

## PRACTICE ASSIGNMENTS

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1. Agri-Services, Inc., is a foreign corporation engaged in the purchase and sale of hay, feed yard chemicals, conditioners, and preservatives. Agri-Service is opening an office and storage facility in your city. It will invest \$100,000 in this local operation, and it will employ seven persons in its office and warehouse. Agri-Services has 29,000 shares of common stock, \$ .01 par value, issued and outstanding, and its principal place of business is 2309 South Elati Street, Metropolis, New State. Mary Naugle is the president and George Foreman is the secretary of the corporation. You will be the registered agent for Agri-Services in your state. Prepare all documents required for qualification under your local corporation code, inserting any assumed facts necessary to complete the forms.
2. Review your local corporation code and prepare a memorandum on the following issues:
  - a. What are the penalties for a corporation conducting business without qualifying?
  - b. What types of transactions do not constitute “doing business” for purposes of qualification?
  - c. Under what circumstances must a corporation amend its qualification documents?
  - d. What names are permitted to be used by a foreign corporation in your state?
3. Find a local business that is a foreign corporation and find out the state of its incorporation. Describe the reasons you believe the corporation was formed in the state of its domestication instead of being formed in your state.
4. Describe three reasons why you would incorporate a business in Delaware, even though its primary business activity is in your state.

## ENDNOTES

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1. “Selection of Jurisdiction” in Chapter 8.
2. See, e.g., Kan. Stat. Ann. § 17-7648.
3. See, e.g., W. Va. Code § 47-9-49.
4. See “Formation and Operation of a General Partnership” in Chapter 3.
5. See the sample resolution for organizational meetings of the board of directors in “Business Conducted at Organizational Meetings” in Chapter 10.
6. See Model Business Corporation Act (hereafter M.B.C.A.) § 15.01.
7. Del. Code Ann. tit. 8, § 373(a).
8. M.B.C.A. § 15.02.
9. Ala. Bus. Corp. Act § 10-2B-15.02.
10. See the schedule of penalties for doing business without qualifying, 1 Prentice-Hall, Corporations § 7103.
11. E.g., Delaware, Del. Code Ann. tit. 8, § 384; New York, N.Y. Bus. Corp. Law § 1303 (McKinney).
12. E.g., West Virginia, W. Va. Bus. Corp. Act § 31D-15-1503.
13. E.g., Nebraska, Neb. Rev. Stat. § 21-20.170.
14. 15 Pa. Stat. Ann. § 4124.
15. Oklahoma, Okla. Stat. Ann. tit. 18, § 1130 (West).
16. Virginia, Va. Code Ann. § 13.1-759 (Michie).
17. E.g., Wisconsin, Wis. Stat. Ann. § 180.1503 (West)(paid-in capital).
18. Compare M.B.C.A. §§ 4.01 and 15.06.
19. M.B.C.A. § 15.06.
20. See “Selection and Reservation or Corporate Name” in Chapter 8.
21. See M.B.C.A. § 4.03; and forms for registration and transfer of a corporate name in Chapter 8.
22. See M.B.C.A. §§ 15.07, 15.08.
23. M.B.C.A. § 15.10.
24. See M.B.C.A. § 15.05.
25. M.B.C.A. § 16.21.
26. E.g., Arizona, Ariz. Rev. Stat. Ann. § 10-1504(A).
27. E.g., Indiana, Ind. Code Ann. § 23-1-49-4 (Burns).
28. M.B.C.A. § 15.04.
29. See “Application for Certificate of Authority” and “Certificate of Authority” earlier in this chapter; M.B.C.A. § 15.04.
30. M.B.C.A. § 15.06.
31. See “Merger, Consolidation, and Exchange” in Chapter 15.
32. See M.B.C.A. § 11.06.
33. M.B.C.A. § 11.06.
34. M.B.C.A. § 11.07(d).
35. M.B.C.A. § 15.20.
36. E.g., Connecticut, Conn. Bus. Corp. Act § 33-932.
37. E.g., Massachusetts, Mass. Corp. Code Ch. 181 § 17.
38. M.B.C.A. § 15.31.
39. E.g., District of Columbia, D.C. Bus. Corp. Act § 29-101.115.
40. New Jersey, N.J. Stat. Ann. § 14A:13-10 (West).

Amendment of the Articles of Incorporation
Merger and Exchange
Sale, Mortgage, or Other Disposition of Assets
Rights of Dissenting Shareholders
Domestication and Conversion
Voluntary Dissolution
Involuntary Dissolution
Liquidation

# CHANGES IN CORPORATE STRUCTURE AND DISSOLUTION

Previous chapters have considered corporate activities that occur in the ordinary course of business. The board of directors and the officers to whom the directors delegate authority are vested with continuing discretion in the management of business affairs; the shareholders exercise only indirect control over corporate operations through their election of the directors. This chapter is concerned with **extraordinary corporate activity** outside the scope of corporate business routine. Each extraordinary matter involves structural changes to the corporation and, in most cases, affects the ownership rights of the shareholders. Consequently, a common characteristic in each transaction is the requirement for shareholder approval. Moreover, the law governing extraordinary corporate activity grants special rights for shareholders in some cases, such as the right to have their shares appraised and purchased by the corporation if they disagree with the decision of management and their fellow shareholders. Special statutory procedures have been adopted by most states to regulate these structural changes.

## AMENDMENT OF THE ARTICLES OF INCORPORATION

Any amendment of the articles of incorporation is a structural change of the corporation because the amendment changes the primary authorizing document for corporate existence. The corporation has the right to amend its articles of incorporation within the statutory guidelines established for the original articles of incorporation. Any provision may be inserted in an amendment if it would have been permitted in the original articles. Section 10.01 of the Model Business Corporation Act simply states that “a corporation may amend its articles of incorporation at any time to add or change a provision that is required or permitted in the articles of incorporation or to delete a provision not required in the articles of incorporation.”

This broad statutory power to amend is typical of most modern state statutes on the subject of amendments to the articles of incorporation. The power to amend on any issue that may be permitted in the original articles of incorporation may be safely inferred from the general statutory authority.

## Procedure

Section 10.05 of the Model Business Corporation Act permits the corporation's board of directors to adopt certain amendments to the articles of incorporation without shareholder action, including amendments to accomplish the following:

1. extend the duration of the corporation;
2. delete the names and addresses of the initial directors;
3. delete the name and address of the initial registered agent and registered office, if a statement of change is on file with the secretary of state;
4. change each issued and unissued authorized share of an outstanding class into a greater number of whole shares or increase the number of authorized shares to permit a share dividend if the corporation has only shares of that class outstanding;
5. change the corporate name by substituting the word *corporation*, *incorporated*, *company*, or *limited*, or the abbreviation *Corp.*, *Inc.*, *Co.*, or *Ltd.*, or a similar word or abbreviation in the name, or by adding, deleting, or changing a geographical attribution for the name; or
6. make any other changes permitted by the statute to be made without shareholder action (such as canceling shares reacquired by the corporation under section 6.31 or creating a series of shares under section 6.02).

If the incorporators would prefer that the shareholders always be involved in approving amendments to the articles, the power of the board of directors to adopt these amendments without shareholder action may be denied expressly in the articles themselves.

In the usual amendment procedure, the board of directors adopts a resolution that sets forth the proposed amendment and directs that it be submitted to a vote at an annual or special meeting of the shareholders.<sup>1</sup>

### EXAMPLE

#### Resolution to Change Corporate Name

RESOLVED, that Article I of the Articles of Incorporation of The Nobles Company be amended to read as follows:

“The name of this corporation is The Nobility Company.”

FURTHER RESOLVED, that this amendment shall be submitted to the vote of the shareholders at a special meeting called for the purpose of considering the amendment.

Some states permit the shareholders to propose an amendment to the articles of incorporation.<sup>2</sup> The concerted action of a specified number of shareholders—for example, the holders of one-tenth of the outstanding voting stock of the corporation—is required, and those shareholders may petition the board of directors to propose the amendment or may request that the president of the company call a meeting of shareholders to consider the proposed amendment.

Written notice of the proposed amendment must be given within the statutory period to each shareholder of record entitled to vote upon the proposal.<sup>3</sup> In many cases, the proposal is submitted to the shareholders at their annual meeting, and the written proposal may be included in the notice of the annual meeting. If a special meeting is called, the notice must state the reason for the meeting—that is, to consider a proposed amendment to the articles of incorporation.<sup>4</sup> In jurisdictions where the shareholders may unanimously consent in writing in lieu of a meeting, the consent procedure may be used to consider and approve the amendment.<sup>5</sup>

## Adoption of the Amendment

The number of shareholder votes required to approve a proposed amendment to the articles of incorporation may be greater than the number required for routine shareholder matters. Moreover, if the amendment affects the rights of the shareholders of a certain class, those shareholders must approve the amendment, even if they otherwise have no voting rights.

The Model Business Corporation Act formerly required the affirmative vote of the holders of two-thirds of the shares entitled to vote, but a recent amendment to the act has reduced the

vote to a majority. The reduced voting provision has been accepted in most of the jurisdictions that follow the act.

If a proposed amendment affects the rights of the holders of a certain class of shares, those shares are entitled to vote as a class on the amendment's adoption. An amendment is deemed to affect the rights of a particular class when it increases or decreases the aggregate number of authorized shares of the class, or modifies the number of shares held by shareholders of the class. Changing any of the designations, preferences, limitations, or rights of the shares of the class also qualifies for special approval. If the proposed amendment creates a new class having rights that are prior or superior to the rights of the class, provides for an exchange of shares of another class into shares of the class, or divides the class into series, class voting applies. Finally, any amendment that limits or denies the preemptive rights of the shares of the class, or affects accrued but undeclared dividends of the class, must be approved by the class.<sup>6</sup> In most states, a change in the par value of the shares of the class also requires a class vote.

Some examples are appropriate. If the corporation has a class of common stock and a class of nonvoting 6% cumulative preferred stock with a par value of \$100, the holders of the preferred shares would be entitled to vote on all amendments to accomplish the following:

1. increase par value to \$200 per share;
2. change dividends from cumulative to noncumulative, but only if dividends have accrued at the time the amendment is proposed;
3. add a new class of preferred stock with equal, prior, or superior liquidation preferences to the existing preferred class;
4. permit the directors to issue the remaining authorized shares of the preferred class in series; and
5. add an additional one thousand authorized shares of the preferred class.

Each of these amendments would directly affect the preferred shareholders by diluting their ownership interest or altering their preferred status, and in order to pass such an amendment, the holders of a majority (or two-thirds, depending upon the jurisdiction) of the shares of the class must vote affirmatively. The class would not have a separate voice on other amendments, however. If the corporation were to change its stated purposes, or its name, the nonvoting class could not vote, even though these amendments might indirectly affect the value or quality of the shares.

Since shareholder approval is required for adoption of an amendment to the articles of incorporation, it would be difficult to amend the articles before any shares have been issued unless there were a separate procedure for that contingency. The Model Business Corporation Act provides such a procedure in section 10.02, and many states have comparable provisions. If shares have not been issued, an amendment to the articles of incorporation may be adopted by the resolution of the incorporators or the initial board of directors named in the articles of incorporation.

## Articles of Amendment

The adopted amendment is set forth in the articles of amendment (see Exhibit 15–1, Articles of Amendment), which are filed with the appropriate state official. Additional fees and franchise taxes may be due under the state statute when the articles of amendment are filed.

In addition to the statement of the amendment, the Model Business Corporation Act requires that the articles of amendment contain information about the corporation, whether the amendment was duly approved by the incorporators, directors, or shareholders, and the date of adoption of the amendment.<sup>7</sup>

In most states the amendment becomes effective when it has been accepted for filing by the appropriate filing officer.<sup>8</sup> In some states, there may be conditions to the filing officer's acceptance for filing, such as consent of the state's taxing authorities when certain<sup>9</sup> tax consequences may result from the amendment. In most states and under the Model Business Corporation Act, it is now possible to specify a delayed effective time and date up to ninety days following the filing of the amendment.<sup>10</sup>

**Exhibit 15-1.**Articles of Amendment  
(Delaware)

**STATE OF DELAWARE  
CERTIFICATE OF AMENDMENT  
OF CERTIFICATE OF INCORPORATION**

a corporation organized and existing under and by virtue of the General Corporation Law of the State of Delaware.

**DOES HEREBY CERTIFY:**

**FIRST:** That at a meeting of the Board of Directors of \_\_\_\_\_

resolutions were duly adopted setting forth a proposed amendment of the Certificate of Incorporation of said corporation, declaring said amendment to be advisable and calling a meeting of the stockholders of said corporation for consideration thereof. The resolution setting forth the proposed amendment is as follows:

**RESOLVED,** that the Certificate of Incorporation of this corporation be amended by changing the Article thereof numbered " \_\_\_\_\_ " so that, as amended, said Article shall be and read as follows:

**SECOND:** That thereafter, pursuant to resolution of its Board of Directors, a special meeting of the stockholders of said corporation was duly called and held upon notice in accordance with Section 222 of the General Corporation Law of the State of Delaware at which meeting the necessary number of shares as required by statute were voted in favor of the amendment.

**THIRD:** That said amendment was duly adopted in accordance with the provisions of Section 242 of the General Corporation Law of the State of Delaware.

**FOURTH:** That the capital of said corporation shall not be reduced under or by reason of said amendment.

**IN WITNESS WHEREOF,** said \_\_\_\_\_  
has caused this certificate to be signed by

\_\_\_\_\_, an Authorized Officer,  
this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

BY: \_\_\_\_\_  
Authorized Officer

TITLE: \_\_\_\_\_

NAME: \_\_\_\_\_  
Print or Type

Finally, the additional formalities for amendment of the articles of incorporation parallel the formalities for the articles of incorporation in each jurisdiction.<sup>11</sup> Thus, a jurisdiction that requires that the articles be filed with a county clerk in addition to the secretary of state will also require that an amendment to the articles be so filed. Similarly, if the state statute requires that the articles of incorporation be published in a newspaper, the amendment to the articles also must be published.

### Restated Articles of Incorporation

If the original articles of incorporation have been amended several times, it may be difficult to determine the current status of the articles by studying the files of the secretary of state. Consequently, most statutes permit a **restatement** or composite of the articles of incorporation whereby all past amendments are consolidated with the original articles of incorporation into a new document, which supersedes the original articles and the filed amendments. This procedure is also used if the corporation was formed many years ago and several amendments to the articles of incorporation are required to conform to current law. Under section 10.07 of the Model Business Corporation Act, shareholder approval is not necessary to restate the articles of incorporation, since restatement is only a mechanical process of putting the corporation's file in order. If a new amendment is to be added in connection with the restatement, shareholder approval is required. The procedure for restatement is specified in the statute, and a restated certificate of incorporation is usually issued (see Exhibit 15–2, Restated Articles of Incorporation).<sup>12</sup>

## MERGER AND EXCHANGE

Merger and share exchange are statutory devices for combining two or more corporations into one corporate entity or into a parent-subsidary relationship. In a merger, the acquiring corporation takes over the assets, liabilities, and business of the merging corporation, and one of the corporations in the transaction ceases to exist. In a share exchange, the acquiring corporation exchanges some of its shares for some or all of the shares of the acquired corporation. If fewer than all of the acquired corporation's shares are exchanged, the corporations continue their businesses in a parent-subsidary relationship. It is also possible for two corporations to form a new corporation, which exchanges its shares for all of the shares of both acquired corporations. That transaction has historically been called a consolidation. The corporate parties to these transactions are called **constituent corporations**, and that terminology is used in the discussion of these transactions.

A **merger** is a device whereby one or more constituent corporations merge into and become a part of another constituent corporation. The corporations that merge into the other corporation cease to exist after the merger. The **surviving corporation** continues to exist after the merger, and takes over the assets and liabilities of the merging corporations. The survivor also takes over the stockholders, personnel, business contacts, and other normal business activities of the terminated corporations. To illustrate, suppose the ABC Corporation and the XYZ Corporation agree to merge, and their agreement provides that the XYZ Corporation will survive the merger. When the merger is accomplished, the ABC Corporation will no longer exist, and all of its assets, liabilities, and other business incidents will belong to XYZ Corporation, which will maintain its original corporate structure throughout, unless the merger requires certain amendments to the structure.

In a **consolidation transaction**, one or more constituent corporations join together to form a new corporation, pooling their assets, liabilities, and business, and transferring them to a new consolidated entity. The hypothetical ABC and XYZ Corporations could consolidate by forming the LMN Corporation and by transferring all of their respective business to this new corporation. In a consolidation, all constituent corporations cease to exist, and the consolidation results with the combined businesses of the constituent corporations.



**Exhibit 15–2.**Restated Articles of  
Incorporation (Maine)

<p><b>DOMESTIC BUSINESS CORPORATION</b></p> <p><b>STATE OF MAINE</b></p> <p><b>RESTATED ARTICLES OF INCORPORATION</b></p> <p>_____</p> <p style="text-align: center;">(Name of Corporation)</p>	<p><b>Filing Fee \$80.00</b></p> <div style="border: 1px solid black; padding: 10px; margin: 5px 0;"> <p>_____</p> <p style="text-align: center;">Deputy Secretary of State</p> <hr/> <p style="text-align: center;"><b>A True Copy When Attested By Signature</b></p> <p>_____</p> <p style="text-align: center;">Deputy Secretary of State</p> </div>
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Pursuant to 13-C MRSA §1007, the undersigned corporation executes and delivers the following Restated Articles of Incorporation:

**FIRST:** The text of the restated articles of incorporation as set forth in Exhibit \_\_\_\_ attached contains the same information and provisions as are required for original articles.

**SECOND:** ("X" one box only.)

The restated articles of incorporation consolidate all amendments into a single document **OR**

If a new amendment is included in the restated articles of incorporation the following must be completed:

The text of the new amendment was adopted on (date) \_\_\_\_\_ and was duly approved as follows: ("X" one box only.)

by the incorporators if shareholder approval was not required **OR**

by the board of directors if shareholder approval was not required **OR**

by the shareholders in the manner required by this Act and by the articles of incorporation.

**THIRD:** If the text of the new amendment provides for an exchange, reclassification or cancellation of issued shares, provisions for implementing the amendment, if not contained in the amendment itself, are set forth in Exhibit \_\_\_\_ or as follows:

**FOURTH:** The effective date of the restated articles of incorporation (if other than the date of filing of the restated articles of incorporation) is \_\_\_\_\_.

**DATED** \_\_\_\_\_ **\*By** \_\_\_\_\_

(signature of any duly authorized person)

\_\_\_\_\_

(type or print name and capacity)

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\*This document **MUST** be signed by any duly authorized officer **OR** the clerk. (§121.5)

Please remit your payment made payable to the Maine Secretary of State.

**SUBMIT COMPLETED FORMS TO: CORPORATE EXAMINING SECTION, SECRETARY OF STATE,  
101 STATE HOUSE STATION, AUGUSTA, ME 04333-0101**

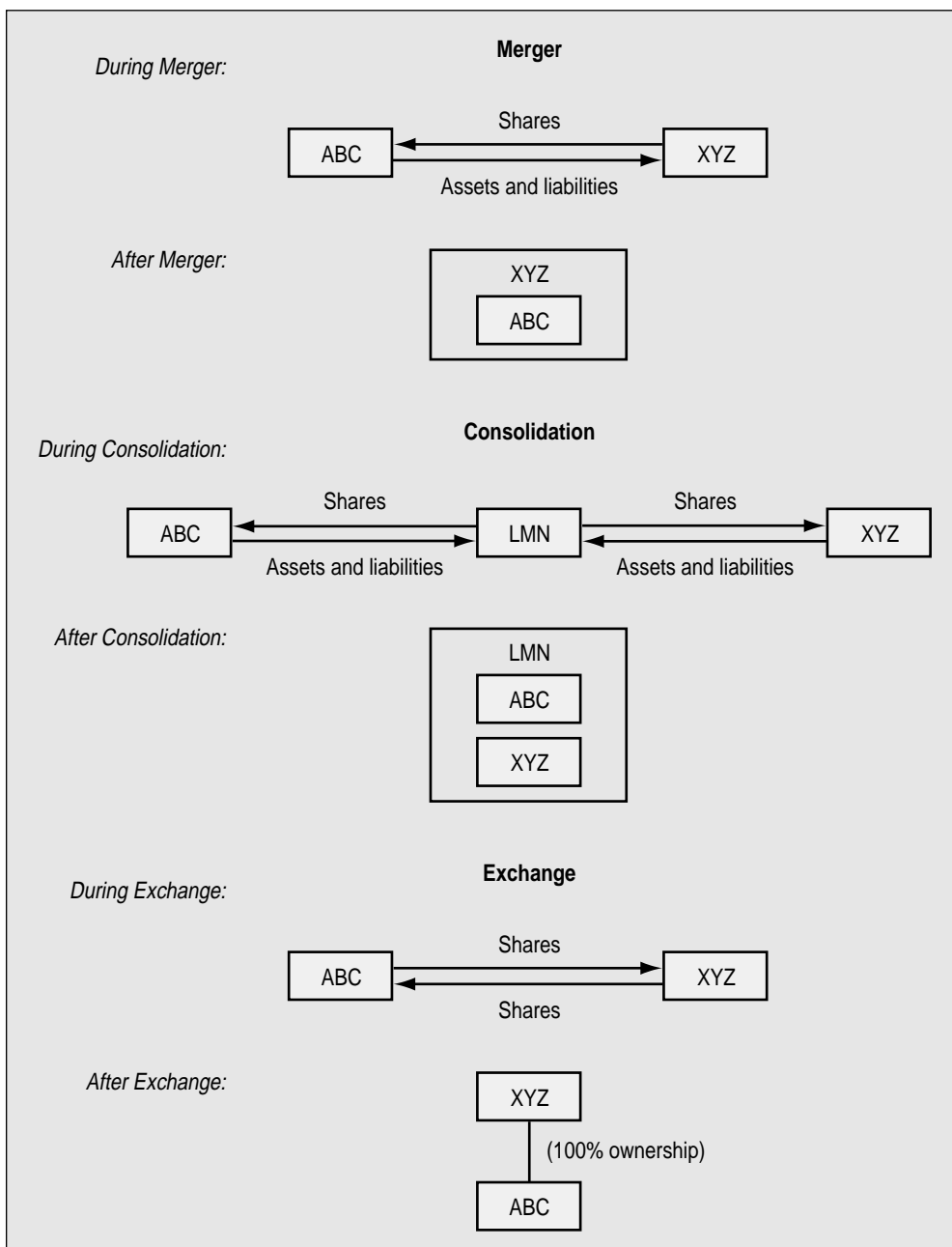
FORM NO. MBCA-6A 7/1/2003 **TEL. (207) 624-7740**

The revised Model Business Corporation Act has deleted all references to consolidation. In modern corporate practice, consolidation transactions are obsolete, since it is nearly always advantageous for one of the constituent corporations in the transaction to be the surviving corporation. If creation of a new entity is considered desirable, the new act provides that a new entity may be created for the merger and the disappearing constituent corporations are simply merged into it. Many state statutes still refer to consolidation transactions, however, and provide a statutory procedure by which to accomplish them. Consequently, this text still refers to the consolidation as a separate transaction, although it will have limited usefulness in the future.

A more cautious combination than a merger or consolidation is an **exchange**. Neither corporation ceases to exist in an exchange, but some or all of the shares of one corporation are exchanged for some or all of the shares of the other corporation. For example, the XYZ Corporation could exchange a certain number of its common shares for all of the preferred

shares of ABC Corporation or all of the common shares of ABC Corporation, or it could complete some combination of those transactions. If XYZ Corporation exchanged shares of its common stock for *all* shares of ABC Corporation, common and preferred, the exchange would begin to look like a merger, and it might be necessary to follow merger rules. The charts on the next page illustrate how mergers, consolidations, and exchanges differ.

Merger, consolidation, and exchange involve structural changes and affect share ownership in the constituent corporations. Consider the shareholders of the ABC Corporation in a merger with the XYZ Corporation. After the merger, their corporation will no longer exist, and they will rightfully expect to be consulted for their approval of the transaction. The shareholders of the expiring constituent corporation usually receive a specified number of shares of the surviving corporation or cash in return for their original shares. The shareholders of the XYZ Corporation also should approve the transaction because their share ownership will be diluted when shares are issued to all of the shareholders of the late ABC Corporation. Consolidation

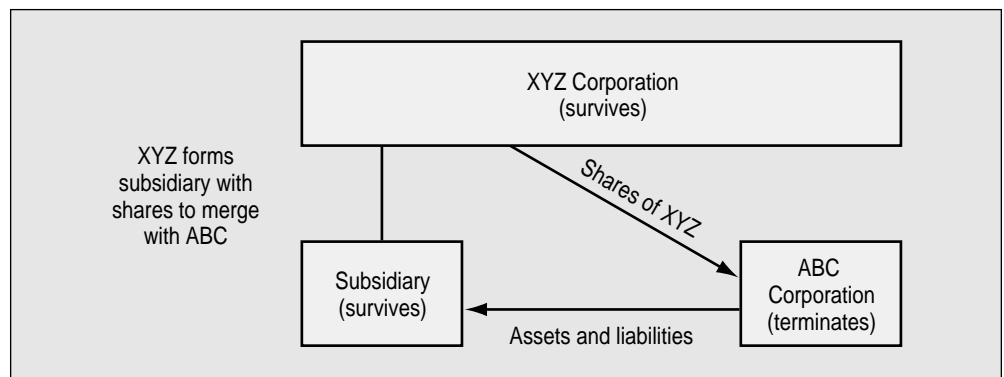




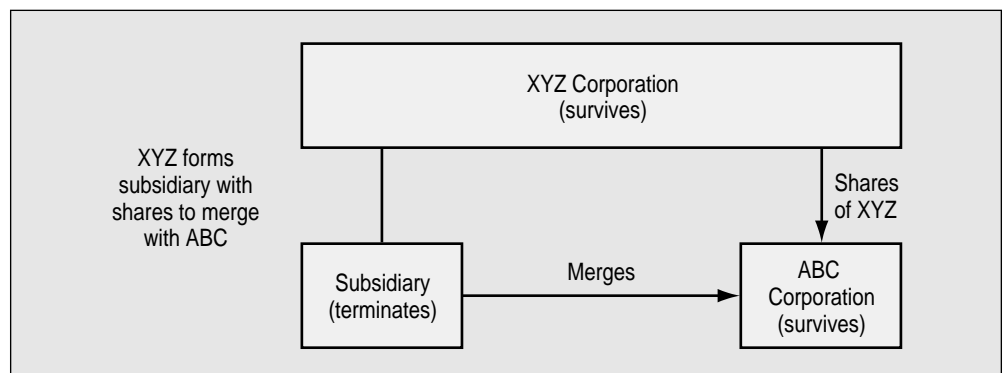
and exchange transactions involve the same equities, since shareholders of both constituent corporations will probably receive shares of the new consolidated corporation or receive them in exchange for their original shares.

### Variations on the Merger Transaction

In many merger transactions, a newly formed subsidiary is used to accomplish the transaction. Say, for instance, that ABC Corporation and XYZ Corporation desire to merge. Because ABC Corporation is involved in a high-risk business (such as manufacturing potentially dangerous products that may cause injuries to consumers), the managers of XYZ Corporation decide to insulate the assets of their corporation by forming a new corporation to accomplish the merger. When the subsidiary is formed, XYZ Corporation owns all of its stock, so it has complete control over the subsidiary's activities. The new corporation will be entitled to limited liability when it is formed, so the potential products liability problems of ABC that will transfer in the merger will not expose the assets of the parent corporation, XYZ Corporation, after the merger. The merger is accomplished by merging ABC Corporation with the subsidiary. In the transaction, the shareholders of ABC Corporation will receive shares of XYZ Corporation, and the assets and liabilities of ABC Corporation will be transferred to the wholly owned subsidiary corporation of XYZ. This transaction is called a **triangular merger** because of the three-way transaction by which it is accomplished.



Another three-way merger is called a **reverse triangular merger**. This is the same transaction as a triangular merger, except the newly formed subsidiary is merged into the target corporation. In this transaction, ABC Corporation would become the wholly owned subsidiary of XYZ Corporation. This type of merger is used when the target corporation, ABC Corporation, has valuable licenses or other contractual arrangements that might terminate if the corporation ceases to exist. Accordingly, the effect of this transaction is to allow the target corporation to continue to survive, but as a wholly owned subsidiary of the acquiring corporation, XYZ Corporation.



## Tax Terminology

In tax terminology, the merger, consolidation, or exchange may be referred to as a **reorganization**. Several different types of reorganizations follow:

- A. **Reorganization**—a statutory merger or consolidation accomplished under the state corporate statutes, as described in this section.
- B. **Reorganization**—the acquisition of one corporation by another or a combination of two corporations through a share exchange, but not a complete corporate law merger or consolidation. In a type B reorganization, one corporation swaps its voting shares for a controlling block (80% to 100%) of the shares of another corporation. Both corporations continue to exist, so a complete merger or consolidation is not accomplished. The acquired corporation becomes a subsidiary of the acquiring corporation, which maintains at least an 80% controlling interest in the subsidiary's stock.
- C. **Reorganization**—the exchange of voting shares of the acquiring corporation for substantially all of the assets of the acquired corporation. Since both corporations continue to exist, this transaction is not a true merger or consolidation, but neither is it an exchange, because the stock was traded for assets, not for other stock.

## Procedure

The board of directors' resolution is the procedural starting point for a merger, consolidation, or exchange. The boards of directors of both corporations approve the transaction, stating the names of the constituent corporations; the terms of the proposed combination; and the manner and basis for converting the shares of the constituent corporations into shares of the exchanging corporation in an exchange, or shares or cash of the surviving corporation in a merger. The plan approved by resolution also must state changes to be made in the articles of incorporation of the surviving corporations. The plan may include any other terms necessary to accomplish the transaction.<sup>13</sup>

The resolution of the board of directors is the first statutory step toward approval of these transactions, but it is only the tip of the iceberg. Notice that the resolution must contain the terms and conditions of the proposed transaction. This unassuming requirement represents the culmination of several months (maybe years) of planning, drafting, and negotiation between the parties to establish those terms. Corporate management will have labored over a lengthy agreement containing the terms of the structural changes that it believes will be acceptable to the shareholders and in the best business interests of all corporate parties. New corporate purposes must be drafted to account for the expanded business; the positions of the directors and officers of the constituent corporations must be placed or abandoned in the surviving or new corporation; the accounts of all corporate parties must be combined and reconciled; and bylaws must be harmonized. Certain restrictions regarding dividends, sales of stock, issuance of options, or other activities out of the ordinary course of business are usually placed on the constituent corporations during the pendency of the transaction. At various stages of these negotiations, the corporate parties usually exchange **letters of intent**, which express in writing their respective understandings of the terms of the proposed agreement. Further negotiations are conducted based upon these stated positions, and eventually the negotiations result in the final agreement, or in abandonment of the transaction if the negotiations reach an impasse. After acceptable terms are drafted, a proposed closing date is set, considering the other preparatory procedures that must be accomplished before closing. Rulings on the tax ramifications of the transaction are usually required, and the impact of the securities laws on the transfers of stock should be examined. Current accounting opinions should be scheduled, and financial reports are supplemented with current information. Documents must be reviewed by the attorneys, accountants, and other experts for all parties, and appropriate directors' and shareholders' meetings must be held in accordance with state law. That brings us back to the statutory requirements, which begin with the directors' resolution to approve the merger or exchange plan.

The resolution should reflect that the plan for the combination has been presented to the meeting of directors and approved by the directors, should authorize appropriate corporate officers to call a meeting of shareholders to consider the plan, and should further authorize the

officers to file the necessary documents to accomplish the plan if the shareholders of the constituent corporations approve it.

### EXAMPLE

#### Resolution to Approve Merger

RESOLVED, that the board of directors hereby recommends and approves the proposed Plan of Merger between this corporation and The Nobles Company, a Colorado corporation, substantially in the form presented to this meeting, and the directors and officers of this corporation are hereby authorized to enter into said plan by executing the same, under the seal of this corporation, and

FURTHER RESOLVED, that said plan as entered into by the directors and officers of this corporation be submitted to the holders of the common stock of this corporation at a special meeting to be called for the purpose of considering and adopting said plan on August 15, 2005, at 2:00 P.M., at the offices of the corporation, and

FURTHER RESOLVED, that July 15, 2005, is hereby fixed as the record date for the determination of the holders of the common stock entitled to notice of and to vote at such special meeting, and

FURTHER RESOLVED, that in the event said plan shall be approved and adopted at the special meeting of the shareholders of this corporation in accordance with the statutory requirements of the State of Colorado, and shall also be approved and adopted by the shareholders of The Nobles Company in accordance with the statutory requirements of the State of Colorado, then the Secretary of this corporation is hereby authorized to certify upon said plan that it has been adopted, and the President and Secretary of this corporation are hereby authorized to execute articles of merger in the name and on behalf of this corporation and under its seal and to cause the same to be filed in the Office of the Secretary of State of the State of Colorado.

The Model Business Corporation Act requires shareholder approval by the shareholders of both corporations. Some states limit the approval of an exchange to only the shareholders of the corporation whose shares are being exchanged.

With respect to mergers, there are two important exceptions to the requirement of shareholder vote. The first exception is that under the revised Model Business Corporation Act, a shareholder vote of the surviving corporation on a merger is not required if

1. the corporation will survive the merger;
2. the corporation's articles will not be changed in the transaction;
3. each shareholder of the surviving corporation will have the same number of shares with the same rights after the merger;
4. the issuance of shares in the merger will not cause an increase in the outstanding shares above 20% of the voting power of the shares.<sup>14</sup>

This transaction is called a **small-impact merger**; the shareholders of the surviving corporation are not required to vote on the plan because it has such a small impact on their ownership rights. Following the merger, the shareholders of the surviving corporation have essentially the same rights and shares, subject to a dissolution of up to 20%, but they are otherwise unaffected by the transaction.

The second exception is contained in section 11.05 of the Model Business Corporation Act. If a parent corporation owns at least 90% of the voting power of a subsidiary corporation, the parent may merge the subsidiary into itself without shareholder approval of either corporation. This is called a **short-form merger**. Since the parent corporation already owns at least 90% of the voting power of the subsidiary, the two respective business organizations are practically merged anyway. In addition, a shareholder vote at the subsidiary corporation level would be useless, since the parent already owns 90% of the voting power, and everyone knows how the parent corporation would vote.

Shareholder approval of a plan of merger, consolidation, or exchange is very similar to that required for amendment of the articles of incorporation and other structural changes. The plan may be considered at either a special or an annual meeting of shareholders. The Model Business Corporation Act requires notice to be given to every shareholder, whether or not entitled

to vote, and the notice must always state that the plan of merger, consolidation, or exchange is to be considered at the meeting.<sup>15</sup> Most states require that notice be sent to every shareholder and that it contain a statement of the purpose of the meeting. Further, the notice may have to inform shareholders of their dissenting rights.

Because these transactions affect all corporate shares, many jurisdictions permit all shares to vote on the plan, whether or not they have the right to vote on other corporate matters. The Model Business Corporation Act originally demanded these expanded voting rights but later was amended to include only regular voting shares on the theory that shareholders with non-voting stock had waived the right to vote unless the shares of their particular class would be directly affected by the plan. Presently, section 11.04 of the act requires the affirmative vote of the holders of the majority of voting stock and the affirmative vote of the holders of shares of each class entitled to vote, based upon the same tests for class voting as those applied to amendments to the articles of incorporation.<sup>16</sup> Many states require the affirmative vote of the holders of two-thirds of the voting shares.

Shareholders are almost uniformly granted the right to dissent to these transactions and to demand payment for their shares.<sup>17</sup>

### Articles of Merger, Consolidation, or Exchange

Following the shareholder approval, articles of merger, consolidation, or share exchange are prepared and filed with the appropriate state official (see Exhibit 15–3, Articles of Merger). Many state statutes have no provision for separate articles and instead require that the plan of merger or exchange, duly certified as having been approved, be filed. Publication also may be required, paralleling the formalities for the original articles of incorporation.<sup>18</sup>

Section 11.06 of the Model Business Corporation Act establishes the contents of the articles of merger or share exchange, including

1. the names of the parties to the merger;
2. the amendments, if any, to the articles of incorporation of the surviving corporation;
3. a statement whether or not shareholder approval was required, and, if so, that the merger was duly approved by the shareholders and by each voting group whose approval was required;
4. for foreign corporations that are parties to the merger, a statement that the participation of the foreign corporation in the transaction was authorized by the law of the state of its formation.

As with other filings, the articles of merger or share exchange will be effective when they are accepted for filing by the secretary of state or other appropriate filing officer.<sup>19</sup> In addition, most states and the Model Business Corporation Act provide that the effectiveness of the transaction may be delayed until a date fixed in the plan, not longer than 90 days after filing.<sup>20</sup>

The delayed effectiveness alternative is particularly desirable where filings are required in several states and simultaneous filing is impracticable. The effective date may be set at a specified time, and all the filings may be completed before that date. For example, if a corporation in New York is acquiring two corporations, one in Florida and one in California, the merger will require filings in all three states. The companies may want the merger to be effective as of 12:01 A.M. January 1 (so the three companies will be fully combined at the beginning of the year). It will not be possible to be physically in New York, Florida, and California at that time and date to make the required filings. The delayed effective date permits the filing of all necessary documents with the appropriate state filing offices in December. If the documents state that the merger will be effective at the agreed time, it will be effective as stated.

### Statutory Effect

When the merger or consolidation becomes effective, all constituent corporate parties to the plan become a single corporation (the designated survivor in a merger or the new corporation

**Exhibit 15-3.**

Articles of Merger  
(Massachusetts)

	FEDERAL IDENTIFICATION NO. _____ FEDERAL IDENTIFICATION NO. _____
Examiner _____	<p><b>The Commonwealth of Massachusetts</b>                  William Francis Galvin                  Secretary of the Commonwealth                  One Ashburton Place, Boston, Massachusetts 02108-1512</p> <p><b>ARTICLES OF *CONSOLIDATION / *MERGER</b>                  (General Laws, Chapter 156B, Section 78)</p> <p>*Consolidation / *merger of _____                  _____                  _____                  _____                  _____,</p> <p style="text-align: right;">the constituent corporations, into _____,</p> <p style="text-align: center;">*a new corporation / *one of the constituent corporations.</p> <p>The undersigned officers of each of the constituent corporations certify under the penalties of perjury as follows:</p> <p>1. An agreement of *consolidation / *merger has been duly adopted in compliance with the requirements of General Laws, Chapter 156B, Section 78, and will be kept as provided by Subsection (d) thereof. The *resulting / *surviving corporation will furnish a copy of said agreement to any of its stockholders, or to any person who was a stockholder of any constituent corporation, upon written request and without charge.</p> <p>2. The effective date of the *consolidation / *merger determined pursuant to the agreement of *consolidation / *merger shall be the date approved and filed by the Secretary of the Commonwealth. If a <i>later</i> effective date is desired, specify such date which shall not be more than <i>thirty days</i> after the date of filing:</p> <p>3. (For a merger)                  **The following amendments to the Articles of Organization of the <i>surviving</i> corporation have been effected pursuant to the agreement of merger:</p>
C <input type="checkbox"/> P <input type="checkbox"/> M <input type="checkbox"/> R.A. <input type="checkbox"/>	<p><small>*Delete the inapplicable word.      **If there are no provisions state "None".                  Note: If the space provided under any article or item on this form is insufficient, additions shall be set forth on separate 8 1/2 x 11 sheets of paper with a left margin of at least 1 inch. Additions to more than one article may be made on a single sheet as long as each article requiring each addition is clearly indicated.</small></p>
P.C. _____	<small>156b78n 4/400</small>

in a consolidation), and the other corporations cease to exist. The surviving or new corporation has all the rights and privileges, is vested with all the assets, and is responsible for all liabilities and obligations of the constituent corporations. The articles of incorporation of the surviving corporation are deemed amended to the extent provided in the merger plan, filed as a part of the articles of merger. Thus, if the plan requires modifications to the structure of the surviving corporation, there is no need to comply separately with the statutory procedure for amendments to the articles of incorporation.<sup>21</sup> In the case of consolidation, the articles of consolidation are deemed to be the articles of incorporation of the new consolidated corporation.

**Exhibit 15–3.**

*(continued)*

**(For a consolidation)**

(a) The purpose of the *resulting* corporation is to engage in the following business activities:

(b) State the total number of shares and the par value, if any, of each class of stock which the *resulting* corporation is authorized to issue:

WITHOUT PAR VALUE		WITH PAR VALUE		
TYPE	NUMBER OF SHARES	TYPE	NUMBER OF SHARES	PAR VALUE
Common:		Common:		
Preferred:		Preferred:		

\*\* (c) If more than one class of stock is authorized, state a distinguishing designation for each class and provide a description of the preferences, voting powers, qualifications, and special or relative rights or privileges of each class and of each series then established.

\*\* (d) The restrictions, if any, on the transfer of stock contained in the agreement of consolidation are:

\*\* (e) Other lawful provisions, if any, for the conduct and regulation of the business and affairs of the corporation, for its voluntary dissolution, or for limiting, defining, or regulating the powers of the corporation, or of its directors or stockholders, or of any class of stockholders:

*\*\*If there are no provisions state "None".*

*(continued)*

**Hostile Takeovers**

Not all business combination transactions are friendly. While many mergers and share exchanges result from negotiations among corporations that desire to combine their businesses, in some cases a corporation or individual will attempt to take over the operations of another corporation by using these statutory combinations against the will of the other corporation and its shareholders.

**Exhibit 15–3.***(continued)*

4. The information contained in Item 4 is *not a permanent* part of the Articles of Organization of the \*resulting / \*surviving corporation.

(a) The street address of the \*resulting / \*surviving corporation in Massachusetts is: *(post office boxes are not acceptable)*

(b) The name, residential address, and post office address of each director and officer of the \*resulting / \*surviving corporation is:

	NAME	RESIDENTIAL ADDRESS	POST OFFICE ADDRESS
President:			
Treasurer:			
Clerk:			
Directors:			

(c) The fiscal year (i.e. tax year) of the \*resulting / \*surviving corporation shall end on the last day of the month of:

(d) The name and business address of the resident agent, if any, of the \*resulting / \*surviving corporation is:

The undersigned officers of the several constituent corporations listed above further state under the penalties of perjury as to their respective corporations that the agreement of \*consolidation / \*merger has been duly executed on behalf of such corporation and duly approved by the stockholders of such corporation in the manner required by General Laws, Chapter 156B, Section 78.

\_\_\_\_\_, \*President / \*Vice President,

\_\_\_\_\_, \*Clerk / \*Assistant Clerk,

of \_\_\_\_\_  
*(Name of constituent corporation)*

\_\_\_\_\_, \*President / \*Vice President,

\_\_\_\_\_, \*Clerk / \*Assistant Clerk,

of \_\_\_\_\_  
*(Name of constituent corporation)*

*\*Delete the inapplicable words.*

One corporation may perceive a profitable area for business expansion, but rather than develop its own operations for this purpose, it may attempt to take over another corporation that is already successfully engaged in that type of business. Another corporation's business may be deteriorating because management has lost interest or has been protecting its own expensive, personal objectives (such as high salaries or generous benefit plans). The performance of this corporation may be mediocre. Other companies or individuals may believe that if this corporation's management is replaced, the corporation would be substantially more profitable. These outsiders may see an opportunity to acquire control of the corporation, eliminate its existing management, and replace its management with more effective persons who will make the business profitable. In this situation, the prospect of a business combination becomes an adversary transaction. Existing management circles its wagons to protect its position and resist the potential takeover, while the acquiring parties aggressively attempt to secure control of



**Exhibit 15–3.***(continued)*

THE COMMONWEALTH OF MASSACHUSETTS

**ARTICLES OF \*CONSOLIDATION / \*MERGER**  
(General Laws, Chapter 156B, Section 78)

\_\_\_\_\_

I hereby approve the within Articles of \*Consolidation / \*Merger and, the filing fee in the amount of \$ \_\_\_\_\_, having been paid, said articles are deemed to have been filed with me this \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_\_.

Effective date: \_\_\_\_\_

**WILLIAM FRANCIS GALVIN**  
*Secretary of the Commonwealth*

**TO BE FILLED IN BY CORPORATION**  
Contact information:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Telephone: \_\_\_\_\_

Email: \_\_\_\_\_

A copy this filing will be available on-line at [www.state.ma.us/sec/cor](http://www.state.ma.us/sec/cor) once the document is filed.

the corporation to modify its business structure and objectives. Note that this situation may create a conflict of interest for the management of the target corporation, since they have fiduciary duties to the shareholders of the corporation who should want the corporation to be more profitable, but members of management also want to save their jobs and preserve their benefits. The extent to which management resists a takeover attempt must be carefully reviewed by counsel to ensure that the fiduciary duties to shareholders are not abandoned in favor of management's self-interest.

The aggressors will attempt to use statutory procedures to acquire the business operations for their own gain. With public corporations, stock is readily available for purchase in the market. Consequently, a purchaser can buy enough shares of a publicly held corporation in the market to control the shareholder vote on a merger or similar transaction. Even in a closely held corporation, an outsider can acquire a substantial block of stock that will allow

that outsider to control corporate activities. It is for this reason that close corporations usually have shareholder agreements in place that prevent the sale of stock to outsiders without a first offering of the shares to other shareholders or to the company.

Not all acquisitions are for the altruistic business reason of improving the company. Many investors search for stock in companies that may be underpriced either because the market has responded negatively to publicity concerning the company or because the business of the company is in trouble and the market is reflecting uncertainty about the future of the company. These investors may purchase substantial blocks of stock to acquire control, and then use the stock as a basis upon which to make a personal profit. An investor may sell control back to the company when the directors seek to protect their own positions without having to deal with new shareholders who may threaten their future. The term **greenmail** describes situations in which investors profit from their newly acquired control by selling it back to the corporation or to other interested shareholders at a premium.

Several corporate procedures and statutory rules have been developed to avoid abuses that are likely to occur in a hostile takeover.

**Corporate Structure Defenses** When management of a corporation perceives that the corporation is vulnerable to a hostile takeover, certain structural changes can be made to the corporation to discourage the possibility of a takeover. The structure of the corporation can be changed only with the approval of the shareholders, but management frequently can convince the shareholders that the company's vulnerability may result in a substantial loss of the value of its shares if an outsider acquires control of the company through discount purchases of the company stock in a depressed market.

Management usually proposes that the stock structure be altered to provide for special rights to existing stockholders in case of a potential takeover. These special rights are frequently called "**poison pills**," because existing stockholders can exercise them in the event of a takeover to make the takeover ineffective. A new class of shares is created that has rights that are superior to those of all other shares in the corporation. The corporation declares a dividend and distributes either the newly created shares or rights to purchase the newly created shares to its existing shareholders. These shares provide that in the event of a proposed merger or share exchange, the existing shareholders will have greater rights than any shareholder who has purchased without having the newly created rights or shares. These plans come in various forms, but the general approach of each is to permit the existing shareholders to dilute an interest or acquire a substantially greater interest in the corporation as soon as a triggering event, such as a merger, consolidation, or share exchange, is proposed. Management of the corporation is given the right to redeem these special shares (and thereby neutralize the poison) in the event of a friendly takeover.

Management may be able to devise its own defense to a hostile takeover without involving its shareholders. All the officers of a public company recently announced a **people pill**, or "*suicide pact*," where these officers agreed that if *any* of them were demoted or fired after a change of control of their company, they would *all* resign. Any purchaser would have to choose between retaining all the existing management without change or losing the entire executive staff at once. Again, such an agreement may not be consistent with the fiduciary duties of these officers, and the conflict of interest inherent in such an agreement would undoubtedly require that it be prepared and reviewed by lawyers other than the corporate counsel.

**Statutory Rules** Many states have adopted statutes designed to discourage hostile takeovers of their local corporations. These statutes recognize that a hostile takeover usually starts by a market acquisition of controlling shares. Once the **control shares** have been acquired by an investor, the investor usually can cause corporate action to be taken to merge, consolidate, or exchange shares with another company. Investors who purchase shares with this objective are called "**sharks**," and many of the statutory provisions and corporate structures that can be developed to prevent these takeovers are called "**shark repellent**." The effect of these statutory provisions is to place any persons who acquire control shares at a

disadvantage as long as they do not have the consensus of the other shareholders on their plans for the business.

One example of such statutory provisions is the procedures for control share acquisitions found in several states, such as Florida and Indiana. Control shares are defined to mean the shares that would have voting power sufficient to entitle the owner to control the affairs of the corporation. They usually are described in terms of thresholds of percentage of voting power. For example, in Florida, the restrictions on control shares are triggered whenever a shareholder acquires 20% of all voting power in a corporation. A second trigger occurs at the acquisition of 30%, and a third occurs when 50% of the voting power is acquired. In a publicly held corporation, only 20% of the entire voting power of the corporation may substantially control the outcome of a vote on a merger or consolidation, but 50% certainly will control the vote.

Whenever a person acquires sufficient control shares, the acquiring shareholder will not be entitled to vote the shares unless the other shareholders affirmatively decide to permit the shareholder to exercise voting power. Voting power is lost and must be affirmatively restored at each triggering event. In other words, the effect of the statute is to take away all votes of the shares acquired until the acquiring shareholder has been able to convince the other shareholders (and probably management) that his or her motives with respect to the control of the corporation are not adverse to the interests of the corporation and the other shareholders. The statute also allows the corporation's articles of incorporation or bylaws to provide that control shares acquired can be redeemed by the corporation at the fair value of the shares, permitting the corporation to buy out a hostile investor, rather than permit the investor to vote the shares in a manner that will cause harm to other shareholders.

Another approach to statutory protection involves statutory rules relating to mergers and share exchanges with **affiliated corporations**. In a hostile takeover context, one corporation may acquire a substantial number of shares in another corporation. Once the corporation has acquired those shares, it may then elect to vote to merge the acquired corporation into its own operations. Such an action may be against the business policies or best interests of the management and shareholders of the acquired corporation. Several state statutes provide that once a corporation acquires a certain percentage of the shares in another corporation, the corporations become affiliated. Then, the shareholder vote required to accomplish a business combination among the affiliated corporations is automatically increased from a majority to a two-thirds vote for that purpose. This requirement gives the existing shareholders statutory protection, since a potential shark will have to acquire a substantially larger number of shares to accomplish a business combination transaction if the other shareholders are not persuaded that the combination is in their best interests.

The Model Business Corporation Act offers a form of statutory protection to existing shareholders when the corporation is undertaking a transaction that will result in the voting power of shares to be issued to comprise more than 20% of the voting power outstanding immediately before the transaction. In such a case, section 6.21(f) requires shareholder approval of such a transaction by a majority vote. Thus, if a potential acquirer with enough votes to influence the board of directors convinced the board to issue a block of shares that increased the voting power by 20% or more, the shareholders would have to vote on the transaction. The act anticipates the potential manipulation of such transactions to avoid a shareholder vote by providing that a series of transactions will be integrated (and considered as one transaction) if one transaction is contingent on the consummation of other similar transactions. If an acquirer entered into an agreement to purchase 16%, then 16% more, and 19.999% more shares, with all transactions contingent on the others (as they should be if the acquirer wants to obtain control of the voting power), shareholder approval would be required for the entire transaction.

## **SALE, MORTGAGE, OR OTHER DISPOSITION OF ASSETS**

If the corporation disposes of substantially all of its assets, a **corporate shell** results; while the basic corporate structure remains the same, the corporation becomes an organization without

normal business assets. The sale, mortgage, lease, exchange, or other disposition of substantially all corporate assets is considered by most states to be a structural change in the corporation that requires shareholder approval.

This type of transaction may be, in tax language, part of a type C reorganization, where an acquiring corporation exchanges its voting stock for substantially all of the assets of the acquired corporation, or a type D reorganization, where substantially all of the assets are transferred to a corporation controlled by the transferring corporation or its shareholders.<sup>22</sup> These transactions are not statutory mergers or exchanges, since all corporations survive the transaction; however, instead of owning business assets, the transferring corporation will own voting stock of the acquiring corporation. The management of the corporation also may sell the entire corporate business to a purchaser for cash and subsequently dissolve the corporation, distributing the cash to its shareholders.

Statutes regulating these dispositions of assets are designed to secure shareholder approval if substantially all of the assets of the corporation are to be alienated from the business. To illustrate the equities of these statutes, suppose that the Nobles Company is engaged in the business of manufacturing and selling sporting goods. Its assets include all the machinery used for manufacture; the manufacturing plant; its inventory of skis, bicycles, and other sporting goods; accounts receivable; goodwill; and so forth. If substantially all of these assets are sold to another company for cash or stock, the Nobles Company shareholders will have an entirely different investment. Instead of owning an investment in a growing, successful sporting goods company, they may own a corporation holding cash, which will probably be distributed to them in exchange for their shares. Alternatively, their corporation may receive stock of the purchasing corporation, and while the business may be continued by the purchaser, it will operate under different management, which probably has different policies and interests. The character of the investment is thus changed. The law recognizes the fairness of consulting shareholders for their approval of such transactions.

The Model Business Corporation Act makes several distinctions regarding these transactions in sections 12.01 and 12.02:

1. The mortgage or pledge of corporate property never requires shareholder approval. If the corporation borrows money from its bank and secures the loan with all of the corporate assets, the shareholders do not need to be consulted.
2. The sale, exchange, lease, or other disposition of substantially all of the property and assets in the usual and regular course of business (such as a company with a cyclical business that disposes of substantially all of its inventory to its customers in the summer) does not require shareholder approval.
3. No shareholder approval is required for a corporation to transfer all of its assets to another corporation when the transferring corporation already owns all of the other corporation's shares (such as when a parent corporation transfers all of its assets to a wholly owned subsidiary).
4. Shareholder approval is required if substantially all of the corporate assets are sold, leased, exchanged, or disposed of in a transaction *not* within the ordinary course of business if the disposition would leave the corporation without a significant continuing business activity.

Most states permit the mortgage or pledge of corporate property without shareholder approval. In these transactions, the corporation continues to use the property, but has granted an interest in the property as collateral to secure a loan or other obligation. Business should continue as usual, and the property will be lost only if the corporation defaults on the obligation. The character of the shareholder's investment will not be affected if all goes as planned—that is, the corporate business will generate enough income to pay the obligation, the mortgage or pledge will be removed, and the corporate assets will remain intact. Consequently, there is no pressing need for shareholder protection here.

Several jurisdictions provide, as does the Model Business Corporation Act, that a sale or other disposition of substantially all of the corporate assets, if within the usual and regular course of corporate business, may be accomplished by action of the board of directors with-

out shareholder approval. The theory behind this rule is that if the transaction is within the ordinary course of corporate business, the board of directors is already authorized to proceed with it, and shareholder approval is never required for normal business transactions. On the other hand, other state statutes do not attempt to distinguish between transactions in or out of the ordinary course of business, perhaps because the distinction is difficult to apply. However, where the distinction exists, the normalcy of the transaction may be determined by the statement of purposes in the articles of incorporation. Suppose a corporation is organized for the purpose of purchasing and selling a single parcel of real estate, anticipating a profit from the sale. When the property is sold, the transaction is within the ordinary course of business, since that is exactly what the corporation was organized to do. Most cases are not that clear, however. If the articles of incorporation of the Nobles Company stated that one purpose of the corporation is to “sell, lease, transfer, exchange, or otherwise deal in the assets of the corporation,” the broad enabling authority may make a transfer of substantially all assets a normal corporate event, but that certainly would be subject to interpretation. From the standpoint of better corporate practice, any questionable transaction should be approved by the shareholders.

The transfer of all of the assets of a parent corporation to its subsidiary need not involve shareholder approval. The shareholders own the shares of the parent, which already owns all of the shares of the subsidiary. When the parent’s assets are distributed to the subsidiary, the same shareholders still own the assets through their ownership of the parent.

## Procedure

The sale or other disposition of assets is characterized as a structural change when the transaction is not within the usual and regular course of the corporation’s business, and the disposition would leave the corporation without a significant continuing business activity. The Model Business Corporation Act provides some guidance about what would constitute a “significant continuing business activity” by providing that a corporation is conclusively deemed to have it if it retains a business that uses at least 25% of the total assets used at the end of the most recent fiscal year, and is producing income or revenues of at least 25% of the prior fiscal year.

### Resolution for Sale of Assets Outside the Ordinary Course of Business

#### EXAMPLE

RESOLVED, that this Board hereby declares that the consideration in the form of capital stock of The Nobles Company to be received in exchange for the hereinabove described properties and interests, is a full, fair, and adequate consideration; that this Board hereby ratifies, confirms, and approves all of the acts of its officers in making said agreement with The Nobles Company; and that this Board hereby recommends to the stockholders of this Company that said agreement be approved by said stockholders; and

FURTHER RESOLVED, that the question of approval of said agreement with The Nobles Company be submitted to the stockholders of this Company in a special meeting called for that purpose; and to that end it is

FURTHER RESOLVED, that a special meeting of the stockholders of this Company be called to be held at the principal office of this Company in the City of Des Moines, State of Iowa, at 10:00 A.M. on the 10th day of October, 2005; that the secretary of this Company be and hereby is authorized and directed to give all the stockholders of this Company proper, timely, and adequate notice of the time, place, and purpose of said meeting; and that books for the transfer of stock will close at the conclusion of business on September 15, 2005, and will reopen on the day following the adjournment of said meeting.

If a structural change is involved in the disposition of assets transaction, the procedure for approval of the transaction parallels the approval of a merger or share exchange. The board of directors adopts a resolution recommending the transaction and directing the submission of its terms to the shareholders for their approval.

The shareholders may consider the transaction at either an annual or special meeting.<sup>23</sup> Every shareholder, whether or not otherwise entitled to vote, must receive such notice. The period of notice may be different in the various states, and most states require a statement of the

shareholders' rights if they have the right to dissent to the transaction.<sup>24</sup> The Model Business Corporation Act requires an affirmative vote of the majority of the voting shares to approve the transaction, and authorizes class voting if the transaction affects the rights of the particular class.

## DOMESTICATION AND CONVERSION

Whenever a corporation has been formed in one state and prefers to be governed by the laws of another state, it is possible to change the state of **domestication**. Of course, any corporation formed in any state may qualify to do business in other states and be entitled to the benefits of the laws of the foreign jurisdiction for the business conducted there.<sup>25</sup> Although qualifying to do business as a foreign corporation authorizes a corporation to enter into transactions and have a presence in the foreign state, it remains subject to any limitations on its operations as a result of being domesticated in its state of formation. There may be good reasons for a corporation to be domesticated in a state other than where it was formed. For example, suppose a corporation were formed in State X but does most of its business in State Y. The corporation may be subject to taxation by State Y on sales of its products in State Y and may also be subject to tax on its income in State X, because it is domesticated there. If the corporation domesticated itself as a corporation in State Y, its income would not be subject to taxation in State X. Another common occurrence involves state laws that favor local contractors. Many states' laws provide that local corporations are to be given a priority for state projects or are entitled to special financial incentives because they are local corporations. Thus, a corporation formed in State A seeking to do a highway project in State B will not receive the local preference to which contractors in State B are entitled. The corporation could domesticate itself in State B and become a local corporation for that project. Finally, many corporations that have been formed in various states will review the possibility of domesticating in Delaware or another permissive corporate state before offering shares to the public, so that the entity will have the benefit of the permissive statutory provisions favoring management and the ample precedents in the cases interpreting the corporate statutes to regulate the internal affairs of the corporation.

Historically, corporations could domesticate in a new jurisdiction by using a merger procedure. A new domestic corporation was formed in the new state and the existing corporation was merged into it. Merger of a foreign corporation with a domestic corporation is authorized in the laws of every state.<sup>26</sup> Modern corporation statutes are now permitting domestication by a more direct method, authorizing a procedure whereby the corporation can simply domesticate itself in a new jurisdiction.

The Model Business Corporation Act permits a foreign corporation to become a domestic corporation if the process is permitted by the laws of the state of formation. Thus, a corporation in State X will be allowed to domesticate itself in State Y only if the laws of State X authorize this procedure. The domestication procedure in the Model Business Corporation Act is very similar to other fundamental changes in the corporate structure.<sup>27</sup> A plan of domestication is adopted by the board of directors and is submitted to the shareholders for their approval. The plan must include

1. the new jurisdiction in which the corporation is to be domesticated;
2. any amendments to articles of incorporation that are necessary or desired;
3. the manner and basis of reclassifying shares of the corporation based upon the laws of the new state of domestication;
4. any other terms and conditions of the domestication.

The plan must be approved by the shareholders by a majority vote, and, like the cases of a merger or share exchange, if there are provisions of the domestication that will affect the rights of a particular class of shares, such a class must be allowed to approve the plan as a separate voting group.



**Exhibit 15-4.**

Articles of Domestication  
(Maine)

**FOREIGN  
BUSINESS CORPORATION**

**STATE OF MAINE**

**ARTICLES OF DOMESTICATION**

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(Name of Corporation in Jurisdiction of Incorporation)

**Filing Fee \$125.00**

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Deputy Secretary of State

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**A True Copy When Attested By Signature**

---

Deputy Secretary of State

Pursuant to 13-C MRSA §923, the undersigned corporation executes and delivers the following Articles of Domestication:

**FIRST:** If the true corporate name is not available or the corporation desires to change its name in connection with the domestication, the name it proposes to use in the State of Maine:

\_\_\_\_\_

The corporation was originally incorporated in \_\_\_\_\_ (state or country) and the original date of incorporation was \_\_\_\_\_.

**SECOND:** The domestication of the corporation in this State was duly authorized as required by the laws of the jurisdiction in which the corporation was incorporated.

**THIRD:** All the statements required to be set forth in Articles of Incorporation (Form MBCA-6-1) are attached as Exhibit \_\_\_\_\_.

**FOURTH:** The effective date of the articles of domestication (if other than the date of filing of the articles of domestication):

\_\_\_\_\_.

**DATED** \_\_\_\_\_ **\*By** \_\_\_\_\_

(signature of an officer or other duly authorized representative)

(type or print name and capacity)

---

\*This document **MUST** be signed by an officer or other duly authorized representative. (§923.1)

Please remit your payment made payable to the Maine Secretary of State.

**SUBMIT COMPLETED FORMS TO: CORPORATE EXAMINING SECTION, SECRETARY OF STATE,  
101 STATE HOUSE STATION, AUGUSTA, ME 04333-0101  
TEL., (207) 624-7740**

FORM NO. MBCA-19 7-1-2003

Upon approval of the plan, articles of domestication are prepared and are delivered to the Secretary of State or other public filing officer in the new domestic state. These articles of domestication include

1. the name of the corporation (which must satisfy the requirements of the corporate name statute in the new state);
2. the jurisdiction of incorporation before filing the articles and the date of initial incorporation;
3. a statement that domestication of the corporation was duly authorized under the laws of the initial state of formation. (See Exhibit 15-4, Articles of Domestication).

At the same time, the corporation is required to file articles of charter surrender in the state of its formation. The articles of charter surrender state that the corporation is now being domesticated in a foreign jurisdiction and that the shareholders have appropriately approved the procedure. (See Exhibit 15-5, Articles of Charter Surrender)

Upon completion of the process, the corporation becomes a domesticated corporation in the new state. Title to its property and its rights and obligations are unaffected, and, except



**Exhibit 15–5.**

Articles of Charter  
Surrender for  
Domestication (Maine)

**DOMESTIC  
BUSINESS CORPORATION**

**STATE OF MAINE**

**ARTICLES OF CHARTER SURRENDER  
(Upon Domestication)**

\_\_\_\_\_

(Name of Corporation)

**Filing Fee \$70.00**

\_\_\_\_\_

Deputy Secretary of State

---

**A True Copy When Attested By Signature**

\_\_\_\_\_

Deputy Secretary of State

Pursuant to 13-C MRSA §§924 and 925, the undersigned corporation executes and delivers the following Articles of Charter Surrender:

**FIRST:** The articles of charter surrender are being filed in connection with the domestication of the corporation in a foreign jurisdiction and the effective date of the domestication is (date) \_\_\_\_\_.

**SECOND:** The domestication was duly approved by the shareholders and, if voting by any separate voting group was required, by each such separate voting group, in the manner required by this Act and the corporation's articles of incorporation.

**THIRD:** The corporation's new jurisdiction of incorporation is \_\_\_\_\_.

**FOURTH:** The corporation shall appoint the Secretary of State as its agent for service of process in a proceeding to enforce the rights of shareholders who exercise appraisal rights in connection with the domestication and that the foreign business corporation shall provide a mailing address to which the Secretary of State may mail a copy of any process served on the Secretary of State.

\_\_\_\_\_

(mailing address)

**FIFTH:** The corporation agrees that it will promptly pay the amount, if any, to which the shareholders are entitled under chapter 13.

**DATED** \_\_\_\_\_ **\*By** \_\_\_\_\_

(signature of an officer or other duly authorized representative)

\_\_\_\_\_

(type or print name and capacity)

---

\*This document **MUST** be signed by an officer or other duly authorized representative. (§924.1)

Please remit your payment made payable to the Maine Secretary of State.

**SUBMIT COMPLETED FORMS TO: CORPORATE EXAMINING SECTION, SECRETARY OF STATE,  
101 STATE HOUSE STATION, AUGUSTA, ME 04333-0101  
TEL. (207) 624-7740**

FORM NO. MBCA-19A 7-1-2003

for any amendments it has chosen to adopt or that were required by the new state's laws, nothing will have changed but the jurisdiction in which it is now considered a domestic corporation. The corporation is the same corporation as it was originally, and it has not been necessary to maneuver domestication through a merger or share exchange transaction for whatever other consequences such a transaction might have. The new laws permit the entire procedure to be accomplished within the existing corporation, and, to the extent not changed in the domestication process by specific amendments and express provisions adopted by the shareholders, preserve the status quo within the corporation. It just has a new home state.

A **conversion** is a procedure that allows a corporation to become a different type of entity, such as a limited liability company or partnership. Modern corporate laws have begun to recognize that the corporate form is rigid and inflexible compared with the features of a limited liability company or a limited liability partnership. In these entity structures, a variety of rights and obligations may be created in the operating or partnership agreements to tailor the operation of the company to suit the needs of the managers, members, partners,

and other investors. The corporation, on the other hand, still requires considerable separation in the responsibilities and rights of the owners (the shareholders), the policy makers (the directors), and other management (the officers). The corporation also requires that distributions of profits and assets must occur in the proportion of stock ownership and the only techniques that permit variety and diversion from the standard proportionate ownership will be express agreements with shareholders and investors that permit payments to them for other reasons, such as employment with the corporation or payments under separately agreed loans and leases. Consequently, many managers of corporations have considered whether the limited liability company or partnership structure may be better suited to the current operations of the business.

Historically, the conversion of a corporation into another form of entity was accomplished through other fundamental change procedures, such as the sale of substantially all of the assets to a new entity. If a corporation desired to become a limited liability company, it could sell all of its assets to a newly formed limited liability company or partnership in exchange for all of the ownership interests of the company. The corporation could then distribute the ownership interests of the new entity to its shareholders in exchange for their shares in the corporation. At the end of this transaction, the shareholders were members or partners of a new entity that owned the assets formerly owned by the corporation. A variation on such a transaction would involve the corporation distributing all of its assets to its shareholders, who then contribute the assets to a limited liability company or partnership in exchange for the ownership interests of the new entity. There were problems with all of these procedures, depending on the flexibility of the local state's laws. When the corporation sold all of its assets to a new entity and tried to distribute the ownership interests received in exchange for the assets, the taxing authorities considered that to be a distribution of all of the assets to the shareholders and a taxable event at that time, even though the assets were simply going into another company. In addition, if the corporation distributed all of its assets to shareholders so they could contribute them to a new entity, the tax problems were compounded by the fact that most states permit such a distribution only if creditor claims have been satisfied or provided for. The assumption by the new entity of all corporate obligations may not have been enough to satisfy creditor's rights under the local corporate statute. Moreover, limited liability companies and partnerships function under agreements with all members and partners. Somewhere in this process, the shareholders of the corporation that was converting to the new entity had to agree to the terms of the operating or partnership agreement that was to govern it.

Modern statutes are now authorizing conversion by a corporation (and other entities) into different entities. The conversions authorized in the Model Business Corporation Act now include

1. a conversion of a domestic business corporation to become a domestic nonprofit corporation;<sup>28</sup>
2. a conversion of a foreign nonprofit corporation to a domestic business corporation;<sup>29</sup>
3. a conversion by entities generally, such as a domestic or foreign business corporation to a domestic or foreign unincorporated entity or a domestic or foreign unincorporated entity into a domestic or foreign corporation.<sup>30</sup>

The procedures for these various conversions are similar to each other and to the normal procedure for fundamental corporation changes. The conversions must be permitted by the laws of the various states governing the entities that are being converted. If the statute under which the entity was formed does not permit a conversion, the Model Business Corporation Act treats the owners and managers of the entity as if they were shareholders and directors, respectively, of a corporation, so that they can follow a procedure that converts the unincorporated association into a corporate form. Similarly, the act gives shareholders and directors a method to convert the business corporation to a non-profit corporation or an unincorporated entity.

The entity must adopt a plan of conversion that includes

1. the type of entity that the surviving entity will be;
2. the terms and conditions of conversion;

**Exhibit 15–6.**Articles of Entity  
Conversion (Maine)

<p><b>DOMESTIC BUSINESS CORPORATION</b></p> <p><b>STATE OF MAINE</b></p> <p><b>ARTICLES OF ENTITY CONVERSION</b></p> <p>_____</p> <p style="text-align: center; font-size: small;">(Name of Corporation Prior to Conversion)</p>	<p><b>Filing Fee \$125.00</b></p> <div style="border: 1px solid black; height: 150px; margin: 5px 0;"></div> <p style="text-align: center; font-size: small;">Deputy Secretary of State</p> <hr style="border: 0.5px solid black;"/> <p style="text-align: center; font-weight: bold; font-size: small;">A True Copy When Attested By Signature</p> <p style="text-align: center; font-size: small;">Deputy Secretary of State</p>
---	--

Pursuant to 13-C MRSA §955.1, the undersigned corporation executes and delivers the following Articles of Entity Conversion:

**FIRST:** The name of the corporation is changed as follows (the name must satisfy the organic law of the surviving entity):  
\_\_\_\_\_

**SECOND:** The type of unincorporated entity that the surviving entity will be: \_\_\_\_\_.

**THIRD:** The plan of entity conversion was duly approved by the shareholders in the manner required by this Act and the corporation's articles of incorporation.

**FOURTH:** If the surviving entity is a filing entity, attached is Exhibit \_\_\_\_\_ which contains all the provisions required to be set forth in its public organic document with any other desired provisions that are permitted.  
  
For a Domestic Limited Liability Company, attach form MLLC-6-1.  
For a Domestic Limited Partnership, attach form MLPA-6-1.

**FIFTH:** The effective date of the articles of entity conversion (if other than the date of filing of the articles of entity conversion) is \_\_\_\_\_.

**DATED** \_\_\_\_\_ **\*By** \_\_\_\_\_  
(signature of an officer or other duly authorized representative)  
\_\_\_\_\_  
(type or print name and capacity)

---

\*This document **MUST** be signed by an officer or other duly authorized representative. (§955.1)

Please remit your payment made payable to the Maine Secretary of State.

**SUBMIT COMPLETED FORMS TO: CORPORATE EXAMINING SECTION, SECRETARY OF STATE,  
101 STATE HOUSE STATION, AUGUSTA, ME 04333-0101**

FORM NO. MBCA-21 7-1-2003 TEL. (207) 624-7740

3. the manner and basis of converting shares to new ownership interests;
4. the full text of the organic documents of the surviving entity (such as the articles of organization and the operating agreement for a limited liability company or the partnership agreement and registration of a limited liability partnership).

The board of directors must adopt the plan and submit it to the shareholders, who must approve it by a majority vote. As in the case of other fundamental corporate changes, if the rights of any class of shares will be affected, that class must affirmatively approve the plan as a separate voting group.

Following approval by the intracorporate groups, articles of entity conversion are adopted and filed with the following information:

1. the name of the corporation before filing the conversion, and the name of the new entity;
2. the type of entity that the new entity will be;
3. a statement that the plan of entity conversion was approved by the shareholders as required;
4. all of the provisions that are required to be set forth in the new entity's filing requirements (such as the provisions that are required for articles of organization to form a limited liability company) (See Exhibit 15–6, Articles of Entity Conversion).

**Exhibit 15-7.**

Articles of Charter Surrender for Entity Conversion (Maine)

**DOMESTIC  
BUSINESS CORPORATION**

**STATE OF MAINE**

**ARTICLES OF CHARTER SURRENDER  
(Upon Entity Conversion)**

\_\_\_\_\_ (Name of Corporation Prior to Conversion)

**Filing Fee \$70.00**

\_\_\_\_\_  
Deputy Secretary of State

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**A True Copy When Attested By Signature**

\_\_\_\_\_  
Deputy Secretary of State

Pursuant to 13-C.MRSA §§956 and 957, the undersigned corporation executes and delivers the following Articles of Charter Surrender:

**FIRST:** The articles of charter surrender are being filed in connection with the conversion of the corporation to a foreign unincorporated entity and the effective date of the conversion is (date) \_\_\_\_\_.

**SECOND:** The conversion was duly approved by the shareholders in the manner required by this Act and the corporation's articles of incorporation.

**THIRD:** The jurisdiction under the laws of which the surviving entity is organized is \_\_\_\_\_.

**FOURTH:** If the surviving entity is a nonfiling entity, the address of its executive office immediately after the conversion.

\_\_\_\_\_

**FIFTH:** The surviving entity shall appoint the Secretary of State as its agent for service of process in a proceeding to enforce the rights of shareholders who exercise appraisal rights in connection with the conversion and shall provide a mailing address to which the Secretary of State may mail a copy of any process served on the Secretary of State.

\_\_\_\_\_ (mailing address)

**SIXTH:** The corporation agrees that it will promptly pay the amount, if any, to which the shareholders are entitled under **chapter 13**.

**DATED** \_\_\_\_\_ **\*By** \_\_\_\_\_ (signature of an officer or other duly authorized representative)

\_\_\_\_\_ (type or print name and capacity)

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\*This document **MUST** be signed by an officer or other duly authorized representative. (§956.1)

Please remit your payment made payable to the Maine Secretary of State.

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101 STATE HOUSE STATION, AUGUSTA, ME 04333-0101  
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FORM NO. MBCA-21B 7-1-2003

Similar provisions are contained in the Model Business Corporation Act to accomplish the reverse of this transaction: the conversion of an unincorporated entity into a domestic business corporation. Of course, the statutory authority for conversions of one entity to another must be scrupulously followed, and each local variation must be observed.

Upon the delivery of the articles of entity conversion to the appropriate filing officer, and, if necessary, the delivery of articles of charter surrender in any foreign jurisdictions in which the converting entity was formed, the conversion results in the title to property and all rights and obligations of the converted entity to be vested in the surviving entity, and the surviving entity is deemed to be the same company as the corporation from which it was converted without interruption (See Exhibit 15-7, Articles of Charter Surrender).

One of the primary purposes and advantages of the domestication and conversion provisions of the Model Business Corporation Act is that the entity remains the same for all legal

purposes (except for its home state or its business form), and, consequently, the company does not risk a violation of contractual provisions, licensing requirements, or other issues that might have been affected by a fundamental change transaction that involved a merger or share exchange.

## RIGHTS OF DISSENTING SHAREHOLDERS

Under the Model Business Corporation Act and several statutes, nearly half of the outstanding shares may be voted *against* a merger, share exchange, sale of assets domestication, or conversion and the transaction will still be approved. The majority rule controls the holders of the dissenting shares, who must live with the decision of the majority, despite the effect the transaction may have on their shares. The statutory solution to this problem is to grant the dissenting shareholders the right to have their shares appraised and purchased, with limited exceptions, if they do not want to continue as investors in the corporation. In some states, this right is called the “shareholder’s **right of appraisal**” or the “shareholder’s right to demand payment of the value of the stock.” Every state includes some rights of dissent and payment in its corporate statute.

### Circumstances Giving Rise to Appraisal Rights

The Model Business Corporation Act grants the right to dissent in cases of mergers, share exchanges, and sales or exchange of substantially all assets outside the ordinary course of business. In addition, **dissenters’ rights** will apply if the articles of incorporation are amended to materially affect the rights of a shareholder (such as by abolishing a preferential right, a preemptive right, a redemption right, or a voting right); and if the articles, bylaws, or resolutions of the board of directors so provide, dissenters’ rights may apply to any transaction designated therein.<sup>31</sup>

Dissenters’ rights will apply to a domestication transaction in which the shareholders receive shares in the corporation with terms that are not as favorable to the shareholders in all material respects, including voting rights, as before the transaction. Finally, the conversion of a corporation to another type of entity (such as non-profit corporation, limited liability company, or partnership) certainly results in a fundamental change of the owner’s rights and, consequently, appraisal rights are triggered by any conversion transaction.

The dissent and appraisal rights are limited by two important exceptions. They do not apply to shareholders of a surviving corporation whose votes were not necessary to approve the transaction. This rule covers a merger that will have a small impact upon the surviving corporation.<sup>32</sup> The Model Business Corporation Act formerly excluded holders of shares registered on a national securities exchange at the time the shareholders entitled to vote were identified, unless the articles of incorporation provided otherwise. Delaware and several other states have adopted such a rule, excepting holders of shares listed on a national exchange and holders of a class of shares that has 2,000 or more shareholders of record (or a market value of more than \$20 million). The assumption that forms the basis for these rules is that the shares are readily salable if they are registered on a national securities exchange (or if 2,000 other shareholders exist or the shares are so valuable), so the cumbersome appraisal procedure is not necessary to satisfy the dissenting shareholder. A shareholder should be able to sell shares at market if he or she decides to terminate an investment.

The Model Business Corporation Act includes another interesting provision allowing a shareholder to dissent as to less than all shares registered in the shareholder’s name, in which case the dissenter’s rights are to be determined as to the shares dissenting, and the remaining shares are treated as if they belonged to different shareholders. On its face, the provision seems to be directed to an indecisive shareholder who is uncertain about the transaction and who will dissent as to some shares to recoup some of an investment, but will keep other shares in case the structural change turns out to be successful. Theoretically, this could happen, but the rule was designed to permit brokers, trustees, and agents hold-



ing shares for their clients to split the shares into approving and disapproving groups, depending upon their clients' wishes.

Some states are more generous with dissenting shareholders' appraisal rights than is the Model Business Corporation Act. They extend the rights to certain other amendments to the articles of incorporation, such as changes in the corporate purposes, extension of corporate life, and changes in the capital stock structure.

## Procedure

Statutory procedures for perfecting the shareholder's right to payment after dissent are quite complex.<sup>33</sup> The first step is the notice of the shareholders meeting, which, when dissenters' rights apply, must state that shareholders may be entitled to assert dissenters' rights and must be accompanied by a copy of the statute that grants the rights.

Then comes the dissent itself. The shareholder must file *written* notice of an intention to demand payment for shares before the vote is taken at the meeting of shareholders called to consider the transaction. The objection must be made before the meeting in some states, and a few states require that the objection include a demand for appraisal and purchase of the shares.

Of course, the shareholder must not vote in favor of the transaction at the meeting.

Next, assume the transaction is approved by the other shareholders and eventually will be consummated by the corporation. In most states, after approval, the shareholder has a certain period of time within which to demand payment of the fair value of the shares. This time period varies. The demand is addressed to the corporation in a sale of assets or a share exchange; or to the surviving or new corporation in a merger. If the shareholder fails to object, to vote against the action, or to demand payment within the time provided, he or she loses the right to payment for shares and is bound by the corporate action.

The revised Model Business Corporation Act takes a little different approach. If the transaction is approved, the corporation must send notice of that fact to the shareholder who has demanded payment and voted properly (against or abstaining from the transaction), together with a form to use to demand payment and a copy of the statute, stating when the demand must be made and where the shares must be deposited. The time period in the notice cannot be less than forty days or more than sixty days from the date the notice was delivered. Failure to return the demand on time, with the shares, forfeits the shareholder's rights to dissent and sell shares to the corporation. If the shareholder demands payment and deposits the share certificates within the time period required by the notice, the shareholder will be entitled to continue to exercise shareholder rights until the rights are canceled or modified by the taking of the proposed corporate action.<sup>34</sup>

The **fair value** of the shares is defined by the Model Business Corporation Act to be the value immediately before the effectuation of the corporate transaction, using customary and current valuation concepts and techniques generally employed for similar businesses in this context, and without discounting for lack of marketability or minority status.<sup>35</sup> In most state statutes, the appraiser is not given that much guidance. Most states simply require that "fair value" should exclude appreciation or depreciation in anticipation of the transaction. This test requires an evaluation of the impact of the publicity surrounding the transaction in the appraisal of the shares and is extremely difficult to apply. For that reason, many states ignore appreciation or depreciation in value determination, or set the date for the appraisal at some time farther removed from shareholder approval. The Model Business Corporation Act leaves it to the appraiser to determine and apply customary and current valuation concepts and directs that they be applied as they would be to similar businesses in the context of the transaction requiring appraisal. This is a more subtle way of saying to ignore appreciation and depreciation from the transaction if it would be appropriate to do that for similar businesses in such a corporate transaction. If customary and current appraisal policies would consider the appreciation or depreciation from certain businesses engaged in a merger, then such factors should be taken into account. In addition, the Model Business Corporation Act excludes any consideration of a "marketability" discount (a reduction in value because there is no public market upon which the shares could be rapidly sold) or a "minority" discount (a reduction in value because the number of shares being valued is insufficient

to effect voting control over the corporation). Modern corporate practice and case law have also confirmed that these discounts should not apply in the context of appraising shares held by dissenters to these fundamental corporate transactions.

The corporation and the shareholder are encouraged to agree upon the value of the shares, but if fair value is disputed, the Model Business Corporation Act prescribes an elaborate procedure for resolving the issue. Once the corporation has delivered the dissenters' notice (no later than ten days after the corporate action has been taken), the shareholders who wish to sell their shares must demand payment, certify their ownership of the shares, and deposit their certificates in accordance with the terms of the notice. The reason for the certification of ownership is to allow the corporation to determine whether a shareholder owned the shares before the public announcement of the proposed corporate action. If the shareholder purchased the shares after information concerning the proposed corporate action was available, the corporation may withhold payment for that shareholder's shares. This provision prevents shareholders from purchasing shares just before a corporation enters into a fundamental transaction so that they have an automatic market for the sale of their stock through dissenters' rights.<sup>36</sup>

Except for shares acquired after public information is available, the corporation must pay each dissenter the amount the corporation estimates to be a fair value of the shares, plus accrued interest. This payment must be accompanied by the corporation's recent financial statements, an estimate of the fair value from the corporation, an explanation of how the interest was calculated, and a statement of the dissenters' rights (usually including a copy of the statute itself).<sup>37</sup>

If a shareholder disagrees with the estimate of fair value, the shareholder may file his or her own estimate with the corporation within thirty days. If the corporation cannot settle with the shareholder within sixty days after the shareholder's demand, the question of fair value will be referred to a court. The corporation must file the petition, and if it fails to do so, the corporation must pay the shareholder the price the shareholder demanded. If an action is filed with a court, all dissenters who dispute fair value are made parties to the action. The court may appoint appraisers to determine the fair value of the shares, and the court will enter a judgment for the value set by those appraisers.<sup>38</sup> The corporation is usually required to pay the expenses of the proceedings, but the court may assess the expenses against the dissenting shareholders if it finds that their rejection of the corporation's offered amount was arbitrary, vexatious, or not in good faith, and was without justification.<sup>39</sup> This table illustrates the differences between the former act and the revised act:

<i>Timetable #1</i>	<i>Number of Days</i>	<i>Former Model Business Corporation Act</i>	<i>Revised Model Business Corporation Act</i>
	-10	Date notice is sent to shareholders	Date corporation notifies shareholders of right to dissent
	-1	Date fair value determined	Date fair value determined
Date of meeting for shareholder approval	0	Latest date for written objection to action; shareholder must vote against action	Latest date for filing written objection; shareholder must not vote in favor of transaction
	10	Latest dates for written demand for payment	If transaction is approved, date corporation sends notice to dissenters
	30	Latest date for submitting certificates representing shares to corporation for notation	Earliest date that corporation may require shareholder to demand payment and deposit certificates
	60		If transaction is not effected by now, date the corporation must return certificates



*Timetable #2*

Date action is effected	0		Date corporation remits payment of fair value with information required by statute
	10	Latest date for corporation notice to shareholders with an offer at a specified price	
	30	Latest date for agreement	Latest date for dissenter's demand for estimate of fair value
	60	Latest date for corporation to file petition on its own	
	90	Latest date for corporation to file petition on shareholder demand; date of payment if agreement reached on fair value	Latest date for corporation to settle with shareholder or file petition with the court; failure to do one or the other requires payment to the dissenter at dissenter's price

In some states, it is necessary to file an agreement to pay dissenting shareholders and to appoint the secretary of state as an agent to receive process for the corporation if it is not a domestic corporation (see Exhibit 15–8, Agreement to Pay Dissenting Shareholders).

Once a shareholder exercises the right to dissent and obtain an appraisal of the shares, the shareholder's rights as such are forfeited except to pursue this remedy, which is said to be "exclusive," meaning that a demand for payment for shares is the only remedy a shareholder has if dissatisfied with the transaction. When the demand for payment is made, the shareholder loses the right to vote or to exercise any other rights as a shareholder. The shareholder usually cannot withdraw the demand unless the corporation consents, and shareholder status is regained only upon withdrawal and consent, or if the corporation abandons the transaction, or if a court decides that the shareholder is not entitled to the right of payment for the shares.

## **VOLUNTARY DISSOLUTION**

The dissolution of the corporation is a structural change that will affect the shareholders, and the shareholders must be consulted for their approval.

### **Procedure**

The corporation may be dissolved at any time after it is formed by the appropriate concurrence of its aggregate membership. A decision to dissolve may be made immediately after formation, before the corporation commences business and before shares are issued. The incorporators (or the initial directors, if named in the articles of incorporation) constitute the total aggregate membership at this point, and an admission that the corporation was a bad idea is theirs to make. The Model Business Corporation Act procedure for dissolution before commencement of business and before the issuance of shares is very simple. The majority of the incorporators (or the initial directors) may execute and file articles of dissolution.<sup>40</sup>

A corporation that has commenced business and has issued shares may be dissolved through two typical procedures, which may originate with either the shareholders or the directors of the corporation. If the shareholders take the initiative, many states allow voluntary dissolution by the shareholders' unanimous written consent. All shareholders, whether or not they are otherwise entitled to vote, normally must join the consent, but a few states allow the holders of only the voting shares to make the decision.<sup>41</sup>

**Exhibit 15–8.**

**Agreement to Pay  
Dissenting Shareholders  
(Maine)**

*(To be filed with Articles of Merger when the surviving corporation is to be governed by the laws of any jurisdiction other than Maine.)*

**AGREEMENT BY**

\_\_\_\_\_

surviving corporation

**TO PAY DISSENTING SHAREHOLDERS OF DOMESTIC CORPORATIONS  
AND APPOINTMENT OF SECRETARY OF STATE AS AGENT**

Pursuant to 13-A MRSA §906.4, the undersigned corporation submits the following agreement and appointment of agent to accept service of process.

**FIRST:** The corporation agrees that it will promptly pay to the dissenting shareholders of any participating domestic corporation the amount, if any, to which they are entitled under 13-A MRSA (Maine Business Corporation Act) with respect to the rights of dissenting shareholders.

**SECOND:** The corporation agrees that it may be served with process in the State of Maine in any proceeding to enforce any obligation of a participating domestic corporation or any participating foreign corporation previously subject to suit in the State of Maine, or to enforce the right of dissenting shareholders of any participating domestic corporation against the surviving corporation.

**THIRD:** The corporation irrevocably appoints the Secretary of State of Maine as its agent to accept service of process in any such proceedings.

**FOURTH:** The address to which the Secretary of State shall mail a copy of any process in such proceeding is \_\_\_\_\_

\_\_\_\_\_

**FIFTH:** The address of the registered office of the corporation is\* \_\_\_\_\_

\_\_\_\_\_

(street, city, state and zip code)

**DATED** \_\_\_\_\_

\_\_\_\_\_

(surviving corporation)

**\*\*By** \_\_\_\_\_

(signature)

\_\_\_\_\_

(type or print name and capacity)

**\*\*By** \_\_\_\_\_

(signature)

\_\_\_\_\_

(type or print name and capacity)

\*Give address of registered office in Maine. If the corporation does not have a registered office in Maine, the address given should be the principal or registered office in the State of incorporation.

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\*\*This document **MUST** be signed by (1) the Clerk OR (2) the President or a vice-president *and* the Secretary or an assistant secretary, or such other officer as the bylaws may designate as a 2nd certifying officer OR (3) if there are no such officers, then a majority of the Directors or such directors as may be designated by a majority of directors then in office OR (4) if there are no such directors, then the holders, or such of them as may be designated by the holders, of record of a majority of all outstanding shares entitled to vote thereon OR (5) the holders of all of the outstanding shares of the corporation.

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101 STATE HOUSE STATION, AUGUSTA, ME 04333-0101  
TEL. (207) 287-4195**

FORM NO. MBCA-10Ma Rev. 96

If dissolution is recommended by the board of directors (as it must under the Model Business Corporation Act), or if unanimous shareholder consent to the dissolution is not feasible, the corporation may be dissolved by the usual procedure for corporate structural changes—that is, by the directors and the shareholders acting in their respective meetings. The board of directors adopts a resolution recommending that the corporation be dissolved and submits this resolution to the vote of the shareholders at either an annual or a special meeting.<sup>42</sup>

**EXAMPLE**

**Resolution to Dissolve**

The president made a statement as to the present plight of the Corporation, and after a confirmatory statement by the treasurer, it was unanimously

RESOLVED, that the Board of Directors hereby recommends to the stockholders that in their interest, this Corporation be dissolved and its affairs wound up; and

FURTHER RESOLVED, that a special meeting of the stockholders of the Corporation be held at the offices of the Corporation, on the 3rd day of December, 2005, at 3:00 P.M., to vote on the question of whether this Corporation be dissolved, and that the secretary is hereby directed to give due notice of said meeting.

The Model Business Corporation Act does not specify any unusual time period within which notice must be given, but the notice must state that the meeting will be for the purpose of considering the dissolution of the corporation.<sup>43</sup>

### Notice of a Meeting for Dissolution

EXAMPLE

The stockholders of The Nobles Company are hereby notified that a special meeting of the stockholders of said Company will be held at the corporation's offices, 200 West 14th Avenue, Denver, Colorado, on the 3rd day of December, 2005, at 3:00 P.M., to vote on the question of whether said Company should be dissolved.

Dated November 18, 2005.

\_\_\_\_\_, Secretary

The shareholders must approve dissolution by a designated percentage of the vote. The Model Business Corporation Act originally required the affirmative vote of the holders of two-thirds of the outstanding shares entitled to vote on the issue, but the percentage currently is a majority of the voting shares. Class voting is also authorized under the act. Many states continue to adhere to the two-thirds vote requirement, and several jurisdictions allow every share to vote on the dissolution question, whether or not otherwise entitled to vote. The minutes of the shareholders' meeting would reflect the approval of the dissolution.

### Resolution to Dissolve

EXAMPLE

WHEREAS, the Board of Directors believe this Corporation should be dissolved, and have called this special meeting of the stockholders to consider the matter; and

WHEREAS, after considering the statements of officers and a report of a committee of the stockholders, it appears to be for the best interests of the stockholders of this Corporation that its business should be terminated, the Corporation dissolved, and its assets distributed according to law:

NOW, THEREFORE, whereas the holders of record of two-thirds of the outstanding shares of this Corporation entitled to vote therein concur therein:

RESOLVED, that this Corporation hereby elects to dissolve, and that pursuant to the Colorado Corporation Law, the president and secretary, or other proper officers, are hereby authorized to execute and file the proper certificate of dissolution with the Secretary of State, that they duly publish the certificate of the Secretary of State of said filing, and that they and the other officers of this Corporation are hereby authorized and directed to take the steps prescribed by law to complete the dissolution and to wind up the affairs of this Corporation.

The result of a dissolution will be to distribute the assets of the corporation (after creditors are paid) to the shareholders, so the shareholders will receive their proportionate share of the value of the corporation. Consequently, a dissenting shareholder's appraisal remedy is rare in dissolution, and even if authorized, it is usually limited to special circumstances surrounding the manner in which the dissolution and liquidation is conducted.

### Statement of Intent to Dissolve

The dissolution procedure in many states has two sections designed to give advance public and private notice to outsiders that the corporation has initiated dissolution proceedings. These notices are intended to facilitate orderly liquidation of the corporation.

The statement or notice of intent to dissolve, the first notice filed for dissolution of a going concern, is not required for dissolution by the incorporators, since one prerequisite to that dissolution procedure is that the corporation has not yet commenced business, and thus protection of the public is not deemed to be necessary.

The statement or notice of intent to dissolve must be executed and filed with the secretary of state if the dissolution has been approved by the vote or consent of the shareholders or by

**Exhibit 15–9.**Statement of Intent to  
Dissolve (Shareholders)

<p><b>DOMESTIC BUSINESS CORPORATION</b></p> <p><b>STATE OF MAINE</b></p> <p><b>STATEMENT OF INTENT TO DISSOLVE</b></p> <p><b>(Written Consent of All Shareholders)</b></p> <p>_____</p> <p style="text-align: center; font-size: small;">(Name of Corporation)</p>	<p><b>Filing Fee \$20.00</b></p> <div style="border: 1px solid black; padding: 5px; margin: 5px 0;"> <p style="text-align: center;">_____ Deputy Secretary of State</p> </div> <p style="text-align: center;"><b>A True Copy When Attested By Signature</b></p> <div style="border: 1px solid black; padding: 5px; margin: 5px 0;"> <p style="text-align: center;">_____ Deputy Secretary of State</p> </div>
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Pursuant to 13-A MRSA §1102, the undersigned corporation intends to dissolve the corporation.

**FIRST:** The names and respective addresses of its officers and directors are:

<u>Title</u>	<u>Name</u>	<u>Address</u>
President	_____	_____
Treasurer	_____	_____
Secretary	_____	_____
Clerk	_____	_____
Directors:	_____	_____
	_____	_____
	_____	_____

**SECOND:** Exhibit A attached hereto is a copy of the written consent signed by all shareholders of the corporation, or signed in their names by their duly authorized attorneys.

**THIRD:** All required Annual Reports have been filed with the Secretary of State. (Note: If the dissolution process is completed on or before June 1st, then the Annual Report covering the previous calendar year is not required.)

**FOURTH:** The undersigned corporation understands that the filing of this document ***DOES NOT*** complete the dissolution process. You must ***ALSO FILE*** Articles of Dissolution.

**FIFTH:** The address of the registered office of the corporation in the State of Maine is \_\_\_\_\_

(street, city, state and zip code)

resolution of the board of directors with subsequent shareholder approval (see Exhibit 15–9, Statement of Intent to Dissolve). Many states require this first notice of the dissolution, although the statement may have to be published rather than filed (see Exhibit 15–10, Affidavit to Dissolve Corporation on page 554).

Upon filing the statement, or beginning other specified statutory requirements for dissolution, the corporation must cease all normal business activity, and it may continue in business only for the purpose of winding up its affairs. The filing of the statement of intent does not terminate corporate existence. The corporate existence usually continues until a certificate of dissolution has been issued by the secretary of state or until a court has declared the corporation to be dissolved.

**Exhibit 15-9.**

*(continued)*

DATED \_\_\_\_\_

\*By \_\_\_\_\_  
(signature)  
\_\_\_\_\_  
(type or print name and capacity)

**MUST BE COMPLETED FOR VOTE  
OF SHAREHOLDERS**

I certify that I have custody of the minutes showing the above action by the shareholders.

\_\_\_\_\_  
(signature of clerk, secretary or asst. secretary)

\*By \_\_\_\_\_  
(signature)  
\_\_\_\_\_  
(type or print name and capacity)

Notice of the filing of this statement shall be mailed to each known creditor of the corporation and to the State Tax Assessor pursuant to 13-A MRSA §1106.2.

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\*This document **MUST** be signed by (1) the Clerk OR (2) the President or a vice-president *and* the Secretary or an assistant secretary, or such other officer as the bylaws may designate as a 2nd certifying officer OR (3) if there are no such officers, then a majority of the Directors or such directors as may be designated by a majority of directors then in office OR (4) if there are no such directors, then the Holders, or such of them as may be designated by the holders, of record of a majority of all outstanding shares entitled to vote thereon OR (5) the Holders of all of the outstanding shares of the corporation.


**SUBMIT COMPLETED FORMS TO: CORPORATE EXAMINING SECTION, SECRETARY OF STATE,  
101 STATE HOUSE STATION, AUGUSTA, ME 04333-0101  
TEL. (207) 287-4195**

FORM NO. MBCA-11 Rev. 96

**Notice to Creditors**

After filing a statement of intent to dissolve, the corporation will proceed to collect its assets and to liquidate its business. As a part of the liquidation process, the corporation gives to each known creditor notice of its intent to dissolve, which is the private notice that complements the filed statement. Through these notices, everyone who cares about the corporation should learn about the dissolution before it becomes effective. Some states require that the corporation advertise its intention to dissolve in a newspaper, rather than sending notices directly to creditors.

**Exhibit 15–10.**Affidavit to Dissolve  
Corporation (Louisiana)

<p>W. Fox McKeithen Secretary of State</p> 	<p><b>AFFIDAVIT TO DISSOLVE CORPORATION</b> (R.S. 12:142.1 &amp; 12:250.1)</p>	
	<p><b>Domestic Corporation (Business or Non-Profit)</b> Enclose \$60.00 filing fee Make remittance payable to Secretary of State <i>Do Not Send Cash</i></p>	<p><b>Return to:</b> Commercial Division P. O. Box 94125 Baton Rouge, LA 70804-9125 Phone (225) 925-4704 Web Site: <a href="http://www.sec.state.la.us">www.sec.state.la.us</a></p>

STATE OF \_\_\_\_\_

PARISH/COUNTY OF \_\_\_\_\_

BEFORE ME, the undersigned Notary Public in and for the parish/county herein above shown, personally came and appeared the undersigned who, after being duly sworn, did depose and say that:

\_\_\_\_\_ Corporation Name

\_\_\_\_\_

is no longer doing business, owes no debts and is dissolved by filing this affidavit with the Secretary of State, executed by the shareholder(s), or incorporator(s) if no shares have been issued, attesting to such facts.

The undersigned further declared that they are: (check one)

The shareholders of the above named corporation.

The incorporators of the above named corporation and no shares have been issued.

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Incorporator(s) or Shareholder(s)

Sworn to and subscribed before me, the undersigned Notary Public, on this date: \_\_\_\_\_

\_\_\_\_\_

Notary

339 Rev. 5/00 (See instructions on back)

**Articles of Dissolution**

The Model Business Corporation Act eliminates the prior requirements of filing a statement of intent to dissolve and giving notice to creditors, and provides simply that after the dissolution is authorized, the corporation must deliver articles of dissolution to the secretary of state (see Exhibit 15–11, Articles of Dissolution). In most states, these articles of dissolution will be filed only after payment of all corporate debts, liabilities, and obligations and after distribution of the remaining corporate property and assets to the shareholders. The articles of dissolution are executed and filed with the Secretary of State



**Exhibit 15–11.**

Articles of Dissolution  
(Massachusetts)

FEDERAL IDENTIFICATION  
NO. \_\_\_\_\_

**The Commonwealth of Massachusetts**  
William Francis Galvin  
Secretary of the Commonwealth  
One Ashburton Place, Boston, Massachusetts 02108-1512

**ARTICLES OF DISSOLUTION**  
(General Laws, Chapter 156B, Section 100)

Examiner \_\_\_\_\_

We, \_\_\_\_\_, \*President / \*Vice President,  
and \_\_\_\_\_, \*Clerk / \*Assistant Clerk,  
of \_\_\_\_\_,  
*(Exact name of corporation)*  
located at: \_\_\_\_\_,  
*(Street address of corporation in Massachusetts)*

certify as follows:

1. The name and post office address of each director and officer of the corporation is:

	NAME	POST OFFICE ADDRESS
President:		
Treasurer:		
Clerk:		
Directors:		

P.C. \_\_\_\_\_ *\*Delete the inapplicable words.*

156Bde 4/5/02

(continued)

with the same formality as are the original articles of incorporation. Although the articles of dissolution described in the Model Business Corporation Act only must state the name of the corporation and the date and manner that the dissolution was authorized, in many states the article of dissolution must state that the corporation has been liquidated; that its debts, obligations, and liabilities have been paid and discharged or that adequate provisions have been made therefor, and that all the remaining property and assets of the corporation have been distributed among the shareholders in accordance with their respective rights and interests. If the voluntary dissolution occurs before the issuance of shares and commencement of business, the incorporators file articles of dissolution declaring those

**Exhibit 15–11.***(continued)*

2. On \_\_\_\_\_, 20 \_\_\_\_\_, the dissolution of the corporation was duly authorized in the manner required by General Laws, Chapter 156B, Section 100, and notice of the proposed dissolution was duly given to the Commissioner of Revenue as required by said section.

3. The effective date of dissolution of the corporation shall be the date approved and filed by the Secretary of the Commonwealth. If a *later* effective date is desired, specify such date which shall not be more than *thirty days* after the date of filing.

\*\*4. Other provisions deemed necessary by the corporation for its dissolution.

SIGNED UNDER THE PENALTIES OF PERJURY, this \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_\_,

\_\_\_\_\_, \*President / \*Vice President,

\_\_\_\_\_, \*Clerk / \*Assistant Clerk.

*\*Delete the inapplicable words.*

*\*\*If there are no such provisions, state "None".*

*Note: Provisions for which the space provided above is not sufficient should be made on one side of separate 8 1/2 x 11 sheets of white paper, numbered 2A, 2B, etc., with a left margin of at least 1 inch.*

facts and confirming the return of amounts paid for subscriptions (see Exhibit 15–12, Articles of Dissolution by Incorporators on page 558).

The corporation is dissolved on the effective date stated in its articles of dissolution.<sup>44</sup>

A dissolved corporation continues its corporate existence but may not carry on any business except to wind up its business affairs. Dissolution of the corporation does not affect title to the corporation's property, prevent transfer of the corporation's shares or securities, subject the corporation's directors and officers to personal liability, prevent commencement of a proceeding by or against the corporation in its name, or affect any proceedings that have been commenced by or against the corporation.<sup>45</sup> Thus, the corporation remains in existence to complete its business, including transferring title to property and finishing litigation that may have been started by it or against it, and the persons

**Exhibit 15–11.***(continued)*

THE COMMONWEALTH OF MASSACHUSETTS

**ARTICLES OF DISSOLUTION**  
(General Laws, Chapter 156B, Section 100)

\_\_\_\_\_

I hereby approve the within Articles of Dissolution and, the filing fee in the amount of \$ \_\_\_\_\_ having been paid, said application is deemed to have been filed with me this \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_.

*Effective date:* \_\_\_\_\_

**WILLIAM FRANCIS GALVIN**  
*Secretary of the Commonwealth*

**TO BE FILLED IN BY CORPORATION**  
**Contact information:**

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Telephone: \_\_\_\_\_

Email: \_\_\_\_\_

A copy this filing will be available on-line at [www.state.ma.us/sec/cor](http://www.state.ma.us/sec/cor) once the document is filed.

acting on behalf of the corporation are still insulated from personal liability. All of these activities must be directed toward terminating the corporation's affairs. Section 14.06 of the Model Business Corporation Act requires that the dissolved corporation must notify any creditors or other claimants of the dissolution in writing after the dissolution has occurred. This notice will state a deadline, which cannot be fewer than 120 days from the date of the notice, by which claims will be considered. If a creditor does not make a claim within the stated time, the creditor may be barred from ever asserting the claim.<sup>46</sup> The dissolved corporation also may publish a notice of its dissolution for any persons who have claims that are not known to the corporation. This publication may state that any claim against the corporation will be barred after three years from the publication of the notice. Any timely filed claim may be enforced against the corporation (to the extent of

**Exhibit 15–12.**Articles of Dissolution by  
Incorporators

Filing fee: \$_____	<b>ARTICLES OF DISSOLUTION BY INCORPORATOR(S) OF</b>
_____	
Pursuant to the provisions of Section 82 of the _____ Business Corporation Act, the undersigned of the corporation hereinafter named, adopt the following Articles of Dissolution:	
FIRST: The name of the corporation is _____	
SECOND: The date of issuance of its certificate of incorporation was _____	
THIRD: None of its shares has been issued.	
FOURTH: The corporation has not commenced business.	
FIFTH: The amount, if any, actually paid in on subscriptions for its shares, less any part thereof disposed of for necessary expenses, has been returned to those entitled thereto.	
SIXTH: No debts of the corporation remain unpaid.	
SEVENTH: The sole incorporator or a majority of the incorporators elects that the corporation be dissolved.	
Dated _____, 20____.	
	_____ _____ _____ Incorporator(s)

its undistributed assets) or, if the assets have been distributed, against the shareholders who have received those assets on a pro rata basis.

### Revocation of Voluntary Dissolution Proceedings

Just as the shareholders and the corporation approve voluntary dissolution, so may they **revoke** it. This indecision is expensive and time-consuming, but every statute gives the intracorporate parties the right to change their minds. The procedure for revocation usually duplicates the procedure for approval. If the shareholders consented to the dissolution (where permitted under local law), they may, by written consent any time before the issuance of a certificate of dissolution, revoke the dissolution proceedings by submitting a statement of revocation to the secretary of state (see Exhibit 15–13, Articles of Revocation of Voluntary Dissolution). The revocation also may be accomplished by act of the corporation. The board of directors may submit to the vote of the shareholders a resolution revoking voluntary dissolution proceedings. Shareholder approval of revocation of voluntary dissolution requires the same vote (either majority or two-thirds) as that required for approval of dissolution.<sup>47</sup> When the statement of revocation is filed with the secretary of state, the corporation may again conduct business as though nothing ever happened. The revocation of voluntary dissolution proceedings must occur within 120 days of the effective date of dissolution under the Model Business Corporation Act, but most jurisdictions require the decision to be made before the articles of dissolution are filed.

## INVOLUNTARY DISSOLUTION

### By the State

A wayward corporation may be dragged, perhaps kicking and screaming, into dissolution by its creator, the state. The state is always entitled to enforce its laws, and if a corporation has failed to comply with the statutory requirements, the secretary of state or the attorney general

**Exhibit 15-13.**

Articles Revocation of Voluntary Dissolution (Texas)



Office of the Secretary of State  
 Corporations Section  
 P.O. Box 13697  
 Austin, Texas 78711-3697

**ARTICLES OF REVOCATION OF DISSOLUTION**

Pursuant to the provisions of article 6.05 of the Texas Business Corporation Act, the undersigned corporation adopts the following articles of revocation of dissolution:

1. The name of the corporation is \_\_\_\_\_
2. The file number is \_\_\_\_\_
3. The date on which the dissolution became effective was \_\_\_\_\_
4. The date on which the revocation of dissolution was authorized was \_\_\_\_\_

Check either A or B in item 5 below:

5.  A. A written consent to revoke voluntary dissolution proceedings, A COPY OF WHICH IS ATTACHED, was signed by all the shareholders of the corporation, or was signed in their names by their attorneys thereunto duly authorized.
- or  B. A resolution to revoke was adopted by the shareholders of the corporation on the following date: \_\_\_\_\_ The number of shares outstanding and entitled to vote, and voting for and against the revocation were as follows:

CLASS	SERIES	OUTSTANDING AND ENTITLED TO VOTE	TOTAL VOTED FOR	TOTAL VOTED AGAINST
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

By \_\_\_\_\_  
 Signature

\_\_\_\_\_  
 Officer Title

(continued)

may bring an action to force dissolution of the corporation. Typical corporate abuses that will justify **involuntary dissolution** include failing to file annual reports, failing to pay franchise taxes, procuring articles of incorporation through fraud, or abusing or exceeding authority granted by law.<sup>48</sup> Some jurisdictions add failure to appoint a registered agent or to notify regarding a change of the corporation's registered office within thirty days, insolvency, unfair competition or restraint of trade, persistent violations of state laws, or an existence that is detrimental to the public interest.

Most corporations never run afoul of state law or commit acts that support involuntary dissolution, but a few of the provisions in this area require caution on the part of the corporation. Even otherwise conscientious corporate officers may delay annual reports, overlook payment of franchise taxes, or neglect to report changes of the registered office or registered agent. The procedures for involuntary dissolution should be explored, therefore, in an effort to save the corporate creation from untimely demise because of a mere oversight.

The Model Business Corporation Act provisions appear to take the fairest approach to the problem. Under sections 14.20 and 14.21, the secretary of state sends notice of any alleged transgressions to the corporation at its registered office or, if it no longer maintains

**Exhibit 15–13.***(continued)*

**INSTRUCTIONS FOR FILING  
ARTICLES OF REVOCATION OF DISSOLUTION**

1. The articles of revocation must be signed by an officer of the corporation. Prior to signing, please read the statements on this form carefully. A person commits an offense under the Texas Business Corporation Act if the person signs a document the person knows is false in any material respect with the intent that the document be delivered to the secretary of state for filing. The offense is a Class A misdemeanor.
2. If the articles of dissolution have been filed but have not become effective by reason of a noted future effective date, note "NOT APPLICABLE" in item number 3.
3. If item 5A is checked, a copy of the consent of all shareholders to revoke the dissolution proceedings must be attached.
4. This document must be received within 120 days of the date the certificate of dissolution was issued to the corporation by the secretary of state.
5. Enclose \$15.00 remittance for the filing fee for the articles of revocation of dissolution. The check should be made payable to the secretary of state.
6. Two copies of the form along with the filing fee should be mailed to the address shown in the heading of this form. The delivery address is James Earl Rudder Office Building, 1019 Brazos, Austin, Texas 78701. We will place one document on record and, *if a duplicate copy has been provided for such purpose*, return a file stamped copy. The telephone number is (512) 463-5555, TDD: (800) 735-2989, FAX: (512) 463-5709.
7. Before filing articles of revocation of dissolution, the secretary of state must determine that the corporation's name is still available. A preliminary determination of availability may be obtained by telephone at (512) 463-5555 or by e-mail at [corpinfo.sos.state.tx.us](mailto:corpinfo.sos.state.tx.us). This is only a preliminary clearance. The final decision on the name will be made when the document is submitted for filing. If the corporation name is unavailable, it will be necessary to file articles of amendment changing the name in order to file the articles of revocation of dissolution.
8. Corporations which have dissolved under article 6.01 of the Texas Business Corporation Act cannot file articles of revocation of dissolution since revocation requires adoption by shareholders.
9. Upon issuance of the certificate of revocation, the existence of the corporation shall be deemed to have continued without interruption.
10. The corporation should inquire of the comptroller of public accounts whether any tax returns or payments are due following revocation. Questions should be directed to the Comptroller of Public Accounts, Tax Assistance Section, Austin, Texas 78774-0100. The telephone number is (512) 463-4600. The toll-free number is (800) 252-1381. TDD: (800) 248-4099 or (512) 463-4621.
11. The foregoing form promulgated by the secretary of state is designed to meet minimum statutory filing requirements and no warranty is made regarding the suitability of this form. This form and the information provided are not substitutes for the advice of an attorney and it is recommended that the services of an attorney be obtained before preparation of the articles of revocation of dissolution.

Form No. 686  
Revised 9/99

a registered office within the state, at its principal place of business. This notice may be sent if the corporation does not pay taxes, deliver its annual report, or maintain current information concerning its registered agent or registered office, or if the corporation's period of duration expires. Within sixty days after service of the notice, the corporation may satisfy the secretary of state that the matter has been resolved or that the grounds for the notice did not exist. If the corporation fails to respond to the notice, the secretary of state may



administratively dissolve the corporation by issuing a certificate of dissolution. After the certificate of dissolution has been issued, the corporation may not carry on any business except to wind up and liquidate its affairs. At any time within two years after the effective date of an administrative dissolution, the corporation may apply to the secretary of state to be reinstated. A condition to reinstatement is the resolution or elimination of any grounds that existed for dissolution at the time of the issuance of the certificate. If the secretary of state permits a reinstatement (or if a court orders reinstatement on appeal from the secretary of state's denial of an application for reinstatement), the reinstatement is retroactive, and the corporation may resume its business as though the administrative dissolution never occurred.<sup>49</sup>

Not all the states are so forgiving. Although many states require notice to the corporation, only about half of the jurisdictions allow the corporation to cure the defect after dissolution proceedings have actually been commenced.

## By Shareholders

If corporate management refuses to consider dissolution and the unanimous consent of the shareholders cannot be obtained, voluntary dissolution is impossible, but an involuntary dissolution procedure may be invoked in special circumstances. For example, under the Model Business Corporation Act, if the board of directors does not recommend a voluntary dissolution to the shareholders, the shareholders have no independent authority to dissolve the corporation alone. Even under jurisdictions that permit the shareholders to voluntarily dissolve their own corporation by unanimous consent, if the majority of the directors are also shareholders and oppose dissolution, no matter how many other shareholders favor dissolution, dissolution cannot be accomplished voluntarily. The approval of the directors-shareholders is necessary for unanimous shareholder consent and for a director resolution for dissolution. Dissolution by voluntary proceedings also is impossible if the directors or shareholders are deadlocked.

The statutory escape is the shareholders' application to a court for liquidation of the business and a decree of dissolution. Section 14.30 of the Model Business Corporation Act grants liquidation power to a court upon application of a shareholder who can establish an unbreakable director deadlock threatening irreparable injury to the corporation; oppressive, illegal, or fraudulent acts of those in control of the corporation; a shareholder deadlock in failing to elect new directors for a period of two years; or misapplication or waste of the corporate assets. These grounds are typical among corporate statutes granting the shareholders the right to bring an action for involuntary liquidation and dissolution. Abandonment of the corporate business or persistent commission of ultra vires acts also are frequently specified grounds.

Some states have expanded the shareholders' authority to obtain a judicial decree of dissolution. In doing so, they have recognized that majority shareholders or directors may take action against certain minority shareholders that may, at the least, put pressure on the minority shareholders to go along with the policies of the majority and, at the worst, actually oppress the minority shareholders so that the corporation is not acting in their best interests. Under these statutes, the shareholders may obtain a decree of dissolution by showing that the directors or those in control of the corporation are acting in a manner "unfairly prejudicial" to the shareholders in their capacity as shareholders, directors, or officers, or as employees of closely held corporations. These statutes also empower a court to order that the corporation buy out the complaining shareholders at a fair price, rather than dissolve the corporation.<sup>50</sup> The Model Business Corporation Act's Close Corporation Supplement provides for a similar remedy in section 42 that would apply to closely held corporations.

If the shareholders prove the allegations in the action, the court proceeds to a judicially supervised liquidation ending in a decree of dissolution.<sup>51</sup> However, if the problem is solved during the course of the liquidation proceedings, most state statutes require that the proceedings be discontinued and all corporate property be returned to the corporation.<sup>52</sup>

## By a Creditor

A creditor may force involuntary dissolution if the corporation is insolvent and the creditor's claim is undisputed. The Model Business Corporation Act deems claims that have been reduced to judgment and claims that have been admitted by the corporation in writing to be undisputed.<sup>53</sup> The creditor may be in the frustrating position of owning an uncontested debt that corporate management cannot pay because the corporation is insolvent, but management may be resisting dissolution and liquidation whereby the creditor would receive some satisfaction from the assets. In such a case, the creditor may force judicial liquidation and involuntary dissolution.

## LIQUIDATION

Closely associated with dissolution, whether voluntary or involuntary, is the process of collecting all corporate assets, completing or terminating unexecuted contracts, paying creditors and expenses, and distributing the remains to the owners. These activities are collectively referred to as **liquidation**. Under the Model Business Corporation Act, normal corporate business ceases when a decree of dissolution is entered by a court or when the secretary of state issues a certificate of dissolution.<sup>54</sup> The only corporate activities that may follow a dissolution are those necessary to wind up and liquidate the business and affairs of the corporation. Consequently, liquidation and winding up precede final dissolution.

### Nonjudicial Liquidation

When dissolution is voluntary and does not involve judicial proceedings, corporate management is responsible for winding up and liquidating the corporate business. In most states, this process is commenced after the statement of intent to dissolve is filed and must be completed before the articles of dissolution are filed, since the articles usually recite that all debts, obligations, and liabilities have been paid or provided for, and that the remaining assets have been distributed among the shareholders. There is no time limit on the liquidation process, but practical considerations encourage management to proceed as expeditiously as possible.

**Nonjudicial liquidation** may be conducted as informally as desired, as long as all creditors are paid and remaining assets are distributed. Special safeguards are inserted for creditors: The directors of the corporation may be personally liable if they distribute assets to the shareholders without providing for creditors,<sup>55</sup> and a forgotten creditor may enforce its claim against the corporation, directors, or shareholders for a period of time after dissolution.<sup>56</sup>

The Model Business Corporation Act has expanded creditor protection in the dissolution of a corporation. Known creditors must receive notice of the dissolution instructing them about submitting claims within a period of time, no less than 120 days from the effective date of the notice. If a creditor does not deliver the claim, or if the claim is rejected and the creditor does not promptly commence a proceeding to enforce the claim, the claim will be barred.<sup>57</sup> For persons who may have a claim against the corporation but are not known at the time of dissolution, the dissolved corporation may publish notice of dissolution and request that persons with claims present them in accordance with the notice. Any person who does not respond to the published notice within five years after the publication date will not be entitled to assert a claim against the corporation.<sup>58</sup>

In connection with the liquidation of a corporation, it may also be necessary to obtain releases or termination certificates from various state agencies, such as workers' compensation administrations or sales tax licensing authorities. In some states, the shareholder may assume personal liability related to obligations that may arise through these agencies (such as workers' compensation claims or unpaid tax liabilities) instead of obtaining the agency's release certificates.

If the directors or officers become immersed in liquidation and discover dissatisfied shareholders or hostile creditors, they may apply to have the liquidation supervised by a court.

### Judicial Liquidation

Court-supervised liquidation is available to corporate management in voluntary dissolution proceedings and is also used when involuntary proceedings have been commenced by the

state, the shareholders, or creditors of a corporation. The court may enjoin any person who threatens to interfere with orderly proceedings, and may appoint a receiver who will carry on the corporate business and preserve the corporation's assets during the proceedings. Creditors usually are required to file their claims under oath within a prescribed time, and a hearing is held to finally determine the claims of all parties. A liquidating receiver is then appointed with authority to collect and sell the assets of the corporation, to apply the proceeds to the expenses of the liquidation and to creditors' claims, and then to distribute remaining funds to shareholders.<sup>59</sup>

## Liquidation Distributions

In any liquidation of a corporation, judicially supervised or conducted by management, the corporate assets will be collected and may be sold, and the proceeds are used to pay first the expenses of liquidation and then the creditors of the corporation. Whatever remains belongs to the shareholders of the corporation. The remnants of the stockholders' corporation are distributed to them in accordance with their liquidation preferences.<sup>60</sup>

## KEY TERMS

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extraordinary corporate activity	short-form merger	conversion
restatement of articles	hostile takeover	appraisal right
constituent corporations	greenmail	dissenter's rights
merger	poison pills	fair value
surviving corporation	people pill	voluntary dissolution
consolidation	control shares	revocation of voluntary dissolution
share exchange	sharks	involuntary dissolution
triangular merger	shark repellent	liquidation
reverse triangular merger	affiliated corporation	nonjudicial liquidation
reorganization	corporate shell	judicial liquidation
letter of intent	domestication	liquidating distributions
small-impact merger		

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## WEB RESOURCES

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General information concerning local statutes governing fundamental changes such as amendments, mergers, share exchanges, sales of substantially all of the assets outside the ordinary course of business, and dissolution is available on every state's Secretary of State's (or Department of Commerce) Web site. Most of the sites offer forms that are required for filing to accomplish these transactions. The National Association of Secretaries of State maintains links directly to the offices of the Secretaries of State in all states. These can be accessed through

[<http://www.nass.org>](http://www.nass.org)

Access to state corporate laws governing fundamental corporate changes may be obtained through the Legal

Information Institute maintained at the Cornell Law School:

[<http://www.law.cornell.edu>](http://www.law.cornell.edu)

The specific sections of a state's corporate law may be located through a search site that directly ties to the corporate laws of the state. This search may be accessed at

[<http://www.megalaw.com>](http://www.megalaw.com)

Various forms of notices to creditors for purposes of dissolution of a corporation are available from the following:

[<http://www.toolkit.cch.com>](http://www.toolkit.cch.com)

[<http://www.findlaw.com>](http://www.findlaw.com)

[<http://www.lectlaw.com>](http://www.lectlaw.com)

[<http://www.ilrg.com>](http://www.ilrg.com)



## CASES

### BECKER v. GRABER BUILDERS, INC.

149 N.C. App. 787, 561 S.E.2d 905 (2002)

THOMAS, J.

[Pamela Becker contracted with Graber Builders, Inc. to build a house and alleges that the septic system was inadequate. Graber Builders, Inc. was administratively dissolved. Dwight E. Graber continued the construction business under the name Graber Homes, Inc., with the same assets of the dissolved corporation. Ms. Becker sued both Graber Builders, Inc. and Graber Homes, Inc. to recover her damages for breach of contract].

The general rule is that a corporation that purchases all, or substantially all, of the assets of another corporation is not liable for the old corporation's debts. *G.P. Publica-*

*tions, Inc. v. Quebecor Printing-St. Paul, Inc.*, 125 N.C.App. 424, 432, 481 S.E.2d 674, 679, *disc. review denied*, 346 N.C. 546, 488 S.E.2d 800 (1997). Plaintiff alleges no facts supporting one of the four well-settled exceptions to this general rule against successor liability. *See id.* at 432-33, 481 S.E.2d at 679 (setting forth the four exceptions: "(1) where there is an express or implied agreement by the purchasing corporation to assume the debt or liability; (2) where the transfer amounts to a *de facto* merger of the two corporations; (3) where the transfer of assets was done for the purpose of defrauding the corporation's creditors; or (4) where the purchasing corporation is a 'mere continuation' of the selling corporation in that the purchasing corporation has some of the same shareholders, directors, and officers.").

Consequently, plaintiff fails to allege a claim upon which relief may be granted against Graber Homes, Inc.

\* \* \*

[The motion to dismiss is sustained].

### CORPORATE EXPRESS OFFICE PRODUCTS, INC. v. PHILLIPS

Florida Supreme Court  
847 S. 2d 406 (2003)

PARIENTE, J.

This case involves the enforceability of noncompete agreements against former employees. Corporate Express Office Products, Inc. (Corporate Express) sought to enforce noncompete agreements against respondents Edward Goff, Doug Phillips, and Lori Farrell. The former employees raised as a defense that the noncompete agreements had been entered into with prior employers and not with Corporate Express. Because one corporate acquisition by Corporate Express was initially accomplished through a 100 percent stock purchase . . . and the other corporate acquisition occurred through a sale of assets, we explain the facts of each acquisition separately.

The first factual scenario involved employees Phillips and Farrell. In 1986, Phillips signed a noncompete agreement with his employer, Bishop Office Furniture Company (Bishop). In 1989, Farrell signed a noncompete agreement with Bishop. Neither agreement included an assignment clause. In 1997, Corporate Express of the South, Inc. (CES) purchased 100 percent of Bishop's stock. The stock purchase agreement between Bishop and CES listed the noncompete agreements with Phillips and Farrell. CES operated the business under the Bishop name until 1998, when

Bishop was merged into CES. Shortly thereafter, CES merged into Corporate Express of the East, Inc. (CEE). CEE then changed its name to Corporate Express Office Products, Inc.

The second scenario began in 1986 when Goff signed a noncompete agreement with his employer, Ciera Office Products (Ciera). In 1996, Ciera sold its assets, including the noncompete agreement with Goff, to CES. Goff executed a consent to Ciera's assignment of his noncompete agreement to CES. Goff did not execute any additional consents to assignment after CES merged with CEE and then changed its name to Corporate Express.

Like Bishop and Ciera, Corporate Express is engaged in the business of selling office furniture and business equipment. Phillips, Farrell, and Goff remained continuously employed with CES from the time of the corporate acquisition through the merger into CEE and the renaming of CEE as Corporate Express. In 2000, the employees terminated their employment with Corporate Express and joined a different employer, allegedly in violation of their noncompete agreements.

The terms of the noncompete agreements precluded the employees from competing against their employers or soliciting the employers' customers for one year following the termination of employment. Further, the agreements covered seven Florida counties, which were the territories serviced by respondents. Corporate Express sued Goff, Phillips, and Farrell and their new employer for unlawful use of trade secrets and breach of the noncompete agreements.

Corporate Express sought a preliminary injunction to enforce the agreements.

The former employees asserted that because the noncompete agreements did not contain a clause authorizing assignment and were in fact never assigned to Corporate Express, the noncompete agreements could not be enforced. \* \* \*

The 1986 noncompete agreements between Goff and Ciera, and Phillips and Bishop, and the 1989 noncompete agreement between Farrell and Bishop, are governed by section 542.33, Florida Statutes (1985), which states in pertinent part:

(2)(a) . . . [O]ne who is employed as an agent or employee may agree with his employer to refrain from carrying on or engaging in a similar business and from soliciting old customers of such employer within a reasonably limited time and area, . . . so long as such employer continues to carry on a like business therein. Said agreements may, in the discretion of a court of competent jurisdiction, be enforced by injunction.

\* \* \*

The question in this case is whether the nature of the business transaction affects whether a consent to an assignment of a noncompete agreement is necessary either in the original agreement or in connection with the subsequent transactions. The types of transactions relevant to this case are an asset sale, a 100 percent stock sale, a merger, and a name change.

\* \* \*

We begin with a discussion of the effect of a 100 percent stock purchase on a corporation's existence. Unlike partnerships, a corporate entity is not dissolved by a change of ownership. *See St. Petersburg Sheraton Corp. v. Stuart*, 242 So.2d 185, 190 (Fla. 2d DCA 1970) ("Ownership by one corporation of all the stock of another corporation does not destroy the identity of the latter as a distinct legal entity. . . ."). In fact, a foundation of corporate law is that, unlike a partnership or a sole proprietorship, the existence of a corporate entity is not affected by changes in its ownership or changes in management. *See Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163, 121 S.Ct. 2087, 150 L.Ed.2d 198 (2001) ("The corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status."); *see also Am. States Inc. Co. v. Kelley*, 446 So.2d 1085, 1086 (Fla. 4th DCA 1984) ("The general rule is that corporations are legal entities separate and distinct from the persons comprising them."). Moreover, there is a "clear distinction between the transfer of an asset or a corporation, such as a franchise agreement, and a transfer of the stock in a corporation itself." *Hawkins v. Ford Motor Co.*, 748 So.2d 993, 1000 (Fla.1999). *Cf. Cruising World, Inc. v. Westermeyer*, 351 So.2d 371, 373 (Fla. 2d DCA 1977) (stating that a share of stock does not vest owner with any right or title to any of corporation's property). With a stock purchase, the corporation

whose stock is acquired continues in existence, even though there may be a change in its management. As explained in *Sears Termitte*, the "fact that there is a change in ownership of corporate stock does not affect the corporation's existence or its contract rights, or its liabilities." 745 So.2d at 486.

In contrast to a sale of corporate stock, in a sale of corporate assets the transaction introduces into the equation an entirely different entity, the acquiring business. The asset sale to that entity may include some or all of the corporate assets, and the transferred assets may include tangibles such as machinery and intangibles such as accounts receivable. *See* § 607.1202(1), Fla. Stat. (2002) ("A corporation may sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property. . . ."). A corporation that sells its assets may continue in existence, may dissolve, or may merge with the entity that purchased its assets. *See Best Towing & Recovery, Inc. v. Beggs*, 531 So.2d 243, 245 (Fla. 2d DCA 1988) (noting that pursuant to an agreement, a transfer of assets may immediately dissolve a corporation).

A corporation that acquires the assets of another business entity does not as a matter of law assume the liabilities of the prior business. *See Bernard v. Kee Mfg. Co.*, 409 So.2d 1047, 1049 (Fla.1982). In *Bernard*, this Court declined to impose product liability on a successor corporation that purchased the assets of the manufacturer of a defective product and continued the product line under the same trade name, but discontinued the allegedly defective model. *See id.* at 1048. This Court set out the generally accepted rule applicable to an asset purchase:

The vast majority of jurisdictions follow the traditional corporate law rule which does not impose the liabilities of the selling predecessor upon the buying successor company unless (1) the successor expressly or impliedly assumes obligations of the predecessor, (2) the transaction is a de facto merger, (3) the successor is a mere continuation of the predecessor, or (4) the transaction is a fraudulent effort to avoid liabilities of the predecessor.

[Citations omitted]

In an asset purchase, the liabilities and responsibilities of each party would be set forth in the parties' agreement. *See William Meade Fletcher et al., Fletcher Cyclopedia of the Law of Private Corporations*, § 7122 (perm.ed., rev.vol.1990) ("The general rule . . . is that where one company sells or otherwise transfers all its assets to another company, the latter is not liable for the debts and liabilities of the transferor. . . . An express agreement, or one that can be implied, to assume the other company's debts and obligations, is necessary. . . ."). Thus, when the sale of the assets includes a personal service contract that contains a noncompete agreement, the purchaser can enforce its terms only with the employee's consent to an assignment. *See, e.g., Pino v. Spanish Broad. Sys. of Fla., Inc.*, 564 So.2d 186, 189 (Fla. 3d DCA 1990) (holding that because contract containing



covenant not to compete included a provision permitting assignment, the covenant was assignable and enforceable by business that bought assets of employee's former employer).

We next address a corporate merger, which is also involved in this case. Under longstanding precedent, on the date of a merger the surviving corporation becomes "liable for the debts, contracts and torts" of the former corporation. *Barnes v. Liebig*, 146 Fla. 219, 1 So.2d 247, 253 (1941). This principle is codified in section 607.1106, Florida Statutes (2002), which provides in pertinent part:

(1) When a merger becomes effective:

(a) Every other corporation party to the merger merges into the surviving corporation and the separate existence of every corporation except the surviving corporation ceases;

(b) The title to all real estate and other property, or any interest therein, owned by each corporation party to the merger is vested in the surviving corporation without reversion or impairment;

(c) The surviving corporation shall thenceforth be responsible and liable for all the liabilities and obligations of each corporation party to the merger[.]

This provision has remained unchanged since its 1989 enactment and thus contains the statutory language applicable at the time of the mergers in this case. Prior to the enactment of section 607.1106, section 607.231(3), Florida Statutes (1987), similarly provided that the surviving corporation of a merger "shall have all the rights, privileges, immunities and powers, and shall be subject to all of the duties and liabilities" of the merged corporation.

Precedent applying these provisions demonstrates the passage of the obligations and rights of a merged corporation to the survivor of the merger. In *Celotex Corp. v. Pickett*, 490 So.2d 35, 37 (Fla.1986), this Court construed section 607.231(3) to hold Celotex liable for punitive dam-

ages stemming from a shipyard worker's exposure to asbestos manufactured by a corporation it had absorbed in a merger. This Court stated:

Where two corporations have truly merged, a corporate tortfeasor by any other name is still a tortfeasor, to paraphrase Shakespeare. *See, e.g., Moe v. Transamerica Title Insurance Co.*, 21 Cal.App.3d 289, 98 Cal.Rpt[r]. 547, 556-57 (1971) (merger "merely directs the blood of the old corporation into the veins of the new, the old living in the new"); *Atlanta Newspapers, Inc. v. Doyal*, 84 Ga.App. 122, 128, 65 S.E.2d 432, 437 (1951) (merger "is like the uniting of two or more rivers, neither stream is annihilated, but all continue in existence").

[Citations omitted]

Based on the language in Florida's statute as well as the decisions in *Barnes* and *Celotex*, we conclude that the surviving corporation in a merger assumes the right to enforce a noncompete agreement entered into with an employee of the merged corporation by operation of law, and no assignment is necessary. This is because in a merger, the two corporations in essence unite into a single corporate existence.

Accordingly, based on fundamental principles of commercial transactions and the applicable statutes, we hold that, in contrast to an asset purchase, neither a 100 percent purchase of corporate stock nor a corporate merger affects the enforceability of a noncompete agreement. This holding is in accord with our decisions in both *Bernard* and *Celotex* where we have followed the traditional principles of corporate law in determining the obligations and liabilities of a successor corporation. This holding also "conforms with the policy of preserving the sanctity of contract and providing uniformity and certainty in commercial transactions." *Pino*, 564 So.2d at 189.

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## PROBLEMS

1. A shareholder of LMN Corporation does *not* have a right to dissent and appraisal of shares under the Model Act when:
  - a. LMN Corporation is the surviving corporation to a merger and LMN owns all the outstanding shares of the other corporate party to the merger;
  - b. LMN Corporation is selling substantially all its assets to XYZ Corporation;
  - c. LMN Corporation is exchanging its shares with XYZ Corporation shareholders; or
  - d. LMN Corporation is being merged in XYZ Corporation.
2. When two corporations continue by forming a new corporation into which both of their businesses are combined, it is a
  - a. merger;
  - b. consolidation;
  - c. dissolution; or
  - d. transfer of assets outside the ordinary course of business.
3. Name the intracorporate parties who must approve a merger.
4. XYZ Corporation has 100,000 shares of common stock outstanding. ABC Corporation has 200,000 shares of common stock outstanding. The corporations are planning to merge. If XYZ Corporation already owns 185,000 shares of ABC Corporation, the transaction is called a \_\_\_\_\_ merger.



5. Under the facts of problem 4, the following parties must approve the merger:
  - a. the shareholders of XYZ Corporation;
  - b. the shareholders of ABC Corporation;
  - c. the board of directors of XYZ Corporation;
  - d. b and c but not a;
  - e. a and b but not c; or
  - f. a and c but not b.
6. Ignoring the facts of problems 4 and 5, if XYZ Corporation is planning to issue 15,000 shares of its common stock to the shareholders of ABC Corporation in exchange for all of their shares of ABC Corporation, the transaction is called a \_\_\_\_\_ merger.
7. Under the facts of problem 6, the following parties must approve the merger:
  - a. the shareholders of XYZ Corporation;
  - b. the shareholders of ABC Corporation;
  - c. the board of directors of XYZ Corporation;
  - d. a and b but not c;
  - e. b and c but not a; or
  - f. a and c but not b.
8. A “poison pill” is
  - a. a bitter thing to swallow;
  - b. a corporate structure designed to prevent a takeover;
  - c. a corporate structure designed to make a takeover undesirable; or
  - d. a compensation agreement among management.
9. State three ways in which a corporation may be voluntarily dissolved.
10. Dissenters’ rights are usually permitted for:
  - a. amendments of the articles of incorporation;
  - b. dissolution;
  - c. changes to the bylaws; or
  - d. mergers.

## PRACTICE ASSIGNMENTS

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1. Allstate Corporation has been doing business in your state for forty years, but now, after significant economic reversals, the board of directors has decided to terminate the business. Allstate has creditor claims of \$1,086,789 and assets of \$2,345,098. It will eliminate its offices at 37856 South Wadsworth Boulevard in your city. All the employees will be fired, and the officers and directors will resign. Shareholders own 34,980 shares of common stock. Prepare the necessary documents to dissolve Allstate.
2. Sara Smith is a shareholder of Righteous Corporation and has received a notice that Righteous Corporation is going to merge with Humble Company. Ms. Smith does not want to be a shareholder of Humble, and regards its business policies as meek and timid. Prepare a letter to Ms. Smith describing her right to dissent to the transaction under your local law. Include all advice necessary for her exercise of dissenters’ rights, and describe what she will receive as a result.
3. Review your local corporation code and describe in a memorandum the circumstances under which a corporation may be involuntarily dissolved.
4. Describe the advantages and disadvantages of a judicially supervised dissolution and liquidation of the corporation to the following persons:
  - a. directors of the corporation;
  - b. officers of the corporation;
  - c. creditors of the corporation;
  - d. shareholders of the corporation; and
  - e. attorneys for the corporation.

## END NOTES

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1. Model Business Corporation Act (hereafter M.B.C.A.) § 10.03.

2. E.g., Pennsylvania, 15 Pa. Stat. Ann. § 1912.

3. See “Shareholder Meetings” in Chapter 10.

4. See M.B.C.A. § 7.04.

5. See “Action without a Meeting” in Chapter 10.

6. See M.B.C.A. § 10.04.

7. M.B.C.A. § 10.06.

8. This is also the rule under the Model Business Corporation Act. See M.B.C.A. § 1.23.

9. E.g., New York requires consent of the state tax commission for amendments reviving an administratively dissolved corporation, N.Y. Bus. Corp. Law § 806 (McKinney).

10. See M.B.C.A. § 1.23.

11. See “Filing and Other Formalities” in Chapter 8.

12. See M.B.C.A. § 10.07.

13. See M.B.C.A. §§ 11.01, 11.02.

14. M.B.C.A. § 11.04(g).

15. M.B.C.A. § 11.04.

16. See “Amendment of the Articles of Incorporation” earlier in this chapter.

17. See “Rights of Dissenting Shareholders” later in this chapter.

18. See “Filing and Other Formalities” in Chapter 8.

19. See M.B.C.A. §§ 11.06(b) and 1.23.
20. E.g. Georgia, Ga. Bus. Corp. Act § 14-2-123.
21. M.B.C.A. § 11.07.
22. I.R.C. of 1986, 26 U.S.C.A. § 368(1)(a).
23. M.B.C.A. § 12.02.
24. See “Rights of Dissenting Shareholders” later in this chapter.
25. See “Effect of Qualification” in Chapter 14.
26. See “Structural Changes in the Foreign Corporation” in Chapter 14.
27. See M.B.C.A. §§ 9.20-9.25.
28. M.B.C.A. §§ 9.30-9.35.
29. M.B.C.A. §§ 9.40-9.43.
30. M.B.C.A. §§ 9.50-9.56.
31. M.B.C.A. § 13.02.
32. M.B.C.A. §§ 11.04, 13.02.
33. M.B.C.A. §§ 13.20-13.23.
34. M.B.C.A. § 13.23.
35. M.B.C.A. § 13.01(4).
36. M.B.C.A. § 13.23.
37. M.B.C.A. § 13.24.
38. M.B.C.A. § 13.30.
39. M.B.C.A. § 13.31
40. M.B.C.A. § 14.01.
41. E.g., Delaware, Del. Code Ann. tit. 8, § 275(c).
42. M.B.C.A. § 14.02.
43. M.B.C.A. § 14.02.
44. M.B.C.A. § 14.03.
45. M.B.C.A. § 14.05.
46. M.B.C.A. § 14.06.
47. M.B.C.A. § 14.04.
48. M.B.C.A. § 14.30.
49. M.B.C.A. §§ 14.22, 14.23.
50. E.g., Minnesota, Minn. Stat. Ann. § 3201A.751 (West).
51. M.B.C.A. §§ 14.31–14.33.
52. See M.B.C.A. § 14.32.
53. M.B.C.A. § 14.30(3).
54. M.B.C.A. §§ 14.21, 14.33.
55. M.B.C.A. § 8.33.
56. See, e.g., Nevada, Nev. Rev. Stat. § 78.585 (permitting creditor claims within two years after dissolution).
57. M.B.C.A. § 14.06.
58. M.B.C.A. § 14.07.
59. M.B.C.A. § 14.32.
60. See “Dissolution and Liquidation” in Chapter 11.