an unsuccessful plaintiff.

Since Civil Rule 23 adequately covers it, no statutory provision concerning compromise or dismissal is included.

CHAPTER 7

DIRECTORS AND OFFICERS

Section

§ 7–1. Board of directors; management of corporation

(a) Subject to any provisions contained in the articles of incorporation, the by-laws, or agreements among shareholders, and permitted under this Act, the business and affairs of a corporation shall be managed by a board of directors.

(b) If the articles of incorporation of a close corporation expressly so provide, the business of such close corporation shall be managed by the shareholders of the close corporation rather than by a board of directors; and if the articles of incorporation provide as aforesaid, the following provisions shall apply:

(1) Whenever the context requires, the shareholders of such close corporation shall be deemed directors of such corporation for purposes of applying any of the provisions of this Act; and

(2) The shareholders of such close corporation shall be subject to the liabilities imposed by this Act for action taken or neglected to be taken by directors; and

(3) Any action required or permitted by this Act to be taken by the directors of a corporation may be taken by action of shareholders of such close corporation at a meeting of the shareholders or by written consent as provided for in this Act.

(4) If the corporation ceases to meet the definition of a "close corporation" by reason of having more than twenty (20) shareholders, whether or not entitled to vote, the president shall call a special meeting of the shareholders to elect a board of directors; and if he fails to call such special meeting within four (4) months from the date when the corporation ceased to qualify as a "close corporation", any shareholder, whether or not entitled to vote, may call such special meeting, with the same rights and powers as are provided in this Act for the call of a substitute annual meeting by a shareholder. At such special meeting, there shall be elected such number of directors as have been specified in the articles or the by-laws, if the articles or by-laws provided for the possibility of the corporation ceasing to qualify as a close corporation; and if no such number is specified, three (3) directors shall be elected.

§ 7–2. Qualifications of directors

Unless the articles of incorporation or the by-laws so require, the directors need not be residents of this State nor shareholders of the corporation. The articles of incorporation or the by-laws may prescribe other qualifications for directors.

§ 7–3. Number of directors

(a) (1) The number of directors of a corporation shall be not less than three (3), except that if all shares of a corporation are owned beneficially and of record by fewer than three shareholders, the number of directors may be less than three but not less than the number of shareholders. The articles of incorporation shall fix the number of directors comprising the initial board of directors. The number so stated in the articles shall constitute the authorized number of directors unless and until changed as provided in subsection (b).

(2) If any close corporation has specified in its articles of incorporation that its business shall be managed by the shareholders, it may also specify, in its articles or in its bylaws, the number of directors who shall be elected in the event that it ceases to qualify as a close corporation. In the event that no such

number is specified, upon ceasing to qualify as a close corporation such corporation shall elect three (3) directors.

(b) The number of directors may be increased or decreased only by (1) amendment of the articles of incorporation, or (2) by a by-law adopted by the directors, if the articles authorize such a by-law, or (3) by a resolution of the shareholders adopted at an annual or special meeting. A statement in the articles setting a maximum and a minimum number of directors shall constitute authorization for the directors to adopt by-laws increasing and decreasing the number of directors within the limits so set in the articles.

(c) No decrease in the number of directors shall have the effect of shortening the term of any incumbent director.

(d) If the directors are so classified that a class of shares has the exclusive power to elect one or more directors, the number of directors to be elected by that class of shares may not be decreased, and the total number of directors may not be increased, unless such change is approved by a vote of a majority of the outstanding shares of such class at a regular or special meeting, notice of which specified consideration of such change.

Comment

The MBCA § 34 authorizes changes in the size of the board by by-law. This seems a sufficiently serious change in the corporate structure so as to require shareholder approval, or at least delegation through the articles.

§ 7–4. Election and term of directors

(a) Each director shall hold office until the expiration of the term for which he is elected, and until his successor shall have been elected and qualified, or until his earlier resignation, removal from office, death or incapacity.

(b) The members of the initial board of directors shall hold office until the first annual meeting of the shareholders and until their successors shall have been elected and qualified.

(c) At the first annual meeting of shareholders, and at each annual meeting thereafter, the shareholders shall elect directors to hold office until the next succeeding annual meeting, except when directors are classified as permitted by § 7–5.

Comment

Same in substance as MBCA § 34, except for the portions of § 34 included in § 7–3.

§ 7–5. Classification of directors

(a) Except as limited in subsection (b), in lieu of electing the whole number of directors annually, the articles of incorporation may provide that the directors be divided into either two or three classes, each class to be as nearly equal in number as possible. The term of office of directors of the first class shall expire at the first annual meeting of shareholders after their election, that of the second class shall expire at the second annual meeting after their election, and that of the third class, if any, shall expire at the third annual meeting after their election. At each annual meeting after such classification the number of directors equal to the number of the class whose term expires at the time of such meeting shall be elected to hold office until the second succeeding annual meeting, if there be two classes, or until the third succeeding annual meeting, if there be three classes. No classification of directors shall be effective prior to the first annual meeting of shareholders.

(b) If a corporation's articles of incorporation provide for cumulative voting for directors, it may not classify its directors as provided in subsection (a) unless:

(1) The number of directors is at least six (6), if there are two (2) classes, or

(2) The number of directors is at least nine (9), if there are three (3) classes;

and there shall be at least three (3) directors elected annually.

(c) Where a corporation is authorized to issue more than one class of shares, the articles of incorporation may confer upon the holders of one or more specified classes of shares the right to elect all directors, or any specified number of them, or the directors of any class or classes established by the articles of incorporation, other than a classification by term of office as provided in subsection (a).

Comment

(a) is identical to MBCA § 35 except that, at the subcommittee's suggestion, the requirement of a nine-man board for classification is deleted.

(b) was added as a partial substitute for the MBCA provisions to protect the right of cumulative voting.

(c) states what is generally assumed to be true; based on South Carolina § 12–18.5.

§ 7–6. Vacancies in board of directors

(a) (1) Any vacancy created by an increase in the number of directors shall be filled only by election at an annual meeting or a special meeting of shareholders called for that purpose, unless the power to fill specific newly created directorships is expressly delegated to the directors by a resolution of a regular or special meeting of the shareholders entitled to vote for the election of directors.

(2) Unless the articles of incorporation or the by-laws reserve to the shareholders the right to fill vacancies, any other vacancy, however occurring, in the board of directors may be filled by a majority of the remaining directors, or by a sole remaining director. If a vacancy occurs with respect to a director elected by the votes of a particular class of shares, the vacancy shall be filled by the remaining director or directors elected by that class, or by the shareholders of that class.

(b) Any director elected to fill any vacancy shall be elected for the unexpired term of his predecessor.

(c) A director who resigns may postpone the effectiveness of his resignation to a future date or upon the occurrence of a future event specified in a written tender of resignation. A vacancy shall be deemed to exist at the time of such tender, and the board of directors or the shareholders may, then or thereafter, elect a successor to take office when the resignation by its terms, becomes effective.

Comment

Based on South Carolina § 18.6, modifying MBCA § 36 as follows:

(1) Giving the right to reserve to shareholders the power to fill *all* vacancies.

(2) Reserving the power to fill *new* directorships to the shareholders, except where directors are authorized to do so by special resolution. Otherwise, this could be a device for packing the board.

It is hard to visualize an emergency in filling *new* directorships which could not be postponed for a shareholders' meeting.

(3) Special class protection and subsection (c) are added.

§ 7–7. Removal of the directors

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

(b) Subject to the limitation in subsection (d), if the corporation does not have a board of directors so classified that different classes of shares elect different directors, such removal may be accomplished by the affirmative vote of two-thirds (⅔) of the outstanding shares entitled to vote for directors. The articles of incorporation may provide that such removal may be accomplished by a lesser vote, but in no case by a vote of less than a majority of shares voting on the proposed removal.

(c) If the directors are so classified that different classes of shares elect different directors, a director may be removed only by the affirmative vote of two-thirds (⅔) of the outstanding shares of that class which elected him. The articles of incorporation may provide that such removal may be accomplished by a lesser vote of the shares of that class, but in no case by a vote of less than a majority of the shares of that class voting on the proposed removal.

(d) No director who has been elected by cumulative voting may be removed if the votes cast against his removal would be sufficient to elect him if then cumulatively voted at an election of the entire board of directors, or, if there be classes of directors, at an election of the class of directors of which he is a part.

(e) If any or all directors are removed at such meeting of the shareholders, new directors may be elected at the same meeting without express notice being given of such election.

(f) Notwithstanding the foregoing provisions, if two-thirds (⅔) 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 shareholders, 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 re-election for a period of time prescribed by the court; and may make such other orders as are just and equitable.

Comment

Except for the last subsection, this is the same in substance as MBCA (optional) § 36A. At the suggestion of several members of the bar, however, the required vote to remove a director without cause has been increased to two-thirds (⅔) from the MBCA provision of a mere majority.

Despite a reluctance to permit arbitrary removal of directors in mid-term, it is felt that—if

shareholders have acquired sufficient votes to command a two-thirds majority—they should be able to put in their own board of directors, as a matter of right.

A provision permitting removal by vote of the shareholders, without proof of "cause", is also desirable because of the confusion in the law as to the proper procedure in removing a director "for cause". According to Baker & Cary, Corporations (Third edition 1959) p. 94, "courts have held or said in some cases that the shareholders may remove a director for cause after giving him a hearing". If this is true, then a simple change in stock ownership might result in a series of pro forma invective accusations, leveled at the director in order to establish cause, followed by a meaningless "hearing" and an equally meaningless vote.

At least California (West's Ann.Corp.Code § 810), Minnesota (M.S.A. § 301.29), Pennsylvania (15 P.S. § 405), North Carolina (§ 55–27), and South Carolina (§ 12–18.7) provide for removal of directors without cause, by majority vote. The British Company Law also permits dismissal of the directors during their term of office by the shareholders.

The procedure recommended by the MBCA, as modified by the ⅔ requirement, would seem to simplify and clarify the law, give the shareholders protection, while affording ample discouragement for frivolous takeover attempts.

The last section, added by the draftsman, is designed to provide expressly for the rare situations when the director is sought to be removed for genuine wrongdoing. In those cases, it is conceivable that an adequate vote could not be secured for removal. The law is relatively vague as to the power of a court to remove a director without express statutory authority. The clarification recommended here should be offensive to no one.

At the suggestion of the Committee, a *permissive* provision has been added permitting removal by a lesser percentage than ⅔ but never less than by a majority of shares voting. Anything less than ⅔-of-outstanding shares voting will require an express provision in the Articles.

§ 7–8. Time and place of meetings of directors

(a) Unless the by-laws otherwise provide, meetings of the board of directors, regular or special, may be held at any place either within or without this State.

(b) The time and place for holding meetings of the directors may be fixed by the by-laws or, if not so fixed, by the directors.

Comment

(a) is the same in substance as MBCA § 39, first paragraph, and identical to South Carolina § 12–18.8.

(b) is added, drawn from South Carolina § 12–18.8.

Subcommittee approved all of MBCA § 39.

§ 7–9. Notice of meetings of directors; persons who may call meetings

(a) Unless otherwise provided by the by-laws, regular meetings of the board of directors may be held without notice if the time and place of the meetings are fixed by the by-laws or by the board.

(b) Special meetings of the board of directors shall be held upon such notice as the by-laws shall prescribe, or in the absence of any such provision, upon notice sent by any usual means of communication not less than three (3) business days before the meeting.

(c) Notice of a meeting of directors need not be given to any director who signs a waiver of notice, either before or after the meeting. Attendance of a director at a meeting shall of itself constitute a waiver of notice of such meeting, except where a director attends a meeting solely for the purpose of stating his objection, at the beginning of the meeting, to the transaction of any business on the ground that the meeting is not lawfully called or convened.

(d) Subject to the provisions of the by-laws, notice of adjournment of a meeting need not be given if the time and place to which it is adjourned are fixed and announced at such meeting.

(e) 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 the meeting unless the articles, the by-laws or this Act so require.

(f) Meetings of the directors may be called by the chairman of the board, the president (or if he is absent or is unable or refuses to act, by any vice-president), by any two directors, or by any other person or persons authorized by the by-laws.

Comment

Based on South Carolina variant of MBCA, South Carolina § 12–18.9.

(a) is the same in substance as first sentence, second paragraph, MBCA § 39.

(b) is the same as the second sentence, second paragraph, MBCA § 39, with the addition of the 3-day provision in the absence of by-laws.

(c) is similar to the third sentence, second paragraph, MBCA § 39, with two improvements: (1) Express provision for written waiver, given at any time, and (2) express requirement that to avoid a waiver by attendance, objection must be made at the beginning of the meeting.

(d) has no equivalent in the MBCA.

(e) is the same as MBCA § 39, last sentence.

(f) has no equivalent in the MBCA.

§ 7–10. Quorum and vote of directors

(a) Except as provided in subsection (b), a majority of the total number of directors then in office shall constitute a quorum for the transaction of business, unless a greater proportion is required for a quorum by the articles of incorporation or by the by-laws.

(b) If at any time there are fewer directors in office then one-half (½) of the number of directors fixed by the by-laws or, in the absence of a by-law fixing the number of directors, of the number stated in the articles of incorporation, the directors then in office may transact no other business than the filling of vacancies on the board of directors, in the manner and to the extent provided in § 7–6, until sufficient vacancies have been filled so that there are in office at least one-half (½) of the number of directors fixed by the by-laws of the articles.

(c) The vote of a 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 vote of a greater number is required by the articles of incorporation, the by-laws or this Act. The articles of incorporation or the by-laws may require any greater number, or a unanimous vote of the directors. The directors present at a duly called or held meeting at which a quorum was once present may continue to do business at the meeting notwithstanding the withdrawal of enough directors to leave less than a quorum.

(d) Failure or refusal of a director to attend a meeting shall in no event stop or bar such director, in his capacity as such or as a shareholder, from challenging any action taken at such meeting on the ground that the meeting was improperly called, that a quorum was not present, or on any other legitimate ground.

Comment

This apparently simple section presents a serious policy question, revolving particularly around the situation which may exist if there are vacancies on the board of directors. MBCA § 37 provides that a majority of the *full* board shall constitute a quorum; South Carolina § 12–18.10 provides that a majority of the directors *then in office* shall constitute a quorum. The difference between these two provisions may best be illustrated by a few examples:

1. Assume that the full board of directors, as specified in the by-laws, is 15. Assume further that 5 vacancies exist, because of deaths, resignations, or any other cause:

(a) Under the MBCA provision, 8 (a majority of 15) will be necessary to constitute a quorum. This means that the refusal or failure to attend of only 3 of the remaining 10 directors can stymie any action.

(b) Under the South Carolina provision, 6 (a majority of 10) will constitute a quorum. Thus, the affirmative votes of only 4 directors, if taken at a meeting with a minimum quorum, could constitute action of the board of directors, even though it was the intention of those who established a 15-man board that action normally be taken by twice the number, 8 votes. If they chose to do so, the remaining directors could delay filling the vacancies on the board indefinitely, and continue for an extended period operating with a group of 4 to 6 directors running the company.

2. Assume a rather common situation, in which a corporation is owned equally by two families, and a 4-man board is established, 2 seats on the board being controlled by each family. Also assume one vacancy caused by death:

(a) Under the MBCA provision, the absence of one of the surviving directors will prevent a quorum, since the minimum quorum is 3. Thus, if there is a dispute between the two families, all corporate action may be prevented by one director refusing to attend meetings.

(b) On the other hand, under the South Carolina provision, the corporation could be completely dominated by one family since their 2 votes would constitute a majority of the remaining board, and they could, by themselves, constitute a quorum and also outvote the survivor of the family in which a death occurred.

In balance, the draft submitted takes the position that the danger of corporate paralysis is more serious than the danger of unfair domination of the corporation by a relatively small group of directors; presumably, there there are judicial remedies for the latter situation. Further, the articles can be written to give protection against small-group-domination by inserting high quorum and vote requirements, if that is the more serious problem in a particular corporation. Therefore, the basic rule adopted is the same as the South Carolina provision: that a majority of directors then in office may constitute a quorum.

To prevent too extreme a situation, however, it is further provided in subsection (b) that normal business may be transacted by the directors only when there is at least half of a full board in office. It would seem improper, for example, to allow a mere majority out of 5, when there should be a 15-man board, run the corporation completely.

(c) Substantially the same as the last sentence in MBCA § 37, with additions which correspond to similar provisions with respect to shareholder's meetings.

(d) Added to prevent a decision like that in Gearing v. Kelly, 11 N.Y.2d 201, 182 N.

E.2d 391 (1962), in which a stockholder-director was held foreclosed from challenging an election because one associated with her deliberately prevented a quorum.

§ 7–11. Unanimous action by directors without a meeting

Unless otherwise provided by the articles of incorporation or by-laws, 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 so to be taken at any time before or after the 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 is substantially the same as MBCA § 39A which is strongly endorsed by the sub-committee. It is modified so as to make it clear that the consent of the directors may be on more than one sheet of paper.

Corresponds to South Carolina § 12–18.12(b), but was separated out as a separate section for clarity.

§ 7–12. Informal or irregular action by directors

(a) 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 by-laws may require, shall be deemed action of the board of directors:

(1) If the directors own all of the corporation's shares of all classes, and all directors know of the action taken, and no director makes prompt objection to such action; or

(2) If all shareholders know of the action taken, and no shareholder makes prompt objection to such action; or

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

(b) 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 aft-

er learning of the action taken and of the impropriety of the meeting, he makes prompt objection thereto.

(c) Objection by a shareholder, 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.

(d) Attendance of a director at a meeting for which this Act, the articles or the by-laws require the giving of notice shall of itself constitute a waiver of such notice, and of any defects in the call or notice of the meeting, unless the director attends the meeting solely for the purpose of stating his objection, at the beginning of the meeting, to the transaction of any business on the ground that the meeting is not lawfully called or convened, or that insufficient notice thereof was given.

(e) In the case of specific items of business which this Act, the articles or the by-laws require to be specifically mentioned in the notice of the meeting, attendance of a director at a meeting shall also constitute a waiver of such specific notice, and of any defect or deficiency therein, unless the director (1) states his objection to the transaction of that item of business, on the ground of insufficiency of notice thereof, when the item of business is first brought before the meeting, and (2) refrains from voting on such item of business.

Comment

This supplements the provisions of § 7–11 (the equivalent of MBCA § 39A), and is based on South Carolina § 12–18.12.

The South Carolina provision on which this section is based included unanimous written consent. That form of action, dealt with in § 7–11, should not be considered "irregular" or "informal"; it is probably the normal *formal* mode of action in the majority of corporations.

This section deals with the more difficult situation in which *less than all* the directors have expressly assented to action not voted upon at a properly called meeting.

Subsection (a) would seem to constitute a codification of the most sensible common law decisions. In any of the three cases enumerated in subsection (a), a court should find that there is an estoppel erected against subsequent objection to the action in question. The provision, therefore, merely clarifies these principles.

Subsections (b) and (c) impose formal requirements necessary to effectuate subsection (a).

§ 7–13. Executive and other committees

(a) If the articles of incorporation or the by-laws 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 two (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:

(1) Amend the articles of incorporation;

(2) Adopt a plan of merger or consolidation;

(3) Recommend to the shareholders 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;

(4) Recommend to the shareholders a voluntary dissolution of the corporation or revocation of such dissolution;

(5) Declare corporate distributions other than dividends from earned surplus; or

(6) Amend the by-laws of the corporation.

(b) 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.

(c) So far as applicable, the provisions of this chapter relating to the conduct of meetings of the board of directors, shall govern meetings of the executive or other committees.

"(d) 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 is largely the same as MBCA § 38, which received strong endorsement from the sub-committee. Minor drafting changes have been made, following the model of South Carolina § 12–18.1, to conform to the style used in this proposed statute.

The only substantive change from MBCA § 38 is the additional exclusion of the power to pay corporate distributions other than ordinary dividends from the powers of committees of the directors; and the requirement that committees consist of at least two directors.

Subsection (c) is added for clarity, but does not change the substance of the MBCA.

§ 7–14. Election, qualifications and powers of officers

(a) The officers of a corporation shall consist of a president, one or more vice-presidents if the by-laws so provide, a secretary, a treasurer, and a clerk.

(b) The officers shall be elected by the board of directors or, if the articles of incorporation expressly provide, by the shareholders, and shall hold their offices until their successors are chosen and have qualified, or until their earlier resignation or removal from office.

(c) The clerk shall have the qualifications specified in § 3–7 and such other qualifications as may be specified in the by-laws; unless specified in the by-laws, it shall not be necessary to elect the clerk annually.

(d) Qualifications of other officers, if any, and the term and manner of their election may be prescribed in the by-laws; but such officers shall be elected annually unless otherwise provided in the by-laws.

(e) Such other officers and assistant officers and agents as may be deemed necessary may be elected or appointed by the board of directors or chosen in such other manner as may be prescribed in the by-laws.

(f) Any two or more offices may be held by the same person, but no officer may act in more than one capacity where action by two or more officers is required.

(g) All officers and agents of the corporation, as between themselves and the corporation, shall have such authority and perform such duties as may be provided in the by-laws or by action of the board of directors, not inconsistent with the by-laws;

(h) Unless otherwise provided by the by-laws, the president shall have authority to institute or defend legal proceedings whenever the directors or shareholders are deadlocked.

(i) 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 businesses in which the corporation is already engaged.

(j) If the by-laws so provide, the treasurer or any person performing his duties, may be required to give bond in such sum and with such sureties as may be specified by the by-laws for the faithful discharge of his duty.

(k) The Clerk shall perform the following duties:

(1) He shall keep, in a book kept for such purpose, the records of all shareholders' meetings, including records of all votes and minutes of such meetings; such book shall be kept by him at the registered office of the corporations or, if the corporation is not a close corporation (as defined in this Act), at another office of the corporation to which the clerk has ready access; wherever kept, such book shall be deemed to be in the custody of the clerk;

(2) He shall act as voting inspector as provided in § 6–9;

(3) He shall keep on file a list of shareholders entitled to vote at each meeting, as provided by § 6–7(b);

(4) He shall keep on file the most recent list of shareholders, to the extent provided by § 6–25;

(5) He shall certify all votes and resolutions of the shareholders, except as provided in § 1–6; and may certify all votes and actions of the board of directors and of its committees;

(6) He shall perform such other duties as the by-laws may provide.

(*l*) In the absence of the Clerk at any shareholders' meeting, the secretary or an assistant secretary or a person elected or appointed by the meeting, who need not be a resident of the State of Maine, shall keep the minutes of the votes and business transacted, and shall promptly deliver such minutes to the Clerk for him to record in the record books of the company. Such person may also certify the votes of shareholders in an emergency, before transmitting the minutes to the Clerk, as provided in § 1–6.

Comment

This section is comparable to MBCA § 44, but follows the South Carolina variant, South Carolina § 12–18.13.

In subsection (a), the list of officers, the Model Act is followed. Since the office of clerk is expressly provided for else-

where, it was originally not mentioned here; and the duties of the clerk are sufficiently different from those of operating officers of the corporation so that it seems better to deal with the clerk separately. But the consensus of the committee was that the status of the clerk as an officer should not be called into question, and he is now expressly listed.

Subsection (b) differs from the Model Act in that it makes express provision for election of officers by the shareholders; but follows the Model Act to the extent that it creates a general rule of their election by the directors.

Subsection (d) differs from many states (and differs from present Maine Title 13 M.R.S.A. § 371) by omitting any requirement that the president be a director. Most corporations will, in fact, choose a president who is a director; they may expressly so require in their articles or by-laws; but there seems no reason to impose this as a statutory requirement in all cases.

Sub-paragraph (f) differs from the Model Act (and from most states) by not expressly providing that the offices of president and secretary may not be held by the same person. This requirement is usually imposed because important corporate acts must be certified by the president and the secretary; the South Carolina variant, adopted here, seems to make more sense by merely requiring that, where the action of two officers is required, the same person cannot act in both capacities.

Sub-paragraph (g) is substantially identical to the corresponding provision of MBCA § 44.

Sub-paragraph (h) has no equivalent in the Model Act; the issue of the president's authority to institute or defend legal proceedings has been the subject of considerable litigation in other jurisdictions; and it seems desirable to make express provisions with regard thereto.

Sub-paragraph (i) was added by the draftsman of this proposed act. There are numerous theories as to the implied powers of the president of a business corporation, and there has been much litigation on the subject in other jurisdictions. It seemed desirable to insert an express provision, even though it is rather limited. The principal purpose of the provision is to prevent a conclusion that the president of a corporation is, as has been held elsewhere, assumed to have such powers as the board of directors could exercise. See, generally, Note Inherent Power as a Basis of Corporate Officer's Authority to Contract, 57 Col.L.R. 868 (1957); the early New York view was, apparently, that the president has prima facie authority to make any contract which the board of directors could have made, with the burden on the corporation to disprove such authority; the later New York view seems to be that the above authority is limited to contracts in the ordinary course of business; but it is unclear whether this is actual or apparent authority, and unclear to what extent the existence of such authority is rebuttable. The Illinois rule similarly seems unclear, particularly as to whether

the office of president carries with it an implied authority, and as to whether there is a rebuttable presumption of authority to act in the ordinary course of business. The article says, in summary, "There has been an increasing tendency in recent years to vest a corporation president, as chief executive officer, with at least the authority of a general manager, with all that implies." Proposed sub-paragraph (i), therefore, is also designed to make it clear that, as to third parties, the indicated power of the president rests on principles of estoppel or apparent authority rather than upon actual authority, implied-in-law.

Subsection (j) seems prferable to the present Maine provision (13 M.R.S.A. § 371) that the treasurer be required to give bond; this should be optional with the corporation.

Subsections (k) and (*l*) have been added in Revision #1 to reflect addition of the clerk to the list of officers, and to conform provisions on the clerk to existing practice and to § 1–6. The committee desired a single section enumerating all duties of the clerk; it is felt that the cross-references included here accomplish that. These subsections now enumerate the roles of the clerk as they now exist, although present statutes contain no such enumeration.

§ 7–15. Vacancies in office; removal of officers

(a) Any officer or agent elected or appointed by the board of directors may be removed by the board of directors or by the executive committee whenever in its judgment the best interests of the corporation will be served thereby.

(b) Any officer or agent elected by the shareholders may be removed only by vote of the shareholders, unless the shareholders shall have authorized the directors to remove such officer or agent.

(c) 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 shareholders.

(d) Removal from office, however effected, shall not prejudice the contract rights, if any, of the officer or agent removed, nor shall election or appointment of an officer or agent of itself create contract rights.

Comment

Based on South Carolina § 12–18.14, this is substantially the same as MBCA § 45, except that it makes express provision for officers who may be shareholder-elected.

It preserves the feature, found notably in Illinois, of separating the questions of removal and contracted long-term employment, by specifying that removal is without prejudice to contract rights.

§ 7–16. Duty of directors and officers

The directors and officers of a corporation shall exercise their powers and discharge their duties in good faith with a view to the interests of the corporation and of the shareholders and with that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions. In discharging their duties, directors and officers may in all cases rely upon financial statements of the corporation to the extent provided in § 7–20(b) (5).

Comment

This is taken verbatim from South Carolina § 12–18.15 (with the cross-reference added), and is a valuable addition to the provisions of the MBCA.

The standard of care and skill imposed on directors has been another subject concerning which there has been a great amount of litigation, and a variety of results. In general, it may be said that two basic rules have found wide recognition; (1) a director owes that degree of care and skill which a reasonable businessman would apply in his own personal business affairs; and (2) the director owes that degree of care and skill which a reasonable director of a corporation would apply in similar circumstances. The latter "reasonable director" rule is somewhat less demanding upon the director, and is the version adopted here. This election is highly flexible, and it will take into account everything from the extremely high level of care which it is reasonable to expect of a bank director, down to the relatively limited attention to the business of the corporation which might be expected of a person appointed as a director because of his highly specialized knowledge of one, and only one aspect of the corporation's business. The proposed provision does not solve all of the possible problems which may arise; for example: is a nonresident director held to the same standard of care as a director living in the same city as the principal office of the corporation? Is a wife, who becomes a director of her husband's corporation merely in order to satisfy a requirement for multiple directors, held to the same standard of care and skill as a businessman? The latter problem, typified by Allied Freightways v. Cholfin, 325 Mass. 630, 91 N.E.2d 765 (1950), may of course be minimized by the elimination of the three-director requirement for one and two-man corporations, but it will undoubtedly arise. It is probably impossible to solve all of these problems by statute, even if an attempt were made to do so, and solutions to some of them must be left to the courts.

Also note, however, that the proposed section expressly imposes a duty running to the shareholders as well as to the corporation. This seems to conform with the better decisions in the case law; and being expressed in terms of a duty to "the shareholders", it would seem to con-

form to the duty normally imposed to the shareholders as a group, and not necessarily to individual shareholders. The corresponding provision in New York is McKinney's Business Corporation Law § 717, the first sentence of which is substantially identical to proposed § 7–16 except that the New York provision does not include any reference to shareholders. § 7–20(b) (5), referred to here, is very similar to New York § 717.

See Note, Directors' Liability Insurance, 67 Col.L.R. 716 (1967) on the extent to which possible breach of duty is insurable.

§ 7–17. Transactions between corporations and directors and officers

(a) No transaction in which a director or officer has a personal or adverse interest, as defined in subsection (b), 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

(1) 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; or if

(2) 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 shareholders, and the transaction is specifically approved by vote of the shareholders; or if

(3) Although the requirements of subparagraphs (1) and (2) of this subsection 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.

(b) A transaction in which a director or officer has a personal or adverse interest shall include,

(1) A contract or any other transaction between the corporation and one or more of its directors or officers;

(2) 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 have a financial interest, direct or indirect; but

the ownership of not over five per cent (5%) 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".

(c) No contract or other transaction by a corporation with (1) any of its subsidiary, parent, or affiliated corporations, or (2) 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.

(d) 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.

(e) Except to the extent that the articles of incorporation or by-laws otherwise provide, the board of directors or the executive committee shall, without regard to the provisions of this section, have authority to fix the compensation of directors for their services as directors, officers, or in any other capacity.

Comment

This section, also, has no equivalent in the MBCA. The corresponding provisions are, in particular, New York, McKinney's Business Corporation Law § 713, and South Carolina § 12–18.16.

The South Carolina variant has been chosen as the basic model in preference to the New York variant, due to some more desirable features in structure and in detail. Neither variant, however, seemed entirely satisfactory in substance.

Perhaps the biggest question is the one posed by the provision in subsection (a) (2), emphasized by square brackets. This provision, taken from the South Carolina act (and not appearing in the New York variant) would seem to change the usual common law rule that the interest of a shareholder, when voting as such, is not disqualifying.

The square-bracketed provision is recommended, however, because the situation is saved by subsection (a) (3); if the transaction is fair and equitable to the corporation, it will be valid even though it has been impossible to secure a disinterested majority vote either of directors or of shareholders. Thus, with the inclusion of subsection (a) (3), the law is really not changed substantially from the common law situation where a transaction has been approved by the shareholders because the interested directors hold a voting majority of the shares. The majority shareholders have generally been held to occupy a fiduciary or a quasi-fiduciary relationship with respect to

the minority shareholders, so as to prevent them from forcing through transactions which are an unfair imposition on the minority interest. In the light of that line of case law, the recommended section does not significantly change the rights and duties of any of the interested parties.

The South Carolina variant is preferable in that it specifically allocates burdens of proof, *i. e.*, (a) (3), and in subsection (c).

Both the New York and South Carolina variants seemed unsatisfactory in their reference to "any corporation, partnership, or association" in which the director has any "financial interest, direct or indirect". A minor financial interest in a publicly-owned corporation should not be disqualifying. Therefore, language was added to subsection (b) (2) to exclude not over 5% ownership interest in such a publicly held corporation from the definition of "financial interest."

This draft, following both South Carolina and New York, expressly authorizes the directors to set their own compensation in all respects.

§ 7–18. Reserved for future use

§ 7–19. Indemnification of officers, directors, employees and agents; insurance

(a) A corporation shall have power to 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 (other than an action by or in the right of the corporation) 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 if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he reasonably believed to be in or not opposed to 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.

(b) A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the corporation to procure a judgment in its favor 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) actually and reasonably incurred by him in connection with the defense or settlement of such action or suit if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation and except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable for negligence or misconduct in the performance of his duty to the corporation unless and only to the extent that the Superior Court or the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which the Superior Court or such other court shall deem proper.

(c) 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 subsections (a) and (b), 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. He may enforce the right to indemnification granted by this subsection 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.

(d) Any indemnification under subsections (a) and (b) (unless ordered by a court) 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 subsections (a) and (b). Such determination shall be made (1) 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 (2) if such a quorum is not obtainable, or, even if obtainable a quorum of disinterested directors so directs, by independent legal counsel in a written opinion, or (3) by the stockholders.

(e) 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 (d) 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.

(f) The indemnification provided by this section shall not be deemed exclusive of any other rights to which those indemnified may be entitled under any by-law, 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.

(g) 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 the provisions of this section.

Comment

The consensus of the Committee was that we should provide the most liberal indemnification reasonable.

In Revision #2, therefore, there has been substituted the full text of the new Delaware section, 8 Del.C. § 145. Using the Delaware provision assures our taking advantage of the most thorough recent study of the outer-most limits of permissible indemnification; and has the added advantage of making available to us any judicial decisions rendered by Delaware courts interpreting the same text.

The last sentence of (c) is added in the interests of clarity: the Delaware text gives the right, this merely specifies the remedy.

§ 7–20. Liability of directors in certain cases

(a) The liabilities imposed by this section shall be in addition to any other liabilities imposed by law upon directors of a corporation.

(b) Directors of a corporation who vote for or assent to:

(1) The declaration of any dividends or other distribution of the assets of a corporation to its shareholders contrary to any provisions of this Act or of the articles of incorporation, shall be jointly and severally liable for the amount of such dividend which is paid, or for the value of such assets which are distributed, in excess of the amount which could have been paid or distributed without violating the provisions of this Act or of the articles;

(2) The purchase or redemption of its own shares contrary to the provisions of this Act, shall be jointly and severally liable for the amount of consideration paid for such shares which is in excess of the maximum amount which could have been paid therefor without a violation of the provisions of this Act;

(3) The distribution of assets of a corporation to its shareholders during the liquidation of the corporation without the payment and discharge of, or without making adequate provisons for, all known or reasonably ascertainable debts, obligations, and liabilities of the corporation, shall be jointly and severally liable for the value of such assets which are distributed, to the extent that such debts, obligations and liabilities of the corporation are not thereafter paid and discharged.

(4) The liability imposed by this subsection may be enforced:

(A) By the corporation, or by any shareholder suing derivatively;

(B) By the receiver, liquidator, or trustee in bankruptcy of the corporation; and

(C) Except where the corporation's properties are being administered in liquidation, or for the benefit of creditors under the supervision of any court, by any of the corporation's creditors damaged by a violation of this subsection. Such creditor may in the same action in which he sues the corporation join one or more of the directors liable under this subsection, and enforce

such liability of the directors to the extent necessary to satisfy his claim against the corporation; or he may obtain a judgment against the corporation, and thereafter in a separate action enforce the liability of any director.

(5) A director shall not be liable under this subsection if:

(A) He relied and acted reasonably and in good faith upon financial statements of the corporation which were either (i) certified in writing by an independent public or certified public accountant or firm of such accountants fairly to reflect the corporation's financial condition, or (ii) reported to him to be correct by the president or by the officer of such corporation having charge of its books of accounts; or if

(B) He considered reasonably and in good faith that the assets were of their book value, in determining the amount available for any such dividend or distribution.

(6) A director who is held liable upon and pays a claim asserted against him pursuant to any provision of this subsection, shall be entitled to reimbursement from each shareholder who accepted any dividend, distribution of assets or consideration on redemption or repurchase of his shares, knowing such dividend or distribution or consideration to have been made or paid in violation of this section, to the extent of the amounts received by each of them respectively. Such shareholders as among themselves shall also be entitled to contribution in proportion to the amounts received by them respectively.

(c) Any director against whom a claim shall be asserted under or pursuant to any provision of this Act shall be entitled to contribution from the other directors who voted for or assented to the action upon which the claim is asserted, and in any action against him shall on motion be entitled to have such other directors made parties defendant.

(d) A director who is present at a meeting of the directors or a committee thereof at which action on any corporate matter is authorized or taken, shall be presumed to have assented to the action taken, unless his contrary vote shall be entered in the minutes of the meeting or unless his written dissent to such action shall be filed either during the meeting or within a reasonable time after the adjournment thereof, with the person acting

as secretary of the meeting or with the clerk or the secretary of the corporation. Such right to dissent shall not apply to a director who voted in favor of such action.

Comment

Almost identical to MBCA § 43 and to South Carolina § 12–18.19.

Note, in (b) (6), change from "contribution" to "reimbursement."

CHAPTER 8

AMENDMENT OF ARTICLES OF INCORPORATION

§ 8–1. Applicability

Amendments to the articles of incorporation may be made pursuant to this Chapter by:

(a) Corporations organized under this Act;

(b) Corporations organized under any prior general corporation Act;

(c) Corporations organized under any special act of the Legislature, if

(1) Such corporation could now be organized under this Act, or

(2) The proposed amendment would not be inconsistent with the special act creating such corporation; and

(d) Corporations organized under any public statute authorizing incorporation of a special class of corporations, if

(1) Such corporation could now be organized under this Act, or

(2) The proposed amendment would not be inconsistent with the statute under which such corporation was organized and such statute fails to provide a procedure for amendments of articles.

§ 8–2. Right to amend articles of incorporation

(a) A corporation may amend its articles of incorporation, from time to time, in any and as many respects as may be de-

sired if 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.

(b) In particular, and without limitation upon the general power of amendment granted by subsection (a) of this section, a corporation may amend its articles of incorporation so as:

(1) To change its corporate name.

(2) To enlarge, limit, or otherwise change the business for which the corporation is organized; or to delete any specification in the articles of the business or businesses in which it will engage.

(3) To shorten or extend the duration of the corporation, or if the corporation has ceased to exist because the duration specified in its articles of incorporation has expired, to revive its existence.

(4) To increase or decrease the aggregate shares, or shares of any class, which the corporation is authorized to issue.

(5) To increase or decrease the par value of the authorized shares of any class having a par value, whether issued or unissued.

(6) To change the designation of all or any part of its shares, whether issued or unissued, and to change the preferences, limitations, and relative rights in respect of all or any part of its shares, whether issued or unissued.

(7) To change shares having a par value, whether issued or unissued, into the same or a different number of shares without par value; and to change shares without par value, whether issued or unissued, into the same or a different number of shares having par value.

(8) To change the shares of any class, whether issued or unissued, and whether with or without par value, into a different number of shares of the same class or into the same or a different number of shares, either with or without par value, of other classes.

(9) To authorize new classes of shares having rights and preferences either prior or subordinate to the shares of any class then authorized, whether issued or unissued.

(10) To cancel or otherwise affect the right of holders of shares of any class to receive dividends which have accrued but have not been declared.

(11) To divide any preferred or special classes of shares, whether issued or unissued, into series and fix and

determine the designations of such series and the variations in the relative rights and preferences as between the shares of such series.

(12) To authorize the board of directors to establish, out of authorized but unissued shares, series of any preferred or special class of shares and to fix and determine the relative rights and preferences of the shares of any series so authorized; and to revoke, enlarge, or diminish such authority of the board.

(13) To authorize the board of directors to fix and determine the relative rights and preferences of the authorized but unissued shares of series previously established in respect of which either the relative rights or preferences have not been fixed and determined or the relative rights or preferences previously fixed and determined are to be changed; and to revoke, diminish or enlarge such authority of the board of directors.

(14) To exchange, classify, reclassify or cancel all or any part of the shares, whether issued or unissued.

(15) To add, change, or strike out any provision, not inconsistent with this Act or with law, relating to the business of the corporation, its affairs, its rights or powers, or the rights or powers of its shareholders, directors or officers, including any provision which is required or permitted to be set forth in the by-laws or in any agreement.

Comment

Substantially the same as MBCA § 53, South Carolina § 12–19.1.

Replaces 13 M.R.S.A. § 201, first sentence.

§ 8–3. Amendment before organizational meeting

(a) Prior to the election of the initial directors, if they were not named in the articles of incorporation, or prior to the organizational meeting of the board of directors required by § 4–7 if the initial directors were named in the articles, the articles of incorporation may be amended by the incorporator or if more than one incorporator, then by two-thirds of the incorporators.

(b) If any amendment permitted by subsection (a) of this section effects a material change in the articles of incorporation, subscribers for shares, if any, not assenting to the amendment

may rescind their subscriptions without liability, notwithstanding any contrary provision of § 5–5 or the subscription agreement.

Comment

Based on South Carolina § 12–19.2; not in MBCA. No exact equivalent in present law.

§ 8–4. Certain amendments by directors and clerk

(a) The directors may, unless otherwise provided by the articles of incorporation, amend the articles with respect to the registered office or the clerk of the corporation, by following the procedures specified in § 3–4; and the clerk may change the registered office by following the procedures specified in § 3–4.

(b) The directors may amend the articles so as to reflect reductions in authorized shares resulting from cancellations of shares, by following the procedures specified in §§ 5–20 and 5–21.

Comment

(a) is based on South Carolina § 12–193; (b) added for consistency and clarity. No MBCA equivalent.

§ 8–5. Amendment by shareholders

(a) All amendments to the articles of incorporation, except those otherwise permitted to be made as provided by §§ 8–3 and 8–4, shall be made by action of the directors and shareholders in accordance with the following procedure:

(1) The board of directors shall adopt a resolution setting forth the proposed amendment and directing that it be submitted to a vote at an annual or special meeting of the shareholders.

(2) Written notice setting forth the proposed amendment or a summary of changes to be effected thereby shall be given to each shareholder of record entitled to vote thereon in accordance with the provisions of this Act relating to the giving of notice of meetings of shareholders.

(3) At such meeting a vote of the shareholders entitled to vote thereon shall be taken on the proposed amendment. The proposed amendment shall be adopted upon receiving the affirmative vote of the holders of at least a majority of all outstanding shares entitled to vote thereon. If any class of shares is entitled to vote thereon as a class, the

proposed amendment shall be adopted only if, in addition to receiving an affirmative vote of at least a majority of all outstanding shares entitled to vote thereon, it also receives the affirmative vote of the holders of at least a majority of the outstanding shares of each class entitled to vote thereon as a class.

(4) Upon adoption, articles of amendment shall be executed and delivered for filing as provided in §§ 1–4 and 1–6.

(b) Any number of amendments may be submitted to the shareholders and voted upon by them at one meeting.

(c) 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 (a) of this section. Such provision:

(1) May require a unanimous or less than unanimous vote;

(2) May prescribe such greater vote for all amendments, or for any particular amendment, or for any specified category of amendments;

(3) May confer such greater vote upon all shares, or upon any class of shares, or upon both;

(4) Shall not be altered, modified, or removed except by the same vote which such provision requires for amending the articles.

(d) If the holders of at least ten per cent (10%) of any class of shares of the corporation propose an amendment, the board of directors shall submit the proposed amendment to the shareholders at a special or annual meeting.

(e) The articles of incorporation may be amended by written consent of all shareholders entitled to vote on such amendment, as provided by subsection (b) of § 6–20; if such unanimous written consent is given, no resolution of the board of directors proposing the amendment is necessary.

Comment

Based on South Carolina § 12–19.4. (a) and (b) are the same in substance as MBCA § 54, with only minor language differences.

(c), particularly (c) (4), is particularly important for close corporations.

Present 13 M.R.S.A. § 201 provides for amendments of certificates of organization by simple majority vote. The Committee left this unchanged.

§ 8–6. Class voting on amendments

The holders of the outstanding shares of any class shall be entitled to vote as a class upon a proposed amendment, notwithstanding any contrary provision of the articles of incorporation, if the amendment would:

(a) Increase or decrease the aggregate number of authorized shares of such class.

(b) Increase or decrease the par value of the shares of such class.

(c) Effect an exchange, or create a right of exchange, of all or any part of the shares of another class into the shares of such class.

(d) Effect an exchange, reclassification or cancellation of all or part of the outstanding shares of such class.

(e) Change the designations, preferences, limitations or relative rights of the shares of such class, including but not limited to, the following:

(1) Cancel or otherwise affect their rights to accrued dividends;

(2) Reduce the dividend preference thereof;

(3) Make noncumulative, in whole or in part, dividends which had theretofore been cumulative;

(4) Reduce the redemption price thereof or make shares subject to redemption when they are not otherwise redeemable;

(5) Reduce any preferential amount payable thereon upon voluntary or involuntary liquidation;

(6) Eliminate, diminish or alter adversely conversion rights pertaining thereto;

(7) Eliminate, diminish, or alter adversely voting rights pertaining thereto, either directly or by increasing the relative voting rights per share of the shares of another class;

(8) Diminish or alter adversely any rights of the holders thereof to purchase other shares of the corporation;

(9) Change adversely any sinking fund provision relating thereto.

(f) Change the shares of such class into the same or a different number of shares of the same or another class or classes.

(g) Create a new class of shares having rights and preferences prior and superior to the rights of such class, or increase

rights and preferences of any class having rights and preferences prior or superior to the shares of such classes.

(h) Divide the shares of such class into series and fix and determine the designation of such series and the variations in the relative rights and preferences as between the shares of such series, or authorize the board of directors to do so.

(i) Limit or deny any pre-emptive rights of the shares of such class.

Comment

Substantially the same as MBCA § 55, modified by South Carolina § 12–19.5, particularly by adding the example given in (e).

Note that present 13 M.R.S.A. § 201 calls for class voting in case of changes in rights and preferences, and requires an 80% vote of affected classes. A ⅔ class vote seems adequate to protect class rights.

Compare § 7–3(d) which protects the class right to elect directors, even when the power to change the number of directors is delegated generally to the directors. If the power to change the number of directors is not so delegated, any class right to elect one or more directors is protected by subsection (e) (7) above.

§ 8–7. Contents of articles of amendment

(a) Except as provided in subsection (c), any amendment of the articles of incorporation shall be set forth in a document entitled "Articles of Amendment" which shall state the following:

(1) The name of the corporation;

(2) The amendment adopted;

(3) The date of adoption of the amendment; and

(4) Whichever of the following is relevant:

(A) If the amendment was adopted by the incorporators pursuant to § 8–3, the number and vote of the incorporators, the consent of the subscribers to such amendment, and the fact of withdrawal of any subscribers, if such is the case.

(B) If the amendment was adopted by the shareholders pursuant to § 8–5, then the following:

(i) The number of shares outstanding and the number of shares entitled to vote on such amendment, and if the shares of any class were entitled to vote thereon as a class, the designation and number of outstanding shares of each class entitled to vote thereon;

(ii) The number of shares voted for and against such amendment, respectively; and, if the shares of any class were entitled to vote thereon as a class, the number of shares of each such class voted for and against such amendment respectively;

(5) If such amendment provides for exchange, reclassification or cancellation of issued shares, and if the manner in which this shall be effected is not set forth in the amendment, a statement of the manner in which the same shall be effected.

(6) If such amendment effects a change in the number or par values of shares which the corporation is authorized to issue, whether or not all or part of such shares are already issued, a statement of the number of shares which the corporation has authority to issue, itemized by classes and series, after giving effect to such amendment, and summarized to show the aggregate par value of shares having par value which the corporation is authorized to issue and the aggregate number of shares without par value which it is authorized to issue.

(b) Amendments of the articles by the directors or the clerk as provided by § 8–4 shall be set forth in documents designated as prescribed by the Secretary of State upon the official forms adopted by him for the filing of statements of cancellation of shares, and of notifications of changes in registered office and clerk.

(c) When the articles of amendment are delivered for filing by the Secretary of State, he shall, before filing them, make the same determination as provided in § 4–5 in the case of original articles, to the extent applicable to a given amendment or amendments, and follow the procedure set out in § 4–5(c) if he is not satisfied that the articles of amendment are entitled to be filed.

Comment

Same in substance as South Carolina § 12–19.6, and as MBCA § 56.

§ 8–8. Effect of amendment

(a) An amendment shall take effect as of the date of filing the articles of amendment by the Secretary of State as provided by § 1–6.

(b) No amendment shall prejudice any claims of creditors or relieve the corporation of any liability already created or assumed, or affect 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 shareholders, 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

Same as South Carolina § 12–19.7; same in substance as MBCA § 58. This covers most of present 13 M.R.S.A. § 204.

§ 8–9. Restated articles of incorporation

(a) A corporation may at any time execute and file, in accordance with §§ 1–4 and 1–6, a "Restated 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 so authorized, further amendments.

(b) A corporation may restate its articles of incorporation by submitting to the shareholders for their approval the proposed restatement thereof, with or without any new amendments which under § 8–5 or under the articles of incorporation require the vote of the shareholders. 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 restated articles include new amendments not theretofore voted upon by the shareholders, the notice of the meeting at which they are 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 restated articles accompanies such notice; if the directors in good faith believe that the restated articles include no such new amendments, the notice of the meeting shall so state, and it shall be unnecessary to send copies of the proposed restatement with the notice of the meeting; and if for any reason the directors are in good faith uncertain whether the restated articles include any such new amendments, the notice of the meeting shall so state and shall be accompanied by a copy of the proposed restated articles of incorporation.

(c) The restated articles shall be specifically designated as such, and shall set forth the same information as is required by § 8–7 in the case of articles of amendment substituting, wherever applicable, the word "restatement" for the word "amendment". Upon filing the restated articles by the Secretary of State, the original articles of incorporation as amended and supplemented shall be superseded, and the restated articles, including any further amendments and changes made thereby, shall be the articles of incorporation of the corporation.

(d) Any amendment or change effected in connection with the restatement of this 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.

(e) The restated articles may omit statements as to the incorporator or incorporators and the original subscribers for shares. In all other respects, the restated articles shall contain the same information and provisions as are required by this Act for original articles.

(f) When the restated articles are delivered for filing by the Secretary of State, he shall, before filing them, make the same determinations as provided in § 4–5 in the case of original articles, and follow the procedure set out in § 4–5(c) if he is not satisfied that the restated articles are entitled to be filed.

Comment

With minor changes, this is the same as South Carolina § 12–19.8. This appears to be a considerable improvement over MBCA § 59, which does not permit new amendments to be included in the restated articles.

In view of the major changes made by this Act (e. g., the elimination of a required statement of purposes), it is likely that many existing corporations will wish to make numerous amendments to their articles. Under this section, this can be done by the simple expedient of securing shareholder approval of restated articles, which can be drafted almost *de novo*.

This section *replaces 13 M.R.S.A. § 75*, which provides for preparation of composite certificates of organization by the Secretary of State. If it is desired to retain a provision for preparation of composite (or restated) articles by the Secretary of State, the fee should probably be specified and placed at a substantial rate. The draftsman believes that this preparation should normally be done privately; the only analogy is a real estate title search, normally done by counsel; but here the pertinent records will usually be found most readily within the corporation's own files.

§ 8–10. Amendments, mergers, and other changes in connection with reorganization proceedings

(a) A corporation, a plan of reorganization of which has been confirmed by the decree or order of a court of competent jurisdiction pursuant to any applicable statute of the United States relating to reorganization of corporations, may put into effect and carry out the plan and decrees and orders of the court relative thereto, and may take any proceedings and do any act provided in the plan or directed by such decrees and orders, without further action by its directors or shareholders. Such authority may be exercised, and such proceedings and acts may be taken, as directed by such decrees or orders, by the trustee or trustees of such corporation appointed in the reorganization proceedings, or if none have been appointed, by any person or persons designated or appointed for the purpose by any such decree or order, with like effect as if exercised and taken by unanimous actions of the directors and shareholders of the corporation.

(b) Without limiting the generality of the foregoing authority, a corporation may amend its articles for the purpose of carrying out such plan, decrees and orders, so as to:

(1) Change the name, period of duration, or business of the corporation;

(2) Change the aggregate number of shares, or shares of any class or series which the corporation has authority to issue;

(3) Change the preferences, limitations, and relative rights in respect of all or any of the shares of the corporation, and classify, reclassify or cancel all or any part of the shares of the corporation, whether issued or unissued, and make any other changes authorized by this Act;

(4) Authorize the issuance of bonds, debentures or other obligations, whether or not convertible into shares of any class or bearing warrants or other evidences of optional rights to purchase or subscribe for the shares of any class, and fix the terms and conditions thereof;

(5) Constitute or reconstitute and classify or reclassify the board of directors of the corporation and appoint directors and officers in lieu of or in addition to all or any of the directors and officers then in office;

(6) Reduce capital, transfer all or part of its assets by sale, lease or other disposition, or merge or consolidate as permitted by this Act.

(c) Any amendment of the articles of incorporation shall contain only such provisions as might be lawfully contained in the original articles of incorporation at the time of making such amendment.

(d) Articles of amendment approved by decree or other order of such court shall be executed by the trustee or trustees or other person or persons as provided by subsection (a), and shall certify that such amendment is authorized by the plan of reorganization or decree or the order of the court relative thereto, and that the plan has been confirmed as specified in the applicable act of Congress with the title and venue of the proceeding and the date when the decree or order confirming the plan was made. Such articles of amendment shall be filed in accordance with § 1–6.

(e) Nonassenting or dissenting shareholders shall have only such rights as are provided for in the plan of reorganization.

(f) If, after the filing of any articles of amendment as provided by this section, the decree or order of confirmation of the plan or reorganization is reversed or vacated or the plan is modified, articles of amendment shall be executed and filed so as to conform to the plan of reorganization as finally confirmed or to the decree or order as finally made.

(g) As respects any corporation proceeding under a plan of reorganization or other plan pursuant to the "Public Utility Holding Company Act of 1935", as now or hereafter amended or supplemented, a certificate of any change may be filed as provided in this section at any time after the entry of a decree or order of a court of competent jurisdiction confirming, approving, or enforcing such plan; and after such plan has been carried out and consummated hereunder in accordance with such decree or order and such decree or order has ceased to be subject to further appeal or review, this section shall cease to apply to such corporation unless there shall be a further plan for such corporation. As respects any corporation proceeding under a plan of reorganization pursuant to any other statutory authority, this section shall cease to apply to such corporation upon and after the entry of a final decree in the reorganization proceeding closing the case and discharging the trustee or trustees, if any.

Comment

This is substantially identical to present 13 M.R.S.A. § 203 and to MBCA [optional] § 59A, with stylistic changes to conform to the balance of the proposed Act. Note the elimination of any enumeration of possible federal acts applicable.

CHAPTER 9

MERGERS AND CONSOLIDATIONS

Section

§ 9–1. Authority of domestic corporations to merge or consolidate; plan of merger or consolidation

(a) Any two or more domestic corporations (designated in this Act as the "participating corporations") may

(1) merge into one of such corporations (designated in this Act as the "surviving corporation"), or

(2) consolidate into a single new domestic corporation (designated in this Act as the "new corporation"),

pursuant to a plan of merger or consolidation approved in the manner provided in this Act.

(b) The board of directors of each participating corporation shall, by resolution adopted by each such board, approve a plan of merger or consolidation containing the information required by this section.

(c) A plan of merger shall set forth:

(1) The names of the participating corporations, and the name of the surviving corporation into which they propose to merge.

(2) The terms and conditions of the proposed merger.

(3) The manner and basis of converting the shares of each participating corporation into shares or other securities of the surviving corporation and, if any shares of any of the participating corporations are not to be converted solely into shares or other securities of the surviving corpo-

ration, the amount of cash or securities of any other corporation which is to be paid or delivered to the holders of such shares in exchange for or upon the surrender of such share, which cash or securities of any other corporation may be in addition to or in lieu of the shares or other securities of the surviving corporation into which any of the shares of any of the participating corporations are to be converted.

(4) A statement of any changes in the articles of incorporation of the surviving corporation to be effected by such merger; or restated articles of incorporation of the surviving corporation, which may include changes in its articles.

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

(d) A plan of consolidation shall set forth:

(1) The names of the participating corporations, and the name of the new corporation into which they propose to consolidate.

(2) The terms and conditions of the proposed consolidation.

(3) The manner and basis of converting the shares of each participating corporation into shares or other securities of the new corporation and, if any shares of any of the participating corporations are not to be converted solely into shares or other securities of the new corporation, the amount of cash or securities of any other corporation which is to be paid or delivered to the holders of such shares in exchange for or upon the surrender of such share, which cash or securities of any other corporation may be in addition to or in lieu of the shares or other securities of the new corporation into which any of the shares of any of the participating corporations are to be converted.

(4) 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.

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

Comment

MBCA §§ 65 and 66 treat mergers and consolidations separately, although § 67 (shareholder approval) treats both together. The present Maine approach of treating both procedures together, consistently, seems preferable; but it was also felt that the MBCA is more clearly drafted and is, perhaps, substantively preferable.

Accordingly, this section represents a combination of MBCA §§ 65 and 66, with a few minor additions and changes.

South Carolina §§ 12–20.1 and 12–20.2 are identical to MBCA §§ 65 and 66.

Para. (3) of (c) and (d) is substantially the same as Delaware 8 Del.C. § 251(b) (4).

§ 9–2. Notice to and approval by shareholders of merger or consolidation

(a) The board of directors of each participating corporation, upon approving such plan of merger or plan of consolidation, shall, by resolution, direct that the plan be submitted to a vote at a meeting of shareholders, which may be either an annual or a special meeting.

(b) Written notice of the meeting shall be given to each shareholder of record, not less than fourteen (14) days before such meeting, in the manner provided in this Act for the giving of notice of meetings of shareholders. Whether the meeting be an annual or a special meeting, the notice

(1) shall state that the purpose or one of the purposes of the meeting is to consider the proposed plan of merger or consolidation;

(2) shall be accompanied by a copy of the proposed plan of merger or consolidation, or an accurate summary of the the material features of the plan;

(3) shall be accompanied (A) by balance sheets of each participating corporation showing in reasonable detail the financial condition of each participating corporation as of the close of the three fiscal years next preceding the date of the plan of merger or consolidation, and (B), by profit and loss statements of each participating corporation for such periods;

(4) shall contain a clear and concise statement, conspicuously displayed, that shareholders dissenting to the proposed plan of merger or consolidation are entitled, upon compliance with § 9–9, to be paid the fair value of their shares; and

(5) shall be mailed to each shareholder whether or not such shareholder is entitled to vote on the proposed plan.

(c) At each such meeting, a vote of the shareholders shall be taken on the proposed plan of merger or consolidation. The plan of merger or consolidation shall be approved upon receiv-

ing the affirmative vote of the holders of at least two-thirds (⅔) of the outstanding shares entitled to vote thereon of each such corporation, unless any class of shares of any such corporation is entitled to vote as a class thereon, in which event, as to such corporation, the plan of merger or consolidation shall be approved upon receiving the affirmative vote of the holders of at least two-thirds (⅔) of the outstanding shares of each class of shares entitled to vote as a class thereon and of the total outstanding shares entitled to vote thereon. Any class of shares of any such corporation shall be entitled to vote as a class, whether or not otherwise entitled to vote, if the plan of merger or consolidation, as the case may be, contains any provision which, if contained in a proposed amendment to articles of incorporation, would entitle such class of shares to vote as a class.

(d) 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 (c) of this section. Such provision

(1) may require a unanimous or less than unanimous vote;

(2) may designate whether all, or any specified class of mergers or consolidations shall be subject to the prescribed vote;

(3) may confer such vote upon all shares, or upon any class or series of shares, or upon both; and

(4) shall be repealed, altered, or otherwise removed or modified only by the same vote which such provision requires for approving a plan of merger or consolidation, except that any such vote shall not be carried forward and made applicable to the surviving or new corporation unless the plan of merger or consolidation specifically so provides.

Comment

Except for (d) (taken from South Carolina § 12–20.3) and (e) (added in this draft), this section is almost identical to MBCA § 67, with style changes.

This draft follows the latest MBCA as to shares entitled to vote.

13 M.R.S.A. § 243 requires only a majority vote; in view of the right to dissent, this is insufficient.

§ 9–3. Articles of merger or consolidation

(a) When the merger or consolidation has been approved by the shareholders of the participating corporations, articles of merger or consolidation shall be executed by each participating corporation and shall be delivered for filing as provided by §§ 1–4 and 1–6. The articles of merger or consolidation shall set forth:

(1) The plan of merger, or the plan of consolidation.

(2) As to each participating corporation,

(A) The number of shares outstanding and the number of shares entitled to vote on such plan, and the number of such shares voted for and against the plan; and

(B) If the shares of any class were entitled to vote as a class, the designation and number of the outstanding shares of each such class, and the number of shares of each such class voted for and against the plan.

(3) The date when the merger or consolidation is to take effect, if such effective date is postponed to a date, not to exceed sixty (60) days, subsequent to the filing date of the articles of merger or consolidation.

(b) 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 as provided in § 4–5 in the case of original articles, and follow the procedure set out in § 4–5 (c) if he is not satisfied that the articles of merger or consolidation are entitled to be filed.

§ 9–4. Merger of subsidiary corporation into parent; authority to merge and procedure therefor

(a) Any corporation (in this Act termed the "parent corporation") owning at least ninety per cent (90%) of the outstanding shares of each class of one or more other corporations (in this Act termed the "subsidiary corporations") may merge one or more such subsidiary corporations into itself without the approval by a vote of the shareholders of either the parent or any such subsidiary corporation, by complying with the following procedure:

(1) The Board of directors of the parent corporation shall, by resolution, approve a plan of merger setting forth:

(A) The name of each participating subsidiary corporation, and the name of the parent corporation (which shall also be the surviving corporation).

(B) The terms and conditions of the proposed merger.

(C) The manner and basis of converting the shares of each participating subsidiary corporation not owned by the parent corporation into shares or other securities or obligations of the parent corporation, or the cash or other consideration to be paid or delivered by the surviving parent upon surrender of each share of each participating subsidiary corporation not owned by the parent corporation.

(D) The plan shall be accompanied by a clear and concise statement, conspicuously displayed, that shareholders of each participating subsidiary corporation dissenting to the plan of merger are entitled, upon compliance with § 9–9, to be paid the fair value of their shares.

(2) A copy of such plan of merger shall be mailed to each holder of record of any shares of the subsidiary corporation (other than shares held by the parent corporation).

(3) On or after the thirtieth (30th) day after the mailing of a copy of the plan of merger to shareholders of each participating subsidiary corporation, or upon the waiver thereof by the holders of all outstanding shares, articles of merger shall be executed and delivered for filing, as provided by §§ 1–4 and 1–6, and shall set forth:

(A) The plan of merger;

(B) The number of outstanding shares of each class of each participating subsidiary corporation and the number of such shares of each class owned by the parent, surviving corporation; and

(C) The date of the mailing to shareholders of each participating subsidiary corporation of a copy of the plan of merger.

(4) Holders of shares of each subsidiary corporation merged, other than shares held by the parent corporation, shall be entitled to dissent to a merger pursuant to this section, and upon complying with the provisions of § 9–9 to be paid the fair value of their shares. Holders of shares of the parent corporation shall not be entitled to dissent to such merger.

(b) Authority to merge under this section shall not bar any merger or consolidation under procedure authorized by any other provision of this chapter. Any plan of merger which requires or

contemplates any changes other than those specifically authorized by this section shall be accomplished under the provisions of § 9–1.

Comment

Substantially identical to MBCA (optional) § 68A, South Carolina § 12–20.5. Modified to permit simultaneous merger of two or more subsidiaries. See Delaware, 8 Del.C. § 253.

Members of the bar indicate a need for short form mergers of subsidiaries.

§ 9–5. Effect of merger or consolidation

(a) The merger or consolidation shall be effected as of either (1) the filing date of the articles of merger or consolidation, or (2) the date specified in the articles of merger or consolidation, not to exceed sixty (60) days subsequent to the filing date of the articles, when the merger or consolidation is to take effect.

(b) When such merger or consolidation has been effected:

(1) The several participating corporations 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 corporation, and, in the case of a consolidation, shall be the new corporation provided for in the plan of consolidation.

(2) The separate existence of all participating corporations, except the surviving corporation in a merger, shall cease.

(3) 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; and if one or more of the participating corporations was originally created by special act of the Legislature, or was originally organized under any public law pertaining to special classes of corporations, such surviving or new corporation shall, in addition, have all the rights, immunities and powers of each such participating corporation.

(4) The surviving or new corporation shall thereupon and thereafter possess all the rights, privileges, immunities, and franchises, as well of a public as of a private nature, of each of the participating corporations. All property, real, personal and mixed, and all debts due on whatever account, including subscriptions to shares, and all other choses in action, and all and every other interest, of or belonging to or

due to each of the participating corporations, shall be taken and deemed to be transferred to and vested in such surviving or new corporation without further act or deed. 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.

(5) The surviving or new corporation shall thenceforth be responsible and liable for all the liabilities and obligations of each of the participating corporations; and any claim existing or action or proceeding pending by or against any of such corporations may be prosecuted as if such merger or consolidation had not taken place, or such surviving or new corporation may be substituted in its place. Neither the rights of creditors nor any liens upon the property of any such corporation shall be impaired by such merger or consolidation.

(6) 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 original articles of incorporation of the new corporation.

Comment

Substantially identical to MBCA § 69 and South Carolina § 12–20.6.

Substantially the same in language—and identical in effect—to 13 M.R.S.A. § 247.

§ 9–6. Merger or consolidation of domestic and foreign corporations

(a) One or more domestic corporations and one or more foreign corporations (all of which are "participating corporations") may

(1) merge into a single surviving corporation, domestic or foreign, or

(2) consolidate into a single new corporation, domestic or foreign,

if such merger or consolidation is permitted by the laws of the jurisdiction under which each participating foreign corporation is organized.

(b) One or more subsidiary corporations, whether foreign or domestic, may be merged under the provisions of § 9–4 into the parent corporation, whether foreign or domestic, if

(1) section 9–4 would apply except that the parent or a subsidiary corporation is a foreign corporation, and

(2) the laws of the jurisdiction under which each foreign participating corporation is organized permit such merger under substantially the same terms and conditions as § 9–4.

(c) With respect to any proposed merger or consolidation authorized by subsections (a) and (b), each participating domestic corporation shall comply with the provisions of this Act applicable to mergers or consolidations of domestic corporations, and each foreign corporation shall comply with the applicable provisions of the laws of the jurisdiction under which it is organized.

(d) If the surviving or new corporation is or is to be a foreign corporation:

(1) It shall comply with the provisions of this Act with respect to foreign corporations if it is to do business in this State and

(2) It shall, in every case, execute and deliver to the Secretary of State (as provided by §§ 1–4 and 1–6) a document setting forth:

(A) The name of the surviving or new corporation;

(B) An agreement that it will promptly pay to the dissenting shareholders of any participating domestic corporation the amount, if any, to which they are entitled under the provisions of this Act with respect to the rights of dissenting shareholders;

(C) An agreement that it may be served with process in this State in any proceeding (i) to enforce any obligation of a participating domestic corporation or any participating foreign corporation previously subject to suit in this State and (ii) to enforce the right of dissenting shareholders of any participating domestic corporation against the surviving or new corporation;

(D) An irrevocable appointment of the Secretary of State as its agent to accept service of process in any such proceedings, and a post office address, within or without this State, to which the Secretary of State shall mail a copy of any process in such proceeding.

(e) If the surviving or new corporation is or is to be a domestic corporation, 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 or is to be a foreign corporation, the effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of domestic corporations except in so far as the laws of such other jurisdiction provide otherwise.

(f) 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.

(g) 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 sixty (60) days after the filing date, if the articles of merger or consolidation so provide.

Comment

This section is substantially identical to South Carolina § 12–20.7 and MBCA § 70, except for subsection (f), added in this draft.

It is the same in substance as 13 M.R.S.A. §§ 245 and 246.

It differs from MBCA primarily by including provision for short-form mergers of subsidiaries where either the parent or subsidiary is a foreign corporation, provided the foreign law also permits such short-form mergers.

Note that under the statutory definition of "foreign corporation" in § 1–2(c) (". . . formed under the laws of a *jurisdiction* other than this State"), mergers and consolidations are possible with corporations formed under the laws of a country other than the United States (*e. g.*, Canada).

§ 9–7. Authority to abandon merger or consolidation

Without limiting the generality of subsections 9–1 (c) (5) and 9–1 (d) (5), any plan of merger or consolidation, whether of domestic corporations or of domestic and foreign corporations, may contain a provision that at any time prior to the filing of the articles of merger or consolidation, the plan may be abandoned by the board of directors of any participating corporation, notwithstanding approval by the shareholders of the participating corporations, either at the absolute discretion of such board of directors or upon the occurrence of any stated condition.

Comment

Substantially the same as South Carolina § 12–20.8 and as the last paragraphs of MBCA §§ 67 and 70.

It is arguable that this provision is unnecessary, since authority in the plan to abandon fits, at least theoretically, into the category of "other provisions . . . deemed necessary or desirable." (*e. g.* § 9–1(c) (5) and (d) (5)).

Since this provision appears in the Model Act, however, it is retained so that it will be impossible for any court to attach an unintended significance to its omission. To satisfy the concern of some Committee members, it has been altered by adding the first clause.

Note also that at least two (2) states (California and Connecticut) permit abandonment by the Board whether or not the agreement (plan) so provides. 2 MBCA Anno. p. 333. This provision would seem useful to negate that great an authority in the Board.

§ 9–8. Right of shareholders to dissent

(a) Any shareholder of a domestic corporation, by complying with the provisions of § 9–9, shall have the right to dissent from any of the following corporate actions:

(1) Any plan of merger or consolidation in which the corporation is participating; or

(2) Any sale or other disposition (excluding a mortgage or other security interest) of all or substantially all of the property and assets of the corporation not made in the usual and regular course of its business, including a sale in dissolution, but not including a sale pursuant to an order of a court having jurisdiction in the premises or a sale for cash on terms requiring that all or substantially all of the net proceeds of sale be distributed to the shareholders in accordance with their respective interests within one (1) year after the date of sale; or

(3) Any other action as to which a right to dissent is expressly given by this Act.

(b) A shareholder may dissent as to less than all of the shares registered in his name. In that event, his rights shall be determined as if the shares as to which he has dissented and his other shares were registered in the names of different shareholders.

(c) The provisions of this section shall not apply to the shareholders of the surviving corporation in a merger if such corporation is on the date of the filing of the articles of merger the owner of all the outstanding shares of the other corporations, domestic or foreign, which are parties to the merger, or if a vote

of the shareholders of such surviving corporation was not necessary to authorize such merger.

Comment

Substantially the same as MBCA § 73 and South Carolina § 12–20.9.

Compare 13 M.R.S.A. §§ 244 and 281.

Subsection (b) is designed to permit brokers and other fiduciaries to act differently as to shares of different beneficiaries all registered in the same name. See 2 MBCA Anno. p. 390.

§ 9–9. Right of dissenting shareholders to payment for shares

(a) A shareholder having a right under any provision of this Act to dissent to proposed corporate action shall, by complying with the procedure in this section, be paid the fair value of his shares if the corporate action to which he dissented is effected. The fair value of shares shall be determined as of the day prior to the date on which the vote of the shareholders (or of the directors, in the case of a merger under §§ 9–4 or 9–6(b)) was taken approving the proposed corporate action, excluding any appreciation or depreciation of shares in anticipation of such corporate action.

(b) The shareholder, whether or not entitled to vote, shall file with the corporation, prior to or at the meeting of shareholders at which such proposed corporate action is submitted to a vote, a written objection to the proposed corporate action. No such objection shall be required from any shareholder to whom the corporation did not send notice of such meeting in accordance with this Act.

(c) If the proposed corporate action is approved by the required vote and the shareholder did not vote in favor thereof, the shareholder shall file a written demand for payment of the fair value of his shares. Such demand

(1) shall be filed with the corporation or, in the case of a merger or consolidation, with the surviving or new corporation; and

(2) shall be filed by personally delivering it, or by mailing it via certified or registered mail, to such corporation at its registered office within this State or to its principal place of business or to the address given to the Secretary of State pursuant to § 9–6(d) (2) (D); it shall be so delivered or mailed within fifteen (15) days after (A) the date on which the vote of shareholders was taken, or (B) the date on which notice of a plan of merger of a subsidiary

into a parent corporation without vote of shareholders was mailed to shareholders of the subsidiary; and

(3) shall specify the shareholder's current address; and

(4) may not be withdrawn without the corporation's consent.

(d) Any shareholder failing either to object as required by subsection (b) or to make demand in the time and manner provided in subsection (c) shall be bound by the terms of the proposed corporate action. Any shareholder making such demand shall thereafter be entitled only to payment as in this section provided and shall not be entitled to vote or to exercise any other rights of a shareholder.

(e) The right of a shareholder otherwise entitled to be paid for the fair value of his shares shall cease, and his status as a shareholder shall be restored, without prejudice to any corporate proceedings which may have been taken during the interim

(1) if his demand shall be withdrawn upon consent, or

(2) if the proposed corporate action shall be abandoned or rescinded, or the shareholders shall revoke the authority to effect such action, or

(3) if, in the case of a merger, on the date of the filing of the articles of merger the surviving corporation is the owner of all the outstanding shares of the other corporations, domestic and foreign, that are parties to the merger, or

(4) if no action for the determination of fair value by a court shall have been filed within the time provided in this section, or

(5) if a court of competent jurisdiction shall determine that such shareholder is not entitled to the relief provided by this section.

(f) At the time of filing his demand for payment for his shares, or within twenty (20) days thereafter, each shareholder demanding payment shall submit the certificate or certificates representing his shares to the corporation or its transfer agent for notation thereon that such demand has been made; such certificates shall promptly be returned after entry thereon of such notation. A shareholder's failure to do so shall, at the option of the corporation, terminate his rights under this section unless a court of competent jurisdiction, for good and sufficient cause shown, shall otherwise direct. If shares represented by a certificate on which notation has been so made shall be transferred, each new certificate issued therefor shall bear a similar notation,

together with the name of the original dissenting holder of such shares, and a transferee of such shares shall acquire by such transfer no rights in the corporation other than those which the original dissenting shareholder had after making demand for payment of the fair value thereof.

(g) Within the time prescribed by this subsection, the corporation, or, in the case of a merger or consolidation, the surviving or new corporation, domestic or foreign, shall give written notice to each dissenting shareholder who has made demand as herein provided that the corporate action dissented to has been effected, and shall make a written offer to each such dissenting shareholder to pay for such shares at a specified price deemed by such corporation to be the fair value thereof. Such offer shall be made at the same price per share to all dissenting shareholders of the same class. The notice and offer shall be accompanied by a balance sheet of the corporation the shares of which the dissenting shareholder holds, as of the latest available date and not more than twelve months prior to the making of such offer, and a profit and loss statement of such corporation for the twelve months' period ended on the date of such balance sheet. The offer shall be made within the later of (1) ten (10) days after the expiration of the period provided in subsection (c) (2) for making demand, or (2) ten (10) days after the corporate action is effected; corporate action shall be deemed effected on a sale of assets when the sale is consummated, and in a merger or consolidation when the articles of merger or consolidation are filed or upon such later effective date as is specified in the articles of merger or consolidation as permitted by this Act.

(h) If within thirty (30) days after the date on which such corporate action is effected, or within thirty (30) days after the expiration of the period provided in subsection (C) (2) for making demand, whichever is later, the fair value of such shares is agreed upon between any dissenting shareholder and the corporation, payment therefor shall be made within ninety (90) days after the date on which such corporate action was effected, upon surrender of the certificate or certificates representing such shares. Upon payment of the agreed value the dissenting shareholder shall cease to have any interest in such shares.

(i) If within the thirty-day period prescribed by subsection (h), a dissenting shareholder and the corporation do not agree as to the fair value of the shares:

(1) The corporation, within thirty (30) days after receipt of written demand for suit from any dissenting shareholder given within sixty (60) days after the date on which such corporate action was effected, shall, or at its election

at any time within such period of sixty (60) days may, bring an action in the Superior Court in the county in this State where the registered office of the corporation is located praying that the fair value of such shares be found and determined. If, in the case of a merger or consolidation, the surviving or new corporation is a foreign corporation without a registered office in this State, such action shall be brought in the county where the registered office of the participating domestic corporation was last located.

(2) If the corporation fails to institute the action within the period specified in the preceding paragraph, any dissenting shareholder may thereafter bring such an action in the name of the corporation.

(3) No such action may be brought, either by the corporation or by a dissenting shareholder, more than six (6) months after the date on which the corporate action was effected.

(4) In any such action, whether initiated by the corporation or by a dissenting shareholder, all dissenting shareholders, wherever residing, except those who have agreed with the corporation upon the price to be paid for their shares, shall be made parties to the proceeding as an action against their shares quasi in rem. A copy of the complaint shall be served on each dissenting shareholder who is a resident of this State as in other civil actions, and shall be served by registered or certified mail, or by personal service without the State, on each dissenting shareholder who is a nonresident. The jurisdiction of the court shall be plenary and exclusive.

(5) The court shall determine whether each dissenting shareholder, as to whom the corporation requests the court to make such determination, has satisfied the requirements of this section and is entitled to receive payment for his shares; as to any dissenting shareholder with respect to whom the corporation makes such a request, the burden is on the shareholder to prove that he is entitled to receive payment. The court shall then proceed to fix the fair value of the shares.` The court may, if it so elects, appoint one or more persons as appraisers to receive evidence and recommend a decision on the question of fair value. The appraisers shall have such power and authority as shall be specified in the order of their appointment or an amendment thereof.

(6) All shareholders who are parties to the proceeding shall be entitled to judgment against the corporation for the amount of the fair value of their shares, except for any shareholder whom the court shall have determined not to be entitled to receive payment for his shares. The judgment shall be payable only upon and concurrently with the surrender to the corporation of the certificate or certificates representing such shares. Upon payment of the judgment, the dissenting shareholder shall cease to have any interest in such shares.

(7) The judgment shall include an allowance for interest at such rate as the court may find to be fair and equitable in all the circumstances, from the date on which the vote was taken on the proposed corporate action to the date of payment. If the court finds that the refusal of any shareholder to accept the corporate offer of payment for his shares was arbitrary, vexatious, or not in good faith, it may in its discretion refuse to allow interest to him.

(8) The costs and expenses of any such proceeding shall be determined by the court and shall be assessed against the corporation, but all or any part of such costs and expenses may be apportioned and assessed as the court may deem equitable against any or all of the dissenting shareholders who are parties to the proceeding to whom the corporation shall have made an offer to pay for the shares, if the court shall find that the action of such shareholders in failing to accept such offer was arbitrary or vexatious or not in good faith. Such expenses shall include reasonable compensation for and reasonable expenses of the appraisers, but shall exclude the fees and expenses of counsel for any party and shall exclude the fees and expenses of experts employed by any party, unless the court otherwise orders for good cause. If the fair value of the shares as determined materially exceeds the amount which the corporation offered to pay therefor, or if no offer was made, the court in its discretion may award to any shareholder who is a party to the proceeding such sum as the court may determine to be reasonable compensation to any expert or experts employed by the shareholder in the proceeding, and may, in its discretion, award to any shareholder all or part of his attorney's fees and expenses.

(9) At all times during the pendency of any such proceeding, the court may make any and all orders which may be necessary to protect the corporation or the dissenting

shareholders, or which are otherwise just and equitable. Such orders may include, without limitation, orders:

(A) Requiring the corporation to pay into court, or post security for, the amount of the judgment or its estimated amount, either before final judgment or pending appeal.

(B) Requiring the deposit with the court of certificates representing shares held by the dissenting shareholders.

(C) Imposing a lien on the property of the corporation to secure the payment of the judgment, which lien may be given priority over liens and incumbrances contracted after the vote authorizing the corporate action from which the shareholders dissent.

(D) Staying the action pending the determination of any similar action pending in another court having jurisdiction.

(j) Shares acquired by a corporation pursuant to payment of the agreed value therefor or to payment of the judgment entered therefor, as in this section provided, may be held and disposed of by such corporation as in the case of other treasury shares, except that, in the case of a merger or consolidation, they may be held and disposed of as the plan of merger or consolidation may otherwise provide.

(k) The objection required by subsection (b) and the demand required by subsection (c) may, in the case of a shareholder who is a minor or otherwise legally incapacitated, be made either by such shareholder, notwithstanding his legal incapacity, or by his guardian, or by any person acting for him as next friend. Such shareholder shall be bound by the time limitations set forth in this section, notwithstanding his legal incapacity.

(*l*) Appeals shall lie from judgments in actions brought under this section as in other civil actions in which equitable relief is sought.

(m) No action by a shareholder in the right of the corporation shall abate or be barred by the fact that the shareholder has filed a demand for payment of the fair value of his shares pursuant to the provisions of this section.

Comment

This section is substantially identical in language to MBCA § 72, reorganized for consistent style and following some suggestions in South Carolina § 12-16.27. The chief difference from those is a broader range of discretion given to the court in subsection (i) (8) in allowance of costs; the absolute 6-month limitation of actions provided in (i) (3); and the addition of subsections (i) (9), (k) and (*l*) to parallel provisions of present Maine law.

The general substance of this section compares to 13 M.R.S.A. §§ 281 et seq. Some significant differences are:

1. Under the proposed Act, the dissenting shareholder is normally required to file his dissent before or at the shareholders' meeting, not afterwards. The dissenting shareholder is required to take at least two affirmative steps: filing his dissent, and then making demand for payment.

2. Instead of making specific statutory provision for such matters as deposits into court by the shareholders (of the shares) and the corporation (of the amount of judgment pending appeal), and lien of dissenting shareholders, these matters are left within the discretion of the court. Subsection (i) (9). The required notation of shares (subsection (f)) and the provision for concurrent delivery of shares and release of the judgment (subsection (i) (6)) remove the necessity of such provisions in most cases.

3. Shorter final demand period. Subsection (c) (2).

CHAPTER 10

SALE AND OTHER DISPOSITION OF CORPORATE ASSETS

Section

§ 10–1. Definition of "sale"

Whenever used in this chapter, the term **"sale"** shall include a sale, lease, exchange, or any other disposition of assets, except a mortgage of or other security interest in the assets.

§ 10–2. Sale of assets in regular course of business

(a) The sale of all, or substantially all, the property and assets of a corporation, when made in the usual and regular course of the business of the corporation, may be made upon such terms and conditions and for such considerations, which may consist in whole or in part of money or property, real or personal, including shares of any other corporation, domestic or foreign, as shall be authorized by its board of directors.

(b) Except to the extent that the articles of incorporation otherwise provide, the consent or authorization of shareholders for such sale of corporate assets shall not be required.

(c) Whether or not a transaction by a corporation occurs within the usual and regular course of business shall be determined by the circumstances of the transaction, including the character of the business in which the corporation is engaged at the time of or immediately preceding the transaction. A sale of assets may be deemed to be in the regular course of its business if the corporation was incorporated for the purpose of liquidating such assets or property, or if the sale is a transaction or one of a series of transactions made in furtherance of the business of the corporation and not to terminate or dispose of its business.

Comment

Subsections (a) and (b) same in substance as MBCA § 71.

Section is taken from South Carolina § 12–21.2.

§ 10–3. Sale of assets other than in regular course of business

(a) A sale of all, or substantially all, the property and assets, with or without the good will, of a corporation, if ordered by a court of competent jurisdiction, shall be made upon such terms and conditions as may be specified in the order of such court. There shall be no right of a shareholder to dissent therefrom.

(b) Any other sale of all, or substantially all, the property and assets, with or without the good will, of a corporation, if not made in the usual and regular course of its business, 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 other corporation, domestic or foreign, as shall be authorized in the following manner:

(1) The board of directors shall adopt a resolution recommending such sale, and directing the submission thereof to a vote at a meeting of shareholders, which may be either an annual or a special meeting.

(2) Written notice of the meeting shall be given to each shareholder of record, not less than fourteen (14) days before such meeting, in the manner provided in this Act for the giving of notice of meetings of shareholders. Whether the meeting be an annual or a special meeting, the notice

(A) shall state that the purpose or one of the purposes of the meeting is to consider the proposed sale;

(B) shall be accompanied by an accurate summary of the material terms of the proposed sale, to the extent that the same are not to be fixed at, or as authorized by, the meeting;

(C) unless the proposed sale is to be for cash on terms requiring that all or substantially all of the net proceeds of the sale be distributed to the shareholders in accordance with their respective interests within one (1) year after the date of the sale, shall contain a clear and concise statement, conspicuously displayed, that shareholders dissenting to the proposed sale are entitled, upon compliance with § 9–9, to be paid the fair value of their shares; and

(D) shall be mailed to each shareholder whether or not such shareholder is entitled to vote on the proposed sale.

(3) At such meeting the shareholders may authorize such sale, 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 therefor. Such authorization shall require the affirmative vote of the holders of at least two-thirds (⅔) of the outstanding shares entitled to vote thereon, unless any class of shares is entitled to vote as a class thereon, in which event such authorization shall require the affirmative vote of the holders of at least two-thirds (⅔) of the outstanding shares of each class of shares entitled to vote as a class thereon and of the total outstanding shares entitled to vote thereon.

(c) 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 (b) of this section. Such provision

(1) may require a unanimous or less than unanimous vote;

(2) may designate whether all, or any specified class of, sales or other disposition shall be subject to the vote required by the articles;

(3) shall be repealed, altered, or otherwise removed or modified only by the same vote which such provision requires for approving a sale of assets.

(d) After such authorization by a vote of shareholders, the board of directors nevertheless, in its discretion, may abandon such sale of assets, subject to the rights of third parties under any contracts relating thereto, without further action or approval by shareholders.

Comment

Same in substance as MBCA § 72 and South Carolina § 12–21.3. Conforms to § 9–2 as to notice and vote requirements.

Compare 13 M.R.S.A. § 241—similar but with different vote requirements.

§ 10–4. Mortgage or pledge of assets of corporation

A mortgage or pledge of or other security interest in all or any part of the assets of a corporation, whether or not in the usual and regular course of its business, may be made by authority of the board of directors of the corporation without authorization of the shareholders, unless the articles of incorporation shall specifically so require.

Comment

South Carolina § 12–21.4; same in substance as part of MBCA § 71.

Same as latter part of 13 M.R.S.A. § 241.

§ 10–5. Right of shareholders dissenting to certain sales of assets

Any shareholder of a corporation, by complying with § 9–9, shall have the right to dissent from any sale of all or substantially all of the property and assets of the corporation, except when such sale is in the usual and regular course of its business, or when such sale is for cash on terms requiring that all or substantially all of the net proceeds of the sale be distributed to the shareholders in accordance with their respective interests within one (1) year after the date of the sale, or when such sale is pursuant to an order of a court having jurisdiction in the premises.

Comment

Parallels § 9–8(a) (2)—may be redundant.

CHAPTER 11

DISSOLUTION OF CORPORATIONS AND DEADLOCK

Section

§ 11–1. Voluntary dissolution by incorporators

A corporation which has not commenced business and which has not issued any shares, may be voluntarily dissolved by its in-

corporator or incorporators at any time after the filing date of its articles of incorporation, in the following manner:

(a) Articles of dissolution shall be executed by the incorporators and delivered for filing, as provided by §§ 1–4 and 1–6, and shall set forth:

(1) The name of the corporation.

(2) The filing date of its articles of incorporation.

(3) That none of its shares has been issued.

(4) That the corporation has not commenced business.

(5) That the amount, if any, actually paid in on subscriptions for its shares, less any part thereof disbursed for necessary expenses, has been returned to those entitled thereto.

(6) That no debts of the corporation remain unpaid.

(7) That a majority of the incorporators elect that the corporation be dissolved.

(b) On the filing date of the articles of dissolution, the existence of the corporation shall cease.

(c) Dissolution pursuant to this section does not require any vote or action of the directors.

Comment

Same in substance and most language as MBCA § 75, and the same as South Carolina § 12–22.1, except for (c), added in this draft for clarity.

§ 11–2. Voluntary dissolution by written consent of all shareholders

(a) A corporation may be voluntarily dissolved by written consent of all of its shareholders, whether or not entitled to vote by the provisions of the articles of incorporation.

(b) Upon the execution of such written consent, a statement of intent to dissolve shall be executed, verified and delivered for filing, as provided by §§ 1–4 through 1–6, and shall set forth:

(1) The name of the corporation.

(2) The names and respective addresses of its officers.

(3) The names and respective addresses of its directors.

(4) A copy of the written consent or consents signed by all shareholders of the corporation.

(5) A statement that such written consent or consents have been signed by all shareholders of the corporation or signed in their names by their duly authorized attorneys.

(c) Dissolution pursuant to this section does not require any vote or action of the directors.

Comment

Same as South Carolina § 12–22.3 and MBCA § 76, except for (c), added in this draft for clarity.

§ 11–3. Voluntary dissolution by resolution of directors and shareholders

(a) A corporation may be dissolved by resolution of the directors and shareholders when authorized in the following manner:

(1) Either

(A) 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 the shareholders, which may be either an annual or a special meeting; or

(B) shareholders owning at least twenty per cent (20%) of all the outstanding shares of the corporation entitled to vote on a proposed dissolution may, in writing, propose the dissolution of the corporation and call upon the board of directors to submit their proposal to a vote of the shareholders; if the directors fail or refuse, for more than thirty (30) days after delivery of such proposal to the corporation, to submit to the shareholders such proposal for dissolution by shareholders owning at least twenty per cent (20%) of all outstanding shares of the corporation entitled to vote thereon, the shareholders proposing dissolution may call a meeting to consider such proposal.

(2) Written notice shall be given to each shareholder of record 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 shareholders, and whether the meeting be an annual or special meeting, shall state that the purpose, or one of the purposes, of such meeting is to consider the advisability of dissolving the corporation.

(3) At such meeting a vote of shareholders entitled to vote thereat shall be taken on a resolution to dissolve the

corporation. Unless the articles of incorporation shall require a greater vote, the resolution shall be adopted upon receiving the affirmative vote of the holders of at least two-thirds (⅔) of the outstanding shares of the corporation entitled to vote thereon, unless any class of shares is entitled to vote as a class, in which event the resolution shall require for its adoption the affirmative vote of the holders of at least two-thirds (⅔) of the outstanding shares of each class of shares entitled to vote as a class thereon, and of the total shares entitled to vote thereon.

(4) Upon the adoption of such resolution, a statement of intent to dissolve shall be executed and delivered for filing, as provided by §§ 1–4 and 1–6, and shall set forth:

(A) The name of the corporation.

(B) The names and respective addresses of its officers.

(C) The names and respective addresses of its directors.

(D) A copy of the resolution adopted by the shareholders authorizing the dissolution of the corporation.

(E) The number of shares outstanding and the number of shares entitled to vote, and if the shares of any class are entitled to vote as a class, the designation and number of outstanding shares of each such class.

(F) The number of shares voted for and against the resolution, respectively, and, if the shares of any class are entitled to vote as a class, the number of shares of each such class voted for and against the resolution, respectively.

Comment

Same in most respects as MBCA § 77, except for (a) (2); similar to South Carolina § 12–22.2.

This follows the most recent version of MBCA in giving a vote only to those shares normally entitled to vote; South Carolina and the earlier version of the MBCA gave the vote to all shares, whether or not normally entitled to vote.

Other protections given nonvoting shares should make it unnecessary to give them a vote on the issue of dissolution.

Compare 13 M.R.S.A. § 549.

§ 11–4. Dissolution of corporation by expiration of articles of incorporation; reinstatement

(a) If a corporation is limited to a period of duration specified by its articles of incorporation, and the corporate existence has not been extended or made perpetual by amendment of the articles or otherwise, a statement of intent to dissolve shall be executed and filed as provided by §§ 1–4 and 1–6 on or before the date upon which the corporate existence is due to expire.

(b) The statement of intent to dissolve shall set forth:

(1) The name of the corporation.

(2) The expiration date specified in the articles of incorporation, and that the duration of the corporate existence has not been extended or made perpetual by amendment of the articles or otherwise.

(3) The names and addresses of its officers and directors as of the date of executing the statement.

(c) At any time prior to the expiration date specified in the articles of incorporation, the directors and shareholders of the corporation may amend the articles of incorporation to extend or to make perpetual the duration of the corporation, by following the procedure prescribed in this Act for other amendments. Such amendment, if filed after the filing of the statement of intent to dissolve but before the expiration date specified in the articles, shall automatically revoke the statement of intent to dissolve, and the corporation may carry on its business.

(d) At any time within two (2) years after the expiration date specified in the articles of incorporation, one or more persons who were directors of the corporation as of the expiration date may execute and deliver for filing, as provided by §§ 1–4 and 1–6, an application for reinstatement of the corporation; such application shall set forth:

(1) that it is authorized by a vote of the shareholders of the corporation at a meeting called and held in the manner prescribed in this Act for amendments to articles of incorporation, as though the duration of the corporation had not expired;

(2) the new period of duration of the corporation, or the fact that it is to have perpetual duration; and

(3) such other statements as are required by this Act in articles of amendment.

The Secretary of State shall file the application upon receiving all fees and taxes which would have been payable during the period

between expiration and reinstatement, together with a reinstatement fee.

As of the filing date of the application, the corporate existence shall be deemed to have continued without interruption from the expiration date, except that reinstatement shall have no effect upon any issue of personal liability of the directors, officers, or agents of the corporation during the period between the expiration date and reinstatement. If the name of the corporation has, during such period, been assumed or reserved or registered by any other person or corporation, the reinstated corporation shall not engage in business until it has amended its articles of incorporation to change its name.

Comment

Based on South Carolina § 12–22.4.

§ 11–5. Effect of statement of intent to dissolve corporation

Upon the filing by the Secretary of State of a statement of intent to dissolve, whether by resolution of directors and shareholders, by written consent of all shareholders, or with respect to expiration of the charter, the corporation shall cease to carry on its business, except in so far 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

Substantially the same as MBCA § 79, South Carolina § 12–22.5.

§ 11–6. Procedure after filing of statement of intent to dissolve

After the filing by the Secretary of State of a statement of intent to dissolve, as provided in this chapter:

(a) The corporation shall carry on no business except for the purpose of winding up and liquidating its affairs.

(b) The corporation shall immediately cause notice of the filing of the statement of intent to dissolve to be mailed to each known creditor of the corporation and to the State Tax Assessor.

(c) The corporation shall fulfill or discharge its contracts, collect its assets, convey and dispose of such properties as are not to be distributed in kind to its shareholders, pay, satisfy and discharge its liabilities and obligations, and do all other acts required or appropriate to wind up and to liquidate its business and affairs, as expeditiously as practicable.

(d) After paying or adequately providing for the payment of all its obligations, the corporation shall distribute the remainder of its assets, either in cash or in kind, among its shareholders according to their respective rights and interests.

(e) The corporation, at any time during the liquidation of its business and affairs, may apply to the Superior Court in the county in which the registered office of the corporation is situated, to have the liquidation continued under the supervision of the court as provided in this Act.

Comment

Generally the same as MBCA § 80 and South Carolina § 12–22.6.

South Carolina requires notice by publication in a newspaper, as well as the actual notice called for in (b). This seems unnecessary.

§ 11–7. Revocation of voluntary dissolution proceedings by consent of all stockholders

(a) By the written consent of all of its shareholders, whether or not entitled to vote, a corporation may, at any time prior to the date of filing the articles of dissolution by the Secretary of State, revoke voluntary dissolution proceedings previously authorized.

(b) Upon execution of such written consent or consents, a statement of revocation of voluntary dissolution proceedings shall be executed and delivered for filing as provided by §§ 1–4 through 1–6, and such statement shall set forth:

(1) The name of the corporation.

(2) The names and respective addresses of its officers.

(3) The names and respective addresses of its directors.

(4) A copy of the written consent or consents signed by all shareholders of the corporation revoking such voluntary dissolution proceedings.

(5) That such written consent has been signed by all shareholders of the corporation or signed in their names by their duly authorized attorneys.

Comment

Same as MBCA § 81 and South Carolina § 12–22.8.

§ 11–8. Revocation of voluntary dissolution proceedings by resolution of directors and shareholders

By resolution of the directors and shareholders, a corporation may, at any time prior to the date of filing the articles of dissolution with the Secretary of State, revoke voluntary dissolution proceedings previously authorized, in the following manner:

(a) The board of directors shall adopt a resolution recommending that the voluntary dissolution proceedings be revoked, and directing that the question of such revocation be submitted to a vote at a special meeting of shareholders.

(b) Written notice, stating that the purpose or one of the purposes of such meeting is to consider the advisability of revoking the voluntary dissolution proceedings, shall be given to each shareholder of record entitled to vote at such meeting within the time and in the manner provided in this Act for the giving of notice of special meetings of shareholders.

(c) At such meeting a vote of the shareholders entitled to vote thereat shall be taken on a resolution to revoke the voluntary dissolution proceedings, which shall require for its adoption the affirmative vote of the holders of at least two-thirds (⅔) of the outstanding shares entitled to vote thereon.

(d) Upon the adoption of such resolution, a statement of revocation of voluntary dissolution proceedings shall be executed and delivered for filing as provided by §§ 1–4 and 1–6, and such statement shall set forth:

(1) The name of the corporation.

(2) The names and respective addresses of its officers.

(3) The names and respective addresses of its directors.

(4) A copy of the resolution adopted by the shareholders revoking the voluntary dissolution proceedings.

(5) The number of shares outstanding.

(6) The number of shares voted for and against the resolution, respectively.

Comment

Same generally as MBCA § 82, South Carolina § 12–22.7.

Note that unlike § 11–3, no express provision is made for class voting; but like that section, the most recent version of MBCA is followed, in that shares may vote only if normally entitled to do so.

§ 11–9. 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 directors and shareholders or by consent of all of the shareholders, the revocation of the voluntary dissolution proceedings shall become effective, and the corporation may again carry on its business.

§ 11–10. Articles of dissolution

(a) 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 to its shareholders, articles of dissolution shall be executed and delivered for filing as provided by §§ 1–4 and 1–6, and such articles shall set forth:

(1) The name of the corporation.

(2) 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.

(3) That all debts, obligations and liabilities of the corporation have been paid and discharged or that adequate provision has been made therefor.

(4) That all remaining property and assets of the corporation have been distributed among its shareholders in accordance with their respective rights and interests.

(5) 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.

(b) 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 shareholders, directors and officers as provided in this Act.

Comment

Same as MBCA § 85, South Carolina § 12–22.10.

§ 11–11. Dissolution upon suit by Attorney General

A corporation may be dissolved involuntarily by a decree of the Superior Court in an action filed by the Attorney General, when it is established that the corporation:

(a) has failed to file its annual report within the time required by this Act, or has failed to pay its franchise tax on or before the date on which such franchise tax becomes due and payable; or

(b) procured its articles of incorporation through fraud or concealment of a material fact, or in any material matter failed to comply with the requirements of this Act or any prior general corporation law concerning the organization of corporations; or

(c) has continued to exceed or abuse the authority conferred upon it by law; or

(d) has failed for thirty (30) days to appoint or maintain a clerk in this State; or

(e) has failed for thirty (30) days after change of its registered office or clerk to file in the office of the Secretary of State a statement of such change; or

(f) has willfully made false statements as to material matters on its annual report.

Comment

Largely the same as MBCA § 87; (b) is enlarged, and (f) and (g) added. South Carolina §§ 12–22.11 et seq. are similar, but with one major difference: As to the causes mentioned in subsections (a), (d) and (e) or this draft, the Secretary of State is given power to enter a dissolution order without judicial proceedings. While this makes sense, it seems too summary a procedure.

§ 11–12. Procedure for dissolution upon suit by Attorney General

(a) The Secretary of State shall annually certify to the Attorney General the names of all corporations which have failed to file their annual reports or to pay franchise taxes in accordance with the provisions of this Act, together with the facts pertinent thereto. He shall also certify, from time to time, the names of all

corporations which have given other cause for dissolution as provided in this Act, together with the facts pertinent thereto.

(b) Not less than thirty (30) days after receipt of such certification, the Attorney General shall file an action in the name of the State against each such corporation for its dissolution.

(c) Whenever the Secretary of State shall certify the name of a corporation to the Attorney General as having given any cause for dissolution, the Secretary of State shall concurrently mail to the corporation at its registered office a notice that such certification has been made.

(d) Every certificate from the Secretary of State to the Attorney General pertaining to the failure of a corporation:

(1) to file its annual report, or

(2) to pay its franchise tax, or

(3) to appoint or maintain a clerk, shall be taken and received in all courts as prima facie evidence of the facts therein stated.

(e) If, before action is filed, the corporation shall remedy its non-compliance with this Act by:

(1) filing its annual report, or

(2) paying its franchise tax, together with all penalties thereon, or

(3) appointing a clerk, or

(4) filing with the Secretary of State the required statement of change of registered office or clerk, or such fact shall be forthwith certified by the Secretary of State to the Attorney General and he shall not file an action against such corporation for such cause.

(f) If, after the action is filed but before final judgment is entered therein, the corporation shall remedy its non-compliance with this Act in the manners specified in subsection (e), and shall pay all the costs of such action, the action shall abate.

Comment

Generally the same as MBCA § 88.

§ 11–13. Venue and process in dissolution actions by Attorney General

(a) Every action for the involuntary dissolution of a corporation shall be commenced by the Attorney General either in the

Superior Court in the county in which the registered office of the corporation is situated, or if it has no such registered office, in the Superior Court in Kennebec County.

(b) Summons shall issue and be served as in other civil actions.

(c) If process is returned not found, the Attorney General shall cause publication to be made as in other civil cases in some newspaper published in the county where the registered office of the corporation is situated, containing a notice of the pendency of such action, the title of the court, the title of the action, the relief sought, and the date on or after which default may be entered. The Attorney General may include in one notice the names of any number of corporations against which actions are then pending in the same court. Such notice shall be published at least once each week for two successive weeks, and the first publication thereof may begin at any time after the summons has been returned not found. Unless a corporation shall have been served with summons, no default shall be taken against it earlier than thirty (30) days after the first publication of such notice.

(d) In any case where publication is made in lieu of service of process on the corporation, the Attorney General shall also cause a copy of such published notice to be mailed:

(1) to the corporation at its registered office, or at the last address given to the Secretary of State for its registered office, and

(2) to every officer and director of the corporation, if any, whose addresses (different from the registered office) were given on the last annual return filed by the corporation, within ten (10) days after the first publication thereof, or at least twenty (20) days before taking a default in such action. The certificate of the Attorney General of the mailing of such notice shall be prima facie evidence thereof.

Comment

Largely the same as MBCA § 89, reorganized and with minor additions.

§ 11–14. Dissolution pursuant to provision in articles of incorporation

(a) The articles of incorporation of any corporation created under this Act may contain a provision that any shareholder, or the holders of any specified number or proportion or class of

outstanding shares, may dissolve the corporation at will or upon the occurrence of any specified event or contingency.

(b) A provision authorized by subsection (a) shall be valid only so long as the shares of the corporation are not traded on any national securities exchange or regularly traded in any over-the-counter market maintained by one or more brokers or dealers in securities.

(c) A transferee of shares in a corporation whose shareholders have entered into a provision authorized by subsection (a) shall be bound by such agreement if he takes the shares with actual notice thereof. A transferee shall be deemed to have actual notice of any such agreement if the text of the agreement, with any amendments, is set forth in the articles of incorporation and is also set forth or conspicuously noted on the face or back of the certificates representing such shares.

(d) If the articles of incorporation as originally filed do not contain the provision authorized by subsection (a) they may be amended to contain such provision if authorized by an affirmative vote of the holders of all outstanding shares, whether or not entitled to vote.

(e) Each certificate of shares in any corporation whose articles of incorporation authorize dissolution as permitted by this section shall set forth on the face or back of the certificate the text of any such provision or, if by reason of its length it is impracticable to reproduce the text thereof, then a clear and conspicuous reference to the existence and substance of such provision.

(f) If the articles of incorporation contain a provision authorized by subsection (a), dissolution by the shareholders given such power by the articles shall be effected as follows:

(1) Such shareholders shall deliver to the registered office of the corporation, or personally to its president, clerk or secretary, a written demand or demands upon the president and other officers to dissolve the corporation, signed by the requisite number of shareholders in person or by their authorized agents.

(2) Within thirty (30) days after the delivery of such demand or demands, the officers of the corporation shall proceed as is provided in this Act in the case of voluntary dissolution by written consent of all shareholders, except that the statement of intent to dissolve, in lieu of setting forth copies of the written consent or consents of all share-

holders and a statement that such written consent or consents have been signed by all shareholders, shall set forth:

(A) A copy of the provision of the articles authorized by subsection (a);

(B) Copies of the written demand or demands delivered to the corporation pursuant to this section;

(C) A statement of the total number of shares outstanding and if the provision of the articles grants the power of dissolution to the shares or part of the shares of a specified class, the number of shares of such class outstanding, and of the number and class of shares owned by the shareholders who signed such written demand or demands; and

(D) A statement that such written demand or demands have been signed by the number of shareholders provided for in the provision of the articles authorized by subsection (a), and that the event or contingency specified therein, if any, has occurred.

(3) If the officers of the corporation do not proceed as required by this subsection, the shareholders making such demand for dissolution may proceed as provided in § 11–15.

Comment

This section does not appear in the MBCA; its substance was taken from South Carolina § 12–22.14, but subsection (f) was added in this draft to give a definite procedure.

Such a provision would be found only in the articles of a close corporation, and is consistent with the purpose of this Act to make it possible for such corporations to have the greatest flexibility—in this case, the same power of dissolution as for a partnership—if proper provision is made therefor in the articles, and if the rights of non-consenting outsiders are not impaired.

§ 11–15. Dissolution pursuant to court order

The Superior Court of this State shall have full power to decree the dissolution of, and to liquidate the assets and business of, a corporation:

(a) In an action filed by a shareholder, in which it is established that:

(1) The directors of the corporation are so divided respecting the management of the corporation's business and affairs that the votes required for action by the board of directors cannot be obtained and the shareholders are un-

able to terminate the division, with the consequence that (A) the corporation is suffering or will suffer irreparable injury, or (B) the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally; or

(2) The shareholders are so divided that they have failed, for a period which includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired or would have expired upon the qualification of their successors; or

(3) The shareholders are so divided respecting the management of the business and affairs of the corporation that (A) the corporation is suffering or will suffer irreparable injury, or (B) the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally; or

(4) The acts of the directors or those in control of the corporation are illegal or fraudulent; or

(5) The corporate assets are being misapplied or wasted; or

(6) The petitioning shareholder has a right under a provision of the articles of incorporation as permitted by § 11–14 to dissolution of the corporation at will or upon the occurrence of any specified event or contingency and has made demand upon the president and other officers of the corporation as provided in that section, and the officers have failed to proceed with dissolution as required by that section; or

(7) The corporation has abandoned its business and has failed, within a reasonable time, to take steps to dissolve and liquidate its affairs and distribute its assets.

(b) In an action filed by a creditor of the corporation:

(1) When the claim of the creditor has been reduced to judgment and an execution thereon returned unsatisfied, and it is established that the corporation is insolvent or that its debts exceed its assets; or

(2) 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 or that its debts exceed its assets.

(c) Upon application by a corporation which has filed a statement of intent to dissolve, as provided in this Act, to have its liquidation continued under the supervision of the court.

(d) In an action filed by a shareholder or creditor of a corporation which has filed a statement of intent to dissolve, as provided in this Act, when it is established that there is serious danger that the persons in control of the corporation and its assets will fail to make proper provision for the payment of its debts or will fail to make proper distribution of the remaining property and assets of the corporation to the shareholders in accordance with their respective rights and interests.

(e) When an action has been filed by the Attorney General to dissolve a corporation and it is established that liquidation of its business and affairs should precede the entry of a decree of dissolution.

(f) Proceedings under subsections (a), (b), (c) or (d) of this section shall be brought in the county in which the registered office or the principal place of business of the corporation in this State is located.

(g) In determining whether dissolution shall be ordered on petition of a shareholder under subsection (a), dissolution shall not be denied solely because it is found that the business of the corporation has been or could be conducted at a profit.

Comment

Largely the same as MBCA § 90 and South Carolina § 12–22.15.

Subsection (a) (3) is not in MBCA, and covers those close corporations managed directly by the shareholders instead of a board of directors; (a) (6) is not in MBCA, as MBCA has no equivalent of § 11–14; (a) (7) is not in MBCA.

Subsection (d) is added in this draft, and has no equivalent in MBCA or South Carolina.

Subsection (g) is not in MBCA. It should be read together with § 11–23.

Includes the substance of 13 M.R.S.A. § 542(1) and part of (2).

Compare 13 M.R.S.A. §§ 549 and 550: in cases of voluntary dissolution under this proposed Act, it will be unnecessary to file an action for dissolution (see § 11–6) unless creditors or shareholders feel threatened (§ 11–15 (d)).

§ 11–16. Procedure in judicial dissolution; liquidation of corporation

In any action for judicial dissolution of a corporation:

(a) The complaint shall specify the section or sections of this Act under which it is authorized, shall state the reasons why the corporation should be dissolved or why the court should

supervise its liquidation and dissolution, and shall be verified by the plaintiff.

(b) Summons shall issue and process shall be served on the corporation as in other civil actions. It shall not be necessary to make shareholders parties to any such action or proceeding unless relief is sought against them personally, or unless the court in its discretion so orders.

(c) The court shall have full power to issue injunctions and temporary restraining orders, to appoint receivers, including a receiver pendente lite, with such powers and duties as the court may from time to time direct, and to take other proceedings and make other orders as may be requisite to preserve the corporate assets wherever situated and carry on the business of the corporation until a full hearing can be held.

Comment

Based on South Carolina § 12–22.16, with additions.

Includes the substance of last paragraph of MBCA § 90 and first paragraph of MBCA § 91.

Includes substance of last sentence of 13 M.R.S.A. § 542.

§ 11–17. Appointment, duties and qualification of receivers in proceedings for judicial dissolution

(a) After a hearing had 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, including all amounts owing to the corporation by shareholders on account of any unpaid portion of the consideration for the issuance of shares. 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 assets of the corporation or the proceeds resulting from a sale, conveyance or other disposition thereof shall be applied to the expenses of such liquidation and to the payment of the liabilities and obligations of the corporation, and any remaining assets or proceeds shall be distributed among its shareholders according to their respective rights and interests. 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.

(b) The court may allow from time to time as expenses of the liquidation compensation to the receiver or receivers and to attorneys in the proceeding, and direct the payment thereof out of the assets of the corporation or the proceeds of any sale or disposition of such assets.

(c) 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.

(d) A receiver shall in all cases be a citizen of the United States or a corporation authorized under the laws of this State to act as receiver, which corporation may be a domestic corporation or a foreign corporation authorized to transact business in this State, and shall in all cases give such bond as the court may direct with such sureties as the court may require.

Comment

Same as South Carolina § 11–17, MBCA §§ 91 and 92.

Same in substance as first sentence of 13 M.R.S.A. § 543, § 544, and § 548.

§ 11–18. Filing of claims in liquidation proceedings; priorities in case of insolvency

(a) In proceedings to liquidate the assets and business 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 four (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 claim on or before the date so fixed may be barred, or may be permitted, by the court, as it deems fit, to participate in the distribution of the assets of the corporation.

(b) 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:

(1) All attachments made within four (4) months before the commencement of the action shall be dissolved; and

(2) The distribution of the assets of the corporation shall be subject to the same priorities of indebteness as specified in the National Bankruptcy Act of 1898, as amended.[1]

Comment

Subsection (a) same as MBCA § 93, South Carolina § 12–22.18, and 13 M.R.S.A. § 545. Subsection (b) based on last part of 13 M.R.S.A. § 543.

§ 11–19. Discontinuance of liquidation proceedings

The liquidation of the assets and business of a corporation may be discontinued at any time during the liquidation proceedings when it is established that cause for liquidation did not exist or 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

Same as MBCA § 94, South Carolina § 12–22.19.

§ 11–20. Decree of dissolution

(a) In proceedings to liquidate the assets and business of a corporation, the court shall enter a decree dissolving the corporation, upon determining that (1) the costs and expenses of such proceedings and all debts, obligations and liabilities of the corporation have been paid and discharged and all of its remaining property and assets distributed to its shareholders in accordance with their respective rights and interests, or (2) in case its property and assets are not sufficient to satisfy and discharge such costs, expenses, debts and obligations, that all the property and assets have been applied so far as they will go to their payment.

(b) Upon entry of the decree dissolving the corporation, the existence of the corporation shall cease.

(c) 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

With minor changes, the same as South Carolina § 12–22.20, MBCA §§ 95 and 96. Subsection (c) same as 13 M.R.S.A. § 555.

1. 11 U.S.C.A. § 1 et seq.

§ 11–21. Deposit with State Treasurer of undistributed assets due certain shareholders and creditors

(a) Upon the voluntary or involuntary dissolution of a corporation, the portion of the assets distributable to a creditor or shareholder 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, shall be reduced to cash and deposited with the State Treasurer and shall be paid over to such creditor or shareholder or to his legal representative upon proof satisfactory to the State Treasurer of his right thereto.

(b) If the Treasurer 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; if the court is satisfied as to the claimant's right to the funds, it shall issue an order directing the Treasurer to pay the same to such claimant. Such action may not be brought after the expiration of twenty (20) years from the time of deposit of such funds with the State Treasurer. At the end of such twenty (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

Subsection (a) is the same as MBCA § 97, South Carolina § 12–22.1

Same as last portion of 13 M.R.S.A. § 550, except that the Treasurer may pay without being sued if he is satisfied as to the claimant's rights.

§ 11–22. Survival of remedy after dissolution; liquidating trustees

(a) The dissolution of a corporation, either (1) by the filing by the Secretary of State of the articles of dissolution, or (2) by a decree of court, or (3) by expiration of its period of duration, shall not take away or impair any remedy available to or against such corporation, its directors, officers, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within two (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 shareholders, directors and officers shall have

power to take such corporate or other action as shall be appropriate to protect such remedy, right or claim.

(b) 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

Same as MBCA § 98, except (b) added as in South Carolina § 12–22.22.

Compare 13 M.R.S.A. § 551.

§ 11–23. Discretion of court to grant relief other than dissolution

(a) If dissolution of a corporation has commenced pursuant to a demand of shareholders made as authorized by § 11–14 and there is no action pending for the judicial dissolution of the corporation, any shareholder, whether or not he joined in the demand for dissolution, may bring a civil action in the Superior Court against the corporation to seek relief other than dissolution.

(b) Any shareholder of a corporation may intervene in an action brought by another shareholder under subsection (a) of § 11–15 to dissolve the corporation, in order to seek relief other than dissolution.

(c) In any action brought under subsection (a) of this section, or upon the application of the plaintiff or any other shareholder or on the court's own motion in any action filed by a shareholder to dissolve the corporation on any of the grounds enumerated in subsection (a) of § 11–15, or on the court's own motion in any action to dissolve the corporation, the court may make such order or grant such relief, other than dissolution, as in its discretion it deems appropriate, including, without limitation, an order

(1) Providing for the purchase at their fair value of shares of any shareholder, either by the corporation or by other shareholders; or

(2) Providing for the sale of all the property and franchises of the corporation to a single purchaser, who shall succeed to all the rights and privileges of the corporation and may reorganize the same under the direction of the court; or

(3) Directing or prohibiting any act of the corporation or of shareholders, directors, officers or other persons party to the action; or

(4) Cancelling or altering any provision contained in the articles of incorporation, or any amendment thereof, or in the by-laws of the corporation; or

(5) Appointing, as an additional director, a person qualified under the laws of this State to act as a receiver and having no close personal, business or financial relationship to the members of any contending faction within the corporation, to act as such director either in all matters or in such matters as the court may direct, and to hold office as such director for such period as the court may order, not in excess of two (2) years; such person shall be paid, by the corporation, such compensation as the court may order, and may be required to post security for the faithful performance of his duties, in such amount and with such sureties as the court may order; or

(6) Cancelling, altering, or enjoining any resolution or other act of the corporation.

(d) Such relief may be granted as an alternative to a decree of dissolution, or may be granted whenever the circumstances of the case are that such relief, but not dissolution, would be appropriate; and should be granted when such relief would furnish greater protection of the interests of creditors and shareholders than would dissolution.

Comment

This section is based on South Carolina § 12–22.23, with substantial modification, and with the addition of the substance of 13 M.R.S.A. § 546.

It is a substantial improvement over the usual provisions (*e. g.*, MBCA), which afford no alternative to dissolution in cases of irreconcilable deadlock, etc. The expenses of judicially-supervised dissolution penalize all concerned, and a going business is destroyed.

A judicially-ordered buy-out, in particular, affords a method of breaking the deadlock at minimum expense. (c) (5) added in this draft for the same purpose.

CHAPTER 12

FOREIGN CORPORATIONS

Section

§ 12–1. Authorization of foreign corporations to do business in this State: certain activities not deemed doing business

(a) No foreign corporation shall do business 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 do business 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.

(b) Whenever there is a public law of this State setting forth a procedure for the authorization to do business of a special class of foreign corporations, a foreign corporation seeking authority to engage in any business included within any such

special class shall comply with the procedure set out in such public law, rather than complying with this chapter; and no foreign corporation authorized to do business under the provisions of this chapter may engage in any business included within any such special class.

(c) No foreign corporation other than a corporation chartered by the United States of America for such purpose shall be authorized to engage in the business of a bank or trust company.

(d) Without excluding other activities which may not constitute doing business in this State, a foreign corporation shall not be deemed to be doing business 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:

(1) Maintaining, defending, or participating in any action or proceeding whether judicial, administrative, arbitrative or otherwise, or effecting the settlement thereof or the settlement of claims or disputes;

(2) Holding meetings of its shareholders, directors or committees.

(3) Maintaining bank accounts.

(4) Maintaining offices or agencies for the transfer, exchange, and registration of its securities, or appointing and maintaining trustees or depositaries with relation to its securities.

(5) Securing or collecting debts or enforcing any rights in property covering the same.

(6) Effecting a transaction in interstate or foreign commerce.

(7) Owning and controlling a subsidiary corporation incorporated in or transacting business within this State.

(8) Conducting within this State an isolated transaction which is completed within a period of thirty (30) days and which is not in the course of a series or number of repeated transactions.

(e) The provisions of 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

Generally the same as MBCA § 99 and South Carolina § 12–23.1. Modified to conform to the same general scheme as contained in § 4–1 to cover special classes, such as insurance companies.

§ 12–2. Application for authority

(a) A foreign corporation may apply for authority to do business in this State by executing and delivering for filing, as provided by §§ 1–4 and 1–6, an application setting forth:

(1) The name of the corporation.

(2) The jurisdiction under the laws of which it is incorporated.

(3) The date of incorporation, and the period of duration of the corporation.

(4) A statement of the business or businesses which it is authorized to do under the laws of its jurisdiction of incorporation; and a statement of the business or businesses which it seeks authority to engage in in this State, if it does not ask authority to engage in all of the businesses authorized under the laws of its jurisdiction of incorporation.

(5) The address of the registered or principal office of the corporation in the jurisdiction of its incorporation.

(6) The address of its proposed registered office in this State and the name of its proposed registered agent in this State at such address.

(7) Statements of the shares which the corporation has authority to issue, itemized by classes, par value of shares, shares without par value, and series, if any, within a class, and summarized to show, in the aggregate, the par value of all shares with par value and the number of all shares without par value which it is authorized to issue.

(b) The application of the corporation for authority shall be accompanied by a copy of its articles of incorporation and all amendments thereto or in lieu thereof, if provided for by its jurisdiction of incorporation, the corporation may furnish a restated or consolidated articles or charter duly authenticated by the proper officer of its jurisdiction of incorporation.

Comment

Generally the same as South Carolina § 12–23.2 and MBCA § 103.

As to the requirement of a registered agent and office, see § 3–5.

§ 12–3. Effect of authorization to do business in State

(a) Upon filing by the Secretary of State of the application for authority, the foreign corporation shall be authorized to do business in this State, and may engage in any business:

(1) which it is authorized to do in the jurisdiction of its incorporation, and

(2) which may be done 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 businesses, in which case the corporation may engage in the business or businesses to which it so limited its application, if such business or businesses qualify under paragraphs (1) and (2) of this section.

(b) Such authority shall continue so long as the corporation retains its authority to do such business in its jurisdiction of incorporation, and so long as its authority to do business in this State has not been suspended, revoked, or surrendered as provided in this chapter.

(c) In addition to complying with this chapter, no foreign corporation shall actually commence any business regulated by chapters 171 through 181 of Title 35, Maine Revised Statutes Annotated, until such foreign corporation shall receive a certificate authorizing it to do so from the Public Utilities Commission; such certificate shall be issued by the Public Utilities Commission upon the foreign corporation's demonstrating that it is authorized by the laws of its place of incorporation to engage in such business, that it has a reasonable amount of assets in relation to the business it plans to engage in, is solvent, and otherwise meets the same qualifications as would be required for a domestic corporation engaging in the same businesses. The Public Utilities Commission may prescribe such forms and rules as are reasonably necessary to carry out this provision and to subject such foreign corporations to the same regulation and conditions of doing business as are imposed on domestic corporations in the same or similar business.

Comment

(a) and (b) substantially the same as South Carolina § 12–23.4; similar to MBCA § 105. (c) remedies a void in present Maine law, which now has no procedure for authorizing foreign utility corporations to do business. Since domestic utilities may be organized under the general corporation law (35 M.R.S.A. § 2301 authorizes incorporation under 13 M.R.S.A. §§ 71–79) the general law should be available to foreign corporations.

§ 12–4. Powers of foreign corporation

A foreign corporation authorized to do business in this State shall, until such authority is revoked, suspended, 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

Substantially same as South Carolina § 12–23.4.

§ 12–5. Corporate name of foreign corporation

(a) No foreign corporation shall be authorized to do business in this State unless the name of the corporation complies with the requirements of § 3–1.

(b) If a foreign corporation authorized to do business in this State shall change its name in its jurisdiction of incorporation, it shall, within thirty (30) days after the effective date thereof, amend its application of authority, as provided by § 12–8.

(c) (1) If the corporation fails to file the amendment required by subsection (b), the corporation's authority to do business in this State shall be suspended, and it shall not thereafter do any business in this State until it has filed the amendment.

(2) If the name to which the foreign corporation has changed would be unavailable to it on an original application for authority, the corporation's authority to do business in this State shall be suspended, and it shall not thereafter do any business in this State until it has adopted a name which is available to it under the laws of this State.

Comment

Same in substance as South Carolina § 12–23.5.

§ 12–6. Amendment to articles of incorporation of foreign corporation

Whenever a foreign corporation authorized to do business in this State amends its articles of incorporation, it shall, within thirty (30) days after the effective date of the amendment, deliver to the Secretary of State for filing, as provided by § 1–6, a copy of such amendment, duly authenticated by the proper officer of its jurisdiction of incorporation; but the filing thereof by the Secretary of State shall not of itself enlarge or alter its authority to do business in this State or entitle it to adopt any name other

than that under which, at the time of filing, it is authorized to do business in this State.

Comment

Same as South Carolina § 12–23.6, MBCA § 109.

§ 12–7. Merger of foreign corporation authorized to do business in State

Whenever a foreign corporation authorized to do business in this State shall be the surviving corporation in a statutory merger permitted by the laws of its jurisdiction of incorporation, it shall, within thirty (30) days after the effective date of the merger, deliver to the Secretary of State for filing, as provided by § 1–6, a copy of the articles of merger duly authenticated by the proper officer of the jurisdiction under the laws of which the merger was effected. It shall not be necessary for such corporation to secure either new or additional authority to do business in this State unless the name of such corporation is changed, or unless the corporation proposes to do other or additional business than that which it is then authorized to do in this State.

Comment

Same as South Carolina § 12–23.7, MBCA § 110.

§ 12–8. Amended application for authority

(a) A foreign corporation authorized to do business in this State shall amend its application for authority if it shall:

(1) Change its corporate name, provided that such change has been effected under the laws of its jurisdiction of incorporation;

(2) Enlarge, limit, or otherwise change the business or businesses which it seeks authority to engage in in this State.

(b) Such amendment shall be executed and delivered for filing to the Secretary of State, as provided by §§ 1–4 and 1–6, and shall set forth:

(1) 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.

(2) The jurisdiction under the laws of which it is incorporated.

(3) The date on which it was authorized to do business in this State.

(4) The proposed amendment to its application of authority.

(5) 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.

(6) If the business which it is to be authorized to engage in in this State is to be enlarged, limited or otherwise changed, a statement that it is authorized to do that business under the laws of its jurisdiction of incorporation.

Comment

Substantially the same as South Carolina § 12–23.8; similar to MBCA § 111.

§ 12–9. Surrender of foreign corporation's authority to do business in State

(a) A foreign corporation authorized to do business in this State may surrender its authority, by executing and delivering for filing, as provided in §§ 1–4 and 1–6, an application for surrender of authority, which shall set forth:

(1) 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.

(2) The jurisdiction of its incorporation.

(3) The date on which it was authorized to do business in this State.

(4) That the corporation is not as of the date of application doing business in this State.

(5) That it surrenders its authority to do business in this State.

(6) That it revokes the authority of its registered agent in this State to accept service 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 the application.

(7) A post-office address within or without this State to which the Secretary of State shall mail a copy of any process served upon him against the corporation.

(b) The authority of the foreign corporation to do business in this State shall terminate as of the date of filing by the Secretary of State of the application for surrender of authority.

Comment

Same as South Carolina § 12–23.9, MBCA § 112.

§ 12–10. Foreign corporation's termination of existence in jurisdiction of its incorporation; effect upon authority in this State

(a) When a foreign corporation authorized to do business 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 do business 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.

(b) The authority of the foreign corporation to do business 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 do business in this State, as the case may be. If those persons in charge of the foreign corporation's business and affairs in this State continue to do business 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 doing business 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 § 12–15. 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 (a) to be filed is delivered for filing to the Secretary of State; and thereafter sum-

mons may only be served in the manner and in those cases mentioned in subsection (c).

(c) 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, and he shall promptly send by registered or certified mail, return receipt requested, with instructions to deliver to addressee only, a copy of any such process to the corporation at the post-office address on file in his office; if no new address has been given him, such mailing shall be to the registered or principal office of the corporation in its jurisdiction of incorporation. Proof of service shall be as provided in § 12–14(c).

Comment

(a) and (c) same as South Carolina § 12–23.10.

(b) is new.

§ 12–11. Revocation of foreign corporation's authority to do business in State

(a) The authority of a foreign corporation to do business in this State may be revoked by the Secretary of State, as provided by subsections (b) and (c) when:

(1) The corporation has failed to file its annual report within the time specified by this Act, or has failed to pay any fees, franchise taxes or penalties prescribed by this Act when they have become due and payable; or

(2) The corporation has failed to appoint and maintain a registered agent in this State as required by § 12–13; or

(3) 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 § 12–13; or

(4) The corporation has failed to file in the office of the Secretary of State within the required time any amendment to its articles of incorporation as required by § 12–6 or articles of merger as required by § 12–7; or

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

(b) The authority of a foreign corporation shall be revoked only after the Secretary of State (1) shall have mailed to the corporation's registered or principal offices in this State and in

its jurisdiction of incorporation at least sixty (60) days' notice of impending revocation of its authority to do business in this State, including a specification of the default, and (2) the corporation shall fail prior to revocation to remove the ground of default.

(c) After the expiration of the sixty (60) day period, if the foreign corporation has not cured the default or, as to the ground for revocation specified in subparagraph (a) (5), 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 do business in this State, and shall mail copies thereof to the corporation's registered or principal offices in this State and in its jurisdiction of incorporation.

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

(e) The authority of the corporation to do business 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.

§ 12–12. Suits by Attorney General against foreign corporations

The Attorney General may bring an action to restrain a foreign corporation from doing in this State (1) without authority any business for which authority is required by this chapter; (2) any business which it is not authorized to do 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; (3) any business, authority for which was obtained through fraud, misrepresentation, or concealment of a material fact. A certified copy of any order of court in such action shall be filed with the Secretary of State.

Comment

Based on South Carolina § 12–23.12.

§ 12–13. Service of process on authorized foreign corporations; registered office and registered agent

(a) Every foreign corporation authorized to do business in this State shall have and continuously maintain in this State:

(1) a registered office which may be, but need not be, the same as its place of business in this State; and

(2) a registered agent, which agent may be either an individual resident in this State whose business office is identical with the corporation's registered office, or a domestic or foreign corporation authorized to do business in this State and having a business office identical with such registered office.

(b) A foreign corporation may change its registered office or its registered agent, or both, by executing and filing, in accordance with §§ 1–4 and 1–6, a statement setting forth:

(1) The name of the corporation;

(2) Its jurisdiction of incorporation;

(3) The date of its authorization to do business in this State;

(4) The address of its then registered office;

(5) If its registered office is to be changed, the address to which the registered office is to be changed;

(6) The name of its then registered agent;

(7) If its registered agent is to be changed, the name of its successor registered agent;

(8) That the registered agent has a business office at the registered office, after giving effect to the changes stated;

(9) That each change therein stated was authorized by the board of directors.

(c) Any registered agent of a foreign corporation may resign as such agent by filing a written notice of resignation with the Secretary of State, in duplicate. The Secretary of State shall forthwith mail a copy thereof to the corporation at its registered office. The appointment of such agent shall terminate thirty (30) days after the filing of such notice by the Secretary of State.

(d) 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 subsec-

tion (b). For whatever reason filed, the statement provided for in subsection (b) 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.

(e) The agents and attorneys-in-fact appointed pursuant to former Title 13 MRSA § 591 by foreign corporations which were authorized to do business in this State prior to the effective date of this Act shall be deemed the registered agents of such corporations, and the addresses given for such agents and attorneys-in-fact shall be deemed the registered offices of such corporations, until such corporation files a statement of change pursuant to subsection (b).

(f) The registered agent appointed by a foreign corporation authorized to do business 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.

(g) Whenever a foreign corporation authorized to do business 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 suspended, or 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 by delivering to and leaving with him, or with any person designated by him to receive such service, duplicate copies of such process, notice or demand. In the event any such process, notice or demand is served on the Secretary of State, he shall immediately cause one of such copies thereof to be forwarded by registered or certified mail, return receipt requested, with instructions to deliver to addressee only, addressed to the corporation at its registered office or principal office in its jurisdiction of incorporation. Any service so had on the Secretary of State shall be returnable in not less than thirty (30) days. Proof of service shall be as provided in § 12–13(c).

(h) The Secretary of State shall keep a record of all processes, notices and demands served upon him under this section, and shall record therein the time of such service and his action with reference thereto.

(i) 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 matter now or hereafter permitted by law.

Comment

Same as South Carolina § 12–23.13, MBCA § 108.

§ 12–14. Service of process on foreign corporation not authorized to do business in State

(a) Every foreign corporation which is not authorized to do business in this State shall, by doing any business in this State, either itself or through an agent, be deemed to have submitted to the jurisdiction of the courts of this State, and shall also be deemed to have designated the Secretary of State as its agent upon whom process against it may be served in any action or proceeding arising out of or in connection with the doing of any business in this State.

(b) In addition to other methods of service which may be authorized by statute or by rule, service of such process may be made by delivering to and leaving with the Secretary of State, or with any person designated by him to receive such service, duplicate copies of such process, notice, or demand. The Secretary of State shall thereupon immediately cause one of such copies to be forwarded by registered or certified mail, return receipt requested, with instructions to deliver to addressee only, addressed to the corporation, either at its registered office in the jurisdiction of its incorporation, if known, or its principal place of business in such jurisdiction, if known, or at the last address of such foreign corporation known to the plaintiff, in that order.

(c) Proof of service shall be by return of service on the Secretary of State, and by the Secretary of State's affidavit of compliance with this section. There shall be filed with the affidavit of compliance the return receipt signed by such foreign corporation or other official proof of delivery, or if acceptance was refused, there shall be filed the original envelope with a notation by the postal authorities that acceptance was refused. If acceptance was refused, a copy of the notice and process together with notice of the mailing by registered or certified mail and of refusal to accept shall be promptly sent by the Clerk of Court to such foreign corporation. If this section is complied with, the refusal to accept delivery of the registered mail or to sign the return receipt shall not affect the validity of the service, and the foreign corporation refusing to accept such

registered mail shall be charged with knowledge of the contents thereof.

§ 12–15. Effect of foreign corporation doing business in State without authority

(a) A foreign corporation which does business in this State without authority, when such authority is required by this Act, shall be liable to this State for all fees, penalties, and franchise taxes 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 did business in this State without authority. In addition, such corporation shall be liable in a civil penal amount of ten dollars ($10.00) per day for each day it fails to pay such fees, penalties and franchise taxes. The Attorney General shall bring proceedings to recover all such amounts due under the provisions of this section.

(b) A foreign corporation doing business 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 do business in this State and shall have paid to the State all fees, penalties, and franchise taxes due under subsection (a). 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 doing business in this State without authority, or is such an assignee, successor or purchaser, the action shall abate until such foreign corporation becomes authorized to do business in this State, or shall be dismissed without prejudice to the right to bring the same after the foreign corporation becomes so authorized.

(c) The failure of a foreign corporation to obtain authority to do business 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

Substantially the same as MBCA § 117, South Carolina § 12–23.15.

§ 12–16. Application of chapter to corporations previously authorized to do business in State

Every foreign corporation which on the effective date of this Act is authorized to do business 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 corporations 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.

§ 12–17. Shareholders' inspection of records of foreign corporation

(a) Every foreign corporation authorized to do business in this State and actually keeping or maintaining within this State any books or records, shall afford to its shareholders the same right to inspect books and records kept or maintained in this State, including but not limited to records of shareholders, as is provided in this Act in the case of domestic corporations.

(b) If any such corporation, or its agent in this State refuses to permit such inspection, the shareholder demanding inspection may bring an action in the same manner, and governed by the same procedure, as is provided in § 6–26.

(c) In any such action against a foreign corporation or its agent, proof that the records inspection of which was demanded were neither within this State at the time of the specific demand nor removed from this State in anticipation of that demand shall be a complete defense.

Comment

This provision should be included, if for no other reason than to discourage out-of-state incorporation of essentially local businesses.

On jurisdiction to require such inspection, see 19 A.L.R.3rd 869.

CHAPTER 13

ANNUAL REPORTS; POWERS OF SECRETARY OF STATE; MISCELLANEOUS

Section

§ 13–1. Annual report of domestic and foreign corporations

(a) Each domestic corporation, unless excused as provided in subsection (c), and each foreign corporation authorized to do business in this State, shall file, within the time prescribed by this Act, an annual report setting forth:

(1) The name of the corporation and its jurisdiction of incorporation.

(2) The address of the registered office of the corporation in this State, and the name of its clerk (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.

(3) A brief statement of the character of the business in which the corporation is actually engaged in this State.

(4) The names and respective business and residence addresses of the directors and officers of the corporation, including the street or rural route number, town or city, and state.

(5) A statement of the aggregate number of authorized shares, itemized by classes, par value of shares, shares without par value, and series, if any, within a class, and summarized to show the aggregate par value of shares with par value and the aggregate number of shares without par value which the corporation has authority to issue.

(6) A statement of the aggregate number of issued shares, itemized by classes, par value of shares, shares without par value, and series, if any, within a class.

(7) The date and place of the last annual meeting of shareholders to elect directors of the corporation.

(b) 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 and dissolved. 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.

(c) The annual report shall be executed as provided by § 1–4. 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. Unless requested by the corporation, the Secretary of State shall not return a copy of the report to the corporation; his official receipt for the filing fee shall be evidence of the filing of the report.

(d) The Attorney General, upon application by any corporation and satisfactory proof that it has ceased to transact business and that it is not indebted to the State on account of franchise taxes, shall file a certificate of the fact with the Secretary of State and shall give a duplicate certificate to the corporation. Thereupon such corporation shall be excused from filing annual returns with the Secretary of State and from the payment of the annual franchise tax, so long as the corporation in fact transacts no business.

Comment

Based on MBCA § 118, South Carolina § 12–24.1, but with several items of information omitted (*e. g.*, stated capital, which is not material to franchise taxes, etc.). The number of *issued* shares is retained, to permit a cross-check on certifications of number of shares voting on certain issues.

Compare 13 M.R.S.A. § 501.

§ 13–2. Failure to file annual report; incorrect report; penalties

(a) Any corporation required to file an annual report as provided by § 13–1 which fails to file its annual report on or before the due date shall forfeit to the State the sum of twenty-five dollars ($25.00) for each failure.

(b) If the Secretary of State finds that any annual report delivered for filing does not conform to the requirements of § 13–1, he shall promptly return the report for correction. If the report is returned for correction and the corrected report is delivered to the Secretary of State for filing within thirty (30) days after the date on which the Secretary returned the report, it shall be filed without additional filing fee and without the penalty provided in subsection (a). If the report is returned for correction and a corrected report is not received by the Secretary within thirty (30) days, or the corrected report is received but does not conform to law, the corporation shall be subject to the forfeiture provided in subsection (a) of this section.

(c) In the event of any such default, the Secretary shall also proceed as provided by § 11–11 or § 12–11, whichever is applicable.

(d) If the annual report of a corporation is not received by the Secretary of State within the time specified in § 13–1, the corporation shall be excused from the forfeiture provided in this section and from any other penalty for failure to timely file the report if (1) it establishes, by affidavit or otherwise, that the report was deposited in the mails, postage prepaid and properly addressed, on or before the last date for filing, and (2) it furnishes the Secretary of State with a copy of such report within thirty (30) days after it learns of the nondelivery of the original report.

Comment

Based on MBCA § 119, South Carolina § 12–24.2, 13 M.R.S.A. § 502. The penalty is cut from $500 to $25, but is not avoided by late filing after suit.

§ 13–3. Powers of Secretary of State

The Secretary of State shall have the power and authority reasonably necessary to enable him to administer this Act efficiently and to perform the duties therein imposed upon him. Such powers shall include, without limitation:

(a) The power to make rules not inconsistent with this Act.

(b) The power to prescribe forms for all documents required or permitted to be filed with him, and to refuse to file documents not utilizing such forms to the extent possible.

(c) The power to refuse to file any document which is not clearly legible, or which may not be clearly reproducible photographically.

Comment

Based on MBCA § 132, South Carolina § 12–24.3, but with the enumeration added.

§ 13–4. False and misleading statements in documents required to be filed with Secretary of State

(a) Any person who signs any document required 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 may be fined in an amount not exceeding five hundred dollars ($500.00).

(b) Any person who violates subsection (a) shall be liable to any person who is damaged thereby.

Comment

Same as South Carolina § 12–24.7.

§ 13–5. 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 existence or nonexistence of facts relating to corporations which would not appear from a certified copy of any document filed in his office shall be taken and received in all courts, public offices, and official bodies as prima facie evidence of the existence or nonexistence of the facts therein stated.

Comment

Same as MBCA § 134, South Carolina § 12–24.8.

§ 13–6. Certified records of corporation as prima facie evidence of facts stated therein

(a) When certified under oath of the president and of the clerk, the secretary or an assistant secretary of the corporation to be true and correct, the original or a copy of

(1) the minutes of the proceedings of the incorporators;

(2) the minutes of the meetings or other proceedings of the shareholders or any class thereof;

(3) the minutes of the meetings or other proceedings of the directors or of any committee thereof;

(4) any written consent, waiver, release, or agreement entered into the records of minutes; and

(5) 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.

(b) 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 South Carolina § 12–24.9.

§ 13–7. Short form certificate of change in corporate identity

(a) The Secretary of State is authorized to issue his certificate, in such short form as is adopted by him:

(1) 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, the fact that the corporate existence was unaffected by such name change, and such other information as the Secretary of State deems desirable.

(2) Of the consolidation or merger of two 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, the fact that the new or surviving corporation is the direct successor of the corporate existences of the participating corporations, and such other information as the Secretary of State deems desirable.

(b) Any certificate issued pursuant to subsection (a) shall be accepted for recording, and recorded, by every register of deeds in the State; such certificates shall be indexed and filed as are the items enumerated in Title 33 M.R.S.A. § 654. The register of deeds shall receive a fee equal to that chargeable for a deed for recording such a certificate.

CHAPTER 14

FEES AND TAXES

Section

§ 14–1. Fees for filing documents and services

(a) In addition to any required fees based on authorized capital stock or for copying, comparing and authenticating documents, as required by §§ 14–2 and 14–3, 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 a resolution of a corporation's board of directors authorizing the use of a similar name by a new corporation, as provided by § 3–1(a) (2), five dollars ($5.00);

General Comment

The form of this chapter is derived from South Carolina § 12–31. Present Maine law requires for most documents filing in both the registry of deeds and the Secretary of State's office, and approval by the Attorney General. Both the filing in the registry and the advance approval by the Attorney General have been omitted. See §§ 1–6 and 4–5 and accompanying comments. An attempt has been made, however, to preserve to the State those fees that were received for registry filing and Attorney General's approval by incorporating those sums into the total filing fee for filing in the Secretary of State's office.

In the case of documents not provided for in present Maine law, a filing fee has been arbitrarily assigned on the basis of comparison with other states.

There is no present provision in Maine law for filing a document comparable to that provided for in § 3–1(a) (2).

(2) Application to reserve corporate name, as provided by § 3–2(b), five dollars ($5.00);

Comment

No comparable provision in present Maine law.

(3) Notice of transfer of a reserved corporate name, as provided by § 3–2(c), five dollars ($5.00);

Comment

No comparable provision in present Maine law.

(4) Application to register corporate name, as provided by § 3–3(b), one dollar ($1.00) for each month or fraction thereof, between the date of filing such application and December 31st of the calendar year in which such application is filed;

Comment

No comparable provision in present Maine law.

(5) Application to renew the registration of a registered name, as provided by § 3–3(d), ten dollars ($10.00);

Comment

No comparable provision in present Maine law.

(9) A statement changing the clerk of a corporation, as provided by § 3–4(c), § 3–4(e) or § 3–4(g), five dollars ($5.00);

Comment

See comment under sub-paragraph (11).

(10) Notice of resignation of a clerk of a corporation, as provided by § 3–4(d), two dollars ($2.00);

(11) Notice of change of registered office, as provided by § 3–4(f), two dollars ($2.00);

Comment

Present Maine law makes no provision for a registered agent; the clerk of the corporation now acts as agent for service of process. 13 M.R.S.A. §§ 373 and 375. However, the clerk was not the statutory agent for service of process on foreign corporations. 13 M.R.S.A. § 591. See comment to § 3–7 proposed draft. When a corporation changes its location, it is required to file in the registry. 13 M.R.S.A. § 205. Fee one dollar ($1.00), 33 M.R.S.A. § 751. Foreign corporations are required to appoint an attorney for service of process, and filing in the Secretary of State's office is required upon appointment and revocation of such agency. 13 M.R.S.A. § 591. Fees, ten dollars ($10.00) for appointment, five dollars ($5.00) for revocation. 6 M.R.S.A. § 86.

Under present law, two filings with the Secretary of State are

required regarding a clerk; election, 13 M.R.S.A. § 375, two dollar ($2.00) fee; resignation, 13 M.R.S.A. § 376, two dollar ($2.00) fee.

The fees set out for clerks and registered agents are based on these present fees, but recognize that somewhat greater expense may be required.

(12) Accompanying service of process upon the Secretary of State as agent of a domestic corporation, as provided by § 3–5(b), two dollars ($2.00);

Comment

See comment following next sub-paragraph.

(13) Accompanying service of process upon the Secretary of State as agent of nonresident director of a domestic corporation, as provided by § 3–6(b), two dollars ($2.00);

Comment

There is no provision similar to § 3–8 or § 3–9 in present Maine law; however, any foreign corporation doing business within the state failing to appoint a resident attorney for service of process is deemed to have appointed the Secretary of State; the fee is two dollars ($2.00). 13 M.R.S.A. § 591. Also, any domestic corporation which, as a result of consolidation, is governed by the laws of another state, appoints the Secretary of State as agent for service of process in Maine; the fee is two dollars ($2.00). 13 M.R.S.A. § 246. Therefore, $2.00 was adopted as the uniform fee for service on the Secretary of State.

(14) Notice of resignation of a nonresident director, as provided by § 3–6(d), two dollars ($2.00);

Comment

See comment under next sub-paragraph.

(16) Articles of incorporation, as provided by § 4–2, twenty dollars ($20.00), plus the fee based on the capital stock specified in § 14–3;

Comment

Under present Maine law, the certificate of organization must first be presented to the Attorney General for certification, recorded in the registry of deeds, and then filed in the Secretary of State's office. 13 M.R.S.A. § 73. The required fees now are:

Attorney General's fee for certification	$10.00
Registry recording fee	5.00
Secretary of State's fee	5.00
TOTAL	$20.00

5 M.R.S.A. § 191, 5 M.R.S.A. § 86, 33 M.R.S.A. § 751.

(17) Statement of a director's resolution establishing and designating series and fixing and determining the relative rights and preferences thereof, as provided by § 5–3(c), five dollars ($5.00);

Comment

No comparable provision in present Maine law.

(18) Statement of cancellation of redeemable shares, as provided by § 5–20(c), five dollars ($5.00);

Comment

See comment under next subparagraph.

(19) Statement of cancellation of other reacquired shares, as provided by § 5–21(c), five dollars ($5.00);

Comment

The actions authorized by §§ 5–20 and 5–21 are similar to those authorized in 13 M.R.S.A. § 202. Section 202 approaches the problem from the view of reduction in capital, requiring filing of a certificate showing shareholder resolution to reduce such capital; purchase and retirement of the corporation's shares operates to reduce capital. No filing fee is specified, but it apparently falls under notice of change in the charter or certificate of organization, fee five dollars ($5.00), 5 M.R.S.A. § 86.

(20) Articles of amendment, as provided by § 8–3 or § 8–5(a) (4), five dollars ($5.00); and if the amendment: (a) increases the total authorized capital stock, the additional amount specified in § 14–3(c), but not less than an additional ten dollars ($10.00), and if it (b) changes the corporation's purposes, a further additional amount of fifteen dollars ($15.00);

Comment

Under present Maine law, any change in the certificate of organization is required to be filed in the Secretary of State's office. 13 M.R.S.A. § 201. The fee is five dollars ($5.00). 5 M.R.S.A. § 86. If the change involves the purposes of the corporation, the Attorney General must approve the action (13 M.R.S.A. § 201); his fee is ten dollars ($10.00) (5 M.R.S.A. § 191); and the Secretary of State's fee is twenty dollars ($20.00).

This provision preserves the basic fees of $5.00 for ordinary changes, and $20.00 for changes of purpose; but the fee structure is rationalized by assuring that an amendment is *no more* expensive than filing a new corporation (barring increase fees for authorized capital stock).

(21) Restated Articles of Incorporation, as provided by § 8–9, ten dollars ($10.00); if the restated articles include an amendment which effects an increase in the total authorized capital stock, the additional amount specified in § 14–3 (c), but not less than an additional ten dollars ($10.00); and if they change the purposes of the corporation, a further additional amount of fifteen dollars ($15.00);

Comment

Similar to 13 M.R.S.A. § 75 authorizing procurement from the Secretary of State of a certified composite certificate of organization; the statute provides for a fee no less than ten dollars ($10.00) for such composite. Producing a composite certificate is a costlier procedure than filing restated articles. Since the restated articles may include amendments, the fee structure for amendments is also included here.

(22) Articles of amendment pursuant to judicial reorganization as provided by § 8–10, same fees as for an amendment by shareholders, provided for in subsection (20) above;

Comment

Basis in Maine law 13 M.R.S.A. § 203(4) and (6).

(23) Articles of merger or consolidation pursuant to shareholder approval, as provided by § 9–3(a), twenty dollars ($20.00); and if the merger or consolidation (a) increases the total authorized capital stock, the additional amount specified in § 14–3(d) but not less than an additional ten dollars ($10.00), and (b) if it changes the corporation's purposes, a further additional amount of fifteen dollars ($15.00);

(24) Articles of merger of subsidiary into parent without shareholder approval, as provided by § 9–4(a) (3), fifteen dollars ($15.00);

(25) Articles of merger or consolidation of domestic and foreign corporations as provided by § 9–6, fifteen dollars ($15.00) if the new or surviving corporation is a foreign corporation, plus the appropriate fee for authority to do business in this State as specified in sub-paragraph (32) if not previously so authorized; if the new or surviving corporation is a domestic corporation, the same sum as would be required by sub-paragraph (23) or (24) for the merger or consolidation of domestic corporations.

(26) Document required by § 9–6(d) in the event that the surviving or new corporation is a foreign corporation, no fee other than that specified in the preceding sub-paragraph.

Comment

Basis in present Maine law, 13 M.R.S.A. §§ 243 and 245. It provides for filing in the Secretary of State's office, approval by the Attorney General, and if the resulting corporation is a domestic corporation, filing in the registry of deeds. Secretary's fee for change in the charter or certificate of organization, five dollars ($5.00). 5 M.R.S.A. § 86. Attorney General's fee, twenty dollars ($20.00). 5 M.R.S.A. § 191. Registry fee apparently for organization of a corporation with capital stock, five dollars ($5.00). 33 M.R.S.A. § 751. Note there is no fee clearly designated in the Revised Statutes for such filings; the Attorney General's fee is the only one specified.

(27) Articles of dissolution of a corporation which has never commenced business, as provided by § 11–1, ten dollars ($10.00);

(28) Statement of intent to dissolve as provided by §§ 11–2, 11–3(a) (5), or 11–4(a), five dollars ($5.00);

(29) Application for reinstatement of expired corporation, as provided by § 11–4(d), ten dollars ($10.00) in addition to the fee chargeable for the amendment to articles of incorporation containing an extension of corporate life;

(30) Statement of revocation of voluntary dissolution proceedings, as provided by § 11–7 or § 11–8, five dollars ($5.00);

(31) Articles of dissolution (voluntary), as provided by § 11–10, fifteen dollars ($15.00);

Comment

Under present law, a copy of every decree or judgment dissolving a corporation, or forfeiting its charter, is to be filed in the Secretary of State's office. 13 M.R.S.A. § 555. There is no specific statutory fee unless it is considered a change in the charter or certificate of organization, then five dollars ($5.00). 5 M.R.S.A. § 86.

There is not now any provision for voluntary, non-judicial dissolution. See § 549 for procedure on voluntary dissolution.

(32) Application of a foreign corporation for authority to do business in the State, as provided by § 12–2, ten dollars ($10.00);

(33) An amendment of the articles of incorporation of a foreign corporation authorized to do business in this State as provided by § 12–6, five dollars ($5.00), or if the amendment changes the authorized capital stock, ten dollars ($10.00);

(34) Articles of merger of a foreign corporation, as provided by § 12–7, five dollars ($5.00), or if the surviving corporation has different authorized capital stock, ten dollars ($10.00);

(35) An amendment to a foreign corporation's application for authority to do business in this State as provided by § 12–8, ten dollars ($10.00);

Comment

Basis in present Maine law for similar filing requirements, 13 M.R.S.A. §§ 592 and 595. However Maine law does not term such original filing as an application. Fee for filing a copy of the charter and certificate of organization in the Secretary of State's office, ten dollars ($10.00), for any changes, five dollars ($5.00). 5 M.R.S.A. § 86. However if there is an increase or decrease in the capital stock of the foreign corporation, the fee is ten dollars ($10.00). As to mergers of a foreign corporation authorized to do business in this State, 13 M.R.S.A. § 245 required filing in the Secretary of State's office and Attorney General approval of such merger between a domestic corporation and a foreign corporation. There is no provision relating to foreign corporations merging only.

There does not appear to be any particular logic in these fees; but the general policy in this revision has been to retain present fees unless there are strong reasons for change.

(36) An application of a foreign corporation for surrender of its authority, as provided by § 12–9, ten dollars ($10.00);

(37) Statement of a foreign corporation's termination of existence, as provided by § 12–10(a), ten dollars ($10.00);

Comment

No comparable fee or provision.

(38) Receiving service of process in any suit permitted by §§ 12–13 and 12–14, two dollars ($2.00);

Comment

Similar to 13 M.R.S.A. § 591 where upon failure to appoint a resident attorney in Maine for service of process, a foreign corporation is then deemed to appoint the Secretary of State. Fee two dollars ($2.00).

(39) Annual report of a domestic corporation as provided by § 13–1, that franchise fee specified in Title 36 § 2401 of the Maine Revised Statutes; annual report of a foreign corporation, as provided by § 13–1, ten dollars ($10.00).

(40) For issuing a short form certificate of change of name or of consolidation or merger, as provided by § 13–10: (a) a fee of one dollar ($1.00) per certificate, if requested at the time articles of amendment containing the name change, or articles of merger or consolidation, are filed, or (b) a fee of two dollars ($2.00) per certificate if requested subsequent to the filing of such articles.

(41) Any other documents not herein specifically provided for, five dollars ($5.00);

(b) All fees collected by the Secretary of State as provided by this section shall be remitted to the State Treasurer for the use of the State.

§ 14–2. Fees for copying, comparing, and authenticating documents

(a) For making and certifying a copy of any document relating to a corporation at the time such document is filed in the office of the Secretary of State, the Secretary of State shall charge a fee of seventy-five cents ($.75) per page.

(b) The Secretary may refuse to accept for filing any document which is not suitable for clear photographic reproduction.

(c) The Secretary of State is under no obligation to compare or certify copies of documents relating to a corporation, submitted to his office either at the time of filing the original or at another time. If the Secretary of State compares and certifies such copies submitted to him, he shall charge a fee twenty-five cents ($.25) per page greater than if the copy had been made in his office.

(d) 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 one dollar ($1.00) per page.

(e) Said fees are in addition to the fees specified in § 14–1 for the filing of documents. All fees collected by the Secretary of State as provided by this section shall be remitted to the State Treasurer for the use of the State.

§ 14–3. Additional fees based on authorized capital stock

Upon filing any of the following documents, the Secretary of State shall collect the following fees:

(a) Upon filing the articles of incorporation of any domestic corporation except those corporations required under § 4–4 (c) to state in their articles of incorporation the specific businesses which they are authorized by law to engage in:

(1) If the corporation is to have authorized stock having par value:

(A) If the aggregate par value of all authorized stock having par value does not exceed two million dollars ($2,000,000), a fee of ten dollars ($10.00) for each hundred thousand dollars ($100,000) or fraction thereof of aggregate par value; or

(B) If the aggregate par value of all authorized stock having par value is more than two million dollars ($2,000,000), but does not exceed twenty million dollars ($20,000,000), a fee of two hundred dollars ($200) plus fifty dollars ($50) per million dollars or fraction thereof of aggregate par value in excess of two million dollars ($2,000,000); or

(C) If the aggregate par value of all authorized stock having par value exceeds twenty million dollars ($20,000,000), a fee of one thousand one hundred dollars ($1,100) plus twenty dollars ($20) per million dollars or fraction thereof of aggregate par value in excess of twenty million dollars ($20,000,000); and

(2) If the corporation is to have authorized stock without par value:

(A) If there are authorized not over twenty thousand (20,000) shares without par value, a fee of one-half cent (½¢) per share without par value, but not less than ten dollars ($10.00); or

(B) If there are authorized more than twenty thousand (20,000) shares without par value but not more than two million (2,000,000), a fee of one hundred dollars ($100) plus one-quarter cent (¼¢) per authorized share without par value in excess of twenty thousand (20,000); or

(C) If there are authorized more than two millon (2,000,000) shares without par value, a fee of fifty dollars ($50) plus one-fifth cent (⅕¢) per authorized share without par value in excess of two million;

(b) Upon filing the articles of incorporation of those corporations required under § 4–4(c) to state in their articles of incorporation the specific businesses which they are authorized by law to engage in:

(1) If the corporation is to have authorized stock having par value:

(A) A fee of twenty-five dollars ($25) if the authorized capital stock does not exceed five thousand dollars ($5,000); or

(B) A fee of fifty dollars ($50) if the authorized capital stock exceeds five thousand dollars ($5,000) and does not exceed ten thousand dollars ($10,000); or

(C) A fee of one hundred dollars ($100) if the authorized capital stock exceeds ten thousand dollars ($10,000) and does not exceed fifty thousand dollars ($50,000); or

(D) A fee of two hundred dollars ($200) if the authorized capital stock exceeds fifty thousand dollars ($50,000) and does not exceed one hundred thousand dollars ($100,000); and

(E) A fee of seventy-five dollars ($75) upon every one hundred thousand dollars ($100,000) of authorized capital stock or fraction thereof in excess of one hundred thousand dollars ($100,000); and

(2) If the corporation is to have authorized stock without par value, a fee of one mill (1/10¢) per share without par value authorized, but not less than the following on all authorized shares without par value:

(A) Twenty-five dollars ($25) if the number of authorized shares without par value does not exceed five thousand (5,000); or

(B) Fifty dollars ($50) if the number of authorized shares without par value exceeds five thousand (5,000) but does not exceed fifty thousand (50,000); or

(C) One hundred dollars ($100) if the number of authorized shares without par value exceeds fifty thousand (50,000) but does not exceed one hundred thousand (100,000); or

(D) Two hundred fifty dollars ($250) if the number of authorized shares without par value exceeds one hundred thousand (100,000) but does not exceed two hundred fifty thousand (250,000); or

(E) Five hundred dollars ($500) if the number of authorized shares without par value exceeds two hundred fifty thousand (250,000) but does not exceed five hundred thousand (500,000); or

(F) Seven hundred fifty dollars ($750) if the number of authorized shares without par value exceeds five hundred thousand (500,000) but does not exceed seven hundred fifty thousand (750,000); or

(G) One thousand two hundred fifty dollars ($1,250) if the number of authorized shares without par value exceeds seven hundred fifty thousand (750,000) but does not exceed one million two hundred fifty thousand shares (1,250,000); and

(H) Five hundred dollars ($500) additional for each five hundred thousand authorized shares without par value (500,000), or any part thereof, in excess of one million two hundred fifty thousand (1,250,000);

(c) Upon filing articles of amendment or restated articles of a domestic corporation which include any increase in the number or the aggregate par value of shares which the corporation is authorized to issue: A fee equal to the amount that a like corporation originally organized with such increased authorized shares would have to pay upon filing its original articles of incorporation (pursuant to subsection (a) or (b)), minus the aggregate amount or amounts which the corporation paid under this or a similar provision of prior law at the time it was organized and at the time of any prior increases of its authorized capital stock;

(d) Upon filing articles of merger or consolidation, in which the surviving or new corporation is a domestic corporation, and which increase the number or aggregate par value of shares which the surviving or new corporation will have author-

ity to issue, in excess of the total number or par value of shares which all participating domestic corporations had authority to issue: A fee equal to the amount that a like corporation originally organized with such increased authorized shares would have to pay upon filing its original articles of incorporation (pursuant to subsection (a) or (b)), minus the aggregate amount or amounts which the participating domestic corporations paid under this or a similar provision of prior law at the time they were organized and at the time of any prior increases of its authorized capital stock.

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

APPENDIX

PROPOSED OFFICIAL FORMS

Form

1. Application for reservation of corporate name.
2. Notice of transfer of reserved corporate name.
3. Application for registration (or renewal of registration) of corporate name.
4. Statement of change of registered office, clerk, or both.
5. Notice of resignation of clerk or of non-resident director.
6. Articles of incorporation.
7. Statement of resolution establishing series of shares.
8. Statement of cancellation of redeemable or other reacquired shares.
9. Articles of amendment before organizational meeting.
10. Articles of amendment.
11. Restated articles of incorporation.
12. Articles of merger or consolidation of domestic or domestic and foreign corporations.
13. "Short form" merger of subsidiary into parent.
14. Statement in connection with merger or consolidation of Maine corporation and foreign corporation where new or surviving corporation is a foreign corporation.
15. Articles of dissolution by incorporators.
16. Statement of intent to dissolve by written consent.
17. Statement of intent to dissolve by resolution (Sec. 11–3).
18. Statement of intent to dissolve by expiration of articles (Sec. 11–4).
19. Revocation of intent to dissolve (Secs. 11–7, 11–8).
20. Articles of dissolution (Sec. 11–10).
21. Application of foreign corporation for authority (Sec. 12–2).
22. Notice of amendment of articles or of merger of foreign corporation (Secs. 12–6, 12–7).
23. Amended application for authority of foreign corporation (Sec. 12–8).
24. Surrender of authority of foreign corporation (Sec. 12–9).
25. Annual report of domestic or foreign corporation.
26. Certificate of change in corporate identity.

Form 1 PROPOSED BUSINESS CORPORATION ACT

Form No. 1 Filing fee: $5.00
Section 3–2

APPLICATION FOR RESERVATION
OF CORPORATE NAME

To the Secretary of State
of the State of Maine:

Pursuant to the provisions of subparagraph (. . .) (Note 1) of Section 3–2(a) of the Maine Business Corporation Act, the undersigned hereby applies for reservation of the following corporate name for a period of one hundred twenty days:

. . . . . .

Dated ....., 19..

..... (Note 2)
Applicant

Typed Name .....

By ..... (Note 3)

Typed Name .....

Capacity .....

By ..... (Note 3)

Typed Name .....

Capacity .....

Notes: 1. Insert number of applicable subparagraph of Section 3–2.
2. Signature of Applicant if an individual or name of Applicant if a corporation.
3. Signature and title of officer if Applicant is a corporation.

Form No. 2 Filing fee: $5.00
Section 3-2(c)

NOTICE OF TRANSFER OF RESERVED
CORPORATE NAME OF

.....
Insert Corporate Name

To the Secretary of State
of the State of Maine:

Pursuant to the provisions of Section 3-2 of the Maine Business Corporation Act, you are hereby notified that the undersigned has transferred to ....., whose address is ....., the corporate name of ....., which was reserved in your office for the exclusive use of the undersigned on ....., 19.., for a period of one hundred twenty days thereafter.

Dated ....., 19...

..... (Note 1)

Typed Name .....

By ..... (Note 2)

Typed Name .....

Capacity .....

By ..... (Note 2)

Typed Name .....

Capacity .....

Notes: 1. Signature of individual or name of corporation in whose name Reservation was made.
2. Signature and title of officer if Reservation was made by a corporation.

Form 3 PROPOSED BUSINESS CORPORATION ACT

Form No. 3
Section 3-3

Fee: New Registration—$1.00 per month
Renewal—$10.00 per year

APPLICATION FOR { ☐ REGISTRATION / ☐ RENEWAL OF REGISTRATION (Note 1) } OF CORPORATE NAME OF

.....
Insert Corporate Name

To the Secretary of State
of the State of Maine:

Pursuant to the provisions of Section 3-3 of the Maine Business Corporation Act, the undersigned corporation hereby applies for the

{ ☐ registration / ☐ renewal of the registration } (Note 1) of

its corporate name for the year (or fraction thereof) ending December .., 19.., and submits the following statement:

FIRST: The name of the corporation is .....
.....

SECOND: It is incorporated under the laws of .....

THIRD: The date of its incorporation is .....

FOURTH: It is carrying on or doing business.

FIFTH: The business in which it is engaged is .....
.....

SIXTH: This Application is accompanied by (a) a certificate setting forth that the corporation is in good standing under the laws of ..... wherein it is incorporated, executed by the official having custody of the records pertaining to corporations in that .....; and (b) a registration fee of $..... as required by law.

Dated ....., 19...

..... (Note 2)

By ..... (Note 3)

Typed Name .....

Capacity .....

By ..... (Note 3)

Typed Name .....

Capacity .....

Notes: 1. Place an "X" in the appropriate box.
2. Exact corporate name of corporation making the application.
3. Signature and title of officer signing for the corporation.

Form No. 4
Section 3-4

Filing Fee: Change of Clerk—$5.00
Change of Office—$2.00

STATEMENT OF CHANGE OF REGISTERED OFFICE
OR CLERK, OR BOTH,
OF

.....
Insert Corporate Name

To the Secretary of State
of the State of Maine:

Pursuant to the provisions of Section 3-4 of the Maine Business Corporation Act, the undersigned corporation submits the following statement for the purpose of changing its registered office or its clerk, or both, in the State of Maine:

FIRST: The name of the corporation is .....
.....

SECOND: The address of its present registered office is .....
.....

THIRD: The address to which its registered office is to be changed is .....
.....

FOURTH: The name of its present clerk is .....
.....

FIFTH: The name of its successor clerk is .....
.....

SIXTH: The address of its registered office and the address of the business office of its clerk, as changed, will be identical.

SEVENTH: (Applies only to changes of clerks)—

(Note 1)
- ☐ Such change was duly authorized by the board of directors, and the power to appoint the clerk is not reserved to the shareholders by the articles of incorporation.
- ☐ Such change was duly authorized by the shareholders.

EIGHTH: (Applies only to changes of registered office filed by the clerk)—

A copy of this notice has been mailed to the corporation.

Dated ....., 19..

..... (Note 2)

By ..... (Note 3)

Typed Name .....

Capacity .....

By ..... (Note 3)

Typed Name .....

Capacity .....

Notes: 1. Place an "X" in the appropriate box.
2. Exact corporate name of corporation making the statement.
3. Signature and title of officer signing for the corporation.

Form 5 PROPOSED BUSINESS CORPORATION ACT

Form No. 5 Filing fee: $2.00

Sections 3-4(d), 3-6(d)

NOTICE OF RESIGNATION

OF { ☐ CLERK (Note 1) / ☐ NON-RESIDENT DIRECTOR (Note 2) }

OF

.....

Insert Corporate Name

To the Secretary of State
of the State of Maine:

Pursuant to the provisions of Section { ☐ 3-4(d) / ☐ 3-6(d) } (Note 2) of the Maine Business Corporation Act, you are hereby notified that the undersigned has resigned as { ☐ Clerk / ☐ a director } (Note 2) of ....., a Maine corporation, whose address is .....

Insert Corporate Name

Dated ....., 19...

Signature .....

Typed Name .....

Notes: 1. Must be filed *in duplicate* if resignation of clerk.
2. Place an "X" in the appropriate box.

Form No. 6 Filing Fee: $20.00 plus

Section 4-3 $

.....

Fee based on auth. stock

ARTICLES OF INCORPORATION
OF

.....

Insert Corporate Name

THE UNDERSIGNED, acting as incorporator(s) of a corporation formed under the Maine Business Corporation Act, adopt the following Articles of Incorporation for such corporation:

FIRST: The name of the corporation is .....
.....

SECOND: The period of its duration is (perpetual) ..... (Note 1)

THIRD: a. The address of its initial registered office shall be
Street & Number .....
City ....., Maine 04....

b. The name of its initial clerk, whose office is at the above address, is .....

(Note 2) FOURTH:

("X" one box only)

☐ a. The number of directors constituting the initial board of directors of the corporation is .....

b. (If selected) the names and addresses of the persons who are to serve as directors until the first annual meeting of the shareholders or until their successors are elected and shall qualify are:

Name	Address
.....	.....
	.....
.....	.....
	.....
.....	.....
	.....

☐ There shall be no directors initially; the shares of the corporation will not be sold to more than twenty (20) persons; the business of the corporation will be managed by the shareholders.

("X" one box only) FIFTH: The board of directors { ☐ is / ☐ is not } authorized to adopt a by-law increasing or decreasing the size of the board of directors.

If they are so authorized, the minimum size (if any) of the board shall be ....., and the maximum size (if any) shall be ..... directors.

SIXTH:

("X" one box only)

☐ There shall be only one class of shares:
Par value of each share .....
Number of shares authorized .....

☐ There shall be two or more classes of shares.

The required information concerning each such class is set out in Exhibit A, which is attached hereto and made a part hereof.

BY WAY OF SUMMARY:

The aggregate par value of all authorized shares (of all classes) *having a par value* is $.....

The total number of authorized shares (of all classes) *without par value* is ..... shares

(Delete if not applicable; see Note 3) SEVENTH: The corporation will claim the authority to engage in one or more of the businesses or activities enumerated in Section 4-4(c), specifically, the authority to: .....
.....

Form 6 PROPOSED BUSINESS CORPORATION ACT

(Note 4) EIGHTH: Provisions of these articles concerning pre-emptive rights are as follows: .....
.....

("X" one box only) NINTH: meetings of the shareholders { ☐ may / ☐ may not } be held outside the State of Maine.

TENTH: Other provisions of these articles, if any, including provisions for the regulation of the internal affairs of the corporation, are set forth in the .....
Insert number or "None"
pages which are attached hereto, marked "Exhibit B" and made a part hereof.

Dated ....., 19...

(Note 5)

Incorporator(s)	Address(es)
Signature	Street .....
Typed Name	City ..... State .....
BY	Capacity .....
Typed Name	
Signature	Street .....
Typed Name	City ..... State .....

Notes: 1. If duration of the corporation is to be OTHER THAN perpetual, delete the word "perpetual" and insert duration desired; otherwise, leave as printed.

2. Place an "X" in the appropriate box. If there is to be a conventional board of directors, "X" the first box, and insert a number in para. a. designating the size of the initial board. If the initial directors have been selected, insert their names and addresses; they will have authority immediately upon filing of the articles. If initial directors are not named, management of the corporation vests in the incorporator(s) until they are named; see Section 4-7.

3. Delete this paragraph unless the corporation claims the authority to engage in one or more of the businesses or activities specifically enumerated in Section 4-4(c). An insertion of such claim of authority here does NOT grant the authority claimed, however; other provisions of law must be first complied with.
Except as to such enumerated businesses, it is not necessary to specify the business in which the corporation will engage (Section 4-4(a)); but if such specification is desired (see Section 4-4(b)) it may be inserted in Exhibit B.

4. See Section 6-23. If it is desired that shareholders have the normal pre-emptive rights provided for by Section 6-23(c), insert the word "None." If it is desired that there be no pre-emptive rights, insert "There are no pre-emptive rights," or words to that effect. Other provisions may be used, if desired, including a grant of greater pre-emptive rights than are provided for by the Act in the absence of any provision in the Articles.

5. There need be only one (or more) incorporators, each of whom may be either a natural person or a corporation, domestic or foreign.
For each incorporator which is a corporation,
   a. the line marked "Signature" should be left blank;
   b. the corporate name of the incorporator should be typed in the "Typed Name" line;
   c. the officer signing on behalf of the incorporator-corporation should sign on the "BY" line, his name should be typed on the line below his signature, and his corporate office should be entered after the word "Capacity."

Form No. 7 Filing Fee: $5.00
Section 5–3

STATEMENT OF
RESOLUTION ESTABLISHING SERIES OF SHARES
OF

.....
Insert Corporate Name

To the Secretary of State
of the State of Maine:

Pursuant to the provisions of Section 5–3 of the Maine Business Corporation Act, the undersigned corporation submits the following statement for the purpose of establishing and designating a series of shares and fixing and determining the relative rights and preferences thereof:

FIRST: The general description of the class of which this series is a part, as given in the Articles of Incorporation, is: .....
.....

SECOND: Attached hereto and made a part hereof is a true copy of a resolution establishing and designating a series of shares and fixing and determining the relative rights and preferences thereof, which was duly adopted by the board of directors of the corporation on ....., 19...

THIRD: The Articles expressly grant to the board of directors the authority to make such a resolution. (Note 1)

(Attach copy of resolution)

Dated ....., 19...

..... (Note 2)

By .....

Typed Name ..... (Note 3)

Capacity .....

By .....

Typed Name ..... (Note 3)

Capacity .....

Notes: 1. If such power has *not* been expressly granted in the Articles, proceed by amendment to the Articles and *do not use this form.*
2. Exact corporate name of corporation making the statement.
3. Signatures and titles of officers signing for the corporation.

Form 8 PROPOSED BUSINESS CORPORATION ACT

Form No. 8 Filing Fee: $5.00

Sections 5–20, 5–21

STATEMENT OF CANCELLATION OF

{ ☐ REDEEMABLE
{ ☐ OTHER REACQUIRED

SHARES OF

.....
Insert Corporate Name

To the Secretary of State
of the State of Maine:

Pursuant to the provisions of Section { ☐ 5–20 / ☐ 5–21 } of the Maine Business Corporation Act, the undersigned corporation submits the following statement of cancellation of shares reacquired by redemption, purchase or otherwise, and cancelled:

FIRST: The name of the corporation is .....
.....

SECOND: The number, class and series of the redeemed or other reacquired shares cancelled, and the date of adoption of a resolution of the board of directors for their cancellation (if cancellation was not automatic upon such reacquisition) are as follows:

Class	Series	Number of Shares	Date of Resolution (Note 1) for Cancellation

THIRD: The number of shares which the corporation has authority to issue (whether or not issued) after giving effect to such cancellation, is as follows:

Class	Par Value	Series	Number of Authorized Shares

BY WAY OF SUMMARY:

The aggregate par value of all authorized shares (of all classes) *having a par value* is ..... $.....

The total number of authorized shares (of all classes) *without par value* is ..... shares.

Dated ....., 19..

..... (Note 2)

By ..... (Note 3)

Typed Name .....

Capacity .....

By ..... (Note 3)

Typed Name .....

Capacity .....

Notes: 1. No entry is required in this column if:
   a. The shares were redeemable shares, and
   b. The articles of incorporation provided that such shares would automatically be cancelled upon redemption or purchase.

   In all other cases, a resolution of the board of directors is required to cancel the shares and thereby reduce authorized shares.
2. Exact corporate name of corporation filing the statement.
3. Signature and title of officer signing for the corporation.

Form No. 9
Sections 8–3 and 8–7

Filing Fee: $5.00 plus additional amount provided by law, if any, of $.....

ARTICLES OF AMENDMENT

BEFORE ORGANIZATIONAL MEETING
OF

.....
Insert Corporate Name

Pursuant to the provisions of Sections 8–3 and 8–7 of the Maine Business Corporation Act, the undersigned corporation adopts the following Articles of Amendment to its Articles of Incorporation:

FIRST: The name of the corporation is .....
.....

SECOND: ("X" one box only)

☐ The initial directors were not named in the Articles and have not yet been elected;

☐ The initial directors were named in the Articles, but they have not yet held their organizational meeting.

THIRD: There were ..... incorporator(s); the following
Insert no.
amendment has the express written approval or vote of ..... of
Insert no.
those incorporator(s). (Note 1) The consents of subscribers and withdrawal of subscribers, if any, are set out in Exhibit A hereto.

FOURTH: The text of the amendment is set forth in full in the attached Exhibit A, consisting of ..... pages.

FIFTH: By way of summary, the effect of the changes, if any, in the number or par value of shares which the corporation is authorized to issue is:

Dated ....., 19...

..... (Note 2)

By ..... (Note 3)

Typed Name .....

Capacity .....

By ..... (Note 3)

Typed Name .....

Capacity .....

Notes: 1. If less than unanimous, must be ⅔ of incorporators.
2. Exact corporate name of corporation adopting the Amendment.
3. Signature, name and title of persons signing for corporation.

Form 10 PROPOSED BUSINESS CORPORATION ACT

Form No. 10
Sections 8–5, 8–7

Filing fee: $5.00 plus additional amount provided by law, if any, of $.....

ARTICLES OF AMENDMENT
TO THE
ARTICLES OF INCORPORATION
OF

.....
Insert Corporate Name

Pursuant to the provisions of Sections 8–5 and 8–7 of the Maine Business Corporation Act, the undersigned corporation adopts the following Articles of Amendment to its Articles of Incorporation:

FIRST: The name of the corporation is .....

SECOND: The following amendment of the Articles of Incorporation was adopted by the shareholders of the corporation on ....., 19.., in the manner prescribed by the Maine Business Corporation Act:

The text of the amendment is set forth in full in the attached Exhibit A, consisting of ..... pages.

THIRD: The number of shares of the corporation outstanding at the time of such adoption was .....; and the number of shares entitled to vote thereon was .....

FOURTH: The designation and number of outstanding shares of each class entitled to vote thereon as a class were as follows:

Class	Number of Shares

(Note 1)

FIFTH: The number of shares voted for such amendment was .....; and the number of shares voted against such amendment was .....

SIXTH: The number of shares of each class entitled to vote thereon as a class voted for and against such amendment, respectively, was:

Class	Number of Shares Voted	
	For	Against

(Note 1)

SEVENTH: The manner, if not set forth in such amendment, in which any exchange, reclassification, or cancellation of issued shares provided for in the amendment shall be effected, is as follows:

(Note 2)

EIGHTH: By way of summary, the effect of the changes, if any, in the number of par values of shares which the corporation is authorized to issue is:

(Note 2)

Dated ....., 19..

..... (Note 3)

By .....
Typed Name .....
Capacity .....
By .....
Typed Name .....
Capacity ..... (Note 4)

Notes: 1. If inapplicable, insert "None."
2. If inapplicable, insert "No change."
3. Exact corporate name of corporation adopting the Articles of Amendment.
4. Signatures and titles of officers signing for the corporation.

Form No. 11
Section 8-9

Filing Fee: $10.00 plus additional amount provided by law, if any, of $.....

RESTATED ARTICLES OF INCORPORATION
OF

.....
Insert Corporate Name

Pursuant to the provisions of Section 8-9 of the Maine Business Corporation Act, the undersigned corporation has restated its Articles of Incorporation, and adopts the Restated Articles of Incorporation which are attached hereto, marked Exhibit A and made a part hereof. The said Exhibit A consists of ..... pages. The Restated Articles include all amendments in effect or to be in effect, including amendments adopted at the time of this Restatement. (Note 1)

FIRST: The attached Restatement of the Articles of Incorporation was adopted by the shareholders of the corporation on ....., 19.. in the manner prescribed by the Maine Business Corporation Act.

SECOND: The number of shares of the corporation outstanding at the time of such adoption was .....; and the number of shares entitled to vote thereon was .....

THIRD: The designation and number of outstanding shares of each class entitled to vote thereon as a class were as follows:

Class	Number of shares

(Note 2)

FOURTH: The number of shares voted for such Restatement was .....; and the number of shares voted against it was .....

FIFTH: The number of shares of each class entitled to vote thereon as a class voted for and against such Restatement, respectively, was:

Class	Number of shares voted	
	For	Against

(Note 2)

SIXTH: By way of summary, the effect of the changes, if any, in the number or par values of shares which the corporation is authorized to issue is:

(Note 2)

Dated ....., 19..

..... (Note 3)

By ..... (Note 4)

Typed Name .....

Capacity .....

By ..... (Note 4)

Typed Name .....

Capacity .....

Notes: 1. Attach complete set of articles of incorporation. Use Form No. 6 or blank paper following the style of Form No. 6.
2. If inapplicable, insert "None".
3. Exact corporate name of corporation adopting the Restated Articles of Incorporation.
4. Signatures, typed names, and titles of officers signing for the corporation.

Form No. 12
Sections 9–1, 9–3, 9–6

Filing Fee: If new or surviving corporation is a Maine corporation: $20.00, plus $..... fee for increased authorized stock, and $..... for change in purposes.

If new or surviving corporation is a foreign corporation: $15.00, plus fee in connection with its Application for Authority to Do Business, if not previously authorized.

(Note 1) ARTICLES OF { ☐ MERGER / ☐ CONSOLIDATION } OF

(Note 1) { ☐ DOMESTIC / ☐ FOREIGN AND DOMESTIC } CORPORATIONS INTO

.....
Insert name of surviving or new corporation

(Note 1) Pursuant to the provisions of Sections 9–3 and { ☐ 9–1 / ☐ 9–6 } of the Maine Business Corporation Act, the undersigned corporations adopt the following Articles of Merger or Consolidation for the purpose of joining them into a single corporation:

FIRST: The plan of merger or consolidation set forth in Exhibit A, which is attached hereto and made a part hereof, was approved by the shareholders of each of the undersigned corporations in the manner prescribed by the Maine Business Corporation Act.

(Note 2) (Attach plan of merger or consolidation as Exhibit A.)

SECOND: As to each of the undersigned corporations, the number of shares outstanding, the designation and number of outstanding shares of each class entitled to vote as a class on such plan, the total number of shares voted for and against the plan and, as to each class entitled to vote thereon as a class, the number of shares of such class voted for and against the plan, are as follows:

					As to Each Class Entitled to Vote as a Class:		
Name of Corporation	Total Outstanding Shares	Total Voted For	Total Voted Against	Designation of Class	Total Outstanding Shares	Total Voted For	Total Voted Against

Form 12 PROPOSED BUSINESS CORPORATION ACT

THIRD: These Articles shall take effect (on their filing date) .... (Note 3)

Dated ....., 19..

..... (Note 4)
By ..... (Note 5)
Typed name .....
Capacity .....

..... (Note 4)
Jurisdiction of incorporation if not Maine: .....

By ..... (Note 5)
Typed name .....
Capacity .....

..... (Note 4)
Jurisdiction of incorporation if not Maine: .....

By ..... (Note 5)
Typed name .....
Capacity .....

(Repeat for additional constituent corporations)

Notes: 1. In each of these lines, "X" the one appropriate box.
2. Attach the complete plan of merger or consolidation, as it was adopted by each board of directors and voted upon by each set of shareholders. The plan must contain the information specified in section 9-1(c) or (d); note that with respect to a consolidation, the plan must include a complete set of articles of incorporation (§ 9-1(d) (4)).
3. If these Articles are not to take effect immediately, delete the words in parentheses and insert the effective date, which may be not later than 60 days after the filing date (§ 9-3(a) (3)).
4. Exact corporate name of each constituent corporation; and as to each constituent corporation not incorporated in Maine, its jurisdiction of incorporation.
5. Signatures, typed names, and titles of officers signing for each corporation.
6. IF THE NEW OR SURVIVING CORPORATION IS NOT A MAINE CORPORATION, THIS FORM MUST ALSO BE ACCOMPANIED BY FORM 14, and will not be accepted for filing without Form 14.

Form No. 13 Filing Fee: $15.00
Sections 9–4, 9–6

ARTICLES OF "SHORT FORM" MERGER
OF SUBSIDIARY INTO

.....
Insert name of surviving parent corporation

Pursuant to the provisions of Section 9–4 of the Maine Business Corporation Act (and Section 9–6 if one of the corporations is a foreign corporation), the undersigned parent corporation adopts the following Articles of Merger of one of its subsidiaries into itself:

FIRST: The name of the subsidiary corporation being merged into the parent is: .....

SECOND: The plan of merger, which complies with Section 9–4(a)(1) and was duly adopted by resolution of the board of directors of the parent corporation on ....., 19.., is set forth in Exhibit A,
date
which is attached hereto and made a part hereof.

(Note 1) (Attach plan of merger as Exhibit A.)

THIRD: The number of outstanding shares of each class of the subsidiary corporation, and the number and percent of shares of each class owned by the parent, surviving corporation, are as follows:

Designation of class	No. shares outstanding	Shares owned by parent corp.	
		Number	Percent

FOURTH: A copy of the plan of merger set forth in Exhibit A was mailed to each shareholder of the subsidiary corporation on .....,
date
19...

FIFTH: These Articles shall take effect (on their filing date) ..... (Note 2)

Dated ....., 19...

..... (Note 3)
By ..... (Note 4)
Typed name .....
Capacity .....
By ..... (Note 4)
Typed name .....
Capacity .....

Notes: 1. Attach the complete plan of merger as it was adopted by the board of directors of the parent corporation and mailed to each shareholder of the subsidiary.
2. If these Articles are not to take effect immediately, delete the words in parentheses and insert the effective date, which may not be later than 60 days after the filing date.
3. Exact corporate name of the surviving, parent corporation.
4. Signatures, typed names, and titles of officers signing for the corporation.
5. IF THE SURVIVING CORPORATION IS NOT A MAINE CORPORATION, THIS FORM MUST ALSO BE ACCOMPANIED BY FORM 14, and will not be accepted for filing without Form 14.

Form 14 PROPOSED BUSINESS CORPORATION ACT

Form No. 14 Filing Fee: None (For this statement only)
Section 9-6(d)

STATEMENT IN CONNECTION WITH MERGER OR CONSOLIDATION OF MAINE CORPORATION AND FOREIGN CORPORATION WHERE NEW OR SURVIVING CORPORATION, ENTITLED:

.....
Insert name of new or surviving corporation

IS A FOREIGN CORPORATION

To the Secretary of State
of the State of Maine:

Contemporaneously with the filing hereof, there are submitted for filing Articles of Merger or Consolidation wherein the undersigned is the new or surviving corporation. Pursuant to the provisions of Section 9-6(d):

FIRST: The name of the new or surviving corporation is .....
.....

SECOND: Said new or surviving corporation is incorporated under the laws of .....
insert name of jurisdiction of its incorporation

(Note 1) THIRD: Said new or surviving corporation { ☐ is / ☐ is not } to do business in the State of Maine.

FOURTH: If the "is" box above is "X'd":

(Note 2)
- ☐ Said surviving corporation has previously been authorized to do business in the State of Maine.
- ☐ Said new or surviving corporation is submitting herewith application for authority to do business in Maine.

FIFTH: The undersigned will promptly pay to dissenting shareholders of Maine corporations which participated in said merger or consolidation the amount, if any, to which they are entitled under the provisions of the Maine Business Corporation Act with respect to the rights of dissenting shareholders.

SIXTH: The undersigned hereby consents to service of process and suit in the State of Maine in any proceeding brought (a) to enforce any obligation of any corporation which participated in said merger or consolidation and which was heretofore subject to suit in Maine either by reason of being a Maine corporation or by reason of being a foreign corporation subject to suit in Maine, and (b) to enforce the right of dissenting shareholders of any Maine corporation which participated in said merger or consolidation against the undersigned.

SEVENTH: In any proceeding of the nature listed in paragraph "SIXTH" above, the undersigned hereby irrevocably appoints the Secretary of State of Maine as its agent to accept service of process for it,

and directs that a copy of such process, if any, be mailed to it at the following address:

Street address .....
City, state, zip .....

Dated ....., 19...

..... (Note 3)

By ..... (Note 4)

Typed name .....

Capacity .....

By ..... (Note 4)

Typed name .....

Capacity .....

Notes: 1. "X" the one appropriate box in this line.
2. If the "is" box was "X'd" above, one of these boxes must be "X'd". In the case of a consolidation, if the new corporation is a foreign corporation, a new application for authority to do business will be necessary even if the participating foreign corporations were previously authorized to do business in Maine, since their corporate life is extinguished by the consolidation. In the case of a merger where the surviving corporation is a foreign corporation which was previously authorized to do business in Maine, it will not be necessary to make application for authority to do business, and the first box may be "X'd"; see Section 12–7 on whether an amended application for authority may be necessary.
3. Exact corporate name of new or surviving corporation.
4. Signatures, typed names, and titles of officers signing for the corporation.

Form 15 PROPOSED BUSINESS CORPORATION ACT

Form No. 15 Filing fee: $10.00
Section 11–1

ARTICLES OF DISSOLUTION
BY INCORPORATORS
OF

.....
Insert corporate name

Pursuant to the provisions of Section 11–1 of the Maine Business Corporation Act, the undersigned, being a majority of the incorporators of the corporation hereinafter named, adopt the following Articles of Dissolution:

FIRST: The name of the corporation is .....

SECOND: The filing date of its Articles of Incorporation was .....

THIRD: None of its shares has been issued.

FOURTH: The corporation has not commenced business.

FIFTH: The amount, if any, actually paid in on subscriptions for its shares, less any part thereof disposed of for necessary expenses, has been returned to those entitled thereto.

SIXTH: No debts of the corporation remain unpaid.

SEVENTH: A majority of the incorporators elect that the corporation be dissolved.

Dated ....., 19...

.....

.....

.....
Incorporators

Form No. 16 Filing fee: $5.00
Section 11-2

STATEMENT OF INTENT TO DISSOLVE

.....
Insert corporate name

BY WRITTEN CONSENT OF SHAREHOLDERS

To the Secretary of State
of the State of Maine:

Pursuant to the provisions of Section 11-2 of the Maine Business Corporation Act, the undersigned corporation submits the following statement of intent to dissolve the corporation upon written consent of all of its shareholders:

FIRST: The name of the corporation is .....

SECOND: The names and respective addresses of its officers are:

Name	Office	Address
.....	President	.....
.....	Vice President	.....
.....	Secretary/Clerk	.....
.....	Treasurer	.....

THIRD: The names and respective addresses of its directors are:

Name	Address
.....	.....
.....	.....
.....	.....

FOURTH: The following written consent to dissolution of the corporation has been signed by all of the shareholders of the corporation, or signed in their names by their respective attorneys thereunto duly authorized:

(Insert copy of Consent)

Dated ....., 19..

..... (Note 1)

By .....
Typed Name .....
Capacity ..... (Note 2)
By .....
Typed Name .....
Capacity .....

Notes: 1. Exact corporate name of corporation making the statement.
2. Signatures and titles of officers signing for the corporation.

Form 17 PROPOSED BUSINESS CORPORATION ACT

Form No. 17 **Filing fee: $5.00**
Section 11-3

STATEMENT OF INTENT TO DISSOLVE

.....
Insert corporate name

BY ACT OF THE CORPORATION

To the Secretary of State
of the State of Maine:

Pursuant to the provisions of Section 11-3 of the Maine Business Corporation Act, the undersigned corporation submits the following statement of intent to dissolve the corporation by act of the corporation.

FIRST: The name of the corporation is .....

SECOND: The names and respective addresses of its officers are:

Name	Office	Address
.....	President	.....
.....	Vice President	.....
.....	Secretary/Clerk	.....
.....	Treasurer	.....

THIRD: The names and respective addresses of its directors are:

Name	Address
.....	.....
.....	.....
.....	.....

FOURTH: The following resolution to dissolve the corporation was adopted by the shareholders of the corporation on ....., 19..:

(Insert copy of Resolution)

FIFTH: The number of shares of the corporation outstanding at the time of such adoption was .....; and the number of shares entitled to vote thereon as a class was:

Class	Number of Shares

(Note 1)

SIXTH: The number of shares voted for such resolution was .....; and the number of shares voted against such resolution was .....

SEVENTH: The number of shares of each class entitled to vote thereon as a class voted for and against such resolution, respectively, was:

Class	Number of Shares Voted	
	For	Against
(Note 1)		

Dated ....., 19..

..... (Note 2)

By .....
Typed name .....
Capacity ..... (Note 3)
By .....
Typed name .....
Capacity .....

Notes: 1. If inapplicable, insert "None."
2. Exact corporate name of corporation making the statement.
3. Signatures, typed names and titles of officers signing for the Corporation.

Form No. 18 Filing fee: $5.00
Section 11-4

STATEMENT OF INTENT TO DISSOLVE

.....
Insert corporate name

BY EXPIRATION OF ARTICLES

To the Secretary of State
of the State of Maine:

Pursuant to the provisions of Section 11-4 of the Maine Business Corporation Act, the undersigned corporation submits the following statement of intent to dissolve the corporation by reason of expiration of its articles of incorporation:

FIRST: The name of the corporation is .....

SECOND: The corporation's articles of incorporation specify that the corporation's life shall expire .....
Insert date

The corporation's duration of existence has not been extended nor made perpetual by amendment of its articles or otherwise.

Form 18 PROPOSED BUSINESS CORPORATION ACT

THIRD: The names and respective addresses of its officers and directors are:

OFFICERS:

Name	Office	Address
.....	President	.....
.....	Vice President	.....
.....	Secretary/Clerk	.....
.....	Treasurer	.....

DIRECTORS:

Name	Street address	City, State
.....	.....	.....
.....	.....	.....
.....	.....	.....
.....	.....	.....

Dated: ....., 19...

..... (Note 1)

By ..... (Note 2)

Typed name .....

Capacity .....

By ..... (Note 2)

Typed name .....

Capacity .....

Notes: 1. Exact corporate name of corporation making the statement.
2. Signatures, typed names and titles of officers signing for the corporation.

Form No. 19 Filing fee: $5.00

Section 11-7, 11-8

STATEMENT OF REVOCATION
OF
VOLUNTARY DISSOLUTION PROCEEDINGS

of

.....
Insert corporate name

To the Secretary of State
of the State of Maine:

(Note 1) Pursuant to the provisions of Section { ☐ 11-7 / ☐ 11-8 } of the Maine Business Corporation Act, the undersigned corporation submits the following statement of revocation of voluntary dissolution proceedings heretofore authorized:

FIRST: The name of the corporation is .....

SECOND: The names and respective addresses of its officers are:

Name	Office	Address
.....	President	.....
		.....
.....	Vice President	.....
		.....
.....	Secretary/Clerk	.....
		.....
.....	Treasurer	.....
		.....

THIRD: The names and respective addresses of its directors are:

Name	Address
.....	.....
	.....
.....	.....
	.....
.....	.....
	.....

FOURTH:

"X" one box only (Note 2)

☐ There is attached hereto, marked Exhibit A and made a part hereof a written consent to this revocation of dissolution proceedings, which consent has been signed by all shareholders of the corporation or signed in their names by their respective duly authorized attorneys, pursuant to Section 11-7.

or

☐ There is attached hereto, marked Exhibit A and made a part hereof a copy of a resolution authorizing this revocation of dissolution proceedings.

Said resolution was duly adopted at a meeting of the shareholders held on ....., date 19.., and called and held pursuant to Section 11-8.

At that time, there were ..... shares outstanding; and the vote on said resolution was ..... shares in favor, and ..... against.

Dated ....., 19...

..... (Note 3)

By ..... (Note 4)

Typed name .....

Capacity .....

By ..... (Note 4)

Typed name .....

Capacity .....

Notes: 1. "X" one box only in this line.
2. "X" the appropriate box. In either case, an exhibit will be necessary: if proceeding under 11-7, it will be a copy of the written consent; if under 11-8, it will be a copy of the shareholders' resolution.
3. Exact corporate name of corporation making the statement.
4. Signatures, typed names, and titles of officers signing for the corporation.

Form 20 PROPOSED BUSINESS CORPORATION ACT

Form No. 20 Filing fee: $15.00
Section 11-10

ARTICLES OF DISSOLUTION
OF

.....
Insert corporate name

Pursuant to the provisions of Section 11-10 of the Maine Business Corporation Act, the undersigned corporation adopts the following Articles of Dissolution for the purpose of dissolving the corporation:

FIRST: The name of the corporation is .....

SECOND: A statement of intent to dissolve the corporation was filed by the Secretary of State of Maine on ....., 19..

THIRD: All debts, obligations and liabilities of the corporation have been paid and discharged, or adequate provision has been made therefor.

FOURTH: All remaining property and assets of the corporation have been distributed among its shareholders, in accordance with their respective rights and interests.

FIFTH: There are no suits pending against the corporation in any court in respect of which adequate provision has not been made for the satisfaction of any judgment, order or decree which may be entered against it.

Dated ....., 19..

..... (Note 1)

By .....
Typed name .....
Capacity ..... (Note 2)
By .....
Typed name .....
Capacity .....

Notes: 1. Exact corporate name of corporation making the statement.
2. Signatures, typed names and titles of officers signing for the corporation.

Form No. 21
Section 12–2

Filing Fee: $10.00

APPLICATION FOR
AUTHORITY TO DO BUSINESS
OF

.....,
Insert corporate name

a ..... corporation
jurisdiction of incorporation

To the Secretary of State
of the State of Maine:

Pursuant to the provisions of Section 12–2 of the Maine Business Corporation Act, the undersigned corporation hereby applies for authority to transact business in your State, and for that purpose submits the following statement:

FIRST: The name of the corporation is .....

SECOND: It is incorporated under the laws of .....
.....
jurisdiction of incorporation

THIRD: It was incorporated on .....
date of incorporation

Its period of duration is .....

FOURTH: In the jurisdiction of its incorporation, it is authorized to engage in the following business or businesses:

It seeks authority to engage in the following business or businesses in the State of Maine: (Note 1)

FIFTH: The address of its registered or principal office in the jurisdiction of its incorporation is: ....
street and number city, state, zip

SIXTH: The address of its proposed registered office in Maine is:
...., Maine 04.....
street and number city

The name of its proposed registered agent in Maine, at that address, is: .....

SEVENTH: The corporation has the authority to issue the following shares, itemized by class and series:

Designation of Class	Designation of Series	Number of Authorized Shares	Par Value

BY WAY OF SUMMARY, the corporation is authorized to issue shares having an aggregate par value of $....., and ..... shares without par value.

Form 21 PROPOSED BUSINESS CORPORATION ACT

(Note 4) EIGHTH: This application is accompanied by a duly authenticated copy of the corporation's articles of incorporation with all amendments thereto, or of its restated or consolidated articles or charter.

Dated ....., 19...

..... (Note 2)

By ..... (Note 3)

Typed name .....

Capacity .....

By ..... (Note 3)

Typed name .....

Capacity .....

Notes: 1. If the corporation seeks authority to engage in all the businesses it is authorized to engage in in its jurisdiction of incorporation, this space may be left blank.

2. Exact corporate name of corporation making application.

3. Signatures, typed names, and titles of officers signing for the corporation.

4. This application will not be acceptable unless accompanied by a copy of the corporation's articles of incorporation (with all amendments), or its restated or consolidated articles or charter, in each case duly authenticated by the proper officer of the jurisdiction of its incorporation (usually, the Secretary of State).

Form No. 22
Sections 12-6, 12-7

Filing Fee: $5.00 ($10.00 if capital is changed)

NOTICE OF

(Note 1) { ☐ AMENDMENT OF ARTICLES / ☐ MERGER }

OF

....., Insert corporate name

a ..... corporation
jurisdiction of incorporation

To the Secretary of State
of the State of Maine:

(Note 1) Pursuant to the provisions of Section { ☐ 12-6 / ☐ 12-7 } of the Maine Business Corporation Act, the undersigned corporation hereby notifies you of the following fact(s):

(Note 1)

☐ Its articles of incorporation have been amended. A copy of the amendment, duly authenticated by the proper officer of its jurisdiction of incorporation, is attached hereto and made a part hereof.

☐ It has been the surviving corporation in a statutory merger carried out pursuant to the law of its jurisdiction of incorporation. A copy of the articles of merger, duly authenticated by the proper officer of its jurisdiction of incorporation, is attached hereto and made a part hereof.

Dated ....., 19..

..... (Note 2)

By ..... (Note 3)

Typed name .....

Capacity .....

By ..... (Note 3)

Typed name .....

Capacity .....

Notes: 1. "X" the appropriate box. Normally, only one box should be "X'd"; in rare instances, where there are amendments to the corporation's articles at the same time as or in connection with a merger, both boxes may be "X'd".
2. Exact corporate name of corporation giving the notice.
3. Signatures, typed names, and titles of officers signing for the corporation.

Form 23 PROPOSED BUSINESS CORPORATION ACT

Form No. 23 Filing Fee: $10.00
Section 12–8

AMENDED APPLICATION FOR AUTHORITY
OF

.....,
Insert corporate name

a ..... corporation
jurisdiction of incorporation

To the Secretary of State
of the State of Maine:

Pursuant to the provisions of Section 12–8 of the Maine Business Corporation Act, the undersigned corporation hereby amends its application for authority to transact business in your State, and for that purpose submits the following statement:

FIRST: The name of the corporation, as it appears in the records in your office, is .....

SECOND: It is incorporated under the laws of .....
jurisdiction of incorporation

THIRD: It was authorized to do business in the State of Maine on .....,
date
19..

FOURTH: It proposes that its application for authority to do business in Maine be amended in the following particulars: (Note 1)

FIFTH: (If the above amendment includes a change in the corporate name) the above change of name was effected on ....., 19.. under the law of the
date
jurisdiction of incorporation; and

SIXTH: (If the above amendment includes a change in the business which the corporation is to be authorized to engage in in the State of Maine) the corporation is authorized to engage, in the jurisdiction of its incorporation, in all the businesses which it seeks to engage in in the State of Maine.

Dated ....., 19..

..... (Note 2)

By ..... (Note 3)

Typed Name .....

Capacity .....

By ..... (Note 3)

Typed Name .....

Capacity .....

Notes: 1. Set forth the proposed amendment in full; use an additional sheet if necessary.
2. Exact corporate name of corporation making application; use the new name if name has been changed.
3. Signatures, typed names, and titles of officers signing for the corporation.

Form No. 24 Filing Fee: $10.00
Section 12-9

APPLICATION FOR SURRENDER
OF
AUTHORITY TO DO BUSINESS
OF

.....,
Insert corporate name

a ..... corporation
jurisdiction of incorporation

To the Secretary of State
of the State of Maine:

Pursuant to the provisions of Section 12-9 of the Maine Business Corporation Act, the undersigned corporation hereby submits the following statement:

FIRST: The name of the corporation, as it appears in the records in your office, is .....

SECOND: It is incorporated under the laws of .....
jurisdiction of incorporation

THIRD: It was authorized to do business in the State of Maine on ....., 19...
date

FOURTH: It is not, on this date, doing any business in the State of Maine.

FIFTH: It hereby surrenders its authority to do business in the State of Maine.

SIXTH: It revokes the authority of its registered agent in Maine to accept service of process, and consents that service of process in any action, suit or proceeding based upon any cause of action arising in Maine during the time the corporation was authorized to transact business in Maine may hereafter be made on the corporation by service thereof on the Secretary of State of the State of Maine.

SEVENTH: The post-office address to which the Secretary of State shall mail a copy of any process against the corporation that may be served on him is .....

Dated: ....., 19...

..... (Note 1)

By ..... (Note 2)

Typed name .....

Capacity .....

By ..... (Note 2)

Typed name .....

Capacity .....

Notes: 1. Exact corporate name of corporation making application.
2. Signatures, typed names, and titles of officers signing for the corporation.

Form 25 PROPOSED BUSINESS CORPORATION ACT

Form No. 25
Section 13-1

Filing Fee: $10.00
(Plus franchise fee of $ .....
in the case of domestic corporation)

(Note 1) ANNUAL REPORT FOR THE YEAR ENDING DECEMBER 31, 19..
of

....., Insert corporate name

(Note 2) a { ☐ DOMESTIC / ☐ FOREIGN } CORPORATION

To the Secretary of State
of the State of Maine:

Pursuant to the provisions of Section 13-1 of the Maine Business Corporation Act, the undersigned corporation submits the following information as of December 31, 19..: (Note 1)

1. The name of the corporation is .....

2. It is incorporated under the laws of .....
jurisdiction of incorporation

3. The corporation is actually engaged in the following business in the State of Maine:

4. The names, business addresses, and residence addresses of the directors and officers of the corporation are:

Office	Name	Business Address	Residence Address (Note 3)
Director	.....	.....	.....
		.....	.....
Director	.....	.....	.....
		.....	.....
Director	.....	.....	.....
		.....	.....
Director	.....	.....	.....
		.....	.....
President	.....	.....	.....
		.....	.....
Vice Pres.	.....	.....	.....
		.....	.....
Secretary/Clerk	.....	.....	.....
		.....	.....
Treasurer	.....	.....	.....
		.....	.....
.....	.....	.....	.....
		.....	.....
.....	.....	.....	.....
		.....	.....

(Use an additional page if necessary)

5. The aggregate number of shares which it is authorized to issue, itemized by class, series and par value, and summarized, and the number of such shares which are issued, is as follows:

Designation of Class	Designation of Series	Par Value (Note 4)	Number of Shares Authorized	Number of Shares Issued

Summary of Authorized shares: Aggregate par value of shares having a par value, $.....; Total shares without par value .....

6. The last annual meeting of shareholders of the corporation, for the purpose of electing directors, was held on ....., 19.. at
date
.....
address, city and state where meeting was held

7. Information regarding any material change in any of the above items of information subsequent to December 31st is as follows:

Dated: ....., 19..

..... (Note 5)

By ..... (Note 6)

Typed name .....

Capacity .....

By ..... (Note 6)

Typed name .....

Capacity .....

Notes: 1. Insert numerals to indicate calendar year for which report is made.
2. "X" the one appropriate box in this line.
3. All addresses must include street and number, city, state and zip code.
4. Insert "None" for no par shares.
5. Exact corporate name of corporation making report.
6. Signatures, typed names, and titles of officers signing for the corporation.

Form 26 PROPOSED BUSINESS CORPORATION ACT

Form No. 26
Section 13–10

Issuance Fee: $1.00 at time of filing articles of amendment, merger or consolidation
$2.00 if issued subsequently

CERTIFICATE OF CHANGE IN
CORPORATE IDENTITY

To: All Registers of Deeds of the State of Maine
and
Recorders and Equivalent Officers in Other States:

THIS IS TO CERTIFY that the corporation which has heretofore been known as: ..... is now known as .....
Old corporate name New corporate name

The foregoing change of name is a result of:

- ☐ Amendment to articles of incorporation changing corporate name.
- ☐ Participation in a merger or consolidation wherein the old corporation was merged or consolidated into the new or surviving corporation whose name is given above.
- ☐ Participation in a merger in which the old corporation was the surviving corporation, but changed its name at the time of the merger.

Documents properly reflecting the foregoing change are on file in my office.

I FURTHER CERTIFY that regardless of the method whereby such change was effected, the corporation bearing the new corporate name listed above is vested, by operation of law, with title to all property, real and personal, of the corporation bearing the old corporate name listed above, and with all of its other rights, privileges, immunities, franchises, and choses in action, all as provided by Section 9–5 (if other than a simple change of name) of the Maine Business Corporation Act.

This certificate is entitled to record under the provisions of Section 13–10 of said Act.

WITNESS MY HAND AND OFFICIAL SEAL this ..... day of ....., 19..

.....
SECRETARY OF STATE OF THE STATE OF MAINE
By .....

†