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MEETINGS

TYPES AND PURPOSES OF MEETINGS

Corporate activity is conducted through meetings of the internal corporate groups: the incorporators, the directors, and the shareholders. Under the common law of corporations, the directors of a corporation do not act individually, but may act only as a board collectively convened. Shareholder and incorporator activities are somewhat more individual, but the democratic rule that the majority will control the minority is applied to both groups. Traditionally, corporate action may not be taken unless it has been approved by one of these groups duly convened at a meeting. In theory, then, any action taken by the corporation requires an approving resolution by the appropriate intracorporate group. In reality, however, it would be much too cumbersome to hold a meeting of one of these groups for daily business decisions. Instead, the board of directors delegates authority for the everyday business affairs of the corporation to the officers, and the board is responsible for the supervision of officer activities. Nevertheless, a corporate decision of any magnitude should be made at a directors' meeting with an appropriate resolution set forth in the minutes, and some major corporate decisions require shareholder approval.¹

Depending upon the structure of a limited liability company, the internal operations of the company may involve formal meetings of the members and managers, similar to the typical meetings held in corporations. The various features of the limited liability company are discussed in Chapter 5. If the business is to be managed by managers elected by the members, the operating agreement of the limited liability company will frequently describe the types and regularity of meetings of both the managers and members; and in some states, statutory provisions for such meetings, similar to corporate statutes, prescribe the formalities for notice, determination of the members who are entitled to vote, and manner of taking action for the intracompany groups. Similarly, limited liability partnerships may conduct business through formal meetings of the partners. In part, the formality of such meetings supports the treatment of these organizations as entities, which justifies their limited liability feature. Although the remainder of this chapter describes the intricacies of corporate meetings, the same rules and procedures may apply to the operations of a limited liability company and limited liability partnerships as well.

Four types of meetings may be held by the intracompany groups described here: organizational meetings, annual meetings, regular meetings, and special meetings. State statutes often detail the circumstances that require such meetings, authority to call them, the notice required, and time and place for the meetings.

REQUIREMENT FOR ORGANIZATIONAL MEETINGS

The corporation is formed by the filing of articles of incorporation or the issuance of a certificate of incorporation, depending upon the law of the particular jurisdiction.² Thereafter, certain organizational meetings must be held, and each state statute should be consulted to determine the parties to the meeting and the business that must be conducted. The organizational meetings are, by most statutes, a required condition that should be satisfied before the corporation commences business operations.³ Some states require only an organizational meeting of the incorporators; others require only an organizational meeting of the directors. Still other states permit either group to hold an organizational meeting, and a few also require the shareholders to have an organizational meeting.⁴ Section 2.05(a) of the Model Business Corporation Act provides as follows:

After incorporation:

- (1) if initial directors are named in the articles of incorporation, the initial directors shall hold an organizational meeting, at the call of a majority of the directors, to complete the organization of the corporation by appointing officers, adopting bylaws, and carrying on any other business brought before the meeting.
- (2) if initial directors are not named in the articles, the incorporator or incorporators shall hold an organizational meeting at the call of a majority of the incorporators:
 - (i) to elect directors and complete the organization of the corporation; or
 - (ii) to elect a board of directors who shall complete the organization of the corporation.

DIRECTORS' ORGANIZATIONAL MEETING

The Model Business Corporation Act provides that the directors' organizational meeting may be called by a majority of the directors named in the articles of incorporation, or a majority of the incorporators if no initial directors were named in the articles. Several states have adopted this rule.

Notice

In many states, at least three days' notice must be given to the directors by mail. Some states and the Model Business Corporation Act require no notice, and Pennsylvania prescribes five days' notice.⁵ It is common practice, however, to either give notice or secure a waiver of notice from the initial directors to avoid the observance of the notice period.

Waiver of Notice of Organizational Meeting

We, the undersigned, constituting all of the directors of Happiness, Inc., a corporation organized under the laws of the State of Colorado, do hereby severally waive notice of the time, place, and purpose of the first meeting of directors of said corporation, and consent that the meeting be held at the corporate offices, and on the 10th day of June, 2005 at 8:30 A.M., and we do further consent to the transaction of any and all business that may properly come before the meeting.

Dated June 10, 2005

EXAMPLE

Nominal Directors

If initial directors are named, the articles of incorporation need only contain the names of the persons who will serve as directors until the first meeting of shareholders and until their successors have been elected and qualified. If the persons named are the actual directors of the corporation, they may transact all necessary director business at their organizational meeting. On the other hand, if the directors named in the articles of incorporation are only **nominal**, or **dummy, directors**, they should not be expected to conduct any more than the formal statutory business, such as adopting bylaws and electing officers. Other corporate business should be reserved for the consideration of the actual directors elected by the shareholders. If multiple meetings are undesirable, it is possible to have the nominal directors submit their resignations one by one at the organizational meeting, with the board of directors adopting by resolution the resignation of each dummy director and electing the actual director to fill the vacancy. The actual director will then serve for the period of the predecessor dummy director, or until the next shareholder meeting when a successor will be elected.

EXAMPLE

Resignation of a Dummy Director

To the Board of Happiness, Inc.

I regret that, owing to other business commitments, I am no longer able to act as a director, and I hereby tender my resignation as a director of Happiness, Inc., to take effect as and from the 10th day of June, 2005.

Edward O'Keefe

EXAMPLE

Acceptance of the Resignation of a Director

RESOLVED, that the resignation of Edward O'Keefe as director of this Corporation be accepted to take effect on June 10, 2005, and the secretary is hereby directed to notify Edward O'Keefe of such acceptance.

If the directors are not named in the articles of incorporation, they are elected at an organizational meeting of the incorporators. The elected directors then hold an organizational meeting after their election.

INCORPORATORS' ORGANIZATIONAL MEETING

If the state statute requires an organizational meeting of the incorporators, it also may require a period of notice preceding the meeting and usually will specify the business to be conducted at the meeting. The statutory requirements must be strictly followed. Even if the statute does not specify the business that must be conducted, certain matters are normally considered at all organizational meetings.

BUSINESS CONDUCTED AT ORGANIZATIONAL MEETINGS

Most state statutes describe specific matters that must be on the agenda of an organizational meeting. In the Model Business Corporation Act, the organizational meeting must consider the adoption of the bylaws and the election of officers. The statute further provides that the organizers should consider "carrying on any other business brought before the meeting."⁶ The following discussion considers the chronological order of business at an organizational meeting and includes examples of the way in which the minutes should reflect the actions taken.

Determination of a Quorum and Election of a Chair and Secretary

Counsel (or the person who is initially presiding) should be certain to determine the presence of a quorum according to the rules stated in the articles of incorporation or the statute. If a quorum is present, the fact should be noted in the minutes, and the persons present and absent should be named in the minutes.

A chair and a secretary should be elected as the first order of business at an organizational meeting. The secretary is responsible for the minutes of the meeting. The minutes are frequently prepared in advance by counsel and may serve as an agenda for the meeting, but the secretary should review them for accuracy and add any necessary new material. The chair is responsible for an orderly meeting.

Recital of Quorum, and Election of Chair and Secretary

The following directors named in the articles of incorporation were present: Edward Giles, Gary Nakarado, and Terryl Gorrell. The following directors named in the articles of incorporation were absent: Richard Vermeire and Adam Golodner.

The presence of the foregoing directors constituted a quorum. By unanimous vote of the directors, Edward Giles was elected Chair of the meeting and Gary Nakarado was elected Secretary of the meeting.

EXAMPLE

Notice of Waivers of Notice

If the appropriate notice has been given to the members of the group, a copy of the notices should be presented at the meeting and attached to the minutes. If waivers of notice of the meeting have been obtained from those present, the waivers should be presented at the meeting and affixed to the minutes as an attachment.

Recognition of Notice

The Secretary presented the waiver of notice of the meeting signed by all of the directors, which was ordered filed with the minutes of the meeting.

EXAMPLE

Determination of Actual Directors

If the directors named in the articles of incorporation are the actual directors of the corporation, no further action regarding their status is required at the organizational meeting. Some states do not require the naming of the initial directors, and all states permit dummy directors to be named in the articles of incorporation.

Election of the actual directors occurs at the incorporators' organizational meeting if no directors are named in the articles of incorporation. If the directors are named but are only nominal directors, the incorporators may obtain the resignations of the nominal directors and replace those directors with actual directors at the incorporators' organizational meeting.

The directors' organizational meeting should be conducted by actual directors. Therefore, if nominal directors are named in the articles of incorporation and there is no meeting of incorporators to elect actual directors, the nominal directors may be replaced by the procedure suggested earlier in this chapter under "Directors' Organizational Meeting."

The resignations of nominal directors should be affixed to the minutes of the meeting during which they were replaced.

EXAMPLE**Determining Actual Directors**

The Secretary announced that resignations had been received from Richard Vermeire and Adam Golodner, who were nominal directors of the corporation named in the articles of incorporation.

Thereupon, upon motion duly made, seconded, and unanimously adopted it was

RESOLVED, that the resignations of Richard Vermeire and Adam Golodner as directors of this corporation be accepted to take effect on the date of this meeting, and the Secretary is hereby directed to notify Mr. Vermeire and Mr. Golodner of such acceptance, and to affix to the minutes of this meeting the original written resignations of these directors.

FURTHER RESOLVED, that Edward Naylor and James Burghardt shall be appointed to fill the vacancies created by the resignations of these directors, and shall be directors of this corporation to serve until the first annual meeting of the shareholders or until their successors are otherwise elected and qualified.

Presentation of Articles of Incorporation

The articles of incorporation, returned by the secretary of state (or other designated filing officer) with the certificate of incorporation (if one has been issued under local law), should be presented to the meeting and affixed as an attachment to the minutes of the meeting. It is not necessary to have a resolution approving the articles of incorporation, but the minutes should reflect that the articles were presented to the meeting, and the secretary should be instructed to insert the articles and the certificate of incorporation in the minute book.

EXAMPLE**Presentation of the Articles of Incorporation**

The Chair submitted to the meeting a copy of the Articles of Incorporation of the corporation and an original receipt showing payment of the statutory organization taxes and filing fees. The Chair reported that the original of these Articles of Incorporation had been filed in the office of the Secretary of State, State of Nebraska, on November 1, 2005. Thereupon, upon motion duly made, seconded, and unanimously adopted, it was:

RESOLVED, that the Articles of Incorporation as presented be, and they hereby are, accepted and approved and that said Articles of Incorporation, together with the original receipt showing payment of the statutory organization taxes and filing fees, be placed in the minute book of the corporation.

Approval of Action Taken at Previous Meetings

When the incorporators have held an organizational meeting and the board of directors subsequently conducts an organizational meeting, it is customary for the board to approve, ratify, and confirm all of the actions taken at the incorporators' meeting. This procedure has the effect of making the actions of the incorporators the actions of the board of directors. For example, if the incorporators have adopted the bylaws, this resolution grants approval of the same by the board of directors. The minutes of the board of directors' meeting may be abbreviated in this fashion:

EXAMPLE**Acceptance of Incorporators' Action**

The Secretary presented to the meeting the minutes of the first meeting of incorporators of the Corporation together with a copy of the Bylaws adopted by the incorporators at their meeting held November 10, 2005.

On motion duly made and seconded, it was unanimously

RESOLVED, that the minutes of the first meeting of the incorporators of the Corporation held on November 10, 2005, be hereby in all respects ratified, approved, and confirmed.

FURTHER RESOLVED, that the Bylaws adopted by the incorporators at the first meeting are hereby adopted by this Board as the Bylaws of this Corporation.

Approval of Bylaws

Counsel should have drafted the bylaws pursuant to the instructions of the incorporators before the organizational meeting. The bylaws are presented to the organizational meeting of the appropriate group for approval. The minutes must contain a resolution that the bylaws have been approved, and the secretary should be instructed to insert a copy of the bylaws in the minutes.

Acceptance of Bylaws

RESOLVED, that the Bylaws submitted to the meeting be and are adopted as the Bylaws of the Corporation, and that the Secretary is instructed to insert a copy of such Bylaws, certified by the Secretary, in the minute book immediately following the Certificate of Incorporation with affixed duplicate original of the Articles of Incorporation.

EXAMPLE

Approval of Corporate Seal

As a part of the corporate supplies, counsel should have obtained a corporate seal designed to the specifications of the incorporators. Even in states that make the use of the corporate seal optional, in many formal transactions, such as the purchase or sale of real estate, corporate officers will be expected to affix the corporate seal to certain documents, such as the deed or mortgage. It is customary to adopt a resolution to the effect that the seal is accepted as the corporate seal, and to affix the seal to the margin in the minute book page. If any regulation of the use of the seal is contemplated, the regulation should be specified in the resolution.

Acceptance of the Seal

RESOLVED, that the seal now produced by the secretary, an impression whereof is now made in the minute book of the Company, be adopted as the seal of the Company, and that such seal shall not be affixed to any deed or instrument of any description, except in the presence of an officer, or director, and the secretary of the Company, who shall respectively sign said deed or instrument.

EXAMPLE

Approval of Share Certificates

Share certificates are obtained as part of the corporate supplies, and a specimen certificate should be presented at the meeting and attached to the minutes for filing in the minute book. The share certificate should contain all appropriate legends if share transfer restrictions are contemplated, and all other matters unique to the particular corporation or the particular class of stock.⁷ The share certificate is accepted by resolution at the organizational meeting, and the secretary should insert the specimen in the minute book.

Acceptance of Share Certificate

RESOLVED, that the form of share certificate presented at this meeting is adopted as the form of share certificate for this Corporation; and the Secretary of the meeting is instructed to append a sample of the certificate to the minutes of this meeting.

EXAMPLE

Authorization to Issue Shares

At their organizational meeting, the incorporators authorize the board of directors to issue the shares of the company. The incorporators' resolution granting such authorization should be contained in the minutes of their meeting. The directors may adopt such a resolution at their organizational meeting authorizing the appropriate officers (as specified by statute) to issue the certificates.

EXAMPLE**Authority to Issue Shares**

RESOLVED, that the President and Secretary of this Corporation be, and they are, hereby authorized to issue certificates for shares in the form as submitted to this meeting and ordered attached to these minutes.

Acceptance of Transfers of Share Subscriptions from Dummy Incorporators

Some states require that an incorporator subscribe for shares as a condition to qualification as an incorporator.⁸ To satisfy this rule, incorporators frequently subscribe for shares they do not intend to purchase. In such cases, the incorporators may assign their preincorporation **share subscriptions** to actual investors in the company, and these subscription transfers are presented at the organizational meeting of the board of directors for the directors' approval. A resolution reflecting the directors' approval should be included in the minutes.

EXAMPLE**Transfer of Subscription**

Dated, Kearney, Nebraska, October 31, 2005

FOR VALUE RECEIVED, I, Charles Luce, hereby sell, assign, and transfer unto William Callison all my right, title, and interest as subscriber to the shares of common stock of Happiness, Inc., which subscription was executed by me on the 3rd day of October 2005, and, when accepted, entitles me to receive 500 shares of the common stock of Happiness, Inc., and I hereby direct said corporation to issue certificates for said shares of stock to and in the name of the aforesaid assignee, or his nominees or assigns.

Charles Luce

EXAMPLE**Adoption of Assignment**

RESOLVED, that the assignment and transfer of a stock subscription from Charles Luce to William Callison, dated October 31, 2005, is hereby approved and accepted on behalf of the Corporation.

Acceptance of Share Subscriptions

The preincorporation share subscriptions are offers to the corporation to buy shares when the corporation is formed.⁹ Once formation has been accomplished, the board of directors should accept the offers on behalf of the corporation and thereby obligate the subscribers to pay for the shares they have offered to purchase. The acceptance of the share subscriptions is accomplished by a resolution, and each subscription should be listed therein, specifying the number of shares the subscriber has offered to purchase, the class of the security, the par value, and the price at which the offer was tendered.

If cash has been offered for share purchases, the resolution accepting the offer need only state the amount offered when describing the consideration.

EXAMPLE**Acceptance of Cash Subscriptions**

RESOLVED, that the written offers dated March 23, 2005, pertaining to the issuance of shares of the Corporation, to wit:

<i>Name</i>	<i>Number of Shares</i>	<i>Consideration</i>
John O'Brien	100	\$ 100
Dwight Shellman	1000	\$1000
Kevin Burr	750	\$ 750

be, and the same hereby are, in all respects accepted for and on behalf of the Corporation.

If property or services are offered to the corporation in exchange for shares, the board of directors must evaluate the property and services consistently with the valuation rule of the particular jurisdiction. Some states require that an actual market value be determined and used by the board in appraising property or services, but most states permit the board of directors to determine the value of the property or services in good faith considering the best interests of the corporation. The directors' determination of value is then conclusive in the absence of fraud. The Model Business Corporation Act requires a directors' determination of adequacy of consideration in section 6.21. This determination of value is critical to the issuance of par value securities, since those securities cannot be sold for less than par value. Thus, if a corporation receives an offer to transfer certain land in exchange for 300 shares that each have a \$100 par value, the board of directors must appraise the land, by the appropriate valuation rule, at an amount equal to or greater than \$30,000. The resolution in the minutes should state the valuation determination.

Acceptance of Property Subscription

EXAMPLE

RESOLVED, that this Corporation hereby accepts the offer of Marcia Kearney and Stephen Roark, as joint owners, to sell and convey to it good and marketable title to the fee of the premises known as 3590 E. Nobles Road, Littleton, Colorado, 80122, together with the buildings thereon, and all personal property belonging to them used in connection with the premises free and clear of all liens and encumbrances, in consideration of this Corporation's issuing and delivering to Stephen Roark, or his nominee, certificates for 150 of its fully paid and nonassessable shares of its 5½% preferred shares, \$100 par value, and of its issuing and delivering to Marcia Kearney, or her nominee, certificates for 150 of its fully paid and nonassessable 5½% preferred shares, \$100 par value. The Board of Directors does hereby adjudge and declare that said property is of the fair value of \$30,000, and that the same is necessary for the business of the corporation.

If the cash or property is not immediately tendered with the offer, it is appropriate for the directors to adopt a resolution to assess or **call** the consideration due. Unless otherwise stated in the subscription agreement, the offer is payable in full upon acceptance, but the board of directors may permit payment by installments.¹⁰

Partial Call of Subscriptions

EXAMPLE

RESOLVED, that a call of fifty percent is hereby made upon each and every share of the capital stock of the Company subscribed for, and same is to be paid by each subscriber to the treasurer of the Company, on or before the 30th day of November, 2005 (and that the president and secretary issue certificates of fully paid stock therefor).

Full Call of Subscriptions

EXAMPLE

RESOLVED, that a full call is hereby made upon each and every share of the capital stock of the Company subscribed for, and the same is to be paid by each subscriber to the treasurer of the Company, on or before the 30th day of November, 2005 (and that the president and secretary issue certificates of fully paid stock therefor).

Authorization to Issue Shares

The board of directors should authorize the officers of the company to issue the shares represented by the accepted share subscriptions. The resolution generally states that the company will issue and deliver the prescribed number of shares to the subscriber when full consideration has been received for the shares. The resolution should further state that the officers are authorized to sign stock certificates and to register the shares in the names of the subscribers.

EXAMPLE**Authorization to Issue Shares**

RESOLVED, that the Corporation issue and deliver to those persons upon receipt of the consideration therefor, pursuant to the terms of the aforesaid offer, certificates representing the subscribed shares of the Corporation, each such shares to include the shares originally subscribed for by the subscribers to the capital stock of the Corporation, and subsequently assigned to the officers; and

FURTHER RESOLVED, that the officers of the Corporation be, and they hereby are, authorized, empowered, and directed to take any and all steps, and to execute and deliver any and all instruments, in connection with consummating the transaction contemplated by the aforesaid offer and in connection with carrying the foregoing resolutions into effect; and

FURTHER RESOLVED, that upon the delivery to this Corporation of proper instruments of conveyance, assignment, and transfer, in such form as counsel for this Corporation may approve and the proper officers of this Corporation may approve, the proper officers of this Corporation be, and they hereby are, authorized and directed to issue to Ms. Kearney an appropriate certificate for 150 of its 5½% preferred shares, \$100 par value, which when issued as provided in the foregoing resolutions shall be fully paid and nonassessable.

If the shares are being issued in excess of par value, or if no par value shares are being sold in excess of stated value, the board of directors should adopt a resolution to allocate the excess consideration to the capital surplus account if they want the corporation to be able to use any of the contributed funds for distributions to shareholders later.

EXAMPLE**Allocation to Capital Surplus**

RESOLVED, that since the corporation's common stock has a par value of \$.50 per share, and the same is being sold for \$1.00 per share, the excess amount over par value shall be allocated to the capital surplus account of the corporation;

AND FURTHER RESOLVED, that seventy-five percent (75%) of the consideration received for the company's no par value stock shall be allocated and applied to the capital surplus account of the corporation.

Since the Model Business Corporation Act now permits shares to be issued for promissory notes and services to be performed, the board of directors may authorize the issuance of shares in such cases, but should take steps to protect the corporation in the event the promissory note is not paid or the contract is not performed. Section 6.21(e) of the act suggests that the corporation may place shares in escrow or otherwise restrict the transfer of shares until the entire purchase price has been received. Provisions concerning the disposition of the shares, in the event that the payment or performance does not occur, should also be included.

EXAMPLE**Escrow of Shares**

RESOLVED, that the corporation issue and deliver in escrow to the First Interstate Bank certificates representing the subscribed shares of the corporation, no par value, in exchange for the subscriptions by the subscribers to the capital stock of the corporation which have not been fully performed, including promissory notes and contracts to perform future services; and

FURTHER RESOLVED, that the officers of the corporation be, and they hereby are, authorized, empowered, and directed to collect all promissory notes and require the performance of all contracts for services, and to notify the First Interstate Bank as escrow agent of the collection of the promissory note or the performance of the contracts for services; and

FURTHER RESOLVED, that upon the payment of the promissory note or the performance of contracts for services, that the officers of the corporation shall release the escrow of shares with First Interstate Bank, and cause the share certificates to be delivered to the subscribers; and

FURTHER RESOLVED, that in the event that the promissory notes are not fully paid or the contracts for services are not fully performed, that the officers of the corporation shall notify First Interstate Bank as escrow agent of the default on such notes and contracts, and to take any and all steps, and to execute and deliver any and all instruments or documents necessary to cancel those shares that have not been paid.

EXAMPLE*(continued)***Reimbursement of Fees**

The authority to pay expenses in connection with the formation of the corporation emanates from the board of directors in its organizational meeting. The treasurer is authorized to pay all taxes, fees, and other expenses incurred and to be incurred in connection with the organization of the company and to reimburse any persons who have made expenditures on behalf of the company during the formation procedure. Legal fees are included here, which usually makes this resolution very important.

Authorization to Pay Expenses

FURTHER RESOLVED that the President of this Corporation be, and hereby is, authorized to pay all charges and expenses incident to or arising out of the organization of this Corporation, including the bill of Chesley Culp III, Esq., for legal services in connection therewith in the sum of \$2,500, and to reimburse any person who has made any disbursement therefor.

EXAMPLE**Adoption of Preincorporation Agreements**

Before formation of the corporation, the incorporators may have entered contracts on behalf of the corporation to ensure that the necessary resources for conducting business would be available when the corporation was formed. For example, they may have leased office space or they may have purchased equipment on credit. An earlier section discussed the general resolution by which the board of directors adopts the acts of the incorporators.¹¹ Any preincorporation agreements that were intended to benefit the corporation should be adopted by a separate, specific resolution during the board of directors' organizational meeting so that it is clear in the corporate minutes that the specific agreement has been adopted by the corporation. The resolution should summarize the terms of the agreements and clearly express the directors' approval of the transactions.

Adoption of Preincorporation Agreements

RESOLVED, the board of directors has reviewed and considered an agreement on behalf of the corporation, a copy of which is attached to these minutes as Exhibit A and incorporated herein by reference. This agreement was entered into prior to the existence and formation of the corporation, and the board of directors, having considered the agreement on behalf of the corporation, does hereby adopt and accept the agreement according to its terms, and agrees that the corporation shall perform all of its obligations and be entitled to all of its rights as specified therein.

EXAMPLE

Election of Corporate Officers

The officers of the corporation are elected by the board of directors, and this election is one of the prescribed matters to be considered at the directors' organizational meeting. The resolution for the election usually states that the officers will serve for a stated period of time or at the discretion of the board of directors, and fixes the officers' compensation.

EXAMPLE

Election and Compensation of Officers

The meeting then proceeded to the election of officers to serve until the next annual meeting of stockholders or until their successors are elected and qualified. The following nominations were made and seconded:

President	Glenna McKelvy
Vice President	Bill Bradford
Secretary	Mary Matthies
Treasurer	Dave Herrenbruck

There being no further nominations, the foregoing persons were unanimously elected to the office set opposite their respective names.

RESOLVED, that until further action by the Board of Directors, the annual salaries of the officers are fixed in the following amounts, effective as of January 1, 2006, and payable in twelve equal monthly installments:

President	\$50,000.00
Vice President	\$45,000.00
Secretary	\$25,000.00
Treasurer	\$20,000.00

Bank Resolution

The bank resolution prescribes the authority for the maintenance of a bank account and names the persons who have authority to obligate the corporation in banking matters. The treasurer of the corporation is often authorized to sign bank documents and in some states may be required to sign for certain banking transactions, such as mortgages or promissory notes. The appropriate persons to sign checks and other routine banking papers is a question of security and the preferences of the directors and officers. It is good practice to require more than one signature on transactions involving significant sums of money. Every bank supplies a form for a banking resolution, which should be completed and attached to the minutes of the meeting. The minutes contain a directors' resolution that authorizes the opening of the bank account, and adopts by reference the provisions in the attached bank form. The directors' resolution looks like this:

EXAMPLE

Acceptance of Bank Resolution

RESOLVED that the funds of the Corporation be deposited in the Central City Bank of Kearney, 6th Avenue Branch, and that the printed resolutions supplied by that bank, as filed at this meeting, be attached to the minutes of this meeting and be deemed resolutions of this Corporation duly adopted by the Board of Directors.

A sample of a bank resolution follows.

EXAMPLE

Bank Resolution¹²

.....
 (Name of Corporation)

Depository
 and
 Signing
 Resolution

I HEREBY CERTIFY TO,
 that at a meeting of the Board of Directors of, a corporation or-
 ganized under the laws of the State of duly called (a quorum be-
 ing present) and held at the office of said corporation, No in the
 city of State of on the day .
, 20 .., the following resolutions were duly adopted and are now in
 full force and effect:

RESOLVED, that the above bank be designated as a depository of this corpora-
 tion and that funds of this corporation deposited in said Bank be subject to with-
 drawal upon checks, notes, drafts, bills of exchange, acceptances, undertakings of
 other orders for the payment of money when signed on behalf of this corporation by
 any of its following officers to wit:

(Number)

Borrowing
 Resolution

RESOLVED, that the above bank, is hereby authorized to pay any such orders
 and also to receive the same for credit of or in payment from the payee or any other
 holder without inquiry as to the officer or tendered in payment of his individual ob-
 ligation.

RESOLVED, that

.....
 be and they hereby are authorized to borrow from time to time on behalf of this
 corporation from the above bank sums of money for such period or periods of time,
 and upon such terms, rates of interest and accounts as may to them in their discre-
 tion seem advisable, and to execute notes or agreements in the forms required by said
 Bank in the name of the corporation for the payment of any sums so borrowed.

That said officers are hereby authorized to pledge or mortgage any of the bonds,
 stocks or other securities, bills receivable, warehouse receipts or other property real
 or personal of the corporation, for the purpose of securing the payment of any mon-
 eys so borrowed; to endorse said securities and/or to issue the necessary powers of
 attorney and to execute loan, pledge or liability agreements in the forms required by
 the said bank in connection with same.

That said officers are hereby authorized to discount with the above bank any bills
 receivable held by this corporation upon such terms as they may deem proper.

That the foregoing powers and authority will continue until written notice of rev-
 ocation has been delivered to the above bank.

RESOLVED, that the secretary of this corporation be and he or she hereby is au-
 thorized to certify to the above bank, the foregoing resolutions and that the provi-
 sions thereof are in conformity with the charter and by-laws of this corporation.

I FURTHER CERTIFY that there is no provision in the charter or by-laws of said
 corporation limiting the power of the board of directors to pass the foregoing reso-
 lutions and that the same are in conformity with the provisions of said charter and
 by-laws.

I further certify that the following are the genuine signatures of the persons now
 holding office in said company as indicated opposite their respective signatures.

..... (Title)
 (Title)
 (Title)

Application for Qualification as a Foreign Corporation

If management contemplates doing business in another jurisdiction, the board of directors must adopt an appropriate resolution authorizing the officers of the corporation to apply for admission and qualification of the corporation as a foreign corporation in any other jurisdiction in which it plans to do business.

EXAMPLE**Authorization of Foreign Qualification**

RESOLVED, that the officers of the Corporation be authorized and directed to qualify the Corporation as a foreign corporation authorized to conduct business in the State of Kansas, and in connection therewith to appoint all necessary agents or attorneys for service of process and to take all other action that may be deemed necessary or advisable.

Appointment of Resident Agents and Office

The articles of incorporation name the resident agents, but the appointment of those agents should be *ratified* by a resolution of the board of directors. Similarly, the establishment of a principal office of the corporation may be resolved at the organizational meeting.

EXAMPLE**Principal Office and Agent**

RESOLVED, that the Articles of Incorporation correctly state the principal office of the corporation and that the person named therein as registered agent shall remain registered agent until subsequently changed by a resolution of the board of directors.

Designation of Counsel and Auditors

The board of directors may designate a certain attorney to act as the general counsel of the company, if appropriate, and also may specify the persons to be retained as the corporation's auditors.

EXAMPLE**Appointment of Counsel and Auditors**

RESOLVED, that Patrick Meyer be hereby appointed to act as attorney for the Company, and that he be paid the ordinary professional charges for his services as attorney.

RESOLVED, that Bert Bondi & Co. be hereby appointed auditors of the Company for the ensuing year, and that the remuneration for their services as such auditors be the sum of \$10,000.00

Authority to Use Assumed Name

Some states permit the corporation to conduct business under an assumed name as long as that name is not deceptively similar to another reserved or registered name. Usually the corporation must file a statement of assumed name with the appropriate state official.¹³ The authority to use such a name and to file the statement comes from a resolution of the directors.

EXAMPLE**Adoption of an Assumed Name**

RESOLVED, that the corporation may use the name "Black, Inc." as an assumed business name to carry out its purposes and objectives in the state of Oregon, and that the officers of the corporation as required by the statute are authorized to execute such documents as are necessary to accomplish the registration of the corporation's assumed business name.

Adoption of Section 1244 Plan

The Small Business Tax Revision Act added Section 1244 of the Internal Revenue Code to offer special loss protection for shareholders of a small corporation. Losses on Section 1244 stock are fully deductible as business losses up to certain dollar limits per year, instead of being treated as capital losses (which are only allowed to offset capital gains). (The substantive

rules of Section 1244 stock are explained in detail in “Taxation of a Corporation” in Chapter 6.) To qualify to issue Section 1244 stock, a corporation must be a small business corporation, as defined by the statute.¹⁴

A **Section 1244 plan** permits a new corporation that qualifies as a small business corporation and issues Section 1244 stock to cause shareholder losses from the sale of the shares to be treated as ordinary losses and not capital losses, so the shareholder may offset the lost value against ordinary income, such as the shareholder’s wages, interest, dividends, and so on. Unless the shares qualify under Section 1244, any such losses offset only capital gains and, to a very limited extent, ordinary income.

Although the statutory requirement of a written plan has been eliminated, it is good practice to clearly indicate the intention to qualify for this special protection by adopting a resolution and plan in the minutes of the organizational meeting. A proper resolution adopting a Section 1244 plan should restate the statutory requirements. Thus, it should recite that the payment of the shares will be in cash or other property but not securities or services, and it should provide that the stock will be offered for sale at a price not lower than the par value of the shares and not higher than an aggregate of \$1,000,000.

Section 1244 Plan

EXAMPLE

A plan was read and (unanimously) adopted for the issuance of common stock of the corporation to qualify the same as “small business corporation” stock under the provisions of Section 1244 of the Internal Revenue Code of 1986 as amended. The Secretary was directed to place a copy of the Plan immediately following these minutes.

Plan for Issuance of Stock

1. The corporation shall offer and issue under this Plan, a maximum of 50,000 shares of its common stock at a maximum price of ten dollars (\$10.00) per share.
2. This offer shall terminate by:
 - (a) complete issuance of all shares offered hereunder,
 - (b) appropriate action terminating the same by the Board of Directors and the Stockholders, or
 - (c) the adoption of a new Plan by the Stockholders for the issuance of additional stock under Section 1244, Internal Revenue Code.
3. No increase in the basis of outstanding stock shall result from a contribution to capital hereunder.
4. No stock offered hereunder shall be issued on the exercise of a stock right, stock warrant, or stock option, unless such right, warrant, or option is applicable solely to unissued stock offered under the Plan and is exercised during the period of the Plan.
5. Stock subscribed for prior to the adoption of the Plan, including stock subscribed for prior to the date the corporation comes into existence, may be issued hereunder, provided, however, that the said stock is not in fact issued prior to the adoption of such Plan.
6. No stock shall be issued hereunder for a payment which, along or together with prior payments, exceeds the maximum amount that may be received under the Plan.
7. Any offering or portion of an offer outstanding that is unissued at the time of the adoption of this Plan is herewith withdrawn. Stock rights, stock warrants, stock options, or securities convertible into stock that are outstanding at the time this Plan is adopted are likewise herewith withdrawn.
8. Stock issued hereunder shall be in exchange for money or other property except for stock or securities. Stock issued hereunder shall not be in return for services rendered or to be rendered to, or for the benefit of, the corporation. Stock may be issued hereunder, however, in consideration for cancellation of indebtedness of the corporation, unless such indebtedness is evidenced by a security or arises out of the performance of personal services.
9. Any matters pertaining to this issue not covered under the provisions of this Plan shall be resolved in favor of the applicable law and regulations in order to qualify such issue under Section 1244 of the Internal Revenue Code. If any shares issued hereunder are finally determined not to be so qualified, such shares, and only such shares, shall be deemed not to be in the Plan, and such other shares issued hereunder shall not be affected thereby.
10. The sum of the aggregate amount offered hereunder plus the equity capital of the corporation amounts to \$500,000.00.
11. The date of adoption of this Plan is November 15, 2005.

This plan should be copied directly into the minutes.

Subchapter S Election

To elect taxation under Subchapter S, the corporation must again qualify as a small business corporation, but the Subchapter S definition of a small business corporation is different from the section 1244 definition.¹⁵ Under a **Subchapter S election**, the income of the corporation is treated as ordinary income of the shareholders, and thus the problem of double taxation of corporation income is avoided.¹⁶ If the shareholders desire to be taxed under Subchapter S, the board of directors should adopt a resolution that provides that the corporation has elected to be taxed as a small business corporation so that the corporate records will reflect that the corporation will file the election and tax returns under Subchapter S and provide shareholders the information necessary to file their tax returns to report their proportionate share of the corporate income. It also may be appropriate to obligate the corporation to distribute to the shareholders the funds necessary to pay the tax on the corporate income they are required to report on their personal tax returns. The resolution should also state that the corporation meets the statutory requirements for Subchapter S corporations.

EXAMPLE

Subchapter S Election

WHEREAS, the corporation qualifies as a small business corporation under Section 1361(b) of the Internal Revenue Code of 1986, as amended (the "IRC"); and

WHEREAS, the board of directors deems it to be in the best interests of the corporation and the shareholders to elect to be taxed as a small business corporation under the IRC, it is

RESOLVED, that the election to be so taxed be submitted to the shareholders for their consent, and that, upon obtaining said consent, the officers of the corporation shall prepare and submit the necessary documents and forms to accomplish said election under Section 1362 of the IRC.

FURTHER RESOLVED, that the corporation shall distribute to the shareholders on or before April 1 of each fiscal year cash in the amount of 40% of the corporation's net profit for the previous fiscal year to provide funds to the shareholders to pay the federal and state income taxes applicable to the corporation's net profit.

The shareholder consent, duly signed, together with a copy of Form 2553 filed with the Internal Revenue Service, should be attached to the minutes.

EXAMPLE

Shareholder Consent to Subchapter S

We, the undersigned, being all of the stockholders in Happiness, Inc., a Nebraska corporation, hereby consent to the election under Section 1361 of the Internal Revenue Code of 1986 as amended, to be treated as a small business corporation for income tax purposes, and submit the following information:
Name and Address of Corporation: Happiness, Inc., 200 West 14th Avenue, Kearney, Nebraska

<i>Name and Addresses of Stockholders</i>	<i>No. of Shares</i>	<i>Date Acquired</i>
_____	_____	_____
_____	_____	_____
_____	_____	_____

Dates of Meetings

The bylaws usually permit the directors to establish regular meetings for their board, and a resolution establishing dates and times is appropriate at the organizational meeting. The resolution also usually identifies the place for the meeting.

Place of Regular Meetings

RESOLVED, that regular meetings of the Board of Directors be held at the office of the Corporation at 200 West 14th Avenue, Kearney, Nebraska, on the third Wednesday of the months of February, May, September, and December, and that a regular meeting also be held in April immediately following the annual meeting of shareholders. No notice shall be required to be given of any of these regular meetings.

EXAMPLE

Delegation of Authority to the Officers

The board of directors may adopt a resolution defining the authority of the officers. These resolutions are usually drafted broadly, and they are not necessary if the officers' duties are described in the bylaws. They may be useful, however, as a written record that the directors have delegated the authority. The typical text of the resolution includes grants of authority to the president and vice-president to conduct all business on behalf of the corporation, to sign all documents necessary in the ordinary course of business in the corporate name, and to perform other necessary managerial acts on behalf of the corporation. The secretary is authorized to procure and maintain necessary corporate books and records, and to open and maintain a stock transfer ledger in accordance with the statute and bylaws. The treasurer is always authorized to pay and discharge any obligations of the corporation, and to perform all other acts necessary and proper within the financial structure of the corporation. The authority of the officers is specified in the bylaws,¹⁷ however, and by approving the bylaws, the directors accomplish the same delegation of authority.

Delegation of Authority to Officers

The authority of the officers of the corporation was discussed, and upon motion made and unanimously approved, the following authority is granted to the officers of the corporation, until subsequently modified by appropriate resolution of the Board of Directors:

President. The President shall be the principal executive officer of the Corporation and, subject to the control of the Board of Directors, shall in general supervise and control all of the business and affairs of the Corporation. The President shall, when present, preside at all meetings of the shareholders and of the Board of Directors. The president may sign, with the Secretary or any other proper officer of the corporation thereunto authorized by the Board of Directors, certificates for shares of the corporation, any deeds, mortgages, bonds, contracts, or other instruments that the Board of Directors has authorized to be executed, except in cases where the signing and execution thereof shall be expressly delegated by the Board of Directors or by the Bylaws to some other officer or agent of the corporation, or shall be required by law to be otherwise signed or executed; and in general shall perform all duties incident to the office of President and such other duties as may be prescribed by the Board of Directors from time to time.

The Vice-Presidents. In the absence of the President or in the event of the President's death, or inability or refusal to act, the Vice-President (or in the event there be more than one Vice-President, the Vice-Presidents in the order designated at the time of their election, or in the absence of any designation, then in the order of their election) shall perform the duties of the President, and when so acting, shall have all the powers of and be subject to all the restrictions upon the President. Any Vice-President may sign, with the Secretary or an Assistant Secretary, certificates for shares of the Corporation; and shall perform such other duties as from time to time may be assigned to him or her by the President or by the Board of Directors.

The Secretary. The Secretary shall: (a) keep the minutes of the proceedings of the shareholders and of the Board of Directors in one or more books provided for that purpose; (b) see that all notices are duly given in accordance with the provisions of the Bylaws or as required by law; (c) be custodian of the corporate records and of the seal of the Corporation and see that the seal of the Corporation is affixed to all documents the execution of which on behalf of the Corporation under its seal is duly authorized; (d) keep a register of the post office address of each shareholder, which shall be furnished to the Secretary by such stockholder; (e) sign with the President, or a Vice-President, certificates for shares of the Corporation, the issuance of which shall have been authorized by resolution of the Board of Directors; (f) have general charge of the stock transfer books of the Corporation; and (g) in general perform all duties incident to the

EXAMPLE

EXAMPLE*(continued)*

office of Secretary and such other duties as from time to time may be assigned to him or her by the President or by the Board of Directors.

The Treasurer. The Treasurer shall: (a) have charge and custody of and be responsible for all funds and securities of the Corporation; (b) receive and give receipts for moneys due and payable to the Corporation from any source whatsoever, and deposit all such moneys in the name of the Corporation in such banks, trust companies, or other depositories as shall be selected in accordance with the provisions of the Bylaws; and (c) in general perform all of the duties incident to the office of Treasurer and such other duties as from time to time may be assigned to him or her by the President or by the Board of Directors. If required by the Board of Directors, the Treasurer shall give a bond for the faithful discharge of his or her duties in such sum and with such surety or sureties as the Board of Directors shall determine.

Assistant Secretaries and Assistant Treasurers. The Assistant Secretaries, when authorized by the Board of Directors, may sign with the President or a Vice-President certificates for shares of the Corporation, the issuance of which shall have been authorized by a resolution of the Board of Directors. The Assistant Treasurers shall, if required by the Board of Directors, give bonds for the faithful discharge of their duties in such sums and with such sureties as the Board of Directors shall determine. The Assistant Secretaries and Assistant Treasurers, in general, shall perform the duties assigned to them by the Secretary and the Treasurer, respectively, or by the President or the Board of Directors.

Adjournment, Signatures, and Attachments

After all the business has been conducted, the minutes should close with the statement, “There being no further business the meeting is adjourned.”

Normally, the secretary, who is in charge of complete and accurate minutes, will sign the minutes of the organizational meeting. It is also permissible to have the chair and the other directors, after their review, sign the minutes of the meeting, signifying their approval.

The **attachments to the minutes** of the meeting are important. A typical organizational meeting will have at least the following attachments, which should be referred to in the minutes and labeled as exhibits:

1. notice or waiver of notice of the meeting;
2. articles of incorporation and certificate of incorporation;
3. minutes and attachments of incorporators’ meeting, if appropriate;
4. bylaws;
5. all promoter or incorporator contracts approved by the board of directors;
6. specimen share certificates;
7. written stock subscriptions;
8. bills for organizational expenses;
9. bank resolution; and
10. (if Subchapter S has been elected) Internal Revenue Service form 2553, Election of a Small Business Corporation by the Shareholders.

DIRECTORS’ REGULAR AND SPECIAL MEETINGS

Directors’ meetings are not strictly regulated by statute. The Model Business Corporation Act states that the directors may meet at regular or special meetings, either within or without the state, and defers to the bylaws most details such as notice and frequency of the meetings.¹⁸ Since the statutes contain little guidance for directors’ meetings, the bylaw provisions should be carefully drafted to specify any desired procedures or notice for these meetings.¹⁹ Even in states where the statutes specify certain rules regulating directors’ meetings, the rules usually may be changed in the bylaws.

Matters Provided by Statute

The quorum of directors required for action by the board is specified in section 8.24 of the Model Business Corporation Act to be the majority of the number of directors fixed by the bylaws or stated in the articles of incorporation, but either of these documents may provide that a greater number than a majority is required for a quorum.

The articles of incorporation or bylaws also may reduce the quorum of the board of directors to as low as one-third of the directors. If the corporation has a variable-size board (such as when a provision in the articles states that the board of directors shall be between nine and fifteen members), a quorum is a majority of the directors in office immediately before the meeting begins. Section 8.24 further provides that a board of director action will be approved by a majority vote of the directors present, unless the articles of incorporation or bylaws state that a greater-than-majority vote is required.

These director quorum and voting provisions are common to most jurisdictions. To observe how they work, suppose the corporation has a nine-member board of directors. If five members are present, they constitute a quorum and may conduct business. The affirmative vote of three members will carry action for the board, since the three members are more than half of those present even though they represent only one-third of the total board.

Most state statutes and the Model Business Corporation Act provide that the attendance of a director at a meeting shall constitute a waiver of notice of the meeting unless the director attends for the express purpose of objecting to the transaction of any business because the meeting is not lawfully convened. To make such an objection successfully, the director must object at the beginning of the meeting (or promptly upon arrival) and may not vote on or assent to any action taken at the meeting.²⁰ The procedures for sending notice and the content of the notice are subjects to be determined in the bylaws.

Section 8.20 of the Model Business Corporation Act authorizes directors to participate in any meeting by conference telephone or by other communication devices by which all directors may simultaneously hear each other during the meeting. Most modern corporate statutes are now including this meeting technique to take advantage of modern electronic technology so that not all directors have to travel to a single meeting place. Whether or not communication devices are used, directors must have an interchange of ideas, as if they were in a single room discussing the issues, so it is necessary that the directors be able to participate in the meeting by hearing all comments of all directors and communicating their comments to all others.

Matters Contained in Bylaws or Resolutions

Place of Regular Meetings The place for the directors' **regular meeting** may be specified in the bylaws or may be left to the determination of the board of directors from time to time. If the bylaws leave the decision to the board members, a resolution should be adopted at each meeting of the board of directors specifying where the next regular meeting will be held.²¹

Call and Procedure for Special Meetings Certain rules for **special meetings** of the board of directors should be detailed in the bylaws, such as the persons authorized to call such a meeting and the notice that must be given. The place for special meetings of the board also may be established in the articles of incorporation bylaws, but, if the local statute permits, it is preferable to defer the selection of a meeting place to the person calling the meeting.

Notice of a Directors' Special Meeting

EXAMPLE

To Jerry Jones, Stephen Hess, and Randall Wilson, Directors:

Pursuant to the power given me by the Bylaws of Happiness, Inc., I hereby call a special meeting of its Board of Directors to be held at the corporate offices, on the 20th day of July, 2005 at 4:00 P.M., for the purpose of considering the advisability of authorizing the officers of the Company to renew the lease on the offices now occupied by them, and for such other action in regard thereto as the Board may deem advisable.

President

The undersigned hereby admit receipt of a copy of the foregoing notice and consent that the meeting may be held as called.

Directors

Notice Whether notice should be required for regular directors' meetings depends upon the size of the board, the directors' involvement in other corporate affairs, their proximity to the corporate offices, and their personal preferences. For example, formal notice is probably not required for a small group of directors who are also key employees of the corporation. However, notice may be necessary for a large board composed of advisory directors whose only corporate function is attendance at board meetings. Courtesy reminders should be given in any case. If formal notice is deemed desirable, the bylaws should specify the manner of giving notice and the period of time within which notice must be given.

EXAMPLE**Notice of a Directors' Regular Meeting**

To: *[Name and address of director]*

You are hereby notified that the regular quarterly meeting of the Board of Directors of Happiness, Inc., will be held at the principal office of said Company at 200 West 14th Avenue, Kearney, Nebraska, on the 1st day of August, 2005, at 2:00 P.M.

[Date]

_____, Secretary

EXAMPLE**Notice of a Directors' Special Meeting**

To: *[Name and address of director]*

You are hereby notified that a special meeting of the Board of Directors of Happiness, Inc., has been called by the president of the Company, to be held at the principal office of the Company at 200 West 14th Avenue, Kearney, Nebraska, on Monday, the 9th day of September, 2005, at 10:00 A.M., to consider the question of selling the corporate stock of Trouble Corporation, and of authorizing the officers of this Company to make the transfer.

[Date]

_____, Secretary

Unless required by the bylaws or state law, the notice need not specify the purpose of the meeting. The Model Business Corporation Act requires two days' notice for special directors' meetings, but permits the articles or bylaws to specify a different notice period and to state whether the purpose of the meeting must be given in the notice.²² It is common to provide a short period of notice for special meetings, since such meetings are usually called to consider urgent matters and a cumbersome notice procedure is likely to be detrimental to the best interests of the corporation.

The notice requirements are nullified somewhat by the statutory provisions that attendance at a meeting by a director constitutes waiver of notice, unless the director attends only for the purpose of objecting to the call for the meeting. In addition, most state statutes provide that whenever any notice is required to be given, a waiver of notice in writing signed by the person entitled to the notice, whether executed before or after the time stated therein, shall be equivalent to the giving of such notice. The Model Business Corporation Act contains this rule in section 8.23.

EXAMPLE**Waiver of Notice**

We, the undersigned, directors of Happiness, Inc., a Nebraska corporation, do hereby waive any and all notice required by the statutes of Nebraska, or by the Articles of Incorporation or Bylaws of said Corporation, of a meeting to be held on the 10th day of August, 2005, at 4:00 P.M., for the purpose of authorizing the officers of said Corporation to execute a trust deed for the benefit of creditors.

Dated August 10, 2005.

[Signatures of all directors]

Method of Voting Voting by directors is usually conducted in an informal manner, but formal records should be kept, particularly regarding matters on which there is disagreement

among directors. There is no particular statutory regulation of director voting, but directors must vote in person and are not permitted to vote by proxy. The bylaws may prescribe any desirable voting procedure. It is good practice to specify a voting procedure for large boards. Directors express their vote by voice or written ballot on each resolution presented to the meeting, and the secretary of the meeting is responsible for recording the votes. If the vote is not unanimous on any particular issue, each director's position should be stated in the minutes of the meeting in case an issue of liability arises from the board's action. For example, suppose a board of directors consisting of Ed Naylor, Pat Linden, and Sheri Visani are voting on whether the corporation should leave its current offices and lease new space. Visani is concerned that the corporation will breach its existing lease with its landlord if it abandons the current office, and she votes against the proposal. Her negative vote on this issue should be expressed in the minutes. If the corporation is later sued by the landlord and the directors are accused of breaching their fiduciary duties to the corporation for causing it to move too soon, Visani will be able to use the minutes to defend herself from these allegations.

SHAREHOLDER MEETINGS

Frequency

Shareholders' meetings are more strictly regulated by statute than are directors' meetings, to protect the shareholder voice in corporate matters. Moreover, shareholders have the responsibility of electing directors, which is usually done on an annual basis. Consequently, the Model Business Corporation Act provides that an annual meeting of the shareholders *shall* be held at the time and place that is fixed in the bylaws.²³ This statutory provision clearly indicates that a shareholder meeting must be held every year. The act further provides that if the annual meeting is not held within six months after the end of the corporation's fiscal year or within fifteen months of the last annual meeting, any shareholder may apply to a court to summarily order a meeting to be held.

The various state statutes approach this issue differently. Nearly all states require annual meetings of shareholders, but failure to call such a meeting triggers various consequences. A few jurisdictions and the Model Business Corporation Act allow shareholders to apply to a court to order the meeting.²⁴ Most states permit a certain number of the holders of the voting shares to call a meeting.²⁵ All states agree that a failure to hold the shareholders' meeting does not invalidate the acts of the corporation, constitute grounds for dissolution, or otherwise impair the corporation's business operations.

In addition to the regular annual meeting, the Model Business Corporation Act states that special meetings of the shareholders may be called by the board of directors or the holders of not less than one-tenth of all the shares entitled to vote at the meeting. Furthermore, the articles of incorporation or bylaws may authorize any other person to call a special shareholders' meeting.²⁶ The call is usually addressed to the secretary of the corporation, who is responsible for giving notice of the meeting.

Call of a Special Shareholders' Meeting

To Judi Wagner, Secretary:

We, the undersigned, Stockholders of Happiness, Inc., owning the number of shares of stock set opposite our names, pursuant to provisions of the Bylaws, do hereby call a special meeting of the Stockholders of said Company to be held at the corporate offices, on the 15th day of July, 2005, at 3:00 P.M. for the purpose of removing Charles Miser as a director and for the transaction of any or all business that may be brought before the meeting, and we hereby authorize and direct that you notify the Stockholders of such meeting in accordance with the provisions of the Bylaws.

Dated _____, 20____.

Signature of Stockholders

Number of Shares

EXAMPLE

State statutes specify different persons who are entitled to call a special meeting, and they particularly differ on the number of shareholders who must join in the call of their own special meeting. For example, the Ohio statute requires holders of 25% of the voting shares to join, and the articles of incorporation may require the concurrence of up to 50% of the voting shares to call a special meeting in that state.

Location

The bylaws may fix a particular place for the shareholders' meeting or they may authorize the board of directors to determine the meeting place from time to time. The latter authority facilitates a decision by the board of directors to hold the annual shareholders' meeting near the beaches of Florida if it is a winter meeting, or in the cool mountains of Colorado if it is scheduled in the summertime. State statutes usually provide that if the bylaws are silent on the matter, the meetings will be held at the principal office of the corporation.

Notice

Shareholders must receive notice of all shareholder meetings, and the statutory notice procedure may be burdensome, especially if the shareholder population is large. State statutes protect the shareholders by prescribing rules for determining the persons who are entitled to receive notice and setting the periods within which notice must be sent.

Persons Entitled to Receive Notice

To determine the shareholders entitled to receive notice of the meeting, the board of directors may set a date at which the corporation's stock transfer books will be closed. All persons listed in the stock record at that time are identified as **holders of record**, and those holders will be entitled to notice of the meeting. Instead of closing the stock transfer books, the board of directors may set a record date in advance of the meeting, and a list of shareholders entitled to receive notice will be prepared that day. Alternatively, the directors may simply direct that the notices will be mailed on a specified date, and all shareholders as of the close of business the day before that date will receive notice.²⁷ Since these determinative dates are all before the meeting, a person holding shares at the time the notice lists are prepared could sell those shares and no longer be a shareholder at the time of the annual meeting. Nevertheless, that person will receive the notice of the meeting and will be entitled to vote at the meeting. The voting determination procedure is founded on the proposition that the corporation must draw the line somewhere; in the interests of orderly procedure, the statute merely suggests a cutoff date.

The various state statutes have a few principal differences in determining the persons who are entitled to notice and to vote at the meeting. In some states, directors determine which shareholders are entitled to notice of a meeting by closing the stock transfer books before the meeting. In this procedure, the books must be closed during a period up to fifty days before a meeting, and the books may be closed for at least ten days immediately preceding the meeting. Thus, there is a period from ten to fifty days preceding the meeting within which the stock transfer books may be closed.

Instead of closing the stock transfer books, the bylaws of the board of directors may fix a **record date** for determination of the shareholders entitled to notice. That date may simply be a certain number of days before the date of the shareholders' meeting. Under the record date procedure, the transfer books are not closed, but an arbitrary date is fixed—say, thirty days before the scheduled meeting—and all persons who own shares as of that date will receive notice and be entitled to vote. Section 7.07 of the Model Business Corporation Act limits the period for setting the record date to seventy days before the meeting. In addition, section 7.05 requires that notice of the meeting must be given no fewer than ten nor more than sixty days before the meeting date.

A final alternative is allowed: If the stock transfer books are not closed and no record date is set, the day before the date that the notice is mailed to the shareholders will be considered to be the record date for determination of shareholders. Since the notice must be delivered no less than ten and no more than sixty days before the meeting,²⁸ roughly the same time periods

apply to this alternative. Thus, the board of directors or bylaws may simply direct that notices will be sent on the thirtieth day preceding the meeting, and the thirty-first day before the meeting is then the record date. This last procedure is realistically feasible only if the notices are prepared and sent the same day.

The major variant in these provisions among the states is the period within which the books may be closed or the record date set. The Delaware statute allows the board of directors to fix a record date not more than sixty nor less than ten days before the meeting and, like the Model Business Corporation Act, states that if no record date is fixed, the record date will be determined to be the close of business on the day preceding the day on which the notice is given. Most states have a minimum period of ten days. The longest maximum period for identifying holders of record is ninety days preceding the meeting in Maryland.

Advance Notice Notice of the shareholder meeting must be written under most statutes, and should be written anyway. It must state the place, day, and hour of the meeting, and for a special meeting, it usually must also indicate the purposes for which the meeting is called.²⁹ A few states require that notices for any meeting must state the purpose of the meeting.³⁰

Notice for the meeting may be delivered to the shareholder either personally or by mail. If mailed, the notice is deemed to be delivered when deposited in the United States mail with postage prepaid and addressed to the shareholder at the shareholder's address as it appears on the stock transfer books of the corporation.

Notice of Annual Shareholders' Meeting

EXAMPLE

To the Stockholders of Happiness, Inc.:

The Annual Meeting of the Stockholders of Happiness, Inc., will be held in the office of the Company, at 200 West 14th Avenue, Kearney, Nebraska, on Monday, September 9, 2005, at twelve o'clock noon, for the election of three directors and for the transaction of such other business as may properly come before the meeting.

The stock transfer books of the Company will not be closed, but only stockholders of record at the close of business on August 20, 2005, will be entitled to vote.

Dated _____, 20____. _____, Secretary

Notice of Special Shareholders' Meeting

EXAMPLE

To the Stockholders of Happiness, Inc.:

Pursuant to vote of the Board of Directors, a special meeting of the Stockholders of Happiness, Inc., is hereby called to be held on Wednesday, November 8, 2005, at 10:00 A.M., at the principal office of the Corporation at 200 West 14th Avenue, Kearney, Nebraska, for the following purposes:

1. To consider and act upon the question of increasing the authorized capital stock of the Corporation and of amending the Certificate of Incorporation of the Corporation accordingly, as set forth in the following resolutions of the Board of Directors passed at a meeting of said Board held on the 3rd day of October, 2005, viz.:

"Resolved, that it is advisable that the amount of the authorized capital stock of this Corporation be increased, by amendment of the Certificate of Incorporation, so as to authorize 100,000 additional shares of the common stock, of the par value of \$1.00 each, and that for this purpose Article V of said Certificate of Incorporation should be amended by striking out the first two sentences thereof and substituting in lieu of said first two sentences the following, viz.: 'The total amount of the authorized capital stock of the Corporation is \$500,000, divided into 500,000 shares, of the par value of \$1.00 each. Of such authorized capital stock, 100,000 shares, amounting at par to \$100,000, shall be preferred stock, and 400,000 shares, amounting at par to \$400,000, shall be common stock.' Said Article V in all other respects to remain unchanged.

"Further resolved, that a special meeting of the stockholders be called to be held at the principal and registered office of the Corporation, to wit, at the office of 200 West 14th Avenue, Kearney, Nebraska, on November 8, 2005, at 10:00 A.M. to take action on the foregoing resolution."

EXAMPLE*(continued)*

2. To transact any other business that may properly come before the meeting. The transfer books of the Corporation will be closed at the close of business on October 20, 2005, and reopened at 10:00 A.M. on November 8, 2005.

By order of the Board of Directors.

Dated _____, 20 ____ . _____, Secretary

If you are unable to be present at the above meeting, please sign and return the enclosed proxy.

Under the Model Business Corporation Act, the notice must be given not less than ten nor more than sixty days before the meeting.³¹ Although this time period is similar to the record date period used in many states, the rule is different from the one stated earlier for the determination of shareholders entitled to receive notice and to vote. The shareholders entitled to notice must first be determined, and then their notice must be properly delivered. Section 1.41 of the Model Business Corporation Act provides that written notice is effective at the earliest of: when received by the shareholder, five days after its deposit in the mail (if mailed postpaid and correctly addressed), or upon the date shown on a written receipt (if sent by registered or certified mail, return receipt requested). Thus, for example, the board of directors is permitted to set a record date for determining shareholders entitled to receive notice anytime up to seventy days before the meeting, and it could legally establish the record date on the eleventh day before the meeting. However, if some notices were not received by the shareholders until the ninth day before the meeting, the delivery rule would be violated.

The time period within which the notice must be delivered varies by jurisdiction. The shortest statutory period for delivery of notice is five days' personal notice in Pennsylvania, and the earliest period prescribed is ninety days in Maryland. A few states say nothing about the time for notice, and Delaware allows the period to be changed in the bylaws.

Several jurisdictions have special notice rules if certain unusual matters are to be considered at the meeting. These statutes usually specify a longer minimum time within which the notice must be given, apparently so the shareholders will have a longer period of time to consider their vote. For example, many states still follow the original rules of the Model Business Corporation Act, which require a minimum of twenty days' notice when the shareholders' meeting is being called for the purpose of considering a plan of merger or consolidation or approval of the sale of assets not in the ordinary course of business.³²

Having waded through the notice provisions and determined the precise procedure and timing of the notice, the giving of proper notice in practice can be a fulfilling event. But if one becomes mired in these rules, one may ask, and not necessarily rhetorically, "What happens if we just ignore this requirement and hold the meeting anyway?"

Failure to give proper notice renders the meeting invalid and vulnerable to the challenge of any shareholder who did not receive proper notice. However, there are some saving provisions. Section 7.06 of the Model Business Corporation Act permits written waiver of notice by any shareholder entitled to receive such notice. The waiver may be signed before or after the event. Also, a procedure for obtaining written consent to action is discussed in "Action without a Meeting" later in this chapter; it may be a solution to the inadequate notice problem for small corporations. As in the rule for directors' meetings,³³ a shareholder may attend a meeting for which no notice was given, and the attendance waives objection to the lack of notice unless the shareholder objects at the beginning of the meeting to the holding of the meeting without notice. If notice is given but does not state the purposes of the meeting, a shareholder may object to any consideration of a matter that was not mentioned in the notice.

Shareholders' Waiver of Notice

EXAMPLE

The undersigned, a shareholder of Happiness, Inc., hereby waives any and all notice required by the statutes of Nebraska, or the articles of incorporation or bylaws of said corporation, for a meeting to be held on the 24th day of November, 2005 at 3:00 P.M. at the corporate offices for the purposes of increasing the authorized capital stock of the corporation and amending the certificate of incorporation of the corporation accordingly.

Dated November 24, 2005.

[Signature of the Shareholder]

Voting Lists

After the record date has been established, the corporation is required to prepare an alphabetical list of names of all of its shareholders who will be entitled to notice of the shareholders' meeting. This list is to be arranged by voting group, and must show the address of and number of shares held by each shareholder. The list is available for inspection by any shareholder, beginning two business days after notice of the meeting is given, and the list must be available at the corporation's principal office or another place identified in the notice. All shareholders are entitled to inspect the list during regular business hours. The purpose of the voting list is to permit shareholders to learn the identities of the other shareholders so they may discuss issues that are likely to arise at the meeting to see if all shareholders share the same concerns or are interested in voting their shares in a certain manner.

Proxies

Shareholders who are unable to be present at the shareholders' meeting may vote by proxy. A **proxy** is a written authorization by a shareholder directing the proxy holder to vote the shareholder's shares on behalf of the shareholder. The proxy holder is bound to vote the shares in the manner directed by the shareholder in the proxy.

Proxies, like any other agreement, may contain any limiting or expanding provisions that the shareholder desires. The proxy form is usually furnished by the management and conforms to a standard form for general authorization to vote. The Model Business Corporation Act and other statutes regulating proxies require that they be written and signed by the shareholder. The act also permits the proxy to be signed by the shareholder's attorney-in-fact.³⁴

A general proxy authorizes the proxy holder to vote on all matters properly presented to the shareholder meeting.

General Proxy for a Specified Meeting

EXAMPLE

I hereby constitute and appoint Ezra Brooks or Jack Daniels, or either one of them, and in place of either, in case of substitution, his substitute, attorneys and agent for me and in my name, place, and stead, to vote as my proxy at the next Annual Meeting, and at any adjournment or adjournments thereof, of the Stockholders of Happiness, Inc., upon any question that may be brought before such meeting, including the election of directors, according to the number of votes I should be entitled to vote if then personally present, with full power to each of my said attorneys to appoint a substitute in his place.

Dated _____, 20 ____ .

The proxy may have a stated duration, in which case it is valid for the period of time stated. If no period is stated, it automatically expires after eleven months from the date of execution under the Model Business Corporation Act.

EXAMPLE**Continuing General Proxy**

The undersigned hereby constitutes and appoints Jack Daniels, Bud Weiser, and John Walker, or any two of them acting jointly, as his, her, or their proxy to cast the votes of the undersigned at all general, special, and adjourned meetings of the Stockholders of Happiness, Inc., from time to time and from year to year, when the undersigned is not present at any such meeting or, if present, does not elect to vote in person. This proxy shall be effective for two years from the date hereof unless sooner revoked by written notice to the Secretary of the Corporation.

Dated _____, 20 ____ . _____

The statutory period of duration varies among the jurisdictions, but proxies are revocable at will, unless they are “coupled with an interest,” such as when stock is pledged to a creditor to secure repayment of a loan, and a proxy to vote the shares is given to the creditor for the duration of the security interest. Section 7.22 of the Model Business Corporation Act recognizes that proxies may be made irrevocable in favor of a creditor (to whom the shares have been pledged), a person who has purchased the shares, an employee of the corporation who required the proxy as part of the employment contract, or a party to a voting agreement.

Proxies are most frequently used for large, publicly held corporations, where many shareholders will not be able to attend the meeting. The federal Securities Exchange Act of 1934 strictly regulates the solicitation of proxies for shareholders of a publicly held corporation.³⁵ A proxy in compliance with that act must satisfy special requirements as to wording and form.

EXAMPLE**Public Corporation Proxy**

Happiness, Inc.

Proxy Solicited by Management for Special Meeting
of Stockholders, October 10, 2005

P The undersigned hereby appoints Jack Daniels, Bud Weiser, and John Walker and each or any of them, attorneys, with powers the undersigned would possess if personally present, to vote all shares of Common Stock of the undersigned in Happiness, Inc. at the Special Meeting of its Stockholders to be held October 10, 2005, at 2:00 P.M., Central Daylight Saving Time, at Kearney, Nebraska, and at any adjournment thereof, upon the proposed amendment to the Certificate of Incorporation of the Company, which amendment is set forth in the Proxy Statement and has been declared advisable by the Board of Directors, and upon a split of each outstanding share of Common Stock of the par value of \$5 into two shares of Common Stock of the par value of \$5 each, and upon other matters properly coming before the meeting.

(Continued, and to be signed on the other side.)

(Continued from the other side.)

Proxy No. _____

The directors favor voting FOR the proposed amendment to the Certificate of Incorporation.

The vote for the undersigned is to be cast (please indicate)

FOR AGAINST

the proposed amendment to the Certificate of Incorporation and the split of each outstanding share of Common Stock of the par value of \$5 into two shares of Common Stock of the par value of \$5 each.

UNLESS OTHERWISE DIRECTED THE VOTE OF THE UNDERSIGNED IS TO BE CAST “FOR” THE PROPOSED AMENDMENT TO THE CERTIFICATE OF INCORPORATION AND THE SPLIT OF EACH OUTSTANDING SHARE OF COMMON STOCK.

Receipt of Notice of Special Meeting of Stockholders and the accompanying Proxy Statement is acknowledged.

Date _____ 20 ____

[Name and address of stockholder]

Please sign above as name(s) appear(s) hereon.

(When signing as attorney, executor, administrator, trustee, guardian, etc., give title as such. If joint account, each joint owner should sign.³⁶)

Quorum

The Model Business Corporation Act states that the majority of shares entitled to vote (represented in person or by proxy) will constitute a **quorum** at a shareholder meeting unless otherwise provided in the articles of incorporation.³⁷ Most states have similar provisions and permit the articles of incorporation to modify the quorum. In most states, the quorum may not be reduced to less than one-third of the shareholders entitled to vote at the meeting, although Louisiana permits reduction to as low as one-quarter of the voting shares. The reduction-in-quorum requirements may be contained in the bylaws in some states.³⁸

Voting of Shares

Unless the articles of incorporation provide otherwise, each outstanding share, regardless of class, is entitled to one vote according to the provision in section 7.21 of the Model Business Corporation Act, and most states take this approach to shareholder voting. A few jurisdictions extend voting to fractional shares, permitting a corresponding fractional vote on each matter submitted to the shareholders.³⁹

Shareholder voting may be altered and concentrated through several devices. The articles of incorporation may provide that shares of different classes will have more or less than one vote per share—a principle called **weighted voting**.⁴⁰ To concentrate voting power, shareholders may predetermine how their shares will be voted by using a pooling agreement or voting trust.⁴¹

In most cases, the affirmative vote of the majority of shares present at the meeting and entitled to vote constitutes the act of shareholders, although this provision may be modified by the articles of incorporation or bylaws. Thus, if the corporation has 100,000 shares of voting stock outstanding, 50,001 shares constitute a quorum for a meeting, and shareholder action would be taken if 25,001 shares were voted in favor of the proposition. The articles of incorporation could provide that one-third of the shares entitled to vote would constitute a quorum, in which case 33,334 shares could hold a meeting and 16,668 shares could decide any issue. In both of these cases, the shares that carry the action are less than the majority of all shares entitled to vote. Conversely, if the articles of incorporation required that 80% of the voting shares must be represented to constitute a quorum, and 80% of the represented shares must vote affirmatively to carry an issue, an affirmative vote by a minimum of 64,000 shares would be required to constitute shareholder action. The rule is to apply the appropriate percentage to the shares represented once a quorum is present.

The Model Business Corporation Act and modern corporate statutes recognize that shareholders may be grouped together (other than simply divided among classes) into separate **voting groups**, which are entitled to vote and be counted together on certain specific corporate issues. For example, the articles of incorporation could designate Class A and Class B shareholders as a single voting group for purposes of approving a transaction involving a merger, but state that Class A, Class B, and Class C shareholders would be a single voting group to decide whether the corporation should dissolve. The voting group must be described in the articles of incorporation,⁴² then the quorum and voting requirements are applied based upon each voting group. For example, if Class A and Class B shareholders are a voting group for purposes of approving a merger, the majority of those shareholders, counted together, would be required for a quorum, and a majority vote among the voting group of both Class A shareholders and Class B shareholders would be required to approve the action.⁴³

A word of caution: A statute may require greater than a majority vote on certain matters. The necessary shareholder vote on individual issues is specified in the following section dealing with shareholder business.

The method of voting at a shareholder meeting is not generally prescribed by statute. Although any method is acceptable, including voice vote or written ballot, written ballot is the preferable procedure to provide a record of the shares voted in favor and against a proposal. A ballot may be required for the election of directors. Moreover, shareholder action is taken by a specified percentage of shares represented at the meeting. A voice vote or show of hands indicates the shareholders' vote for each person, but if there is any disagreement, a ballot will be necessary to determine the number of *shares* (not shareholders) voting in favor of the

proposition. A ballot should specifically describe the matter being submitted to shareholder vote, and the secretary of the meeting is responsible for tallying the votes. Some states permit the appointment of impartial judges of election if requested by the shareholders or required in the bylaws.⁴⁴ These judges are responsible for determining whether the required shareholder vote has been received.

EXAMPLE

Ballot

For voting at a meeting of the Shareholders of Happiness, Inc., on November 24, 2005.

ISSUE NO. _____

RESOLVED, [*here state resolution to be acted upon*]

Please record my vote:

_____ FOR
 _____ AGAINST
 _____ ABSTAIN

 Signature of Shareholder
 [optional]

 Number of Shares

SHAREHOLDER BUSINESS AND VOTE REQUIRED

Shareholders have an indirect voice in management and, except in a close corporation, have very little direct control over the daily business affairs of the corporation. Their meetings, therefore, generally focus on receiving information about corporate business and taking action on matters that are within the ambit of shareholder control as specified in the statute, the articles of incorporation, and the bylaws.

The most important shareholder business is the election of directors. Through their right to elect directors, shareholders indirectly control the management policies and direction of their corporation. Moreover, shareholders are expected periodically to review management activities, and they may ratify and approve management acts at their annual shareholders' meeting. Most statutes also grant shareholders the right to vote directly on major decisions involving modifications in the structure of their corporation. These major fundamental changes usually significantly affect the ownership rights of the shareholder. It is also possible for the incorporators to grant greater control to the shareholders by special provisions in the articles of incorporation or bylaws. Shareholder involvement in each area of shareholder control depends on the particular structure of the corporation and the voting requirements imposed by the statute.

The agenda of a shareholder meeting, therefore, varies considerably from corporation to corporation. Certain shareholder business, however, may be expected to be conducted in every case.

Special Matters over Which Shareholders Have Control

The articles of incorporation or bylaws may reserve to the shareholders certain items of business that would otherwise be determined by the directors. The reservation of control may be as extensive as allowing complete control over all management activities, as is permitted under the close corporation statutes enacted in Delaware and elsewhere,⁴⁵ or as limited as allowing the shareholders to amend and repeal bylaws. Depending upon the local statutory authority to place control with the shareholders, the articles of incorporation or bylaws may grant shareholders the right to select officers; fix compensation; determine the stated value of

no par stock; adopt, amend, and repeal bylaws; and so forth. However, there are obvious practical limitations on shareholder control in these areas. If shareholders are cohesive and few, they may comfortably be vested with these responsibilities. On the other hand, the larger the group of shareholders, the more cumbersome it becomes to take action in these management areas.

The shareholders' vote necessary to carry action on matters reserved to their control is governed by statute and may be altered by the articles of incorporation or bylaws. The Model Business Corporation Act provides that shareholder action on a matter will be approved if the votes cast by the shareholders (or within a voting group, if one is designated) favoring the action exceed the votes cast opposing the action.⁴⁶ There is a subtle distinction here that is not found in most state statutes. Most states require that shareholder matters must be approved by a majority vote of the shareholders present constituting a quorum. For example, if 100 shares were entitled to vote on a matter, and 51 shares were represented at a meeting, a quorum would be present. Under most state statutes, 26 of those shares present must vote affirmatively to approve action by shareholders. Under the Model Business Corporation Act, however, fewer than a majority could approve the action if some shareholders abstained. Thus, if 20 shares voted in favor of the action, 19 shares voted against the action, and 12 shares abstained, the matter would be approved under the act, but would not be approved under most state statutes.

Election of Directors

The election of directors is usually an item of business at each annual shareholders' meeting, since the term of office for directors is generally until the next succeeding annual shareholders' meeting and until the successor directors have been elected and qualified.⁴⁷ Even if the board of directors is classified or staggered, a certain percentage of the board will be elected each year.

Shareholders may be able to cumulate their votes in the election of directors, depending upon the local statute and articles of incorporation. Some jurisdictions require the use of the cumulative voting procedure in the election of directors as a constitutional right of the shareholder. Others have statutes requiring cumulative voting unless the articles of incorporation specifically deny it. Delaware and other states deny cumulative voting under the corporation statute, but permit the articles of incorporation to grant it. The Model Business Corporation Act also takes this approach.⁴⁸

Cumulative voting is a procedure for voting shares in the election of directors that is designed to secure representation of the minority shareholders on the board of directors. With straight voting, the holders of a majority of the stock should be able to elect the directors who will represent their interests, and if the interests of the majority are inconsistent with the interests of the minority, the minority group may suffer without representation on the board. With cumulative voting, each share carries as many votes as there are vacancies to be filled on the board of directors, and each shareholder is permitted to distribute the votes for all his or her shares among any candidates the shareholder desires to elect.

For example, suppose Bilko Building Company has three directors to be elected every year, and has 500 shares of stock outstanding, of which Anderson owns 300 shares, Bonner owns 100 shares, and Carlyle owns 100 shares. With straight voting, each person votes his or her shares for the candidates one at a time. Suppose three directors are to be elected at the meeting. If Anderson nominates Davis, Everett, and Ford as directors, and the minority shareholders nominate Girtler to represent their interests, the votes will probably be tallied as follows with straight voting.

<i>Anderson's 300 shares</i>	<i>Bonner's 100 shares</i>	<i>Carlyle's 100 shares</i>
X Davis	Davis	Davis
X Everett	X Everett	X Everett
X Ford	X Ford	X Ford
Girtler	X Girtler	X Girtler

The total votes for each candidate are as follows:

Davis	300
Everett	500
Ford	500
Girtler	200

Thus, Davis, Everett, and Ford are elected to fill the three director positions, and the minority shareholders have lost in their bid to elect Girtler.

Contrast the result of this election with a result using the cumulative voting procedure. Each shareholder is entitled to as many votes as shares owned, multiplied by the number of vacancies to be filled. Thus, Anderson has 900 votes ($300 \text{ shares} \times 3 \text{ vacancies}$); Bonner has 300 votes (100×3); and Carlyle has 300 votes (100×3). Each shareholder may cast his or her available votes in any manner, including applying all of them to one candidate. Therefore, if Bonner and Carlyle want to be certain to elect Girtler as their director, they may apply all of their votes for that purpose. Anderson cannot prevent Girtler's election no matter how Anderson votes. A cumulative voting ballot will look like this:

<i>Anderson's 300 shares (900 votes)</i>	<i>Bonner's 100 shares (300 votes)</i>	<i>Carlyle's 100 shares (300 votes)</i>
<u>300 Davis</u>	<u>0 Davis</u>	<u>0 Davis</u>
<u>300 Everett</u>	<u>0 Everett</u>	<u>0 Everett</u>
<u>300 Ford</u>	<u>0 Ford</u>	<u>0 Ford</u>
<u>0 Girtler</u>	<u>300 Girtler</u>	<u>300 Girtler</u>

The total votes for the candidates are as follows:

Girtler	600
Davis	300
Everett	300
Ford	300

Thus, Girtler is elected, and a runoff election is necessary to determine the two remaining positions between Anderson's three nominees. Anderson could have applied 601 votes for one of the other candidates, thereby ensuring that one of those candidates would beat Girtler, but that would have left Anderson with only 299 shares for another candidate, and Girtler still would have been elected.

Notice that cumulative voting ensures minority representation on the board only if the minority shareholders are cohesive and determined in electing a representative. If Bonner and Carlyle could not have agreed on a suitable candidate to represent the minority, they may have lost the success of their combined vote.

Directors may be removed with or without cause by vote of the shareholders. If a director were elected to represent the minority interests under a cumulative voting procedure, the protection of cumulative voting could be nullified if the majority shareholders could remove the minority director after the election. Consequently, state statutes usually specify that if cumulative voting is in effect for the election of directors, no director may be removed unless the same cumulative voting procedure is used in the removal action. The director cannot be removed if the votes cast against the removal would be sufficient to elect the director if cumulatively voted at an election of the entire board of directors.⁴⁹ Thus, Bonner and Carlyle could vote cumulatively *against* Girtler's removal and prevent the removal in the same manner in which they elected Girtler.

Finally, many states permit the board of directors to be classified or staggered, so that not all directors are elected each year.⁵⁰ When this classification procedure is combined with cumulative voting, it may neutralize the protective effect of cumulative voting. Suppose that in the previous example, the corporation's three directors are staggered over a three-year period. Only one director would be elected each year. Thus, cumulative voting, which authorizes the number of votes equal to the number of shares times the number of vacancies to be filled, gives

Anderson 300 votes (300 shares × 1 vacancy); Bonner 100 votes (100 × 1); and Carlyle 100 votes (100 × 1). Anderson, therefore, can always defeat Bonner and Carlyle with 300 votes to their 200, just as with straight voting. For this reason, several states permit staggering of the board only if the board consists of nine or more members.⁵¹ That way, at least three directors will be elected each year, and the effect of cumulative voting is preserved.

The ballot for the election of directors should present all nominees and, if cumulative voting is used, should explain how to use it.

EXAMPLE

Ballot for the Election of Directors Using Straight Voting

[STRAIGHT VOTING]

Annual Meeting of the Shareholders of Happiness, Inc., November 24, 2005.

The following persons have been nominated for the Board of Directors of Happiness, Inc., to serve until the next annual meeting of the Shareholders or until their successors have been elected and qualified.

Slate of Directors

[Nominee]
[Nominee]
[Nominee]
[Nominee]

Other nominations

[write in]

FOUR DIRECTORS ARE TO BE ELECTED. PLEASE CHECK ONLY FOUR SELECTIONS. IF MORE THAN FOUR SELECTIONS ARE MADE, THIS BALLOT WILL BE VOIDED [or ONLY THE FIRST FOUR SELECTIONS WILL BE COUNTED].

Please enter the number of shares you own: _____ Shares

<i>Voted for</i>	<i>Name of Nominee</i>
_____	[Nominee]
_____	[Nominee]
_____	[Nominee]
_____	[Nominee]
_____	[write in]
_____	[write in]

Signature of Shareholder
[optional]

EXAMPLE

Ballot for the Election of Directors Using Cumulative Voting

[CUMULATIVE VOTING]

Annual meeting of the Shareholders of Happiness, Inc., November 24, 2005.

The following persons have been nominated for the Board of Directors of Happiness, Inc., to serve until the next annual meeting of the Shareholders or until their successors have been elected.

Slate of Directors

[Nominee]
[Nominee]
[Nominee]
[Nominee]

Other nominations

[write in]

EXAMPLE

(continued)

FOUR DIRECTORS ARE TO BE ELECTED. YOU ARE ENTITLED TO CUMULATE YOUR VOTES IN THIS ELECTION. PLEASE COMPUTE THE NUMBER OF VOTES TO WHICH YOU ARE ENTITLED AS FOLLOWS:

Number of shares owned _____ × 4 = _____

Number of Votes

You may cast these votes for any or all of the nominees, by writing the number of votes you wish to cast for each nominee next to the name of the nominee. THE TOTAL VOTES CAST MAY NOT EXCEED THE NUMBER OF VOTES COMPUTED ABOVE. IF YOU CAST MORE VOTES THAN YOU ARE ALLOWED, OR IF THE NUMBER OF VOTES IS NOT ENTERED BELOW, THIS BALLOT WILL BE VOIDED.

Number of votes

cast [write number]

Name of Nominee

[Nominee]

[Nominee]

[Nominee]

[Nominee]

[write in]

Total votes cast

Signature of Shareholder

[optional]

Approval of Extraordinary Matters

Certain structural changes of a corporation require the approval of the shareholders because the shareholders’ ownership rights as investors may be materially affected by the action. These changes may involve major modifications to the organization or financial structure of the corporation, disposition of the corporation’s assets, adjustments in the ownership characteristics of the shares, or termination of business.

The most frequent structural change in the corporation is the amendment of its articles of incorporation. The organization of the corporation is described in the articles of incorporation, and any amendment to those provisions modifies the structure and probably affects the ownership characteristics of the shareholders in some manner. An amendment as minor as changing the corporate name usually must be approved by the shareholders through the amendment procedure, although the actual effect on shareholder rights may be imperceptible. Other changes may have a more obvious effect on the character of the investment, such as amending the corporation’s period of duration or diminishing the scope of the business it will conduct. Other typical changes directly concern the shares themselves. These include amendments to change the aggregate number of shares the corporation has authority to issue; to exchange, divide, reclassify, redesignate, or cancel shares; to create new classes, with special preferences; to modify preferences or change the authority of the board of directors to establish series of shares; to cancel or otherwise affect accumulated distributions; and to limit, deny, or grant preemptive rights of shareholders.

Recognizing the cumbersome procedure required to approve amendments to the articles of incorporation, the Model Business Corporation Act has begun a trend of permitting the board of directors to make certain changes without shareholder approval. The relaxed rules permit the board alone to extend the duration of the corporation, delete the names and addresses of directors and the registered agent, authorize a stock split or dividend by increasing the total number of shares, and make certain changes in the corporation’s name.⁵² In most states, however, any amendment to the articles of incorporation must be submitted to a vote of the shareholders.⁵³

Merger, share exchange, or consolidation of the corporation and disposition of corporate assets other than in the ordinary course of business also require special shareholder approval. In a merger, one corporation joins another, the merging corporation ceases to exist, and the surviving corporation continues business with the assets, liabilities, and shareholders of both corporations. In a share exchange or consolidation, two corporations join

to form a new corporation, and both of the original corporations may cease to exist. The ownership rights of the shareholders of the constituent corporations will be modified in these transactions. The corporation that is the survivor to the merger will probably issue new shares of stock to the shareholders of the merged corporation, which may dilute the ownership interests of the shareholders in the survivor corporation. The shareholders of the merged corporation will likely have exchanged their stock for shares of the survivor corporation. In a share exchange procedure, one corporation exchanges its shares for all or part of another corporation, or two corporations form a new corporation and the new corporation resulting from the combination will issue new securities to shareholders of both old corporations. The shareholders should have some say in these matters. Similarly, if the directors of the corporation intend to sell or otherwise dispose of substantially all of the assets of the corporation, it may be necessary to obtain shareholder approval. Such approval is not necessary, however, when the corporation merely sells goods from inventory, such as when a department store sells television sets to its customers. However, when the sale of assets is outside the scope of the ordinary course of business, as when the department store sells its display counters, cash registers, and substantially all of its inventory in one transaction with another department store, the shareholders should be asked for their approval.

Finally, the shareholders' ownership rights certainly will be affected by a dissolution of their corporation. The directors are not vested with the authority to dissolve the corporation at will if shares have been issued; voluntary dissolution is regarded as a fundamental change requiring shareholder approval. Similarly, if the shareholders have approved dissolution of their corporation, the directors may not revoke the dissolution proceedings without affirmative shareholder approval of the revocation.

The specific procedures for the approval of these corporate structural modifications are discussed in a later chapter,⁵⁴ but the vote necessary for shareholder approval is discussed here. The Model Business Corporation Act originally provided that shareholder action on these matters would be carried by the affirmative vote of the holders of two-thirds of the shares entitled to vote on the issue. If a particular class was entitled to vote on the issue as a class,⁵⁵ the two-thirds affirmative vote of that class was also required. Many states still require this percentage of shareholder vote to approve structural modifications to the corporation. The Model Business Corporation Act, however, now merely requires a majority vote by the appropriate shares for approval, in order to comply with "contemporary practice in similar institutional matters." The act, like other jurisdictions that permit approval by the majority, allows the articles of incorporation to require a greater proportion of shareholder votes, if the extra shareholder protection is desired in these special areas. When a two-thirds vote is required for approval of the fundamental corporate changes, the minority shareholders holding more than one-third of the voting stock can successfully block such actions by the majority. Since the majority shareholders may be at odds with the minority, and there are cases where the majority stands to profit from such transactions, the extra protection for the minority shareholders may be important.

ACTION WITHOUT A MEETING

Notwithstanding the foregoing discussion intimating that shareholder and director meetings are necessary for effective corporate action, state law usually prescribes a written consent procedure for these intracorporate groups to take action without a formal meeting. The Model Business Corporation Act permits written consent by shareholders in section 7.04 and by directors in section 8.21. The act further provides that the articles of incorporation or bylaws can deny this written consent procedure for directors, but it does not allow restrictions on the written consent procedure by shareholders. All states now have comparable provisions.

The statutory requirements for taking action without a meeting are that the proposed action would have been proper to submit to a regular meeting, and that consent in writing setting forth the proposed action must be obtained for all shareholders or all directors, as the case may be. Thus, unanimous consent is required for written action without a meeting.

EXAMPLE**Unanimous Consent to Action of the Board of Directors**

Pursuant to the provisions of the Nebraska Corporation Code, the following action is taken by the board of directors of Happiness, Inc., by unanimous written consent as if a meeting of the board of directors had been properly called pursuant to notice and all directors were present and voting in favor of such action.

RESOLVED, that the salary of the vice-president be increased from the sum of \$150,000.00 per year to the sum of \$200,000.00 per year.

IN WITNESS WHEREOF, we have executed this unanimous Consent of Action on the dates set forth after our respective names, effective November 10, 2005.

_____	_____
[Director]	Date
_____	_____
[Director]	Date
_____	_____
[Director]	Date

EXAMPLE**Unanimous Consent to Action of the Shareholders**

Pursuant to the provisions of the Nebraska Corporation Code, the following action is taken by the shareholders of Happiness, Inc., by unanimous written consent, as if a meeting of the shareholders had been properly called pursuant to notice and all shareholders entitled to vote on the matters presented herein had been present and voting in favor of such action.

There are 100,000 shares entitled to vote on the matters presented herein, and the undersigned shareholders are the holders of record of all such shares on the date of this Unanimous Consent of the Shareholders.

RESOLVED, that the action of the officers and directors of this corporation in making an investment in securities of Trouble, Inc., as set forth in the report that the corporation mailed to all stockholders of record on May 1, 2005, be and the same hereby is ratified.

IN WITNESS WHEREOF, the undersigned, constituting all of the shareholders of the corporation entitled to vote on the matters presented herein, have executed this unanimous Consent to Action of the Shareholders on the dates set forth after our respective names, effective November 10, 2005.

_____	_____
[Shareholder] [Number of shares]	[Date]
_____	_____
[Shareholder] [Number of shares]	[Date]
_____	_____
[Shareholder] [Number of shares]	[Date]
_____	_____
[Shareholder] [Number of shares]	[Date]
	[etc.]

The only major variations among the statutes with consent-to-action provisions are whether the articles of incorporation or bylaws may deny this procedure for directors' meetings, and the percentage of shareholders required to file written consent in order to carry the shareholder action. Most states do not authorize a limitation on the directors' rights to file written consent and act without a meeting. The Model Business Corporation Act, Delaware, and New Jersey allow the certificate or articles of incorporation or bylaws to alter this provision.

Delaware allows for less-than-unanimous approval for shareholder consent. The statute provides that the holders of outstanding stock having at least the minimum number of votes that would be necessary to approve such action at a meeting may consent in writing and thereby bind the shareholders. The remaining shareholders are then entitled to notice of the action so taken.⁵⁶ Other states authorize the articles of incorporation or bylaws to prescribe a less-than-unanimous number for shareholder written consent.⁵⁷ Otherwise, most states provide that all of the shareholders must file written consent to act without a meeting.

The use of shareholder consent without a meeting should be limited to small, close corporations. The requirements of unanimity and of obtaining the signatures of all shareholders make the procedure impracticable for larger groups of shareholders and impossible for a publicly held corporation.

MINUTES

There is no mandatory procedure for conducting meetings of shareholders and directors. In many cases, these meetings are conducted in an informal manner, but they usually become more formal as the group becomes larger. The science of conducting a corporate meeting for a large intracorporate group has been described with forms and guidelines in various publications that are available to corporate secretaries,⁵⁸ so formal meeting procedures escapes further elaboration here.

It is always necessary to follow the statutory requirements, such as notice, voting, and solicitation of proxies, for every meeting. Consequently, the minutes of the meeting should always reflect that the statutory requirements have been observed. The minutes of the meeting constitute the permanent written record of the corporate history, and all matters considered at a meeting must be carefully recorded in order to trace the origin of all corporate actions. (See Exhibit 10-1, Special Meeting of the Board of Directors, and Exhibit 10-2, Special Meeting of the Shareholders.)

A Special Meeting of the Board of Directors of _____, Inc., was held at _____, _____, _____ on the _____ day of _____, 20____, at ____ o'clock.

The meeting was called pursuant to section _____ of the _____ Corporation Code [and] [or] article ____ of the Articles of Incorporation of the corporation [and] [or] section ____ of the Bylaws of the corporation.

The following directors were present: _____.
The following directors were absent: _____.

The presence of the foregoing directors constitutes a quorum. The following other persons were also present: _____.

The meeting was held pursuant to notice addressed to each director in accordance with the statute, the Articles of Incorporation, and the Bylaws of the corporation. A copy of the notice, together with the Secretary's certificate that such notice was properly mailed or delivered, is attached to the minutes of the meeting.

[or]

The meeting is held pursuant to Waiver of Notice from each director, a copy of which is attached to the minutes of the meeting.

The minutes of the meeting of the Board of Directors on _____, 20____, were approved as read.

The President stated that the purpose of the meeting was to [here describe purpose in narrative form].

Following full discussion, upon motion duly made, seconded and unanimously adopted it was

RESOLVED, [here describe substance of resolution]

[or]

Following full discussion, upon motion duly made by _____, seconded by _____, the following directors voted in favor: [names] ; and the following directors voted against: [names] ; the following resolution:

RESOLVED, [here describe substance of resolution].

The Treasurer of the corporation reported on the financial condition of the corporation, a copy of which is attached to these minutes.

The Board of Directors informally discussed [here describe] and no action was taken at this time.

There being no further business, the meeting was adjourned.

Secretary

Exhibit 10-1.

Special Meeting of the
Board of Directors

Exhibit 10–2.

Special Meeting of the Shareholders

A Special Meeting of the Shareholders of _____, Inc., was held at _____, _____, _____ on the day of _____, 20____, at _____ o'clock.

The meeting was called pursuant to section _____ of the _____ Corporation Code [and] [or] article _____ of the Articles of Incorporation [and] [or] section _____ of the Bylaws of the corporation, by the [President] [Secretary] [The holders of ___% of the shares entitled to vote] [other].

[A copy of the call of the meeting dated _____, 20____, addressed to the Secretary of the corporation and signed by the holders of _____% of the shares entitled to vote, is attached to the minutes of this meeting.]

The meeting was held pursuant to notice addressed to each shareholder in accordance with the statute, the Articles of Incorporation, and the Bylaws of the corporation. A copy of the notice, together with the Secretary's certificate that such notice was properly mailed or delivered to each Shareholder, is attached to the minutes of the meeting.

The Board of Directors, by resolution dated _____, 20____, set _____, 20____, as the record date for the determination of the Shareholders entitled to vote at this meeting, and only Shareholders of record on that date are entitled to vote.

[or]

The meeting was held pursuant to Waiver of Notice from each Shareholder, a copy of which is attached to the minutes of this meeting.

Shareholders holding _____ Shares of record were present at the meeting. Shareholders holding _____ Shares of record were represented by proxy at the meeting, and their shares were voted by _____, duly constituted proxy in their names.

The minutes of the Shareholder meeting on _____, 20____, were approved as read.

The President stated that the purpose of the meeting was to [here describe purpose in narrative form].

Following full discussion, upon motion duly made, and seconded, _____ Shares voted in person in favor; _____ Shares voted by proxy in favor; _____ Shares voted in person against; and _____ Shares voted by proxy against the following resolution:

RESOLVED, [here describe substance of resolution].

The Treasurer of the corporation reported on the financial condition of the corporation, a copy of which is attached to these minutes.

Several questions were raised by the Shareholders concerning [here describe informal discussion and questions]. No action was taken on these matters.

There being no further business, the meeting was adjourned.

Secretary

The secretary of the corporation is usually given the privilege of keeping the minutes. The only guidelines for recording minutes are that the secretary must comply with instructions given by the board of directors and by the chair of the meeting, and the secretary must compose the minutes in such a way that they constitute an accurate and complete transcription of the action taken by the intracorporate group at the particular meeting recorded. Otherwise, the secretary has broad discretion in the manner in which the minutes will be kept. Counsel may assist the secretary in establishing a corporate minute policy after formation of the corporation. As a general guide, all minutes should include at least the following:

1. name of the corporation;
2. date;
3. place where the meeting is held;
4. special statutory, articles of incorporation, or bylaw authority under which the meeting is called;

5. persons present, persons absent, or shares represented in person or by proxy;
6. statement that the meeting is held pursuant to a notice or waiver that is attached to the minutes;
7. nature of the meeting (regular or special);
8. approval of minutes of previous meetings;
9. substance of the issues presented at the meeting, and description of how they were submitted and by whom;
10. decision and vote of the intracorporate group on each issue, in resolution form;
11. presentation of all reports, with copies attached if a report is written and a summary of the report if it is oral;
12. summary of the other business before the meeting; and
13. statement that the meeting was properly adjourned and the time of adjournment.

If the meeting is a directors' meeting, the directors present and absent should be named. It is important to report correctly the directors' vote on each resolution. If the vote is unanimous, that should be stated. If any director abstains or dissents, that director's name and vote should be stated, particularly if there is any possibility that the issue of personal liability of directors for the action taken may arise. For example, if the director were voting on the issuance of a dividend but funds were not legally available for payment of the dividend, the recording of a dissent may be necessary to relieve the director from liability for illegally declared dividends. If a director is "interested" in the particular action, as when the contract being considered by the board of directors is with another corporation in which the director is financially interested, it should be noted that the interested director did not vote or left the room during the discussion.⁵⁹

The names of the shareholders present at a shareholder meeting and the number of shares they hold may be noted if the group is small. Otherwise, the number of shares represented in person and by proxy should be listed.

Informal activity that occurs during a meeting should not be described in unnecessary detail. It is not necessary to record all activities or conversations that occur at a meeting. However, informal information about tentative corporate plans and current business conditions may be reported if it was discussed at the meeting. In this regard, if the chair obtains the informal consensus of the group on any particular matter, the minutes should express the affirmative reaction of those present.

SPECIAL PREPARATION FOR PUBLIC COMPANY SHAREHOLDER MEETINGS

For a publicly held corporation, there may be months of preparation by counsel and the corporate secretary to establish an orderly schedule to ensure that the meeting will run smoothly. The first step in organizing the annual meeting is to prepare and adhere to a schedule or checklist of tasks to be completed prior to the meeting, often referred to as a **timetable**. The timetable establishes deadlines for tasks to be performed prior to the meeting, assigns responsibility for the performance of the tasks, and serves as a checklist of the tasks completed. The timetable must take into account the time periods necessary to prepare, file, and distribute the proxy statement and proxy forms to the shareholders.⁶⁰

A typical timetable includes deadlines for the following:

1. shareholder proposals (Shareholders are permitted to propose issues to be voted upon at shareholder meetings, and these proposals must be described in the proxy statement sent to all shareholders before the meeting. These issues often usually involve issues of environmental, civil rights, or social policy and are presented by shareholders who want to change or challenge the corporation's policies on such matters. These shareholders are often called *corporate gadflies*);
2. the ordering of envelopes for mailing and stock for proxy and proxy statements;
3. preparation and distribution of the officers' and directors' questionnaires for the proxy materials (soliciting individual and financial information required for disclosure in the proxy

- materials since it will be necessary to disclose information about management and their share ownership in the proxy statement);
4. preparation of the preliminary proxy materials;
 5. determination of the availability of nominees (persons who are designated in the proxy materials as nominees to vote the proxies);
 6. reservation of the meeting place;
 7. setting the record date for determination of shareholders entitled to vote at the meeting;
 8. notifying exchanges, depositaries, brokers, banks, proxy agents and other nominees of the record date;
 9. mailing of “search cards” to brokers and others so the proxy statement materials can be distributed to all shareholders;
 10. committee or board approval of the proxy materials;
 11. mailing preliminary copies of documents and filing fees to the Securities and Exchange Commission, allowing time for the Commission’s comments and approval;
 12. mailing proxy material and annual reports to the shareholders, brokers, bank, depositaries, proxy agents and other nominees, the appropriate stock exchanges, and the Securities and Exchange Commission;
 13. mailing of any follow-up correspondence or making of follow-up telephone calls;
 14. holding the annual meeting; and
 15. sending postmeeting reports to the shareholders.⁶¹

A word of caution about the use of a timetable is appropriate. It should not be a rigid document that must be slavishly followed. The schedule may be exhaustive and unrealistic, and counsel must revise it as often as necessary to ensure that all of the important tasks will be completed and the time available will be used effectively.

The presiding officer of the meeting should be selected in accordance with the bylaws, or if the bylaws do not designate the chair of the meeting, the board of directors should appoint a chair in advance of the meeting. The annual meeting is a unique opportunity for management to meet and impress shareholders on a personal basis. The chair should be a person skilled as a “master of ceremonies” and as a “facilitator.” Usually the Chairman of the Board and Chief Executive Officer share the duties of chairing the meeting (whether or not they have such skills). The function of the chair is to preside over the meeting and to defer to or call on others to provide expert information regarding the operations of the corporation.

In selecting the location of the meeting, consideration should be given to the corporate policy of attempting to reach as many shareholders as possible. Some corporations prefer to have their meeting at the same location each year so that the company is familiar with the setting of its meeting, which minimizes the unexpected problems that can result from unfamiliarity with new locations. Other corporations prefer to have meetings in various locations, so that shareholders in different parts of the country or world will be able to attend the meeting at some time. The facilities for the meeting should be capable of accommodating a crowd. Most meeting planners seriously consider the acoustics, sound equipment, lighting, ventilation, seating capacity, parking facilities, availability of caucus rooms, and expense of the various facilities under consideration. Many statutes, including the Model Business Corporation Act, permit corporations with geographically diverse shareholders to use telecommunications innovations that allow closed circuit or satellite meetings in remote locations simultaneously with the principal meeting. Some corporations make their annual meeting an important social and public relations event.

A script usually is prepared for the chair and other participants in the meeting to ensure that all necessary items are considered and acted upon appropriately. A “background binder” or “fact book” is also prepared to summarize important background information regarding the various areas of the corporation’s business. Such documents as the articles of incorporation, bylaws, recent reports to the Securities and Exchange Commission, recent annual reports to the shareholders, and proxy statements usually are included in this book. Counsel should anticipate questions that are likely to be presented by shareholders and summarize the questions and answers in the information book. Likely topics include questions that have been asked at

previous shareholder meetings and controversial issues that have been contained in the company's annual report. The script should include a complete text of anticipated comments to be made by the chair, other officers, and any scheduled speakers. However, the chair should be allowed to remain flexible and should use the script only as a guide. Depending upon the reaction of the shareholders, the chair may need to change the agenda or deviate from the script to manage the meeting appropriately.

The script should identify by name or title each person who must make a required response at the meeting. An occasional anxious moment will occur at a meeting when a question is asked or a response is required and no one is designated in the script to respond. Counsel should be prepared to nudge a nearby officer or director to solicit a response if the script has not anticipated a situation. Skilled managers may freeze if they have been told to follow a script and the script does not say they should speak. The script is only for the internal use of management participating in the meeting; it is never distributed to the shareholders in attendance.

The shareholders receive a printed agenda in advance of the meeting; the agenda usually is prepared by counsel. A typical agenda includes the following:

1. call to order;
2. announcements and introductions;
3. declaration of a quorum;
4. voting on directors;
5. voting on auditors;
6. voting on stockholders' proposals;
7. remarks by management;
8. presentation of reports of election inspectors who monitor the counting of votes and proxies;
9. discussions and questions; and
10. adjournment.⁶²

Note the position of the "discussion" section of the meeting on the agenda. By placing general discussion toward the end of the agenda, the chair is able to curtail unwanted general discussions by the shareholders on any of the prior topics, such as election of directors. The chair may deviate from the agenda, however, if it is appropriate to do so.

KEY TERMS

nominal, or dummy, directors
share subscription
cash subscription
property subscription
call for consideration due
escrow of shares
Section 1244 plan

Subchapter S election
attachments to minutes
regular meetings
special meetings
holder of record
record date
proxy

quorum
weighted voting
voting groups
merger
share exchange
consolidation
timetable

WEB RESOURCES

Access to specific provisions of state laws regarding shareholder and director meetings may be obtained through the Legal Information Institute maintained at the Cornell Law School:

<<http://www.law.cornell.edu>>

Forms for resolutions, notices, and text of other documents relevant to shareholder and director meetings are available at

<<http://www.uslegalforms.com>>

Topics of interest to corporate secretaries, including information about stock exchanges, financial information,

investor relations, corporate governance, news, and Internet search and navigational tools (including links to further resources) may be accessed at

<<http://www.ascs.org>>
<<http://www.corpgov.net>>

Explanation of the terminology applicable to the position of corporate secretary and the duties associated with the position is available at

<<http://www.chasemellon.com>>

The text of the proxy regulations and the federal and state securities laws that apply for public solicitation of shareholders at a meeting may be reviewed at the following sites:

<<http://www.sec.gov>>
<<http://www.seclaw.com>>
<<http://www.law.cornell.edu>>



CASES

UNITED STATES v. FALCONE

934 F.2d 1528 (1991)

PER CURIAM

[Robert and Sandra Falcone were convicted of federal bank fraud because they opened accounts with a federal bank in the name of a Florida corporation, Ocean General Agency, Inc. (OGA) and obtained money by stamping the signature of the corporate treasurer, Wellington “Duke” Peay on checks drawn on the account. The corporate records of OGA required two signatures on each check, Robert Falcone’s and either Edwin Rillo’s or Duke Peay’s.]

Robert Falcone argues that the evidence was insufficient to support his section 1344(a)(2) convictions for obtaining money from Orange State with the checks stamped with Peay’s signature without Peay’s authorization. Falcone points out that OGA’s articles of incorporation provided that the shareholders, not a board of directors, would manage the corporation; the articles, moreover, did not specifically require that the shareholders act as a majority or quorum when they exercised their management power. He contends, therefore, that Sandra Falcone, as a minority shareholder, could, without the knowledge or consent of the other shareholder/directors or officers of the corporation, validly define permitted uses for and use the signature stamp, especially as no corporate resolution expressly forbade or limited use of the stamp. That Peay himself did not authorize the use of the stamp on the checks, according to Falcone, is irrelevant, because Peay was not a shareholder and thus had no power to take corporate action. Falcone concludes that Sandra Falcone’s use of the stamp, or his own use pursuant to her authorization, could not be a false or fraudulent representation. We disagree.

In Florida, the board of directors of a corporation generally manage the company, and the shareholders are “with-

out power, aside from that which is delegated to them as agents, to represent the corporation or act for it in relation to its normal business.” [Citations omitted.] Florida corporation law in effect when OGA was incorporated, however, did permit a corporation, in its articles of incorporation, to provide that the shareholders, rather than the board, would manage the corporation. *See id.* Thus, Falcone is correct that, under OGA’s articles of incorporation, the shareholders retained management power.

Falcone cites no law in support of the proposition that when a corporation’s articles provide that the shareholders will manage the corporation but do not expressly provide that they must act collectively or by majority vote, any minority shareholder may, without the assent or knowledge of the other shareholders, make management decisions and act for the corporation. It is perhaps arguable that such a clause in the articles, if the shareholders make no further provision—in the bylaws or otherwise—defining the way in which they will exercise their management power, allows each shareholder unilaterally to function as a general manager of the corporation—essentially turning the corporation into a partnership. In that case, each shareholder would have the power to act individually for the corporation, constrained only by their fiduciary duty to the corporation and the other shareholders. We note, however, that such a result, in a corporation with several shareholders, might lead quickly to anarchy.

We do not decide, however, whether Falcone’s interpretation of this clause in OGA’s articles is correct under Florida law, because the shareholders of OGA, exercising their management power, chose, in early 1985, to elect themselves (plus Wayne Dent) as a board of directors. Essentially, the shareholders decided that they would manage the corporation collectively, acting as a board of directors; they therefore defined the manner in which they intended to exercise the general management powers granted them by the articles. As board members, the shareholders could act collectively by majority vote taken at a meeting or by unanimous written consent to action taken without meeting, or, because OGA was a close corporation, in limited circumstances by an informal meeting or discussion of all shareholder/directors, *see Etheredge v. Barrow*, 102 So.2d 660,

663 (Fla. Dist. Ct. App. 1958). Each shareholder/director could not, however, act for the corporation individually unless a majority of the shareholder/directors, acting as a board, had given the individual shareholder general management power or express or implied authority to act. 5 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 2101, at 527 (rev. perm. ed. 1987) (“[t]he directors . . . of a corporation are vested with its management, not as individuals, but as a board and, as a general rule, they can act so as to bind the corporation only when they act as a board and at a legal meeting”).

Acting collectively, the shareholder/directors appointed officers (Rillo, as president and treasurer; Peay, as vice president; and Sandra Falcone, as secretary) to run OGA’s day-to-day business. They also passed a corporate resolution requiring two signatures on OGA’s banking transactions at Orange State.

Contrary to Falcone’s assertion, therefore, Peay could authorize the use of, and define permitted uses for, the signature stamp. Pursuant to the corporate banking resolution, validly passed by the shareholders acting as a board of directors, Peay was a required signor on the Orange State accounts. As such, he could sign OGA checks individually or authorize an agent to affix his signature, either by hand or by the use of a signature stamp. He testified, at trial, that he did authorize the use of such a stamp for limited purposes. *See supra* note 10.

After the shareholders decided to manage the corporation as a board and appointed officers, Sandra Falcone could act for the corporation in two capacities, as one member of the board of directors or as secretary. As a board member, she could not act individually, and there is no evidence that the board ever expressly or impliedly granted

her the power to circumvent the requirement that Peay sign (and, thus, authorize) all checks. *See* 5 W. Fletcher, *supra* p. 1543, § 2101, at 527.

As secretary, likewise, she had no authority inherent in her office to expand the permitted uses of the stamp, or to use it in a manner that Peay had not authorized. Under Florida law, “[t]he Secretary of a corporation, merely as such, is a ministerial officer, without authority to transact the business of the corporation upon his volition and judgment.” *Ideal Foods, Inc. v. Action Leasing Corp.*, 413 So.2d 416, 417 (Fla. Dist. Ct. App. 1982). A secretary “has none of the powers of a general or managing agent,” 2A W. Fletcher, *supra* p. 1543, § 637, at 182, and “has no power by virtue of his office to execute . . . checks,” *id.* § 641, at 191. Although the Secretary, “[l]ike every other corporate agent,” “may have more extensive functions than those ordinarily incident to the office,” *Ideal Foods*, 413 So.2d at 417 n. 1, there is no evidence in this case that Sandra Falcone’s power as secretary was more extensive than the norm or that the board ever granted her express or implied authority to designate new uses for the stamp or to use it without Peay’s authorization; indeed, the testimony at trial indicated that she had very little to do with the day-to-day operation and management of the company.

In neither of her roles, therefore, did Sandra Falcone have the authority or power, either inherent in her position or expressly or impliedly granted by the shareholder/directors, individually to authorize the use of the stamp or Peay’s signature for purposes beyond the limited ones he had approved or to stamp checks with Peay’s signature without his authorization.

* * *

MYHRE v. MYHRE

554 P.2d 276 (Mont. 1976)

BENNETT, DISTRICT JUDGE

[Eric Myhre sued his mother and father, Gertrude and Thor Myhre, concerning an agreement to transfer stock in the family advertising company, alleging that his father wrongfully removed him as vice-president of the company. The trial court held that Eric was entitled to the stock he had been promised, and the court enjoined the corporation from removing Eric as vice-president. Thor Myhre appealed, arguing, among other things, that Eric had been properly fired.]

* * *

In his letter dismissing Eric from employment by the corporation, Thor made it clear he was not attempting to alter Eric’s status as either a vice president or a member of the board. There is no evidence of a written contract or agree-

ment between Eric and the board as to Eric’s employment by the company. Uncontradicted testimony and pleadings by Eric established he did not receive any compensation as vice president or director; he was employed as manager of the Great Falls office and in the year 1974 his salary was increased by Thor without board action. The whole record shows this was a closely held family corporation with Thor acting as head of the corporation as well as the family and carrying on the corporate operations pretty much as he wished with the approval of the board. Finally, the owners of the majority of the stock were aware of Thor’s move, both before and after it was made, and they ratified it at the next board of directors meeting.

We conclude from this that Eric wore three hats vis-a-vis the corporation: he was a director, an officer and an employee. (As to divisibility of status, see 2 Fletcher *Cyclopedia Corporations*, Section 266, p. 15, Perm. Ed., 1969). He was discharged as an employee and not as director or officer. As an employee, he had no enforceable contract of

employment with the board. As president, acting for the chairman of the board, Thor Myhre had authority to hire and fire employees. His dismissal of Eric was informally approved at the time by directors with control of a majority of the corporation's stock and formally ratified at the next meeting of the board of directors. Where the directors of a corporation are the only stockholders, they may act for the corporation without formal meetings. Formal meetings can also be waived by custom or general consent, which seems

to have been the case with the Myhre Corporation. See 2 Fletcher Cyclopedia Corporations, Section 394 at pp. 236, 237 and discussion and cases 19 Am.Jur.2d Corporations, §§ 1121 and 1122.

For the above reasons, the award of damages to the plaintiff should be set aside, as should the injunction against removal of Eric from employment.

* * *

PROBLEMS

1. Notice for a shareholder's meeting for a Model Act corporation must be sent how many days before the meeting? How early before the meeting may notice be sent?
2. ABC Corporation has 20,000 shares of common stock authorized, 2,000 of which are treasury shares and 1,000 of which are issued and outstanding:
 - a. What is the minimum number of shares required to constitute a quorum under your state statute?
 - b. What is the minimum number of shares that may constitute a quorum if the articles of incorporation so provide?
 - c. What is the maximum number of shares that may constitute a quorum if the articles of incorporation so provide?
 - d. What number of shares are required to be voted affirmatively to pass shareholder action if a bare quorum is present under (a), (b), or (c)?
3. Which of the following statements(s) is (are) true under the Model Act? A voting list of shareholders:
 - a. must be kept available for inspection for 10 days at the meeting place.
 - b. only lists record holders entitled to vote at the meeting.
 - c. must be prepared on the record date.
 - d. is subject to challenge by any shareholder.
4. What is the statutory minimum number of directors to constitute a quorum in your local corporation law?
5. What is the statutory maximum number of directors to constitute a quorum if the articles of incorporation so provide in your local corporation law?
6. Everready Corporation has 2,000 authorized voting shares, of which 100 shares are treasury shares and 1,900 shares are outstanding. If persons owning 1,000 shares were present and voting at a meeting and cumulative voting were used:
 - a. How many votes would be needed to be certain to elect one of three directors?
 - (1) 251
 - (2) 751
 - (3) 1434
 - (4) 1501
 - b. How many shares would be necessary to elect one of nine directors?
 - (1) 101
 - (2) 191
 - (3) 251
 - (4) 901
7. On normal shareholder matters, which of the following statement(s) about Everready Corporation (see problem 6, above) is (are) correct?
 - a. The articles of incorporation could lower the quorum of shareholders to as low as 667 shares.
 - b. An affirmative vote of 1,001 shares is necessary for shareholder approval.
 - c. If the articles of incorporation are silent, a quorum would be 951 shares.
 - d. If the articles of incorporation are silent, the minimum affirmative vote for shareholder approval would be 501 shares.

PRATICE ASSIGNMENTS

1. Review the Model Act sections concerning shareholder and director meetings and prepare the following:
 - a. a timetable for the directors' regular meeting;
 - b. a timetable for the shareholders' annual meeting;
 - c. a notice for the directors' regular meeting;
 - d. a notice for the shareholders' annual meeting; and
 - e. a waiver of notice for a director.
2. Join members of your family or friends and conduct an organizational meeting of a hypothetical corporation you are forming. Make up all of the facts you need to

- complete resolutions and to conduct the business required. Prepare minutes of the meeting.
3. Contact a publicly owned company in your area, and ask to receive a copy of their latest annual report and

proxy statement. Prepare resolutions for adoption by their board of directors for the transactions described in the proxy statement to be voted upon at the annual meeting.

ENDNOTES

1. See Chapter 15.
2. See “Corporate Existence” in Chapter 8.
3. See Model Business Corporation Act (hereafter M.B.C.A.) § 2.05 (organizational meeting of incorporators or initial directors).
4. See “Formalities after Formation of a Corporation” in Chapter 8.
5. E.g., Pennsylvania, 15 Pa. Stat. Ann. § 1310.
6. M.B.C.A. § 2.05.
7. See “Certificates for Shares” in Chapter 9.
8. See “Ownership and Management of a Corporation” in Chapter 6; “Preincorporation Share Subscriptions” in Chapter 8.
9. See “Preincorporation Share Subscriptions” in Chapter 8.
10. M.B.C.A. § 6.20.
11. See “Approval of Action Taken at Previous Meetings” earlier in this section.
12. DeLano Service, Allegan, Mich. Form R-10.
13. See “Selection and Registration of Corporate Name” in Chapter 8.
14. Internal Revenue Code of 1986, U.S.C.A. § 1244(c) (3).
15. See “Taxation of a Corporation” in Chapter 6.
16. Substantive elements of the Subchapter S election are discussed in “Taxation of a Corporation” in Chapter 6.
17. See “Bylaws” in Chapter 8.
18. M.B.C.A. § 8.20.
19. See the sample bylaw provisions regulating directors’ meetings in “Bylaws” in Chapter 8 and Exhibit I–10 in Appendix I.
20. See M.B.C.A. § 8.23.
21. See the bylaw provisions in “Bylaws” in Chapter 8 and Exhibit I–10 in Appendix I, and the directors’ resolution in “Directors’ Regular and Special Meetings” earlier in this chapter.
22. M.B.C.A. § 8.22.
23. M.B.C.A. § 7.01.
24. E.g., Nebraska, Neb. Rev. Stat. § 21–2053 (application to a court after fifteen months without a meeting).
25. In Massachusetts, the holders of one-tenth of the voting shares may call a special meeting if the annual meeting has not been held. Mass. Gen. Laws Ann. ch. 156B, § 33 (West).
26. M.B.C.A. § 7.02.
27. See M.B.C.A. §§ 7.05 (d), 7.07.
28. M.B.C.A. § 7.05.
29. M.B.C.A. § 7.05.
30. E.g., New Jersey, N.J. Stat. Ann. § 14A:5–4 (West).
31. M.B.C.A. § 7.05.
32. For further elaboration on voting procedures for these transactions, see “Merger, Consolidation, and Exchange” and “Sale, Mortgage, or Other Disposition of Assets” in Chapter 15.
33. See “Directors’ Regular and Special Meetings” earlier in this chapter.
34. M.B.C.A. § 7.22.
35. Securities Exchange Act of 1934, 15 U.S.C.A. § 78n, and the rules promulgated thereunder. See “Public Corporations” in Chapter 7.
36. This proxy must be accompanied by a special notice and a proxy solicitation statement, prepared in accordance with the Securities Exchange Act of 1934.
37. M.B.C.A. § 7.25.
38. E.g., New York, N.Y. Bus. Corp. Law § 608 (McKinney).
39. M.B.C.A. § 6.04(c).
40. Variations in voting rights between classes of shares are discussed in “Common Stock Rights” and “Preferred Stock Rights” in Chapter 9.
41. These shareholder agreements are most frequently found in close corporations. See “Concentration of Voting Power” in Chapter 13.
42. M.B.C.A. § 1.40(26).
43. M.B.C.A. §§ 7.25, 7.26.
44. E.g., California, Corp. Code § 707 (West); New York, N.Y. Bus. Corp. Law § 610 (McKinney).
45. See “Close Corporation” in Chapter 7.
46. M.B.C.A. § 7.25.
47. M.B.C.A. § 8.05.
48. M.B.C.A. § 7.28 (b); see “The Articles of Incorporation” in Chapter 8.
49. M.B.C.A. § 8.08.
50. See “Ownership and Management of a Corporation” in Chapter 4; “The Articles of Incorporation” in Chapter 8.
51. E.g. California, Cal. Gen. Corp. Law § 301.5.
52. M.B.C.A. § 10.05
53. Further elaboration on the procedure to amend the articles of incorporation is contained in “Amendments of the Articles of Incorporation” in Chapter 15.
54. See Chapter 15.
55. See “Preferred Stock Rights” in Chapter 9.
56. Del. Code Ann. tit. 8, § 228.
57. E.g., New York, N.Y. Bus. Corp. Law § 615 (McKinney) (certificate of incorporation); Pennsylvania, 15 Pa. Stat. Ann. § 1766 (by-laws).
58. See CCH Corporate and Finance Group, Corporate Secretaries Guide (2003) supplemented monthly and available through <<http://www.onlinesotre.cch.com>>.
59. See M.B.C.A. § 8.31.
60. See “Public Corporations” in Chapter 7.
61. V. Futter, Shareholder Meetings, reprinted in Shareholder Meetings and Shareholder Control in Today’s Securities Markets 489, 492–94 (P.L.I. 1985).
62. R. F. Balotti and J. Finkelstein, 2 Delaware Law of Corporation and Business Organizations § 7.53 (2000).