

Preincorporation Responsibility
Preincorporation Share Subscriptions
Selection of Jurisdiction
Selection and Reservation of Corporate Name
The Articles of Incorporation
Filing and Other Formalities
Corporate Existence
Formalities after Formation of a Corporation
Bylaws

FORMATION OF A CORPORATION

PREINCORPORATION RESPONSIBILITY

The embryo of a corporation is the business idea conceived by an individual or group of individuals. The idea may be fresh, as with entrepreneurs who simply decide to begin a business, or it may evolve from an established commercial enterprise that will continue under the corporate form. Regardless of the genesis of the idea, the attorney is consulted for the purpose of forming the appropriate structure for operation of the business. If limited liability, flexible capital structure, and tax advantages are desired, the corporate organization may be most desirable. The organizers rely upon the attorney to properly consider the advantages and disadvantages of the various business forms and to advise them of the most beneficial organization.¹

At this point, the organizers are private individuals with a business idea, and good practice suggests that they agree among themselves in writing about certain important matters regarding the corporation to be formed. The relationship between these organizers or **promoters** resembles a **joint venture**, which is like a partnership. Even without a written agreement, the law imposes certain rights and responsibilities upon the relationship, including duties to disclose important information to each other and to avoid any conflict of interest that might interfere with their participation in the project. However, to avoid disputes and to facilitate the smooth incorporation of their business, a written agreement between the organizers is appropriate (see Exhibit 8-1, Agreement Between Promoters).

The organizers or promoters are responsible for investigating the particular business opportunity and assembling the property, cash, and personnel to accomplish the business objectives. Generally, the promoters will look for a suitable business establishment; negotiate a lease or purchase of that establishment; and contract for necessary furniture, fixtures, and so forth. They will search for capable employees, if needed, and may negotiate employment contracts with them. If the business opportunity is unique, patents, copyrights, or trademarks must be obtained. A common denominator to each of these activities is that the promoters are acting as individuals in a joint venture relationship on behalf of a corporation yet to be formed. They cannot bind the corporation to the contracts they are negotiating because the corporation does not exist. In some respects, they are agents acting on behalf of a principal that has yet to be created. Consequently, the promoters usually are required to obligate themselves individually on those contracts. After the

corporation is formed, it may adopt the contracts through appropriate action by the board of directors, but the promoters who have signed the contracts in their individual capacities usually remain obligated for performance of the contracts. Promoters considering the corporate form should always be advised of these ramifications of preincorporation agreements, but they should not be deterred by these facts from forming a corporation, since they would not escape individual liability by using any alternative business form.

Exhibit 8-1.

Agreement Between Promoters

AGREEMENT BETWEEN PROMOTERS

Agreement, made this _____ day of _____, 20____, between A_____ B_____ of _____, and C_____ D_____ of _____.

Whereas, the parties desire to form a corporation upon the terms and conditions set forth in this agreement.

Now, therefore, it is agreed:

1. **Formation of the Corporation.** The parties shall as soon as possible form a corporation under the laws of the State of _____.

2. **Certificate of Incorporation.** The certificate of incorporation shall provide substantially as follows:

(a) The name of the corporation shall be _____, or if this name is not available such other name as the parties shall select.

(b) The principal office or place of business of the corporation shall be located at _____. The name and address of its resident agent shall be _____.

(c) The purpose of the corporation shall be the manufacture and wholesale distribution of textile fabrics. The corporation shall have such powers as may be appropriate in connection with such a business.

(d) The names and places of residence of each of the incorporators are:

(e) The corporation shall have perpetual existence.

(f) The minimum amount of capital with which the corporation shall commence business is \$1,000.

(g) The total number of shares of stock shall be 1,000, divided into two classes as follows:

Common Stock, \$10 par value	500 shares
Preferred Stock, \$100 par value	500 shares

(h) The designations; the powers, preferences, and rights; and the qualifications, limitations, or restrictions of such stock are: [*Here describe*].

3. **Subscriptions of Parties.** The parties subscribe for shares of stock of the proposed corporation, as follows:

(a) Within one week after the certificate of incorporation has been filed and recorded the corporation shall issue to A_____ B_____ _____ shares of common stock of the corporation, \$10 par value, in consideration of the simultaneous execution and delivery to the corporation of a deed transferring marketable title to the following described real property, free and clear of liens: [*Here describe*].

(b) Within one week after the certificate of incorporation has been filed and recorded the corporation shall issue to C_____ D_____ shares of preferred stock of the corporation, \$100 par value, in consideration of the simultaneous payment by C_____ D_____ to the corporation of the sum of \$_____ in cash.

4. **Agreement to Purchase Additional Stock.** C_____ D_____ shares of preferred stock of the corporation, \$100 par value, in consideration of the simultaneous payment by C_____ D_____ agrees to purchase additional preferred stock not to exceed \$_____ in par value if during the first two years of the operation of the corporation its net profits do not equal at least \$_____.

Exhibit 8-1.

(continued)

5. **Stock to Promoter for Services.** The corporation shall issue to _____ of _____, _____ shares of common stock of the corporation, par value \$, in consideration for his services in organizing the corporation.

6. **First Directors of Corporation.** The directors of the corporation for the first year shall be _____, _____, and _____.

7. **Employment Contracts.** The corporation shall employ A _____ B _____ as president and general manager and C _____ D _____ as secretary-treasurer, each for a term of 5 years, at a salary of \$ _____ per year for A _____ B _____ and \$ _____ per year for C _____ D _____. Their employment shall not be terminated without cause and their salary shall not be increased or decreased without unanimous approval of all directors. Written employment contracts shall be entered into with A _____ B _____ and C _____ D _____ wherein they agree to devote their time and best efforts exclusively to the business and interests of the corporation.

8. **Restrictions on Transfer of Stock.** Each of the parties agrees not to transfer, sell, assign, pledge, or otherwise dispose of his or her shares of stock of the corporation without first obtaining the written consent of the other parties to the sale or other disposition, or without first offering to sell the shares to the corporation at a value to be determined by a board of 3 appraisers, one of whom shall be appointed by each of the parties, A _____ B _____, and C _____ D _____. The offer shall be in writing and shall remain open for 30 days. If the corporation fails to accept the offer within that period, a second offer also in writing shall then be made to sell the shares on similar terms to the other parties to this agreement pro rata. If the offer be not accepted by either the corporation or the other parties, the shares shall thereafter be freely transferable.

9. **Designation of Incorporators.** The parties appoint and designate _____ and _____ to act as the incorporators of the corporation and to take whatever steps are necessary to organize the corporation in accordance with the applicable laws of the State of _____. The authority which is hereby granted shall extend to the preparation, execution, and filing of such documents and other papers as are necessary in the incorporation process to carry out the terms and conditions of this agreement.

10. **Organization Expenses.** Each of the parties shall advance to _____ his or her pro rata share of the funds which shall be necessary to pay the expenses and costs of incorporation. As soon as practicable after it commences business, the corporation shall reimburse each of the parties for such advances.

11. **Arbitration.** All disputes, differences, and controversies arising under or in connection with this agreement shall be settled and finally determined by arbitration in the City of _____ according to the Rules of the American Arbitration Association now in force or hereafter adopted.

12. **Nonassignability of Agreement.** This agreement shall not be assignable by any party without the written consent of the other parties.

13. **Subchapter S Election.** Each of the undersigned who make the capital contribution required under section 3 of this agreement further agree to elect to be shareholders in a corporation taxed under Subchapter S of the Internal Revenue Code of 1986, as amended, and to sign and file Form 2553 with the Internal Revenue Service for that purpose.

14. **Persons Bound.** The terms and conditions of this agreement shall be binding upon the parties and their respective legal representatives, successors, and assigns. However, if one of the parties dies prior to the time the corporation comes into existence, this agreement shall automatically terminate.

Executed in triplicate on the date first above written.

A _____ B _____
 C _____ D _____

When soliciting capital for the corporation, the promoters' activities are governed by a different set of rules. Operating capital may be obtained through loans or by the sale of stock in the corporation to be formed. Loans negotiated before the formation of the corporation are treated as ordinary preincorporation agreements, with the promoters risking individual liability for repayment. Sales of stock are accomplished by a preincorporation share subscription.

PREINCORPORATION SHARE SUBSCRIPTIONS

Share subscriptions are offers from interested investors to purchase shares of a corporation. **Preincorporation share subscriptions** are, as the name indicates, offers to purchase shares when the corporation is subsequently formed. These share subscriptions may be necessary to the proper formation of a corporation for several reasons.

In a practical sense, every corporation needs capital to commence business, and investors must be identified and promises to purchase shares must be secured before the new enterprise is launched. In addition, from a strictly legal standpoint, some state statutes require the use of preincorporation share subscriptions in various stages of the formation procedure. One such provision, not found in the Model Business Corporation Act, is that the incorporators must also be subscribers.² In states with this provision, a prospective incorporator must tender a preincorporation share subscription in order to qualify as an incorporator. Several other states require that a corporation must have a minimum amount of **paid-in capital** before it may commence business (see Exhibit 8–2, Certificate of Paid-in Capital);³ and in these jurisdictions, preincorporation share subscriptions are used to solidify promises to contribute the amount required by statute, since the corporation will not be allowed to commence business without the requisite capital. Thus, preincorporation share subscriptions are used in most cases for practical or legal reasons to secure promises to purchase shares once the corporation is formed.

A preincorporation share subscription may be executed by anyone who has decided to invest in the company. The terms of the subscription describe an offer to purchase shares. The subscription may also contain any other contractual terms desired, such as restrictions on the transferability of the shares once they are issued to the shareholders. If the corporation accepts the offer, a binding contract is created. A few states require written, signed subscriptions, and it is good practice to obtain a written offer in any case. A single subscription may be executed by several subscribers, or each subscriber may execute his or her own subscription.

EXAMPLE

Share Subscription for Several Subscribers

We, the undersigned, hereby severally subscribe for the number of shares of the capital stock of Trouble, Inc., set opposite our respective names. The Corporation is to be organized under the laws of the State of Delaware, with an authorized capital stock of \$50,000.00 consisting of 5,000 shares of common stock, \$10.00 par value. We further agree to pay the amount subscribed in cash on demand of the treasurer of the said Corporation as soon as it is organized [*or at such times and in such amounts as may be prescribed by the Board of Directors of the Corporation*].

Dated July 1, 2000.

<i>Names</i>	<i>Addresses</i>	<i>Shares Subscribed</i>	<i>Amount Subscribed</i>
_____	_____	_____	_____
_____	_____	_____	_____

Exhibit 8-2.

Certificate of Paid-in
Capital (New Jersey)

Form C-109—10-31-61 5 M

filing	\$5.00
Recording	\$2.00
Total	\$7.00

Certificate of Payment of Capital Stock

of the Company.

The location of the principal office in this State is at No. Street,
in the of County of

The name of the agent therein and in charge thereof, upon whom process against this corporation may be served, is

In accordance with the provisions of Section 14:8-16 of the Revised Statutes, we
..... President,
and Secretary of the
..... Company,

a corporation of the State of New Jersey, do hereby certify that

..... dollars, being the
.....

of capital stock of said company, as authorized by its Certificate of Incorporation filed in the Department of State on the day of

A. D. 19 .., has been fully paid in: dollars thereof by the purchase of property and dollars thereof in cash. The capital stock of said company previously paid and reported is \$ of Common Stock and of Preferred Stock.

WITNESS our hands the day of
A. D. 19 ..

..... *President.*
..... *Secretary.*

.....
STATE OF }
COUNTY OF } ss.
..... *President,*
and *Secretary of the*
..... *Company.*

Being severally duly sworn, on their respective oaths depose and say that the foregoing certificate by them signed is true.

Subscribed and sworn to before me, }
this *President.*
day of A. D. 19 } *Secretary.*

EXAMPLE**Share Subscription for a Single Subscriber**

The Dillon Manufacturing Company to be incorporated under the laws of the State of Michigan.

Capital Stock \$1,000,000.00

Shares \$100.00 par value

I, the undersigned, hereby subscribe for 100 shares of the capital stock of the Dillon Manufacturing Company to be incorporated and agree to pay in cash for said stock the sum of \$10,000.00 on demand of the Board of Directors of the Corporation.

This agreement is made upon the condition that eighty percent of the capital stock of the Corporation is subscribed in good faith by solvent persons on or before the 1st day of July, 2005, and the Corporation is incorporated within 30 days thereafter.

Dated May 1, 2005.

These subscriptions are also assignable. Therefore, in jurisdictions where incorporators are required to be subscribers by law, the incorporators must subscribe, but if they do not intend to invest, they may assign their preincorporation share subscriptions to outsiders who have acknowledged a desire to invest.

The law presumes that the corporation is formed in reliance upon the offers of subscribers to purchase shares, especially when the statute requires minimum paid-in capital as a condition to commencing business. Under common law, share subscriptions were revocable until the corporation had been formed and had accepted them by agreeing to issue shares for the amount of the subscriptions. Modern statutes provide that the preincorporation share subscriptions are irrevocable for a period of time. Section 6.20 of the Model Business Corporation Act states that a preincorporation subscription of shares of a corporation is irrevocable for a period of six months unless otherwise provided in the terms of the subscription agreement or unless all of the subscribers consent to the revocation. The period of irrevocability varies among the state statutes from three months to one year.⁴ A few states specify the period to be a stated time after the certificate of incorporation is issued.⁵ If a corporation is formed during the period of irrevocability, it may accept the subscription and require the subscriber to purchase the shares for the amount stated therein. In most jurisdictions, acceptance occurs by action of the board of directors after the corporation is formed,⁶ but Pennsylvania makes acceptance automatic upon the filing of articles of incorporation,⁷ and a few states make acceptance automatic upon the issuance of a certificate of incorporation.⁸ When the subscription is accepted by the corporation or automatically under the statute, the subscriber is usually required to pay the amount in full, but the board of directors may permit payment in installments.

EXAMPLE**Call of Subscription**

August 1, 2005

To: James Lyons

[Address]

Dear Sir:

At a regular meeting of the Board of Directors of Trouble, Inc., held on July 30, 2005, a resolution was duly adopted fixing the amount of calls on stock issued as partly paid and the date of payment of each call.

You are hereby notified that the first call on your subscription for partly paid stock amounts to \$500.00, which sum is due and payable at the office of the Corporation on August 15, 2005.

Trouble, Inc.

By _____, Secretary

If a subscriber defaults on the subscription contract and refuses to pay any installment when due, the corporation may sell the shares to another investor, and the defaulting subscriber may be liable for breach of contract. Moreover, under the Model Business Corporation Act, a subscriber may forfeit any right to the shares if the amount due is not paid within twenty days after a written demand has been made.⁹

Demand for Payment and Notice of Forfeiture

September 1, 2005

EXAMPLE

To: James Lyons
[Address]

You are hereby notified that at a regular meeting of the Board of Directors of Trouble, Inc., the following resolution was duly adopted:

“Resolved, that the entire [or _____ percent of the] unpaid balance on all subscriptions to the common stock of this Corporation is hereby called for payment forthwith, and the Secretary is hereby directed to demand payment from each subscriber having an unpaid balance, by mailing to him [or her], at his [or her] last known address, a written demand requiring payment within 20 days from receipt of such notice, in default of which his [or her] shares and all previous payments thereon will be forfeited.”

Demand is hereby made upon you for payment in accordance with the provisions of the above resolution, and you are hereby notified that, in default of payment within 20 days from receipt of this notice and demand, your shares and previous payments thereon will be forfeited.

Trouble, Inc.
By _____, Secretary

Most statutes permit the bylaws to prescribe other penalties for failure to pay in accordance with the subscription.

SELECTION OF JURISDICTION

Preceding sections have discussed the variations in corporate statutes and the trend toward permissiveness and flexibility in the jurisdictional approach to corporate problems. Moreover, states approach corporate taxation differently, and they subject corporations doing business outside the boundaries of their domestic or home states to special procedures when qualifying them to do business.¹⁰ These factors play an important role in the selection of the jurisdiction in which to incorporate. (See Exhibit 8–3, Nevada’s Advertisement for Corporations.)

A corporation formed within the state is known as a **domestic corporation**, and one formed in some other state is called a **foreign corporation**. Each state’s statute has provisions regulating domestic corporations and special provisions for foreign corporations. If a particular state’s statute contains flexible and advantageous provisions for its domestic corporations but contains restrictive and cumbersome procedures for foreign corporations, that state should be considered a good candidate for incorporation (domestication). The converse is also true. There are other considerations as well, such as whether the state corporation law has been well tested by court decisions so as to be capable of accurate interpretation; whether the state’s taxation structure is acceptable; and whether the state laws will permit all desired corporate features. This last consideration requires an analysis of all important points of corporate law in each jurisdiction to be considered (see Exhibit 8–4, Checklist for Selection of Jurisdiction).

Having perused the checklist, you may be reeling at the thought of the monumental task of comparing all of those points for each of fifty states, and also wondering how a corporation is ever formed if that much research is required as a preface. A couple of observations may decrease your anxiety.

First, a corporation should not consider incorporating in a state where it does not intend to do business. To domesticate the corporation in a state where no business activity will be conducted only complicates the corporate structure, increases the cost of organizational expenses, and may result in double taxation. The exceptional case may arise when a permissive jurisdiction, such as Delaware, is particularly attractive for some special reason.¹¹ Thus, incorporators of a restaurant business in Santa Fe, New Mexico, would not consider incorporating outside the state unless an extremely attractive feature of another state is deemed particularly important for their corporate structure. Consequently, the first predisposition in the selection of jurisdiction is to incorporate in the state where the corporation will conduct

Exhibit 8-3.

Nevada's Advertisement for Corporations

Nevada Secretary of State - Why Incorporate In Nevada?

Page 1 of 2

Dean Heller
Nevada Secretary of State
Corporate Information



Why Incorporate in Nevada?

- No Corporate Income Tax
 - No Taxes on Corporate Shares
 - No Franchise Tax
 - No Personal Income Tax
 - No I.R.S. Information Sharing Agreement
 - Nominal Annual Fees
 - Minimal Reporting and Disclosure Requirements
 - Stockholders are not Public Record
-

Additional Advantages

- Stockholders, directors and officers need not live or hold meetings in Nevada, or even be U.S. Citizens.
- Directors need not be Stockholders
- Officers and directors of a Nevada corporation can be protected from personal liability for lawful acts of the corporation.
- Nevada corporations may purchase, hold, sell or transfer shares of its own stock.
- Nevada corporations may issue stock for capital, services, personal property, or real estate, including leases and options. The directors may determine the value of any of these transactions, and their decision is final.

SOS Contact Information



http://sos.state.nv.us/./comm_rec/whyinc.htm

10/7/2003

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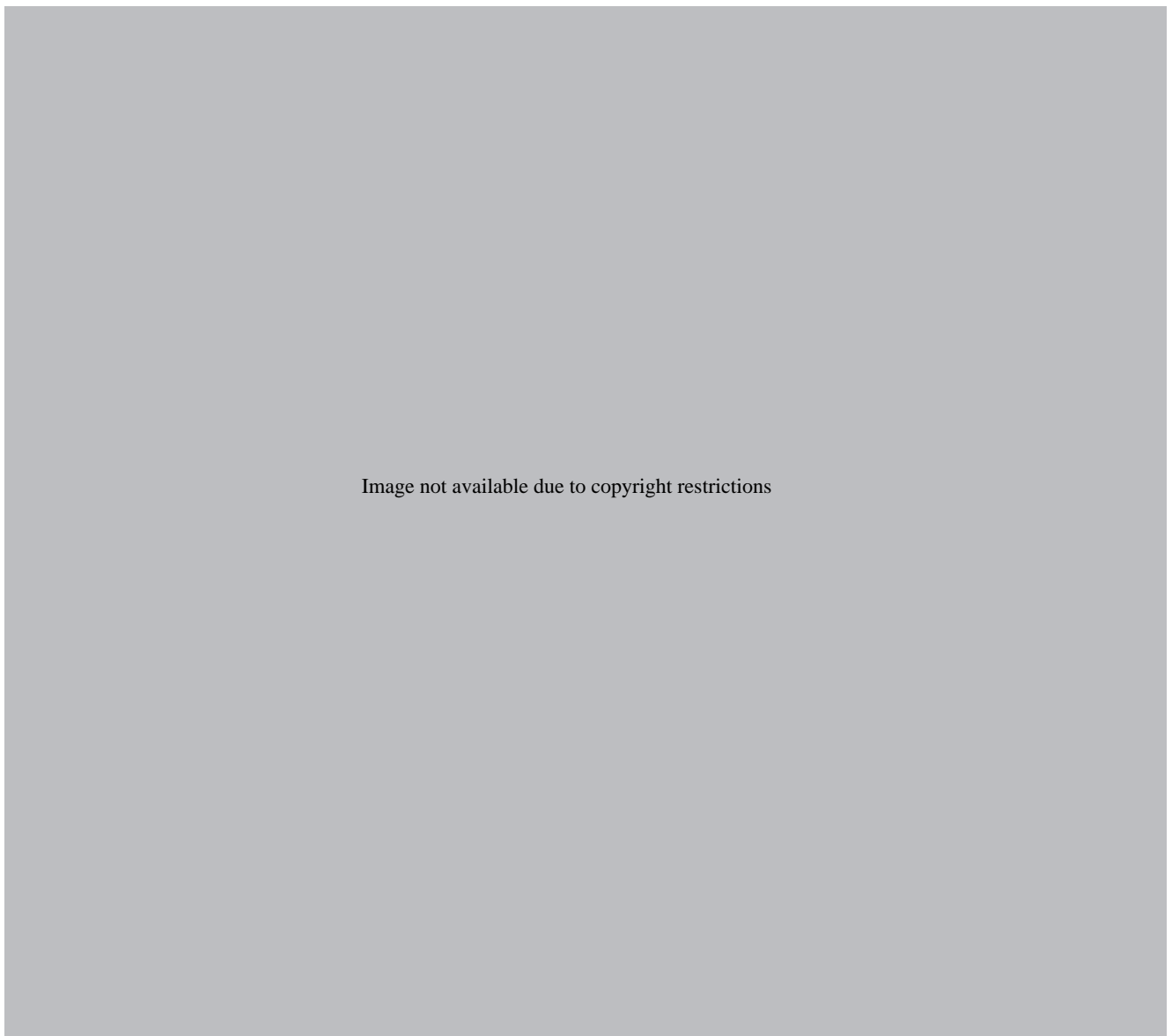


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most of its business. If business is to be conducted in only one state, that state should be the prime candidate for incorporation.

Second, when a corporation intends to conduct relatively equal amounts of business in several jurisdictions, a state-by-state comparison of all of the checklist items will yield a net result of advantages and disadvantages for each state, and a coin-toss decision may be appropriate. The permissive jurisdictions will stand out in relative advantages and flexibility, and they should always be considered when extensive interstate business is contemplated. Remember, however, that flexibility and ease of formation and operation are frequently costly. Most states with permissive corporate laws are seeking to attract corporate business—so they can impose taxes. Make certain that the choice of a permissive state is worth the cost.

Other than the foregoing rules, perhaps the most accurate statement that can be made regarding jurisdiction selection is that the choice depends upon the circumstances of each case. The particular needs and desires of the client on each of the enumerated points in the check-

list must be considered, and the decision will depend upon the weight assigned to each element of the corporate structure.

SELECTION AND RESERVATION OF CORPORATE NAME

Most states require that every corporation must have a name that indicates it is a corporation. Even in the states that do not require a corporate “catchword” as part of the name, it is recommended that organizers adopt one so that the corporate name clearly indicates to outsiders that it is a corporate entity. The selection and determination of the availability of the name should come at an early stage in the incorporation procedure. The Model Business Corporation Act specifically requires that all names of corporations contain the words “Corporation,” “Company,” “Incorporated,” “Limited,” an abbreviation of one of those words, or an abbreviation of similar meaning in another language.¹³ This requirement is common to most jurisdictions. A few states will not permit “Limited” or “Company” and other statutory restrictions specify certain names and titles that may not be used in a corporate name.¹⁴ Many state statutes also prohibit a corporate name that contains any word or phrase indicating that the corporation is organized for any purpose other than the purposes stated in its articles of incorporation. Moreover, most jurisdictions forbid a corporate name that is the same as, or deceptively similar to, the name of any other domestic corporation existing under the laws of the state or any foreign corporation authorized to transact business in the state.¹⁵ This last requirement is a response to unfair competition and is designed to avoid the use of one organization’s name and reputation by another in order to induce public patronage. For example, the Great Atlantic and Pacific Tea Company, which operates A & P Food Stores, prevented a separate corporation from using the name A & P Trucking Corporation because of the possible public confusion in the names.

The prohibition against deceptive similarity has several ramifications. On the negative side, care must be taken to avoid the selection of a name that is dangerously close to that of another well-known company or individual. Moreover, if the new corporation intends to do business in several states, the name cannot approximate a well-known name in any of those states, even if the similar name is recognized only regionally and would be unknown in all the other states. If a name has been registered as a **trademark** under federal trademark registration laws, there are substantial civil penalties for using a deceptively similar name to the trademark even if the trademark is not used in the state where the corporation is formed. On the positive side, the selected corporate name should be one the state courts will protect against infringement by others. For example, descriptive names, such as Janitorial Service, Inc., or Builders Supply Company are very vulnerable to infringement because of their general application. Similarly, Jones and Smith, Inc., could not expect complete protection because of the courts’ reluctance to prohibit other Joneses and Smiths from using their own names. On the other hand, coined names that are selected arbitrarily, such as Gazorninplat Corporation, Jello, Inc., or Sunkist Fruit Co., will receive the greatest protection from infringement by a competitor.


The selection of the name is another of those individual matters for the client to decide. However, the problems of similarity, overstating corporate purposes, and statutory requirements must be considered in making that decision.

Availability of Name

To determine whether the proposed corporate name is available for use in a particular state, counsel should consult the state agency designated as the repository of corporate names, which is usually the secretary of state. That office will review the records to determine if the name has been used or if it is deceptively similar to the name of another corporation. The decision regarding availability is usually discretionary with the state authorities, and those authorities will refuse to accept a reservation of name or the articles of incorporation if they feel the name is too similar to another in use. Sometimes this issue may be negotiated if the name is important to the client, and the addition of an extra word to the name

Exhibit 8–5.

Application for Reservation
of Corporate Name
(Mississippi)

F0016 - Page 1 of 1  1. Type of Corporation ('X' in one only) <input type="checkbox"/> Mississippi Profit <input type="checkbox"/> Mississippi Nonprofit <input type="checkbox"/> Mississippi Limited Partnership <input type="checkbox"/> Foreign Limited Partnership <input type="checkbox"/> Foreign Profit <input type="checkbox"/> Foreign Nonprofit	OFFICE OF THE MISSISSIPPI SECRETARY OF STATE P.O. BOX 136, JACKSON, MS 39205-0136 (601) 359-1333 Reservation of Name
2. Name to reserve <input style="width: 100%;" type="text"/>	
3. (For Foreign Corporations and Limited Partnerships ONLY) - Name elected to use in Mississippi <input style="width: 100%;" type="text"/>	
4. Applicant's name and address <input style="width: 100%;" type="text"/> Address <input style="width: 100%;" type="text"/> City, State, ZIP5, ZIP4 <input style="width: 20%; border: 1px dashed black;" type="text"/> <input style="width: 5%; border: 1px dashed black;" type="text"/> <input style="width: 15%; border: 1px dashed black;" type="text"/>	
Signature of Owner/Applicant <input style="width: 80%; height: 40px;" type="text"/> <small>(Please keep writing within brackets)</small>	
<small>Rev. 01/96</small>	

may be enough to obtain permission to use the desired name. According to legend, one secretary of state once refused the use of the name Westwind Corporation because another corporation was using it, but permitted the new corporation to be formed under the name Westwind Corporation Jr. The addition of one word—Jr.—was enough to distinguish the names. Both corporations (apparently operating different types of businesses) operated happily ever after.

Since the name will appear on all corporate documents, the choice of the name and its **reservation** must come early in the incorporation procedure.

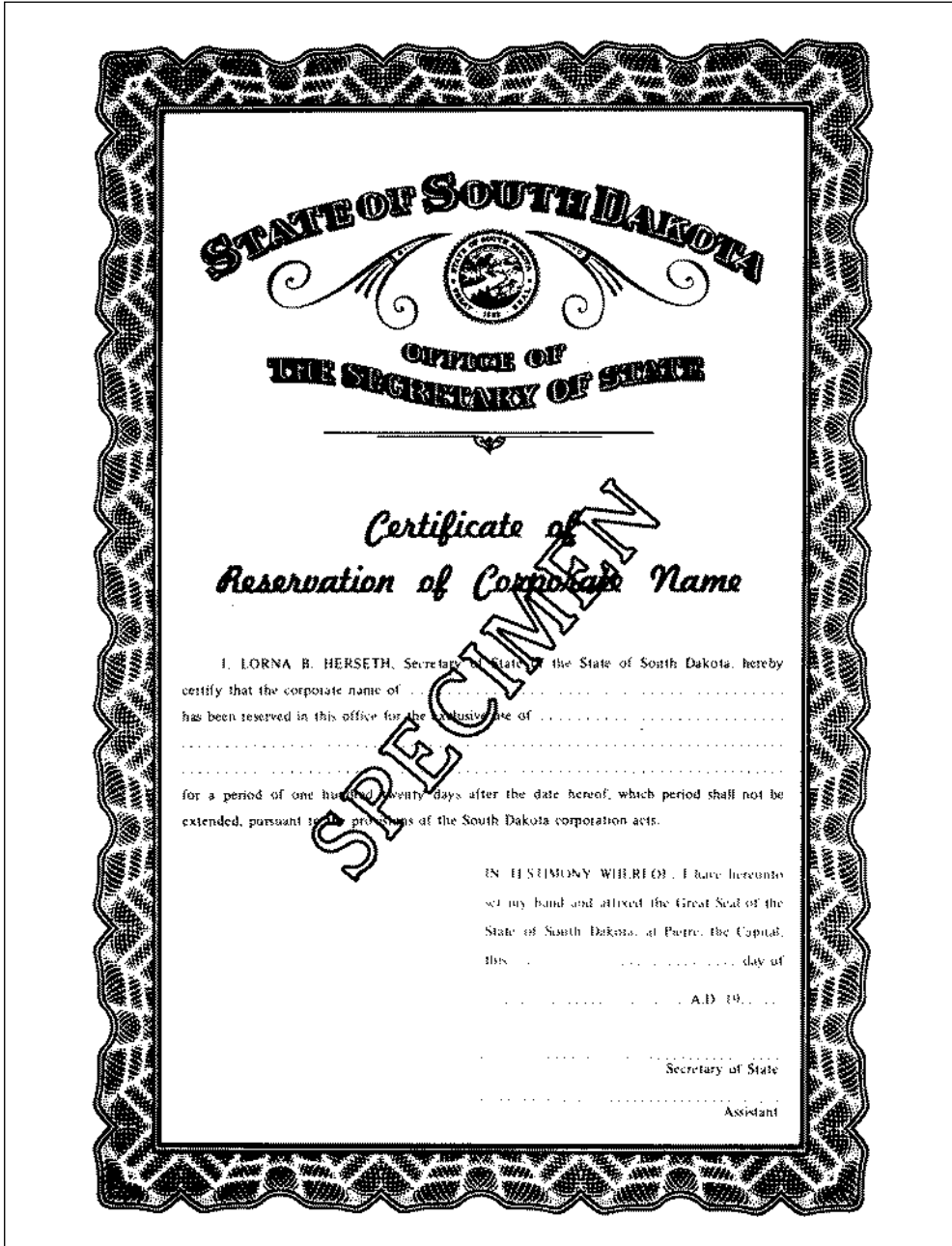
Reservation of Name

If the proposed corporate name is available, it should be reserved while the corporate papers are being prepared (see Exhibit 8–5, Application for Reservation of Corporate Name, and Exhibit 8–6, Certificate of Reservation of Corporate Name). Nothing is more frustrating and embarrassing than learning that a name is available, and preparing all corporate documents using that name, only to learn upon filing that the name has just been taken by another organization. Most states permit reservation of a corporate name for a limited period of time (from thirty days to twelve months) for a small fee,¹⁶ and a few states allow extension of the reservation for another limited period. Reservation holds the particular name for the exclusive use of the corporation for the specified period.

Under the Model Business Corporation Act, a corporate name may be reserved by any person intending to organize a corporation, domestic or foreign; any foreign corporation intending to qualify to do business within the state; or any organized domestic or foreign corporation

Exhibit 8-6.

Certificate of Reservation of Corporate Name (South Dakota)



intending to change its name. The period of reservation provided by the act is one hundred and twenty days.¹⁷

It is usually possible to **transfer** the reserved name to any person by filing a notice of transfer with the same state officer (see Exhibit 8-7, Notice of Transfer of Reserved Name and Exhibit 8-8, Certificate of Transfer of Reserved Corporate Name). This procedure allows an attorney or a member of the attorney’s staff to reserve the name for the client and then transfer the name to the corporation when the articles of incorporation are filed.


The Model Business Corporation Act and jurisdictions that follow it have an additional statutory provision that allows a corporation to *register* the corporate name for periods of one year at a time (see Exhibit 8-9, Application for Registration of Corporate Name and

Exhibit 8-7.

Notice of Transfer of
Reserved Name
(Mississippi)

F0018 - Page 1 of 1 **OFFICE OF THE MISSISSIPPI SECRETARY OF STATE**
P.O. BOX 136, JACKSON, MS 39205-0136 (601) 359-1333

Transfer of Reserved Name



1. Type of Corporation ('X' in one only)

<input type="checkbox"/> Mississippi Profit	<input type="checkbox"/> Mississippi Nonprofit	<input type="checkbox"/> Mississippi Limited Partnership
<input type="checkbox"/> Foreign Limited Partnership	<input type="checkbox"/> Foreign Profit	<input type="checkbox"/> Foreign Nonprofit

2. Name reserved

3. Owner of reserved corporate name

4. Transferred to

5. Address

Address

City, State, ZIP5, ZIP4 -

Signature of Owner/
Applicant (Please keep writing within blocks)

Rev. 01/96

Exhibit 8-8.

Certificate of Transfer of
Reserved Corporate Name
(Model Act)

STATE OF _____
OFFICE OF THE SECRETARY OF STATE

**CERTIFICATE OF
TRANSFER OF RESERVED CORPORATE NAME
OF**

The undersigned, as Secretary of State of the State of _____, hereby certifies that the corporate name of _____, which was reserved in this office on _____, 20____, for a period of one hundred twenty days thereafter, has been transferred to _____, whose address is _____, pursuant to the provisions of Section 9 of the _____ Business Corporation Act. Dated _____, 20____.

Secretary of State

Exhibit 8–9.

Application for Registration
of Corporate Name
(Alabama)

STATE OF ALABAMA
APPLICATION FOR REGISTRATION
OF FOREIGN CORPORATE NAME
TO THE SECRETARY OF STATE OF THE STATE OF ALABAMA,

PURSUANT TO THE PROVISIONS OF THE ALABAMA BUSINESS CORPORATION ACT, THE UNDERSIGNED HEREBY APPLIES FOR THE REGISTRATION OF ITS CORPORATE NAME THROUGH DECEMBER 31, 20____ AND SUBMITS THE FOLLOWING STATEMENT.

- The exact name of the Corporation (Alabama law requires the corporate name to include "Corporation," "Corp," "Incorporated" or "Inc.):

- The Corporation is incorporated under the laws of the state of _____.
- The date of its incorporation is _____.
- The business in which it is engaged is:

- This application is accompanied by: (1) a certificate of existence executed by the official having custody of the records pertaining to corporations; and (2) a registration fee of \$ _____.*

* **There is a fee of one dollar for each month, or a fraction thereof between the date of filing such application and December 31 of the calendar year in which such application is filed, but not less than five dollars.**

I understand that the Office of the Secretary of State does not assume any responsibility for the availability of the corporate name requested or for any duplication which may occur.

Date: _____

 Type or Print Corporate Officer's Name and Title

 Signature of Officer

MAIL APPLICATION WITH THE APPROPRIATE FILING FEE TO:
 SECRETARY OF STATE, CORPORATIONS DIVISION, POST OFFICE BOX 5616, MONTGOMERY, ALABAMA 36103-5616
 (334)242-5324

Rev. 4/2000

Exhibit 8–10, Certificate of Registration of Corporate Name). **Registration of the corporate name** has the same effect as reservation of the name, but registration is permitted only for a corporation already organized and existing and, therefore, would be used only by foreign corporations interested in qualifying to do business within the state. (An organized and existing domestic corporation would have no use for the registration procedure, since incorporation reserves its name as long as the corporation remains in good standing.) The registered name may not be the same as or deceptively similar to the name of a domestic or qualified foreign corporation. The initial registration is effective until the close of the calendar year in which the application for registration is filed, and the fee is prorated for the portion of the year remaining at the time of filing. Thereafter, a corporation may continue to

Exhibit 8–10.

Certificate of Registration
of Corporate Name (South
Dakota)

STATE OF SOUTH DAKOTA

OFFICE OF
THE SECRETARY OF STATE

*Certificate of
Registration of Corporate Name*

I, LORNA B. HERSETH, Secretary of State of the State of South Dakota, hereby certify that
a corporation incorporated under the laws of the State of
..... has registered its corporate name in this office, pursuant to
the provisions of Section 9 of the South Dakota Business Corporation Act, effective to and
including December 31, 19.....

IN TESTIMONY WHEREOF, I have hereunto
set my hand and affixed the Great Seal of the
State of South Dakota, at Pierre, the Capital,
this day of
..... A.D. 19.....


.....
Secretary of State
.....
Assistant

renew the registration from year to year by filing an application for renewal (see Exhibit 8–11, Application for Renewal of Registered Name and Exhibit 8–12, Certificate of Renewal of Registered Name).¹⁸

States without this registration procedure pose problems for a multistate corporation that wants to be certain its name is protected nationwide. Reservation of the name is not a viable alternative, since the reservation is good only for a limited period, and actual qualification to do business in every state will subject the corporation to additional regulation and taxation.¹⁹ Consequently, many corporations use “name-saver” subsidiaries to protect their corporate names. A domestic subsidiary corporation that uses the corporate name is formed within each state, and the name is thereby permanently reserved. Since the subsidiary usually has no ma-

Exhibit 8-11.

Application for Renewal of Registered Name (Idaho)



APPLICATION FOR REGISTRATION OF CORPORATE NAME OR RENEWAL OF NAME REGISTRATION

To the Secretary of State of the State of Idaho:
Pursuant to Section 30-1-403, Idaho Code, the undersigned corporation hereby applies for the registration of its corporate name and submits the following statement:

1. The name of the corporation:

2. The name in which it shall use in Idaho:

3. It is incorporated under the laws of _____
4. The date of its incorporation _____
5. The business in which it is engaged is:

6. This application is accompanied by an original certificate of existence or good standing executed by the official having custody of the records pertaining to corporations in the jurisdiction in which it is incorporated.
7. Check here if a renewal.

Dated _____

(Name of Corporation)

Signed _____

Typed Name _____

Capacity _____

Note: The fee for a new registration is \$5.00 for every month or part thereof remaining in the calendar year. The fee for renewing a registration for one calendar year is \$60.00.

Submit application and certificate of status to:

Office of the Secretary of State
700 W Jefferson
PO Box 83720
Boise, Idaho 83720-0080

Filing Office Use Only

g:\corp\forms\misc_forms\name_registration.pdf

Revised 09/00/02

For assets and conducts no business, the taxation and regulation imposed on the name-saver corporation are minimal. For example, if McDonalds Corporation wanted to preserve its right to use the name “Big Mac Company” in all states, but did not have definitive plans for when the name would be implemented in its corporate operations, it could form a subsidiary corporation with the name “Big Mac Company” in each state. The formation of the subsidiary entity would record the name as a corporate name and prevent others from adopting a similar name. There is no need to renew or worry about the expiration of the reservations of the name since the subsidiary corporation will permanently hold the name as long as the subsidiary is in existence.

Exhibit 8–12.

Certificate of Renewal of
Registered Name (South
Dakota)



Operation under an Assumed Name

The corporation may be formed under one name but may desire to operate under another, especially when it operates several different types of businesses and wants its various divisions to conduct business under separate names. An **assumed name** (also called a “trade name”) is also frequently used to satisfy the statutory restriction that the name may not contain any word or phrase that indicates or implies that the corporation is organized for any purpose other than the purposes stated in its articles of incorporation.

The procedure for the use of an assumed or trade name by a corporation is very similar to that followed by a sole proprietorship or partnership. Several state statutes allow the use of assumed or trade names by corporations, and they usually require the filing of a statement with

Exhibit 8–13.

Certificate of Assumed Name by Corporation (Michigan)

BCS:CD-541 (Rev. 07/03)

MICHIGAN DEPARTMENT OF CONSUMER & INDUSTRY SERVICES BUREAU OF COMMERCIAL SERVICES										
Date Received	(FOR BUREAU USE ONLY)									
This document is effective on the date filed, unless a subsequent effective date within 90 days after received date is stated in the document.										
<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td colspan="3">Name</td> </tr> <tr> <td colspan="3">Address</td> </tr> <tr> <td>City</td> <td>State</td> <td>Zip Code</td> </tr> </table>		Name			Address			City	State	Zip Code
Name										
Address										
City	State	Zip Code								
EXPIRATION DATE: DECEMBER 31,										

Document will be returned to the name and address you enter above.
If left blank document will be mailed to the registered office.

CERTIFICATE OF ASSUMED NAME
For use by Corporations, Limited Partnerships and Limited Liability Companies
(Please read information and instructions on reverse side)

Pursuant to the provisions of Act 284, Public Acts of 1972 (profit corporations), Act 162, Public Acts of 1982 (nonprofit corporations), Act 213, Public Acts of 1982 (limited partnerships), or Act 23, Public Acts of 1993 (limited liability companies), the corporation, limited partnership, or limited liability company in item one executes the following Certificate:

1. The name of the corporation, limited partnership, or limited liability company is:

2. The identification number assigned by the Bureau is:
3. The assumed name under which business is to be transacted is:

4. This document is hereby signed as required by the Act.

COMPLETE ITEM 5 ON LAST PAGE IF THIS NAME IS ASSUMED BY MORE THAN ONE ENTITY.

Signed this _____ day of _____, _____

By _____
(Signature)

(Type or Print Name) (Type or Print Title or Capacity)

(Limited Partnerships Only - Indicate Name of General Partner if the General Partner is a corporation or other entity)

the secretary of state (see Exhibit 8–13, Statement of Assumed Name by Corporation).²⁰ The corporation also may have to file with county officials where business is conducted. The statutes specify whether an assumed name must contain the special corporate words (Company, Incorporated, Limited, Corporation), and the assumed name may not be deceptively similar to any other well-known or reserved name.

THE ARTICLES OF INCORPORATION

The document that initiates the creation of the corporate existence and defines the corporate structure is the **articles of incorporation**, or corporate charter. The document is also called

certificate of incorporation, articles of association, or articles of agreement.²¹ Recall that corporate existence is regulated first by the state statute. The articles of incorporation then flesh out the statutory provisions to tailor a particular corporate structure to the needs of its incorporators.

The articles of incorporation may be thorough and detailed or they may contain only the bare essentials required by statute. The content of the articles is not arbitrarily determined, however; certain matters are required by the state statute and must always be included. Thereafter, any aspect of corporate existence may be regulated by the articles if desired—but remember that the articles, once filed, are difficult to change. The amendment procedure requires the approval of the shareholders and filing with the designated public officials.²² Thus, if the incorporators want certain rules to have some degree of permanence, these rules should be included in the articles of incorporation. On the other hand, if certain rules for regulation of corporate affairs are expected to change in the future, they are best reserved to the bylaws of the corporation, where the amendment procedure is considerably more convenient. These matters should be determined in an early conference with the incorporators when all statutory requirements and other drafting possibilities for the articles of incorporation are discussed (see Exhibit 8–14, Checklist for Articles of Incorporation).

Statutory Requirements

The Model Business Corporation Act requires that the articles of incorporation set forth the following information:

1. a corporate name for the corporation that satisfies the requirements of section 4.01;
2. the number of shares the corporation is authorized to issue;
3. the street address of the corporation's initial registered office and the name of its initial registered agent at that office; and
4. the name and address of each incorporator.

The articles of incorporation may set forth

1. the names and addresses of the individuals who are to serve as the initial directors;
2. provisions not inconsistent with law regarding
 - (a) the purpose or purposes for which the corporation is organized;
 - (b) managing the business and regulating the affairs of the corporation;
 - (c) defining, limiting, and regulating the powers of the corporation, its board of directors, and shareholders;
 - (d) a par value for authorized shares or classes of shares;
 - (e) the imposition of personal liability on shareholders for the debt of the corporation to a specified extent and upon specified conditions; and
3. any provision that under the act is required or permitted to be set forth in the bylaws.

The articles of incorporation need not set forth any of the corporate powers enumerated in the act.²³

Over the years, the Model Business Corporation Act and various state statutes have substantially relaxed the requirements of the articles of incorporation. Very little information is required to meet the minimum statutory requirements. Most states require that the following additional issues be addressed:

1. the period of duration, which may be perpetual;
2. the designation of each class of shares, and the statements concerning the preferences, limitations, and relative rights of the shares of each class;
3. the question of whether the corporation will allow preemptive rights to the shareholders; and
4. the question of whether the corporation will allow cumulative voting for the shareholders.

Exhibit 8–14.

Checklist for Articles of Incorporation

1. Corporate name
 - (a) Clear intended name with Secretary of State of state of incorporation
 - (b) Clear intended name with Secretary of State of other states where corporation intends to transact business
 - (c) Desirability of trademark search of intended name
 - (d) Desirability of filing name as a trade name
2. Location of principal office
 - (a) County
 - (b) City
 - (c) Street and number
3. Resident agent
 - (a) Name of individual or corporation
 - (b) Address (including street and number)
4. Purposes
 - (a) Nature of business in general
 - (b) Scope of activities in detail
5. Powers
 - (a) Is it desired to set out the statutory powers?
 - (b) Are there to be any limitations of the customary powers, such as the right to deal in real and personal property, to borrow money, to deal in securities, etc.?
6. Capital stock
 - (a) Total number of shares of all classes
 - (b) Number of shares of each class having a par value
 - Common
 - Preferred
 - Other
 - (c) Par value of each class
 - Common
 - Preferred
 - Other
 - (d) Number of shares without par value
 - Common
 - Preferred
 - Other
 - (e) Price at which par value stock is to be sold
 - Common
 - Preferred
 - Other
 - (f) Price at which no par value stock is to be sold
 - Common
 - Preferred
 - Other
 - (g) Are incorporators planning to exchange property for stock? If so, description and agreed value of property
 - (h) How is the price at which subsequently issued stock shall be sold to be determined?
7. Characteristics of preferred stock
 - (a) Dividends
 - Source
 - Rate
 - Dates of payment
 - Cumulative or noncumulative

Exhibit 8–14.*(continued)*

- (b) Redemption
 - Price
 - Notice
 - Manner
- (c) Priority of shares in event of dissolution
- (d) Conversion rights of preferred stock
- (e) Sinking fund for redemption or retirement
- 8. Minimum amount of capital with which corporation will commence business
- 9. Incorporators
 - (a) Names and addresses of each of the incorporators (dummies or principals)
- 10. Period of duration
 - (a) Is corporation to have perpetual existence?
 - (b) If for a fixed term, commencing _____; ceasing _____
- 11. Liability of stockholders
 - (a) Is private property of stockholders to be subject to payment of corporate debts?
- 12. Is the certificate to include the provision for compromises and arrangements between the corporation and its creditors?
- 13. Is the preemptive right of stockholders to be denied?
- 14. Are there special situations, such as a sale of assets, which should require the approval of more than a majority of the outstanding stock?
- 15. Voting rights
 - (a) Any limitations on the right of each stockholder to one vote for each share of stock
 - (b) Is the preferred stock to have full, limited, or no voting power?
- 16. Is the transfer of stock to be restricted?
- 17. Is there to be a provision for a stock option plan?
- 18. Are the directors to have the power to amend bylaws?
- 19. Are the directors to have the power to set apart reserves?
- 20. Is the requirement that directors be elected by ballot to be eliminated?

The specific demands of each state statute should be carefully studied and scrupulously followed. It is usually unnecessary for the articles of incorporation to repeat the corporate powers enumerated in the statute, but the articles should specify the corporate purposes. Most states print and distribute “official” forms that may be used for the articles of incorporation and contain the bare essentials necessary for compliance with the statute (see Exhibit 8–15, Articles of Incorporation). The incorporators or counsel usually prefer more elaboration in the articles than that which is permitted on the official forms.²⁴

Many of the items specified as necessary ingredients to the articles of incorporation have been previously discussed or will be discussed in detail later. Nevertheless, the typical requirements are covered briefly here.

Name of the Corporation The articles of incorporation must contain the corporate name selected by the incorporators and approved by the secretary of state or other designated public official. If the name has not been previously reserved, the articles of incorporation will reserve the name for the use of the corporation during its existence.²⁵

EXAMPLE**Name**

The name of the corporation shall be Five Points Land and Cattle Company.

Exhibit 8–15.

Articles of Incorporation
(New York)

New York State
Department of State
Division of Corporations, State Records
and Uniform Commercial Code
Albany, NY 12231

(This form must be printed or typed in black ink)
CERTIFICATE OF INCORPORATION
OF

(Insert corporate name)

Under Section 402 of the Business Corporation Law

FIRST: The name of the corporation is: _____

SECOND: This corporation is formed to engage in any lawful act or activity for which a corporation may be organized under the Business Corporation Law, provided that it is not formed to engage in any act or activity requiring the consent or approval of any state official, department, board, agency or other body without such consent or approval first being obtained.

THIRD: The county, within this state, in which the office of the corporation is to be located is: _____

FOURTH: The total number of shares which the corporation shall have authority to issue and a statement of the par value of each share or a statement that the shares are without par value are: 200 No Par Value

FIFTH: The secretary of state is designated as agent of the corporation upon whom process against the corporation may be served. The address to which the Secretary of State shall mail a copy of any process accepted on behalf of the corporation is:

SIXTH: *(optional)* The name and street address in this state of the registered agent upon whom process against the corporation may be served is:

DOS-1239 (Rev. 5/03)

Shares The corporation’s **equity securities**, or shares, must be accurately described in the articles of incorporation. The articles of incorporation establish the number of shares that the corporation has authority to issue, and the corporation is limited to the number of shares so authorized, unless an amendment to the articles is adopted permitting the issuance of additional shares. The articles should describe in the classes of equity securities, such as common stock, preferred stock, and so forth, but they generally do not contain any information about the corporation’s **debt securities**, or bonds. One reason for this is that the equity securities are always owned by shareholders, so it is appropriate to describe all of the terms of these securities

Exhibit 8–15.*(continued)*

SEVENTH: *(optional) the existence of the corporation begins on the date the certificate of incorporation is filed by the Department of State. Corporate existence may begin on a date, not to exceed 90 days, after the date of filing by the Department of State. Complete this paragraph only if you wish to have the corporation's existence to begin on a later date, which is not more than 90 days after the date of filing by the Department of State.)* The date the corporate existence shall begin is: _____ .

Incorporator Information Required

X

(Signature)

(Type or print name)

(Address)

(City, State, Zip code)

CERTIFICATE OF INCORPORATION OF

(Insert corporate name)

Under Section 402 of the Business Corporation Law

Filed by: _____
(Name)

(Mailing address)

(City, State and Zip code)

Note: This form was prepared by the New York State Department of State for filing a certificate of incorporation for a business corporation. It does not contain all optional provisions under the law. You are not required to use this form. You may draft your own form or use forms available at legal stationery stores. The Department of State recommends that legal documents be prepared under the guidance of an attorney. The fee for a certificate of incorporation is \$125 plus the applicable tax on shares required by Section 180 of the Tax Law. The minimum tax on shares is \$10. The tax on 200 no par value shares is \$10 (total \$135). Checks should be made payable to the Department of State for the total amount of the filing fee and tax.

permanently in the articles of incorporation. On the other hand, debt securities are issued only when the corporation needs to borrow money, and the terms of the debt are adapted from time to time to the particular needs of the corporation. Moreover, debt securities are also expected to be repaid and retired; thus there is no need to describe the terms of the debt in the permanent record of the articles of incorporation.

Every corporation must have at least one class of stock, and if only one class is authorized, it is usually called common stock. The financial structure of a corporation has infinite flexibility—it may be as simple or as complex as desired, depending upon the projected financial needs of the

businesses and, probably, the imagination of the drafter.²⁶ Details of the financial structure that must be described in the articles of incorporation in order to authorize the issuance of equity securities typically include the following:

1. the number of shares of each class and series that the corporation is authorized to issue,
2. if the shares are to be divided into classes or series:
 - (a) the designation of each class
 - (b) a statement of the preferences limitations and relative rights of the shares of each class or series;
3. the authority of the board of directors to issue shares in series and to determine variations in the rights and preferences between series.²⁷

The articles of incorporation must authorize one or more classes of shares that have unlimited voting rights at any given time and one or more classes of shares that are entitled to receive the net assets of the corporation upon dissolution at any given time.²⁸ For example, a corporation could have a class of stock with voting rights on certain issues and another class with certain voting rights on other issues, so long as some group of shareholders will be able to vote on all potential issues that may arise at any time. Similarly, one class could have unlimited voting rights for a period of time (e.g., the first five years of the corporation's existence) and another class could have unlimited voting rights thereafter, so long as some shareholders could vote on any issue at any point in time. The same is true for the distribution of assets upon dissolution of the corporation: there must be some shareholder to whom the assets may be distributed at any given time. In addition, the revised Model Business Corporation Act provides certain guidance concerning the permissible variations of shares among classes, which are as follows:

1. shares that have special, conditional, or limited voting rights, or no right to vote;
2. shares that are redeemable or convertible at the option of the corporation, the shareholder, or another person, or upon the occurrence of a designated event; for cash, indebtedness, securities, or other properties; in a designated amount or in an amount determined in accordance with the designated formula;
3. shares that entitle the holders to distributions calculated in any manner, including dividends that may be cumulative, noncumulative, or partially cumulative; and
4. shares that have a preference over other shares with respect to distributions, including dividends and distributions upon dissolution of the corporation.²⁹

The share authorization clause in the articles of incorporation may be very simple, as when the corporation intends to issue only one class of common stock, or quite complex, as when multiple classes of stock are to be issued with varying rights and preferences among the classes.

Capital Stock

The amount of the total authorized capital stock of the Corporation shall be 50,000 shares of common stock of the par value of \$1.00 per share.

EXAMPLE

The capital stock structure is developed after studying many financial and practical matters, all of which are discussed in detail later.³⁰ Briefly, the decision to issue par value or **no par value** shares depends upon the consideration (money, property, or services) expected to be given in exchange for the shares, the organizational taxes imposed by the state, and the accounting ramifications of each value approach. Par value shares may not be sold for less than par value,³¹ which means that a share of \$100 par value stock can be issued only in exchange for cash, property, or services valued at \$100 or more. No par value shares may be sold at their **stated value**, which is determined from time to time by the board of directors.³² The no par feature adds some flexibility to the sale of shares, since the board of directors may exert control over the going price of the shares.

EXAMPLE

Capital Stock

- a) The total authorized capital stock of this Corporation shall be divided into one thousand (1000) shares of which five hundred (500) shares shall be preferred stock and shall be issued at a par value of One Hundred Dollars (\$100) each; and five hundred (500) shares shall be common stock which shall be issued without par value and shall be sold at One Dollar (\$1) per share.
- b) The holders of the shares of preferred stock shall be and are entitled to receive and shall so receive dividends on the value of such stock at the rate of six percent (6%) per annum, which shall be cumulative and which shall be set aside and paid before any dividend shall be set aside or paid upon the shares of common capital stock.
- c) The voting power of the shares of capital stock in this Corporation shall be vested wholly in the holders of the shares of common capital stock. The preferred capital stock shall have no voting power whatever.
- d) In the event of the liquidation or dissolution, or the winding up of the business affairs of the Corporation, the holders of the preferred shares of capital stock shall be and are entitled to be paid first for the full and determined value of their shares, together with unpaid dividends up to the time of the payment; after the payment to the preferred stockholders, the remaining assets of the Corporation shall be distributed among the holders of the common capital stock to the extent of their respective shares.
- e) This Corporation shall have the right at its option to retire the preferred stock upon ten (10) days notice, by a resolution of its Board of Directors, by paying for each share of preferred stock One Hundred Two Dollars (\$102) in cash, and in addition thereto all unpaid dividends accrued thereon to the date fixed for such redemption.

Organizational taxes are imposed in some jurisdictions on the total aggregate value of the authorized capital stock structure, and the distinction between par value and no par value shares is important for tax computation. To compute the total aggregate value, state statutes usually place a value on no par shares. For example, suppose the state imposes a \$10 tax for each \$10,000 aggregate authorized capital stock, and places a \$100 value on each no par share. A corporation could authorize 100 shares with no par value for a tax of \$10; it could also set par value of \$1 per share and authorize 10,000 shares for the same tax. A few jurisdictions with organization taxes based upon the capital stock structure try to discourage no par shares by placing a high valuation on them for tax computation purposes.³³

Finally, accounting principles require that the par value of issued shares must be placed in an account called stated capital, and that account is restricted so that no dividends may be paid from it. However, the consideration for no par shares may be allocated to an account called **capital surplus**, and those funds may be available in special circumstances for distribution to shareholders or for repurchase of corporate shares.³⁴ Thus, if the corporation issued \$100 par value shares for \$100 cash, all of the funds must go to the restricted stated capital account; however, if it issued no par shares for the same amount, some or all of the \$100 could be placed in capital surplus, a more flexible account. These accounting ramifications may be important to a corporation that requires the flexibility to be able to distribute its equity accounts before it has accumulated profits to distribute.

The decision to issue several classes of equity securities is usually based upon the attractiveness of the securities to potential investors. If shares of common stock will sell well enough to raise the needed capital, there is usually no reason to authorize other classes of stock. However, if some investors insist that their stock must have special preferences to dividends, voting, or liquidation, then separate classes of securities will be necessary.

All special features of equity securities should be described in the articles of incorporation. Conversion privileges, redemption provisions, and restrictions on the sale of stock also should be specifically described in the articles of incorporation as part of the capital stock structure.³⁵

Registered Office and Agent The corporation must maintain a **registered office** and a **registered agent** within the state so that all legal or official matters pertaining to its corporate existence may be addressed there. The registered office does not have to be the principal place

of business of the corporation, although it frequently is. The registered agent may be any natural person or entity located at that office.

The registered office serves many functions and is referred to throughout state corporate laws. For example, most statutes require notices to the corporation to be addressed to the registered office, and many states require the corporation to keep the stock transfer record at the registered office.

The registered agent has the primary responsibility for receiving notices of litigation (service of process) for the corporation. If the corporation has no available registered agent, the secretary of state (or another specified state office) receives process on behalf of the corporation. Under the Model Business Corporation Act, the failure to maintain a registered agent for sixty days is grounds for an administrative dissolution of the corporation.³⁶

Every state except California and Connecticut requires a registered office; but several states, including New York, Pennsylvania, and Minnesota, do not require a registered agent. The corporate statute of the jurisdiction in which incorporation is contemplated should be carefully studied for this purpose.

Registered Office and Agent

EXAMPLE

The registered office of the corporation shall be at 730 Seventeenth Street, Suite 600, Denver, Colorado, 80202, and the name of the initial registered agent at such address is Nancy A. Stober. Either the registered office or the registered agent may be changed in a manner provided by law.

The registered agent may be required to consent to his or her appointment as such. (See Exhibit 8–16, Consent to Appointment by Registered Agent.)

Incorporators The incorporators are named in the articles of incorporation, and they sign the articles. Usually the incorporators must be adults of “legal age,” and they may have to meet other qualifications such as citizenship, residency, or share subscription requirements.³⁷

Permissive Provisions

The preceding material considers certain provisions that are required to be enumerated in the articles of incorporation under the Model Business Corporation Act. Many other provisions must be included in the articles of incorporation under specific state statutes, and *may* be included under the Model Business Corporation Act.

Initial Directors The Model Business Corporation Act permits the articles of incorporation to name the initial board of directors and to give their addresses.³⁸ Regarding the structure of the board of directors, the articles of incorporation may do one of three things: (1) specify the number of directors who will constitute the board; (2) specify a formula or procedure by which to determine the desired number; or (3) delegate this determination to the bylaws.

Initial Board of Directors

EXAMPLE

The initial board of directors of the corporation shall consist of three directors, and the names and addresses of the persons who shall serve as directors until the first annual meeting of shareholders or until their successors are elected and shall qualify are as follows:

<i>Name</i>	<i>Address</i>
_____	_____
_____	_____
_____	_____

Exhibit 8–16.

Consent to Appointment by
Registered Agent
(Wyoming)

**SECRETARY OF STATE
State of Wyoming
The Capitol
Cheyenne, WY 82002**

**CONSENT TO APPOINTMENT
BY REGISTERED AGENT**

I, _____, voluntarily consent to serve as the
registered agent for _____ on the date shown
below.

The registered agent certifies that he is: (circle one)

- (a) An individual who resides in this state and whose
business office is identical with the registered office;
- (b) A domestic corporation or not-for-profit domestic
corporation whose business office is identical with
the registered office; or
- (c) A foreign corporation or not-for-profit foreign
corporation authorized to transact business in this
state whose business office is identical with the
registered office.

Dated this _____ day of _____, 19_____.

Signature of Registered Agent

Revised: 7/1/96

EXAMPLE**Number of Directors**

The number of directors of the corporation shall be fixed and may be altered from time to time as may be provided in the bylaws. In case of any increase in the number of directors, the additional directors may be elected by the directors or by the stockholders at an annual or special meeting, as shall be provided in the bylaws.

No particular qualifications are required for directors under the Model Business Corporation Act, although some states require legal age, share ownership, or state citizenship.³⁹ Moreover, the act permits a single director, but many states require three or more. If specified in the articles of incorporation, the initial directors hold office until the shareholders meet to elect their successors. The written consent of the initial board of directors to serve as directors may be necessary under state law and may be a desirable procedure in any case, since these persons will be assuming fiduciary duties to the corporation being formed. It is prudent to obtain their consent to assume those responsibilities.

Period of Duration If the issue of duration is addressed in the articles of incorporation (as it must be in many states), the articles usually state that the corporation shall exist perpetually. It is possible to establish a specified period after which the corporate existence will automatically terminate, but such a provision may cause an unnecessary burden in that an amendment to the articles of incorporation would be required if the owners should subsequently decide to continue the business. If perpetual existence is specified in the articles of incorporation, the corporation will terminate only if dissolved according to the statutory procedure.⁴⁰

Period of Duration

This corporation shall exist perpetually [or shall terminate on December 31, 2020], unless dissolved according to law.

EXAMPLE

Corporate Purposes The corporation may engage in any lawful business, unless the articles of incorporation restrict the corporate purposes, and then the corporation may do only acts that are within the scope of its stated authorized purposes. **Corporate purposes** should be distinguished from **corporate powers**, which are discussed in “Statutory Powers of a Corporation” in Chapter 6. The purposes are the business objectives of the corporation, and the powers are the means by which those objectives are achieved. For example, the incorporators may form a corporation to purchase and rent apartment buildings. Their corporate *purposes* would specify real estate investment, management, operation, lease, and so on. Their statutory *powers* would provide that the corporation has the power to purchase and hold property, make contracts, borrow money, and so on. The powers, therefore, are the enabling authority for the corporation to pursue its purposes.

The modern trend of corporate law is either to eliminate the need to address purposes in the articles of incorporation or to permit the incorporators to adopt broad corporate purposes and thereby authorize the corporation to do any legal act. Most states allow the formation of a corporation for any lawful purposes, except banking and insurance. Several states, including Delaware and Pennsylvania, permit the articles of incorporation to authorize “any lawful activity.”

In the drafting stages, the incorporators describe the general nature of the contemplated business, such as operating a bookstore, manufacturing bicycles, conducting environmental services, and so forth. After formation, however, the management of the corporation may decide to invest in real estate with its merchandising profits, or to open a cafeteria next to its bookstore, and the scope of the designated purposes in the articles of incorporation then becomes a critical consideration.

The purpose clauses of the corporation usually specify a particular type of business, as shown in the following examples.

Purposes for a Cherry Fruit Business

To buy and sell, and otherwise deal in, at both wholesale and retail, all kinds and brands of cherries; to brine and preserve maraschino cherries of every nature and character; to engage in the canning and pitting of cherries and to prepare cherries for every possible purpose and use; to engage in the buying, selling, and otherwise dealing with and in the canning, preservation, and preparation of all kinds of fruits of every nature, character, and description; and generally to do all acts reasonable and necessary for the furtherance of the foregoing business.

EXAMPLE

Purposes for a Jewelry Store

To carry on business as jewelers, gold and silver smiths; as dealers in china, curiosities, coins, medals, bullion, and precious stones; as manufacturers of and dealers in gold and silver plate, plated articles, watches, clocks, chronometers, and optical and scientific instruments and appliances of every description; and as bankers, commission agents, and general merchants.

EXAMPLE

These limited purposes, however, would not allow the corporations to operate a restaurant, or to manufacture bicycles, or to invest in real estate. When the incorporators anticipate additional activities but wish to specify purposes in the articles of incorporation, additional purpose clauses must be added.

If the state statute is sufficiently permissive to allow the articles of incorporation to authorize “any lawful activity” without further specification and the incorporators want broad purposes, the drafting of the purpose clauses is simple. However, if the state requires specificity of corporate purposes, or if the incorporators desire to restrict the corporate purposes, the drafter’s job becomes more difficult. Counsel must pay close attention to detail to ensure that the drafted purpose clauses in the articles of incorporation will permit the corporation to do everything necessary to operate the intended business. The purpose clauses must anticipate expansion and give the corporation room to do everything it might be expected to do in the near future, but they must not be so overbroad that management has no business guidance. The incorporators may restrict the corporate purposes to direct management toward specific business objectives.

The law provides implied power for the corporation to conduct any necessary act consistent with its stated purposes, but the law does not allow the corporation to exceed its purposes if those purposes are restricted in the articles of incorporation. Admittedly, this is a delicate distinction. Consider the cherry fruit business described in the preceding example. The corporate *powers* would permit the corporation to buy a cannery to conduct its canning and pitting operations, and they might allow it to buy an adjacent building if expansion was contemplated. However, the corporate *purposes* would not allow it to buy the adjacent building for investment purposes. Consequently, under modern statutes, it is best to state the corporate purposes as broadly as possible. The drafter should attempt to prepare a statement of corporate purposes that is sufficiently specific to avoid excursions into unauthorized areas of business but sufficiently broad to allow expansion of the contemplated business without amendment of the articles of incorporation.

A word about the dangers lurking in the statement of corporate purposes: A corporation is not permitted to exceed its stated corporate purposes; if it does, it is said to have committed an *ultra vires* act. The law protects the shareholders from such abuses of corporate authority by allowing application by the shareholders to a court to have the unauthorized act stopped. The attorney general may protect the interests of the state by suing to stop the act or to dissolve the corporation for committing unauthorized acts. Moreover, directors and officers who have caused the corporation to venture forth into the unauthorized business activities may be held personally liable for any loss occasioned by the transactions.⁴¹

Preemptive Rights The articles of incorporation may contain a statement regarding shareholders’ preemptive rights. A shareholder’s preemptive right is the common law right to maintain a proportionate ownership interest in the corporation. If the corporation intends to issue additional shares of stock, the existing shareholders have the right to buy their proportionate shares of the new stock. Some states require preemptive rights for the shareholders unless such rights are specifically denied in the articles of incorporation.⁴² Other statutes provide that preemptive rights do not exist unless specifically granted in the articles of incorporation.⁴³ It is good practice to always specify the desires of the incorporators on this point.

The articles of incorporation may simply deny or grant preemptive rights without further elaboration.

EXAMPLE

Preemptive Rights

No holder of any stock of the Corporation shall be entitled, as a matter of right, to purchase, subscribe for, or otherwise acquire any new or additional shares of stock of the corporation of any class, or any options or warrants to purchase, subscribe for, or otherwise acquire any such new or additional shares, or any shares, bonds, notes, debentures, or other securities convertible into or carrying options or warrants to purchase, subscribe for, or otherwise acquire any such new or additional shares.

The articles also may distinguish preemptive rights among specified classes of equity securities.

Preemptive Rights among Classes

EXAMPLE

Holders of preferred stock shall have the right to subscribe for and purchase their pro rata shares of any new preferred stock that may be issued by the Corporation, but shall have no such preemptive rights with respect to new shares of common stock that may be issued. Holders of common stock shall have the right to subscribe for and purchase their pro rata shares of any new common stock that may be issued, but shall have no such preemptive rights with respect to new shares of preferred stock that may be issued.

In addition, it is possible to limit, define, or expand preemptive rights in the articles of incorporation. For example, preemptive rights may be limited to stock issued only for cash and may be excluded from employee stock option plans. It is also good practice to specify the scope of preemptive rights with respect to **treasury shares** (stock repurchased by the company that may be subsequently resold).⁴⁴

Cumulative Voting If shareholders are to be permitted to cumulate their shares in elections of directors, a statement to that effect in the articles of incorporation is appropriate and may be required. Cumulative voting is treated like preemptive rights in the various state statutes; that is, some states grant the right unless it is specifically denied, and others deny it unless specifically granted.⁴⁵ The articles should always reflect the corporate policy either way.

Cumulative Voting

EXAMPLE

At all elections for directors each stockholder shall be entitled to as many votes as shall equal the number of his or her shares of stock multiplied by the number of directors to be elected, and each stockholder may cast all such votes for a single director, or may distribute them among the number to be voted for, or any two or more of them, as he or she may see fit.

Optional Provisions

The Model Business Corporation Act allows the articles of incorporation to contain any provision for the regulation of internal affairs of the corporation that might ordinarily be set forth in the bylaws, as long as those provisions are not inconsistent with the statute.⁴⁶ By virtue of this broad statutory authority, the articles of incorporation may contain any number of various rules and regulations pertaining to the operation of the company. However, remember that provisions in the articles are more permanent than are bylaw provisions, since the amendment procedure for articles of incorporation is considerably more difficult.⁴⁷ The drafter should begin with this inflexibility in mind when considering miscellaneous optional provisions for the articles of incorporation.

Generally, the articles of incorporation may contain any regulation of internal affairs that is not inconsistent with the law. If the incorporators have devised a procedure for distributing keys to the corporate restrooms, for example, the procedure can be posted on a bulletin board, written into the bylaws, or given special dignity (and public notice) by being drafted into the articles of incorporation. In this case, the inflexibility of the articles could become painfully obvious if it were later discovered that the specified procedure did not cover certain corporate executives, and those executives had to wait for keys to the restroom until an amendment could be adopted.

There are, however, several instances in the Model Business Corporation Act and other corporate statutes where the articles of incorporation may modify the statutory rules, but a bylaw provision is ineffective for that purpose. Therefore, if the incorporators desire a modified

approach to their corporate structure, certain additional optional provisions must be included in the articles of incorporation. The following statutory rules of the act and other corporation codes may be modified or amplified only by a special provision in the articles of incorporation.

Directors Several procedures regulating the conduct of directors must be addressed in the articles of incorporation in order for those procedures to be changed from the normal statutory scheme. The Model Business Corporation Act permits the board of directors to be dispensed with entirely under certain circumstances, and the directors' activities may be limited or restricted by provisions in the articles of incorporation.⁴⁸ Limitations may be placed on the directors' ability to fix their own compensation.⁴⁹ Several provisions may be included concerning the election and terms of the directors, requiring a vote greater than a plurality,⁵⁰ providing for directors to be elected by specific classes of shares,⁵¹ and staggering directors' terms so that all directors are not elected in the same year.⁵² Shareholders' power over the removal of directors may be restricted or eliminated,⁵³ and the power to fill vacancies on the board of directors may be limited to a decision by the shareholders.⁵⁴

All of these provisions should be discussed in detail with the organizers of the corporation to determine the specific corporate structure that will best suit their needs. If these issues are not addressed in the articles of incorporation, the statutory provision concerning the resolution of these matters will govern the issues. For example, if the organizers want the board of directors to be removed only upon the vote of the holders at least ninety percent of the shares entitled to vote, a provision to that effect must be drafted in the articles of incorporation to be effective under the Model Act. If such a provision were drafted in the bylaws, it would not be effective, and the Model Act default rule, that a majority vote to remove a director is sufficient, would govern.

Limitation on Director Liability During the past decade, a combination of factors caused sharp increases in the cost of **director and officer liability insurance** (typically called "D&O insurance"), and led in many cases to its unavailability at any price. Several court decisions also eroded the confidence of members of corporate boards of directors by imposing liability for damages based upon decisions made by the directors using their business judgment (or lack of it). Many directors became concerned about their potential liability, including the nonmonetary costs of litigation such as damage to their reputations, loss of time, and distraction from other activities. Consequently, many outside directors of corporations (particularly of public corporations) resigned or declined to be elected to the board because of potential financial exposure.

Several state legislatures quickly adopted legislation to solve the problem, and most states now have adopted some form of legislation aimed at limiting the exposure of directors (and in some cases, officers) to personal liability for money damages. These limited liability statutes fall into three categories:

1. authorization for a provision in the articles of incorporation eliminating or limiting personal liability for money damages, with stated exceptions ("optional statutes");
2. elimination of personal liability for money damages, with certain exceptions ("self-executing statutes"); and
3. limitation on the amount of personal liability for money damages, with certain exceptions ("damage limitation statutes").

Delaware was the first state to enact an "optional statute," and most states have followed its lead. In these states, a corporation may adopt a provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director.⁵⁵ In most states, the limitation of liability does not apply to suits by third parties who are not shareholders, such as creditors of the corporation.⁵⁶ The organizers should decide whether such a limitation on the liability of directors would be appropriate for the operations of the corporation to be formed.

Limitation on Director Liability

EXAMPLE

The directors of this corporation shall not be liable to the corporation or its shareholders for money damages for any action taken, or any failure to take any action, as a director, except liability for (a) the amount of a financial benefit received by a director to which the director was not entitled; (b) an intentional infliction of harm on the corporation or the shareholders; (c) improper distributions from the corporation as prohibited by statute; or (d) an intentional violation of criminal law.

The principal difference among the optional statutes is found in their exceptions, which generally state the standard that a plaintiff must meet in order to impose personal liability for money damages upon a director. For example, many states do not permit the director to be relieved from liability for breach of the director's duty of loyalty to the corporation or to its stockholders, acts or omissions not in good faith, intentional misconduct, knowing violation of law, improper distributions, or any transaction from which the director derived an improper personal benefit.⁵⁷

The most radical legislative approach to director liability is the self-executing statutes, which impose liability on a director only if the director has breached or failed to perform duties in compliance with the statutory standard of care *and* "the breach or failure to perform constitutes willful misconduct or recklessness."⁵⁸ In these states, a director would have to commit a damaging act intentionally or with careless regard for the consequences to be liable. A person seeking to hold a director responsible under such a standard would have a substantial burden to prove that the director's act justified liability.

The third approach, the damage limitation statutes, combines a provision in the articles of incorporation with a statutory limit on liability. In Virginia, for example, the damages that may be assessed against an officer or director are limited to a monetary amount specified in the articles of incorporation or the bylaws or a statutory amount based upon the compensation received by the officer or director during the previous twelve months.⁵⁹

Indemnification of Officers and Directors The corporation has the power to **indemnify** its management personnel from any liability or expenses incurred by reason of litigation against them in their capacities as directors, officers, or employees of the corporation. The Model Business Corporation Act specifically confers this power in sections 8.50 through 8.58. These complex provisions generally grant the right to indemnification if the individual was not negligent in the performance of his or her duties to the corporation and if the director was acting in good faith and in a manner he or she reasonably believed to be in the best interests of the corporation. In addition, if a director is acting outside of the director's "official capacity" (which would include service for any other corporation or any partnership, joint venture, trust, employee benefit plan, or other enterprise), the director may be indemnified if the director's conduct was not opposed to the best interests of the corporation. For example, suppose a director of a corporation is also a real estate developer, and she borrowed money from the local bank for her real estate investments. The real estate has declined in value, forcing the director to declare bankruptcy personally to avoid the debt. This fact is highly publicized in the local newspapers because the director is such a prominent citizen. A shareholder of the corporation sues the director, claiming that the director's conduct in becoming overextended financially has embarrassed the corporation and caused it to lose money. The director could not show that her actions in borrowing the money and filing bankruptcy were in the best interests of the corporation—they actually had little to do with the corporation's interests at the time. But the director could obtain indemnification for expenses and liability in the lawsuit if she could show that her actions were *not opposed to* the best interests of the corporation.

In jurisdictions adopting the act's provision, the statutory authority for indemnification obviates any need to grant such power in the articles of incorporation; but in most jurisdictions, the statutory right to indemnification is considerably limited.⁶⁰ Many persons would not agree to serve as a director, officer, or employee unless they knew that the corporation would stand

behind them for litigation fees, expenses, and liability incurred as a result of their employment. Consequently, the articles of incorporation should establish the scope of indemnification for corporate personnel.

EXAMPLE

Indemnification

The Corporation shall indemnify any director, officer, or employee, or former director, officer, or employee of the Corporation, or any person who may have served at its request as a director, officer, or employee of another corporation in which it owns shares of capital stock, or of which it is a creditor, against expenses actually and necessarily incurred by him or her in connection with the defense of any action, suit, or proceeding in which he or she is made a party by reason of being or having been such director, officer, or employee, except in relation to matters as to which he or she shall be adjudged in such action, suit, or proceeding to be liable for negligence or misconduct in the performance of duty. The Corporation may also reimburse to any director, officer, or employee the reasonable costs of settlement of any such action, suit, or proceeding, if it shall be found by a majority of a committee composed of the directors not involved in the matter in controversy (whether or not a quorum) that it was to the interests of the corporation that such settlement be made and that such director, officer, or employee was not guilty of negligence or misconduct. Such rights of indemnification and reimbursement shall not be deemed exclusive of any other rights to which such director, officer, or employee may be entitled under any bylaws, agreement, vote of shareholders, or otherwise.

[or]

(1) *Definitions.* The following definitions shall apply to the terms as used in this Article:

- (a) “Corporation” includes this corporation and any domestic or foreign predecessor entity of the corporation in a merger, consolidation, or other transaction in which the predecessor’s existence ceased upon consummation of the transaction.
- (b) “Director” means an individual who is or was a director of the corporation and an individual who, while a director of the corporation, is or was serving at the corporation’s request as a director, officer, partner, trustee, employee, or agent of any other foreign or domestic corporation or of any partnership, joint venture, trust, other enterprise, or employee benefit plan. A director shall be considered to be serving an employee benefit plan at the corporation’s request if his or her duties to the corporation also impose duties on or otherwise involve services by him or her to the plan or to participants in or beneficiaries of the plan. “Director” includes, unless the context otherwise requires, the estate or personal representative of a director.
- (c) “Expenses” includes attorney fees.
- (d) “Liability” means the obligation to pay a judgment, settlement, penalty, fine (including an excise tax assessed with respect to an employee benefit plan), or reasonable expense incurred with respect to a proceeding.
- (e) “Official capacity,” when used with respect to a director, means the office of director in the corporation, and, when used with respect to a person other than a director, means the office in the corporation held by the officer or the employment or agency relationship undertaken by the employee or agent on behalf of the corporation. “Official capacity” does not include service for any other foreign or domestic corporation or for any partnership, joint venture, trust, other enterprise, or employee benefit plan.
- (f) “Party” includes an individual who was, is, or is threatened to be made a named defendant or respondent in a proceeding.
- (g) “Proceeding” means any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative, and whether formal or informal.

(2) *Indemnification for Liability.*

- (a) Except as provided in paragraph (d) of this section (2), the corporation shall indemnify against liability incurred in any proceeding any individual made a party to the proceeding because he or she is or was a director or officer if:
 - (I) he or she conducted himself or herself in good faith;
 - (II) he or she reasonably believed:
 - (A) in the case of conduct in his or her official capacity with the corporation, that his or her conduct was in the corporation’s best interests; or
 - (B) in all other cases, that his or her conduct was at least not opposed to the corporation’s best interests; and

- (III) in the case of any criminal proceeding, he or she had no reasonable cause to believe his or her conduct was unlawful.
- (b) A director's or officer's conduct with respect to an employee benefit plan for a purpose he or she reasonably believed to be in the interests of the participants in or beneficiaries of the plan is conduct that satisfies the requirements of this Section (2). A director's or officer's conduct with respect to an employee benefit plan for a purpose that he or she did not reasonably believe to be in the interests of the participants in or beneficiaries of the plan shall be deemed not to satisfy the requirements of this Section (2).
- (c) The termination of any proceeding by judgment, order, settlement, or conviction, or upon a plea of nolo contendere or its equivalent, is not of itself determinative that the individual did not meet the standard of conduct set forth in paragraph (a) of this Section (2).
- (d) The corporation may not indemnify a director or officer under this Section (2) either:
- (I) in connection with a proceeding by or in the right of the corporation in which the director or officer was adjudged liable to the corporation; or
 - (II) in connection with any proceeding charging improper personal benefit to the director or officer, whether or not involving action in his or her official capacity, in which he or she was adjudged liable on the basis that personal benefit was improperly received by him or her.
- (e) Indemnification permitted under this Section (2) in connection with a proceeding by or in the right of the corporation is limited to reasonable expenses incurred in connection with the proceeding.
- (3) *Mandatory Indemnification.*
- (a) Except as limited by these Articles of Incorporation, the corporation shall be required to indemnify a director or officer of the corporation who was wholly successful, on the merits or otherwise, in defense of any proceeding to which he or she was a party against reasonable expenses incurred by him or her in connection with the proceeding.
- (b) Except as otherwise limited by these Articles of Incorporation, a director or officer who is or was a party to a proceeding may apply for indemnification to the court conducting the proceeding or to another court of competent jurisdiction. On receipt of an application, the court, after giving any notice the court considers necessary, may order indemnification in the following manner:
- (I) If it determines the director or officer is entitled to mandatory indemnification, the court shall order indemnification under paragraph (a) of this Section (3), in which case the court shall also order the corporation to pay the director's or officer's reasonable expenses incurred to obtain court-ordered indemnification.
 - (II) If it determines that the director or officer is fairly and reasonably entitled to indemnification in view of all the relevant circumstances, whether or not he or she met the standard of conduct set forth in paragraph (a) of Section (2) of this Article or was adjudged liable in the circumstances described in paragraph (d) of Section (2) of this Article, the court may order such indemnification as the court deems proper; except that the indemnification with respect to any proceeding in which liability shall have been adjudged in the circumstances described in paragraph (d) of Section (2) of this Article is limited to reasonable expenses incurred.
- (4) *Limitation on Indemnification.*
- (a) The corporation may not indemnify a director or officer under Section (2) of this Article unless authorized in the specific case after a determination has been made that indemnification of the director or officer is permissible in the circumstances because he or she has met the standard of conduct set forth in paragraph (a) of Section (2) of this Article.
- (b) The determination required to be made by paragraph (a) of this Section (4) shall be made:
- (I) by the board of directors by a majority vote of a quorum, which quorum shall consist of directors not parties to the proceeding; or
 - (II) A quorum cannot be obtained, by a majority vote of a committee of the board designated by the board, which committee shall consist of two or more directors not parties to the proceeding; except that directors who are parties to the proceeding may participate in the designation of directors for the committee.
- (c) If the quorum cannot be obtained or the committee cannot be established under paragraph (b) of this Section (4), or even if a quorum is obtained or a committee designated if such quorum or committee so directs, the determination required to be made by paragraph (a) of this Section (4) shall be made:
- (I) by independent legal counsel selected by a vote of the board of directors or the committee in the manner specified in subparagraph (I) or (II) of paragraph (b) of this Section (4) or, if a

EXAMPLE*(continued)*

- quorum of the full board cannot be obtained and a committee cannot be established by independent legal counsel selected by a majority vote of the full board; or
- (II) by the shareholders.
- (d) Authorization of indemnification and evaluation as to reasonableness of expenses shall be made in the same manner as the determination that indemnification is permissible; except that if the determination that indemnification is permissible is made by independent legal counsel, authorization of indemnification and evaluation as to reasonableness of expenses shall be made by the body that selected said counsel.
- (5) *Advance Payment of Expenses.*
- (a) The corporation shall pay for or reimburse the reasonable expenses incurred by a director, officer, employee, or agent who is a party to a proceeding in advance of the final disposition of the proceeding if:
- (I) the director, officer, employee, or agent furnishes the corporation a written affirmation of his or her good faith belief that he or she has met the standard of conduct described in subparagraph (I) of paragraph (a) of Section (2) of this Article;
- (II) the director, officer, employee, or agent furnishes the corporation a written undertaking, executed personally or on his or her behalf, to repay the advance if it is determined that he or she did not meet such standard of conduct; and
- (III) a determination is made that the facts then known to those making the determination would not preclude indemnification under this Section (5).
- (b) The undertaking required by subparagraph (II) of paragraph (a) of this Section (5) shall be an unlimited general obligation of the director, officer, employee, or agent, but need not be secured and may be accepted without reference to financial ability to make repayment.
- (c) Determinations and authorizations of payments under this Section shall be made in the manner specified under Section (4) hereof.
- (6) *Reimbursement of Witness Expenses.* The corporation shall pay or reimburse expenses incurred by a director in connection with his or her appearance as a witness in a proceeding at a time when he or she has not been made a named defendant or respondent in the proceeding.
- (7) *Insurance for Indemnification.* The corporation may purchase and maintain insurance on behalf of a person who is or was a director, officer, employee, fiduciary, or agent of the corporation or who, while a director, officer, employee, fiduciary, or agent of the corporation, is or was serving at the request of the corporation as a director, officer, partner, trustee, employee, fiduciary, or agent of any other foreign or domestic corporation or of any partnership, joint venture, trust, other enterprise, or employee benefit plan against any liability asserted against or incurred by him or her in any such capacity or arising out of his or her status as such, whether or not the corporation would have the power to indemnify him or her against such liability under the provisions of this Article. Any such insurance may be procured from any insurance company designated by the Board of Directors of the corporation, whether such insurance company is formed under the laws of Colorado or any other jurisdiction of the United States of America, including any insurance company in which the corporation has equity or any other interest, through stock or otherwise.
- (8) *Notice of Indemnification.* Any indemnification of or advance of expenses to a director in accordance with this Article, if arising out of a proceeding by or on behalf of the corporation, shall be reported in writing to the shareholders with or before the notice of the next shareholders' meeting.
- (9) *Indemnification of Officers, Employees, and Agents of the Corporation.* The Board of Directors may indemnify and advance expenses to an officer, employee, or agent of the corporation who is not a director of the corporation to the same or greater extent as to a director if such indemnification and advance expense payment is provided for in these Articles of Incorporation, the Bylaws, by resolution of the shareholders or directors, or by contract, in a manner consistent with the Colorado Corporation Code.

Purchase of Corporate Shares Although the Model Business Corporation Act has been amended to eliminate statutory restrictions on purchases of corporate shares,⁶¹ many state statutes permit the corporation to repurchase its own shares from investors, thereby creating *treasury shares*. These statutes, however, limit the source of funds for such purchases to unreserved and unrestricted earned surplus, which means that the corporation may repurchase its own shares from investors only with accumulated profits that have not been designated for any other purpose. Under these statutes, if no profits have accumulated, the corporation may not

repurchase its own stock. However, the articles of incorporation may provide that capital surplus (the excess amount collected over par value, or the amount collected and designated capital surplus for no par value shares) may be used in addition to earned surplus for this purpose. There are many reasons supporting this flexibility. For example, management may desire to reduce the number of shares outstanding so as to increase the earnings-per-share figures, or it may wish to reacquire outstanding shares to hold for employee stock purchase plans. Counsel should remember that an appropriate clause in the articles of incorporation is necessary to open the capital surplus account for the repurchase of shares.

The provisions of the articles of incorporation may have a negative impact on the corporation's purchase of its own securities. The articles may restrict management by requiring that all corporate shares repurchased by the corporation be canceled and not resold or reissued. Management is not bound to cancel such shares, however, without an express provision to that effect in the articles of incorporation.

Repurchase of Corporate Shares

EXAMPLE

The corporation shall have the power to repurchase its shares of cumulative preferred stock with any surplus then in existence that has not been otherwise reserved or restricted. [Check statutory authority for the type of surplus that may be permitted for repurchase of shares.]

[and]

Upon repurchase of shares of the corporation, the corporation shall cancel and retire the same, and such shares shall not be held as treasury shares or reissued to shareholders under any circumstances.

Reservation of the Right to Fix Consideration for Shares to the Shareholders

Many matters that are ordinarily determined by the directors may be reserved to the shareholders by an appropriate clause in the articles of incorporation. This is one of them. Section 6.21 of the Model Business Corporation Act vests in directors the power to determine the price of shares and proper consideration for the issuance of those shares, but the shareholders may exercise this power if the articles of incorporation so provide.

Right to Fix Consideration for Shares

EXAMPLE

The shareholders of the corporation at a meeting duly called for such purpose shall fix and determine the stated value of the shares of the corporation.

Stock Rights and Options The corporation may create **stock options** or stock rights that entitle the holder of the option or right to buy shares at a designated price. The articles of incorporation may restrict management in creating such options or rights and may also elaborate upon the terms of those options or rights, including time of exercise and price. A restrictive provision in the articles of incorporation would be necessary only if the incorporators wanted to narrow management's broad statutory authority to create such options, as is contained in section 6.24 of the Model Business Corporation Act.

Restrictions on the Issuance of Stock Rights and Options

EXAMPLE

The board of directors may not, without the express approval of at least the majority of the then outstanding shares of the corporation at a meeting duly called for such purpose, create or issue rights or options entitling the holders thereof to purchase from the corporation shares of any class or classes. Further, even upon such approval by the shareholders, the board of directors shall not create and issue such rights or options that shall provide for a price less than fifty percent (50%) of the then market value of such shares, determined by an independent certified public accountant of the corporation, or upon terms that would permit the holder of such options or rights to pay the purchase price of such shares over a period longer than six months.

Quorum and Vote of Shareholders and Directors A majority of the shares entitled to vote is a **quorum** for shareholder meetings, and the affirmative vote of the majority of the quorum carries action on behalf of the shareholders under section 7.25 of the Model Business Corporation Act. The articles of incorporation may vary these requirements in any manner, but most states still provide that a quorum may never be less than one-third of the shares entitled to vote. Thus, the articles of incorporation can provide that a quorum shall be forty percent of the shares entitled to vote and shareholder action requires an affirmative vote of seventy-five percent of the shares represented, or that a quorum requires eighty percent of the shares entitled to vote and shareholder action requires eighty percent of the shares represented, and so forth.

The articles of incorporation may similarly modify the quorum and vote necessary for director action under section 8.24. However, a quorum or vote of directors usually may not be reduced below a majority, and the voting or quorum requirements may be increased only by the articles of incorporation. The Model Business Corporation Act permits the quorum of a board of directors to be reduced to as low as one-third of the directors in office.⁶²

EXAMPLE

Quorum and Vote of Shareholders

The quorum of the shareholders of this corporation for each annual or special meeting of the shareholders shall be one-third of the shares then outstanding and entitled to vote. No resolution of the corporation at any meeting of the shareholders shall be adopted except by the vote of at least seventy-five percent (75%) of the shares represented in a properly called meeting at which a quorum of the shares is present.

EXAMPLE

Vote of Directors

No resolution of the corporation at any meeting, whether regular or special, shall be adopted except by the unanimous vote of the three directors duly elected as provided herein.

Directors are permitted by statute to take action without a meeting by signing a consent to action in writing.⁶³ The articles of incorporation may deny this power, however, if the incorporators want their directors to act only in formal session.

Shareholder Control of Bylaws The initial bylaws of the corporation are adopted either by the incorporators or the board of directors at an organizational meeting, and the normal statutory rule is that the board of directors has the power to alter, amend, or repeal the bylaws.⁶⁴ This power may be reserved to the shareholders in the articles of incorporation.

EXAMPLE

Amendments to the Bylaws

The bylaws of this corporation shall not be amended, modified, or altered except by the vote of the shareholders of the corporation at a meeting of the shareholders, duly called, at which a quorum is present.

The articles of incorporation may also reserve to the shareholders the right to adopt or amend a bylaw that provides for greater quorum or voting requirements for the shareholders than are required by statute.⁶⁵ With this authority placed in the articles of incorporation, the shareholders may, from time to time, amend and modify their own quorum and voting requirements by simply changing the bylaws.

Distribution Provisions The board of directors has full discretion under the Model Business Corporation Act for the payment of **dividends** to shareholders.⁶⁶ The articles of incorporation may restrict this discretion, and may establish certain conditions that must be satisfied before dividends may be declared. Conversely, in most states the articles of incorporation may expand the corporation's ability to distribute cash or property to shareholders by expressly authorizing such distributions out of capital surplus.⁶⁷ Moreover, the articles of incorporation for a corporation whose principal business is the exploitation of natural resources, as in timber operations, oil wells, and mines, may authorize the payment of dividends from **depletion reserves**, an account that reflects the reduction of the natural resources available to the corporation.⁶⁸

Restriction on Payment of Dividends

EXAMPLE

The board of directors of the corporation may not pay or declare a dividend during the first two years of the corporation's operation of its business. Thereafter, the board of directors may, from time to time, declare and pay dividends in accordance with the law provided that the corporation has adequate cash reserves at all times to meet six months' projected operating expenses.

Distributions from Capital Surplus

EXAMPLE

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

- a) no such distribution shall be made at a time when the corporation is insolvent or when the distribution would render the corporation insolvent;
- b) no such distribution shall be made to the holders of any class of shares unless all cumulative dividends accrued on all preferred classes of shares entitled to preferential dividends have been fully paid;
- c) no such distribution shall be made to the holders of any class of shares that would reduce the remaining net assets of the corporation below the aggregate preferential amount payable in the event of an involuntary liquidation to the holders of shares having preferential rights to the assets of the corporation in the event of liquidation; and
- d) such distribution, when made, shall be identified as a distribution from capital surplus and the amount per share disclosed to shareholders receiving the same concurrently with the distribution thereof.

Payment of Dividends from Depletion Reserves

EXAMPLE

The board of directors may, from time to time, declare and the corporation may pay dividends in cash from the depletion reserves earned by the corporation through its business of exploiting natural resources, but such reserves and the amount per share paid from such reserves shall be disclosed to the shareholders receiving the same concurrently with the distribution thereof.

Transactions with Interested Directors A director owes a strict fiduciary duty of loyalty to the corporation and, in exercising his or her responsibilities, must strive to represent the corporation without any conflict of interest. The common law looked askance at any contract formed between a director's corporation and the director in a personal capacity or between the director's corporation and another corporation for which the same person also served as a director. When the same director appeared in the negotiations for both sides of the transaction, either personally or as a director to another corporation, the transaction was always vulnerable to a court test and would be upheld only upon a showing that it was eminently fair despite the apparent conflict.

In modern corporations, common, or **interlocking**, directors appear frequently, and it is good practice to include in the articles of incorporation a clause that describes the corporation's

position on transactions where a conflict of interest may be implied. The clause should provide that such transactions will not be considered automatically invalid, but also should not completely exculpate the directors involved. The conflict of interest protection should be preserved for the rare cases where a director has compromised the corporation for personal gain.

EXAMPLE

Transactions with Interested Directors

No contract or other transaction between the corporation and any other corporation, whether or not a majority of the shares of the capital stock of the other corporation is owned by the corporation, and no act of the corporation shall in any way be affected or invalidated by the fact that any of the directors of the corporation are pecuniarily or otherwise interested in, or are directors or officers of, the other corporation. Any director individually, or any firm of which the director may be a member, may be a party to, or may be pecuniarily or otherwise interested in, any contract or transaction of the corporation, provided that the fact that the director of the firm is so interested shall be disclosed to or is known by the Board of Directors or a majority thereof, and provided that any director of the corporation who is also a director or officer of the other corporation, or who is so interested, may be counted in determining the existence of a quorum at any meeting of the Board of Directors of the corporation to authorize such contract or transaction, and may vote at that meeting to authorize such contract or transaction, with like force and effect as if he or she were not the director or officer of the other corporation or not so interested.

Classification, Compensation, and Qualifications of Directors The articles of incorporation may provide for staggered terms for directors to ensure continuity of management policies. A staggered board of directors will always have some “seasoned” members.⁶⁹ Section 8.06 of the Model Business Corporation Act permits classification of directors only if the entire board consists of nine or more members. A sample classification clause for the articles of incorporation follows.

EXAMPLE

Classification of Directors

At the first annual meeting of the shareholders, the members of the Board of Directors shall be divided into three classes of three members each. The members of the first class shall hold office for a term of one year; the members of the second class shall hold office for a term of two years; the members of the third class shall hold office for a term of three years. At all annual elections thereafter, three directors shall be elected by the shareholders for a term of three years to succeed the three directors whose terms then expire, provided that nothing herein shall be construed to prevent the election of a director to succeed himself or herself.

As long as the articles of incorporation are touching upon some matters relating to directors, qualifications may also be covered. Under the Model Business Corporation Act, directors need not have any particular qualifications to serve as such,⁷⁰ but the articles of incorporation or the bylaws may impose qualifications for directors. It may be desirable to require that directors be shareholders, for example, or that they be over thirty-five years of age, or perhaps under thirty-five years of age. Director qualifications should be tailored to the desires of the incorporators.

FILING AND OTHER FORMALITIES

Filing Procedure

The articles of incorporation are filed with the secretary of state or other designated public official, and the Model Business Corporation Act requires an original and a conformed (exact)

copy to be filed.⁷¹ Several states also require that the articles be filed with certain designated county offices in which the corporation has its registered office, and the corporation is not properly formed unless the articles of incorporation are filed in all places required by statute.⁷² After determining that the articles of incorporation are in proper form and that all fees have been paid, the secretary of state will return the duplicate copy of the articles of incorporation with the certificate of incorporation. Many states are now providing on-line filing of articles of incorporation and other entity documents through Internet access. Where on-line filing is permitted, it is also possible to download a certificate confirming that the document has been filed appropriately.

Miscellaneous Formalities

Each state statute treats the execution and filing of the articles of incorporation differently. All jurisdictions require that the articles of incorporation must be signed by the incorporator. The Model Business Corporation Act states simply that the incorporators sign the document, but acknowledgment (a procedure whereby the signatures of the incorporators must be notarized) is required in the New York statute and in several other states.⁷³ County recording of the articles of incorporation is a common formality. Some states require approval of the state corporation commission,⁷⁴ filing with a probate judge,⁷⁵ or publication of the articles of incorporation in a newspaper of general circulation in the county where the corporation has its registered office.⁷⁶ Finally, a state may require certain other documents to be filed with the articles of incorporation. For example, California requires the filing of an application for a permit to issue stock with the commissioner of corporations, and many states that require payment of a minimum amount of paid-in capital also require an affidavit of subscription or payment to accompany the articles of incorporation.

Careful analysis of the particular state statute under which the corporation is to be formed is absolutely necessary to ensure strict compliance with its provisions.⁷⁷

Payment of Capital

The Model Business Corporation Act formerly required that a certain amount of capital must be collected before a corporation may commence business, and many states have preserved this rule. In those states, the payment of the preincorporation share subscriptions in the prescribed amount is a formality that must be satisfied before the corporation may commence business.

CORPORATE EXISTENCE

Modern statutes have adopted simple incorporation procedures, the principal features of which are the preparation and filing of the articles of incorporation and, in most cases, the subsequent issuance of the certificate of incorporation (see Exhibit 8–17, Certificate of Incorporation). In most states, corporate existence begins when the secretary of state, after reviewing the articles of incorporation, issues the certificate of incorporation.⁷⁸ The Model Business Corporation Act and several jurisdictions, including Maine, Michigan, New York, Delaware, and California, provide that corporate existence begins when the articles of incorporation are *filed* with or endorsed by the appropriate state official.⁷⁹

The point at which the corporation is born is used to circumscribe shareholder and promoter liabilities for corporate obligations and to establish the beginning of corporate characteristics, such as taxation as a separate entity. When the certificate of incorporation is issued, or, in the appropriate case, when the articles are filed, the corporation is said to be a **de jure corporation**, or a corporation by law, and it acquires all power to act in accordance with the statute under which it is organized.

Exhibit 8-17.

Certificate of Incorporation
(North Dakota)

Certificate No.

UNITED STATES OF AMERICA

DEPARTMENT OF STATE

State of North Dakota

CERTIFICATE OF INCORPORATION
OF

.....

The undersigned, as Secretary of State of the State of North Dakota, hereby certifies that duplicate originals of Articles of Incorporation for the incorporation of

.....

duly signed and verified pursuant to the provisions of the North Dakota Corporation Act, have been received in this office and are found to conform to law.

ACCORDINGLY the undersigned, as such Secretary of State, and by virtue of the authority vested in him by law, hereby issues this Certificate of Incorporation to

.....

and attaches hereto a duplicate original of the Articles of Incorporation.

In Testimony Whereof, I have hereunto set my hand and affixed the Great Seal of the State at the Capitol in the City of Bismarck, this day of A. D., 19.....

.....
Secretary of State.

By.....
Deputy.

FORMALITIES AFTER FORMATION OF A CORPORATION

Although the corporation is formed when the articles of incorporation are filed or when a certificate of incorporation is issued, several other matters should precede commencement of the corporate business.

Organizational Meetings

Organizational meetings of the incorporators and the initial directors are usually required as one of the first matters of corporate business. Because organizational meetings are quite routine, counsel may draft the minutes in advance and use the predrafted minutes as an agenda for the meetings. The particular statute of each state should be consulted to determine which of the corporate groups (incorporators, directors, or shareholders) are required to hold an organizational meeting. The Model Business Corporation Act requires an orga-

nizational meeting of the incorporators if initial directors are not named in the articles of incorporation. If initial directors are named in the articles of incorporation, the initial directors are to hold the organizational meeting.⁸⁰ Several states require only an organizational meeting of the incorporators.⁸¹ Florida, Hawaii, New Jersey, and most other states require only an organizational meeting of the directors. In addition, there is nothing wrong with holding an organizational meeting for a corporate group that is not required to meet by statute.

Organizational meetings assist in establishing the air of formality that must be continually observed in corporate operations. The important point, however, is the corporation's need to hold the statutory organizational meetings so as to be considered a properly formed corporation. Even if corporate existence begins when the certificate of incorporation is issued or the articles are filed, a failure to observe the statutory formalities following these events may destroy the protection and special privileges of the corporation.

An organizational meeting of the incorporators may consider acceptance of the certificate of incorporation or articles of incorporation and acknowledgment of the payment of taxes, election of initial directors (if they are not named in the articles of incorporation) and resignation of any accommodation (dummy) directors, authorization of the board of directors to issue shares, adoption of bylaws, transfers of any subscriptions from accommodation (dummy) incorporators, and transaction of any other business appropriate for incorporators to consider.

An organizational meeting of the board of directors will consider many of the same matters, and if an organizational meeting of incorporators has been held, the board usually reviews and approves the business conducted there. In addition, the board of directors will decide other matters of corporate business, such as the issuance and transfer of shares, ratification of preincorporation agreements, banking arrangements, the election of officers, qualification as a foreign corporation, and tax plans.⁸² The organizational meeting will be discussed in more detail in Chapter 10.

Corporate Supplies

The attorney's office usually orders the corporation's supplies for the newly formed business. The corporation must maintain a **minute book** and a **stock transfer ledger**, and it must have share certificates and a **corporate seal**. Corporation kits containing these supplies are available from many local printers and those who advertise in legal periodicals.

BYLAWS

Bylaws complement the state statute and the articles of incorporation by prescribing rules to regulate the internal affairs of the corporation. The bylaws must be consistent with the articles of incorporation and the statute. Rules that are for the internal management and are intended to be flexible are best described in the bylaws, since they are most easily amended. On the other hand, rules that require permanence should be placed in the articles of incorporation. Interchangeability between the articles and bylaws is facilitated by the statutory rule that any provision that is required or permitted to be set forth in the bylaws may also be included in the articles of incorporation.⁸³ The converse is not true.

The authority to adopt bylaws is contained in the state statute, which may also suggest certain matters that should be contained in the bylaws.⁸⁴ Most states and the Model Business Corporation Act simply provide that the bylaws may contain any provision for the regulation and management of the corporation's affairs that is not inconsistent with statutory law or the articles of incorporation.⁸⁵ In these jurisdictions, the bylaws may be either simple or complicated. Certain provisions usually appear in the bylaws, such as the place of holding meetings of shareholders and the time of the annual meeting of shareholders; the number of directors, except the first board of directors; the notice to be given for directors' meetings; the procedure for the election and appointment of officers; and a description of the officers' duties.

The bylaws should not be complicated with intricate procedures for corporate operation, because a complicated bylaw provision may become a trap for the unwary, rather than a useful guide to corporate management. However, the bylaws should be as extensive and thorough as necessary to ensure that the procedures for internal management of the corporation are fully described in writing for the officers and directors.

Initial Bylaws

The adoption of the initial bylaws is the responsibility of the incorporators, the shareholders, or the board of directors, depending upon the jurisdiction involved. In New York, the incorporators adopt the initial bylaws. The bylaws are then approved by the board of directors at its organizational meeting. In a few jurisdictions, the shareholders adopt the initial bylaws.⁸⁶ The Model Business Corporation Act provides that the incorporators or the board of directors (if the initial board is named in the articles of incorporation) will adopt the initial bylaws of the corporation.⁸⁷ Most jurisdictions and the act provide for the adoption of the initial bylaws by the board of directors, but the articles of incorporation may reserve this power to the shareholders.⁸⁸

The bylaws are prepared by counsel, with guidance from the incorporators and the initial directors, and they are presented at the organizational meeting for the approval of the appropriate intracorporate group.

Content of Bylaws

Standard bylaw provisions deal with the following matters:

1. Offices
 - (a) Location of the principal office of the corporation
 - (b) Location of the registered office of the corporation
 - (c) Authority to change the address of the registered office by the board of directors

EXAMPLE

Offices

The principal office of the Corporation in the State of South Dakota shall be located in the City of Deadwood, County of Lawrence. The Corporation may have such other offices, either within or without the State of South Dakota, as the Board of Directors may designate or as the business of the Corporation may require from time to time.

The registered office of the Corporation required by the South Dakota Business Corporation Act to be maintained in the State of South Dakota may be, but need not be, identical with the principal office in the State of South Dakota, and the address of the registered office may be changed from time to time by the Board of Directors.

2. Shareholders⁸⁹
 - (a) Time of the annual meeting

EXAMPLE

Annual Meeting

The annual meeting of the shareholders shall be held on the first Tuesday in the month of May in each year, beginning with the year 2005, at the hour of 9:00 A.M., for the purpose of electing directors and for the transaction of such other business as may come before the meeting. If the day fixed for the annual meeting shall be a legal holiday in the State of South Dakota, the meeting shall be held on the next succeeding business day. If the election of directors shall not be held on the day designated herein for any annual meeting of the shareholders, or at any adjournment thereof, the Board of Directors shall cause the election to be held at a special meeting of the shareholders as soon thereafter as is convenient.

- (b) Procedure for calling special meetings of shareholders

Special Meetings

EXAMPLE

Special meetings of the shareholders, for any purpose or purposes, unless otherwise prescribed by statute, may be called by the President or by the Board of Directors, and shall be called by the President at the request of the holders of not less than one-tenth of all the outstanding shares of the corporation entitled to vote at the meeting.

- (c) Place of the shareholder meetings
 (d) Authority for waiver of notice to be signed by shareholders entitled to vote at the meeting—This procedure permits a cure of defective notice or failure to give notice by obtaining written waivers from shareholders entitled to notice.

Place of Meeting and Waiver of Notice

EXAMPLE

The Board of Directors may designate any place, either within or without the State of South Dakota, as the place of meeting for any annual meeting or for any special meeting called by the Board of Directors. A waiver of notice signed by all shareholders entitled to vote at a meeting may designate any place, either within or without the State of South Dakota, as the place for the holding of such meeting. If no designation is made, or if a special meeting be otherwise called, the place of meeting shall be the principal office of the Corporation in the State of South Dakota.

- (e) Procedure for sending notice of meeting and the time period within which notice is given.

Notice of Meeting

EXAMPLE

Written notice stating the place, day, and hour of the meeting, and in case of a special meeting, the purpose or purposes for which the meeting is called, shall be delivered not less than ten nor more than fifty days before the date of the meeting, either personally or by mail, by or at the direction of the President, or the Secretary, or the persons calling the meeting, to each shareholder or record entitled to vote at the meeting. If mailed, such notice shall be deemed to be delivered when deposited in the United States mail, addressed to the shareholder at his or her address as it appears on the stock transfer books of the corporation, with postage thereon prepaid.

- (f) Procedure for determining the shareholders entitled to notice or entitled to vote or entitled to receive dividends—This procedure states a particular time that the stock transfer books will be closed in order to determine the holders of record.

Determination of Shareholders Entitled to Notice or Vote

EXAMPLE

For the purpose of determining shareholders entitled to notice of or to vote at any meeting of shareholders or any adjournment thereof, or shareholders entitled to receive payment of any dividend, or in order to make a determination of shareholders for any other proper purpose, the Board of Directors of the Corporation may provide that the stock transfer books shall be closed for a stated period but not to exceed, in any case, fifty days. If the stock transfer books shall be closed for the purpose of determining shareholders entitled to notice of or to vote at a meeting of shareholders, such books shall be closed for at least ten days immediately preceding such meeting. In lieu of closing the stock transfer books, the Board of Directors may fix in advance a date as the record date for any such determination of shareholders, such date in any case to be not more than fifty days, and in case of a meeting of shareholders, not less than ten days, prior to the date on which the particular action, requiring such determination of shareholders, is to be taken. If the stock transfer books are not closed and no record date is fixed for the determination of shareholders entitled to notice of or to vote at a meeting of shareholders, or shareholders entitled to receive

EXAMPLE*(continued)*

payment of a dividend, the date on which notice of the meeting is mailed or the date on which the resolution of the Board of Directors declaring such dividend is adopted, as the case may be, shall be the record date for such determination of shareholders. When a determination of shareholders entitled to vote at any meeting of shareholders has been made as provided in this section, that determination shall apply to any adjournment thereof except where the determination has been made through the closing of the stock transfer books and the stated period of closing has expired.

- (g) Procedure for preparation of **voting lists**
- (h) Provision for examination of voting lists

EXAMPLE**Voting Lists**

The officer or agent having charge of the stock transfer books for shares of the Corporation shall make a complete list of the shareholders entitled to vote at each meeting of shareholders or any adjournment thereof, arranged in alphabetical order, with the address of and the number of shares held by each. The list shall be produced and kept open at the time and place of the meeting and shall be subject to the inspection of any shareholder during the whole time of the meeting.

- (i) Number of shares required to constitute a quorum, and number of shares required to adjourn the meeting of shareholders

EXAMPLE**Quorum**

A majority of the outstanding shares of the Corporation entitled to vote, represented in person or by proxy, shall constitute a quorum at a meeting of shareholders. If less than a majority of the outstanding shares are represented at a meeting, a majority of the shares so represented may adjourn the meeting from time to time without further notice. At an adjourned meeting at which a quorum is present or represented, any business may be transacted that might have been transacted at the meeting as originally notified. The shareholders present at a duly organized meeting may continue to transact business until adjournment, notwithstanding the withdrawal of enough shareholders to leave less than a quorum.

- (j) Authorization for voting by proxy

EXAMPLE**Proxies**

At all meetings of shareholders, a shareholder may vote in person or by proxy executed in writing by the shareholder or by his or her duly authorized attorney in fact. Such proxy shall be filed with the secretary of the Corporation before or at the time of the meeting. No proxy shall be valid after eleven months from the date of its execution, unless otherwise provided in the proxy.

- (k) Voting entitlements of each class of stock

EXAMPLE**Voting of Shares**

Each outstanding share entitled to vote shall be entitled to one vote upon each matter submitted to a vote at a meeting of shareholders.

- (l) Authorization to vote by representatives of the holder of record (e.g., administrator, executor, agent of another corporation, etc.)

Voting of Shares by Certain Holders

EXAMPLE

Shares standing in the name of another corporation may be voted by such officer, agent, or proxy as the bylaws of that corporation may prescribe or, in the absence of such provision, as the board of directors of that corporation may determine.

Shares held by an administrator, executor, guardian, or conservator may be voted by that person, either in person or by proxy, without a transfer of the shares into his or her name. Shares standing in the name of a trustee may be voted by him or her, either in person or by proxy, but no trustee shall be entitled to vote shares held by that trustee without a transfer of the shares into his or her name.

Shares standing in the name of a receiver may be voted by the receiver, and shares held by or under the control of a receiver may be voted by the receiver without the transfer thereof into his or her name if such authority is contained in an appropriate order of the court by which the receiver was appointed.

A shareholder whose shares are pledged shall be entitled to vote the shares until the shares have been transferred into the name of the pledgee, and thereafter the pledgee shall be entitled to vote the shares so transferred.

Neither shares of its own stock held by the Corporation, nor those held by another corporation if a majority of the shares entitled to vote for the election of directors of the other corporation are held by the Corporation, shall be voted at any meeting or counted in determining the total number of outstanding shares at any given time for purposes of any meeting.

(m) Informal action by the shareholders

Informal Action by Shareholders

EXAMPLE

Any action required to be taken at a meeting of the shareholders, or any action that may be taken at a meeting of the shareholders, may be taken without a meeting if a consent in writing, setting forth the action so taken, shall be signed by all of the shareholders entitled to vote with respect to the subject matter thereof.

(n) Cumulative voting rights

Cumulative Voting

EXAMPLE

At each election for directors, every shareholder entitled to vote at the election shall have the right to vote, in person or by proxy, the number of shares owned by that shareholder for as many persons as there are directors to be elected and for whose election that shareholder has a right to vote, or to cumulate his or her votes by giving one candidate as many votes as the number of the directors multiplied by the number of his or her shares shall equal, or by distributing the votes on the same principles among any number of candidates.

3. Board of directors

(a) Authorization for the board of directors to manage the business⁹⁰

General Powers

EXAMPLE

The business and affairs of the Corporation shall be managed by its Board of Directors.

(b) The number, tenure, and qualifications of directors

Number, Tenure, and Qualifications

EXAMPLE

The number of directors of the Corporation shall be nine. Each director shall hold office until the next annual meeting of shareholders and until his or her successor has been elected and qualified. Directors need not be residents of the State of South Dakota or shareholders of the Corporation.

(c) Classification of directors (if desired)⁹¹**EXAMPLE****Classification of Directors**

At the first annual meeting of the shareholders, the members of the Board of Directors shall be divided into three classes of three members each. The members of the first class shall hold office for a term of one year; the members of the second class shall hold office for a term of two years; the members of the third class shall hold office for a term of three years. At all annual elections thereafter, three directors shall be elected by the shareholders for a term of three years to succeed the three directors whose terms then expire; provided that nothing herein shall be construed to prevent the election of a director to succeed himself or herself.

(d) Time and place for regular meetings⁹²**EXAMPLE****Regular Meetings**

A regular meeting of the Board of Directors shall be held without other notice than this Bylaw immediately after, and at the same place as, the annual meeting of shareholders. The Board of Directors may provide, by resolution, the time and place, either within or without the State of South Dakota, for the holding of additional regular meetings without other notice than such resolution.

(e) Procedure for calling special meetings

EXAMPLE**Special Meetings**

Special meetings of the Board of Directors may be called by or at the request of the President or any two directors. The person or persons authorized to call special meetings of the Board of Directors may fix any place, either within or without the State of South Dakota, as the place for holding any special meeting of the Board of Directors called by them.

(f) Procedure for giving notice of special meetings

(g) Authorization to waive notice of any meeting

EXAMPLE**Notice and Authorization to Waive Notice**

Notice of any special meeting shall be given at least two days previously thereto by written notice delivered personally or mailed to each director at his or her business address, or by telegram. If mailed, such notice shall be deemed to be delivered when deposited in the United States mail so addressed, with postage thereon prepaid. If notice is given by telegram, such notice shall be deemed to be delivered when the telegram is delivered to the telegraph company. Any director may waive notice of any meeting. The attendance of a director at a meeting shall constitute a waiver of notice of that meeting, except where a director attends a meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the Board of Directors need be specified in the notice or waiver of notice of the meeting.

(h) The number of directors for a quorum and to adjourn the meeting

EXAMPLE**Quorum**

A majority of the number of directors fixed by these Bylaws shall constitute a quorum for the transaction of business at any meeting of the Board of Directors, but if less than such majority is present at a meeting, a majority of the directors present may adjourn the meeting from time to time without further notice.

- (i) The number of directors required to approve a certain matter

Manner of Acting

EXAMPLE

The act of the majority of the directors present at a meeting at which a quorum is present shall be the act of the Board of Directors.

[or]

No resolution of the corporation at any meeting, whether regular or special, shall be adopted except by the unanimous vote of the directors duly elected as provided herein.

- (j) Informal action by the board of directors

Action without a Meeting

EXAMPLE

Any action that may be taken by the Board of Directors at a meeting may be taken without a meeting if a consent in writing, setting forth the action to be taken, is signed before the action by all the directors.

- (k) Procedure for filling vacancies and removing directors⁹³

Vacancies

EXAMPLE

Any vacancy occurring in the Board of Directors may be filled by the affirmative vote of a majority of the remaining directors though less than a quorum of the Board of Directors. A director elected to fill a vacancy shall be elected for the unexpired term of his or her predecessor in office. Any directorship to be filled by reason of an increase in the number of directors may be filled by election by the Board of Directors for a term of office continuing only until the next election of directors by the shareholders.

Removal

EXAMPLE

The stockholders of the Corporation may, at any meeting called for the purpose, remove any director from office, with or without cause, by a vote of a majority of the outstanding shares of the class of stock that elected the director; provided, however, that no director shall be removed if the votes of a sufficient number of shares are cast against the director's removal, which if cumulatively voted at an election of the entire board of directors would be sufficient to elect that director.

- (l) Compensation and payment of expenses

Compensation

EXAMPLE

By resolution of the Board of Directors, each director may be paid his or her expenses, if any, of attendance at each meeting of the Board of Directors, and may be paid a stated salary as a director or a fixed sum for attendance at each meeting of the Board of Directors or both. No such payment shall preclude any director from serving the Corporation in any other capacity and receiving compensation therefor.

- (m) Presumption of assent when the director is present at a meeting

Presumption of Assent

EXAMPLE

A director of the Corporation who is present at a meeting of the Board of Directors at which action on any corporate matter is taken shall be presumed to have assented to the action taken unless that director's dissent shall be entered in the minutes of the meeting or unless that director shall file his or her written dissent to such action with the person acting as the secretary of the meeting before the adjournment thereof or shall forward such dissent by registered mail to the Secretary of the Corporation immediately after the adjournment of the meeting. Such right to dissent shall not apply to a director who voted in favor of such action.

4. Executive committees⁹⁴

- (a) Authority for the appointment of executive committees and the delegation of authority

EXAMPLE**Appointment**

The Board of Directors, by resolution adopted by a majority of the full board, may designate two or more of its members to constitute an Executive Committee. The designation of such committee and the delegation thereto of authority shall not operate to relieve the Board of Directors, or any member thereof, of any responsibility imposed by law.

EXAMPLE**Authority**

The Executive Committee, when the Board of Directors is not in session, shall have and may exercise all of the authority of the Board of Directors except to the extent, if any, that such authority shall be limited by the resolution appointing the Executive Committee and except also that the Executive Committee shall not have the authority of the Board of Directors in reference to amending the Articles of Incorporation; adopting a plan of merger or consolidation; recommending to the shareholders the sale, lease, or other disposition of all or substantially all of the property and assets of the Corporation otherwise than in the usual and regular course of its business; recommending to the shareholders a voluntary dissolution of the Corporation or a revocation thereof; or amending the Bylaws of the Corporation.

- (b) Tenure and qualifications of members of the executive committee

EXAMPLE**Tenure and Qualifications**

Each member of the Executive Committee shall hold office until the next regular annual meeting of the Board of Directors following his or her designation and until his or her successor is designated as a member of the Executive Committee and is elected and qualified.

- (c) Time and place for regular meetings of the executive committee
- (d) Procedure for calling special meetings of the executive committee
- (e) Procedure for giving notice of a meeting to the executive committee

EXAMPLE**Meetings**

Regular meetings of the Executive Committee may be held without notice at such times and places as the Executive Committee may fix from time to time by resolution. Special meetings of the Executive Committee may be called by any member thereof upon not less than one day's notice stating the place, date, and hour of the meeting, which notice may be written or oral, and if mailed, shall be deemed to be delivered when deposited in the United States mail addressed to the member of the Executive Committee at his or her business address. Any member of the Executive Committee may waive notice of any meeting, and no notice of any meeting need be given to any member thereof who attends in person. The notice of a meeting of the Executive Committee need not state the business proposed to be transacted at the meeting.

- (f) Number of the members of the committee necessary to constitute a quorum, and vote required of the committee to authorize certain acts

Quorum

EXAMPLE

A majority of the members of the Executive Committee shall constitute a quorum for the transaction of business at any meeting thereof, and action of the Executive Committee must be authorized by the affirmative vote of a majority of the members present at a meeting at which a quorum is present.

(g) Informal action by the executive committee

Action without a Meeting

EXAMPLE

Any action that may be taken by the Executive Committee at a meeting may be taken without a meeting if a consent in writing, setting forth the action to be taken, is signed before such action by all the members of the Executive Committee.

(h) Procedure for filling vacancies, accepting resignations, and removing members of the executive committee

Vacancies

EXAMPLE

Any vacancy in the Executive Committee may be filled by a resolution adopted by a majority of the full Board of Directors.

Resignation and Removal

EXAMPLE

Any member of the Executive Committee may be removed at any time with or without cause by resolution adopted by a majority of the full Board of Directors. Any member of the Executive Committee may resign from the Executive Committee at any time by giving written notice to the President or Secretary of the corporation, and unless otherwise specified therein, the acceptance of such resignation shall not be necessary to make it effective.

(i) Procedure for conducting executive committee meetings

Procedure

EXAMPLE

The Executive Committee shall elect a presiding officer from its members and may fix its own rules of procedure which shall not be inconsistent with these Bylaws. It shall keep regular minutes of its proceedings and report the same to the Board of Directors for its information at the meeting thereof held next after the proceedings have been taken.

5. Officers⁹⁵

(a) Number of officers

Number

EXAMPLE

The officers of the Corporation shall be a President, one or more Vice Presidents (the number thereof to be determined by the Board of Directors), a Secretary, and a Treasurer, each of whom shall be elected by the Board of Directors. Such other officers and assistant officers as may be deemed necessary may be elected or appointed by the Board of Directors. Any two or more offices may be held by the same person, except the offices of the President and Secretary.

(b) Procedure for election and term of office

EXAMPLE**Election and Term of Office**

The officers of the Corporation to be elected by the Board of Directors shall be elected annually by the Board of Directors at the first meeting of the Board of Directors held after each annual meeting of the shareholders. If the election of officers shall not be held at such meeting, such election shall be held as soon thereafter as is convenient. Each officer shall hold office until that officer's successor has been duly elected and has qualified or until that officer's death or until that officer shall resign or shall have been removed in the manner hereinafter provided.

(c) Removal and the filling of vacancies

EXAMPLE**Removal**

Any officer or agent may be removed by the Board of Directors whenever in its judgment the best interests of the Corporation will be served thereby, but such removal shall be without prejudice to the contract rights, if any, of the person so removed. Election or appointment of an officer or agent shall not of itself create contract rights.

EXAMPLE**Vacancies**

A vacancy in any office because of death, resignation, removal, disqualification, or other reason may be filled by the Board of Directors for the unexpired portion of the term.

(d) Responsibilities of the officers

EXAMPLE**Officers**

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

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

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

eral charge of the stock transfer books of the Corporation; and (g) in general perform all duties incident to the office of Secretary and such other duties as from time to time may be assigned to him or her by the President or by the Board of Directors.

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

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

EXAMPLE

(e) Salaries

Salaries

The salaries of the officers shall be fixed from time to time by the Board of Directors, and no officer shall be prevented from receiving such salary by reason of the fact that he or she is also a director of the Corporation.

[or]

No salary or other compensation for services shall be paid to any director or officer of the corporation unless the same has been approved in writing or at a duly held stockholders' meeting by stockholders owning at least seventy-five percent in amount of the capital stock of the corporation then outstanding.

EXAMPLE

6. Authorization for executing contracts and other written matters on behalf of the corporation—These provisions permit the board of directors to authorize any officer to contract on behalf of the corporation, and they may further restrict the ability of management to contract loans or other indebtedness. It is common to specify here which persons must sign checks, drafts, and other evidences of indebtedness issued in the name of the corporation, and where the funds of the corporation will be deposited.

Authorization

Contracts. The Board of Directors may authorize any officer or officers, agent or agents, to enter into any contract or execute and deliver any instrument in the name of and on behalf of the Corporation, and such authority may be general or confined to specific instances.

Loans. No loans shall be contracted on behalf of the Corporation and no evidences of indebtedness shall be issued in its name unless authorized by a resolution of the Board of Directors. Such authority may be general or confined to specific instances.

Checks, Drafts, etc. All checks, drafts, or other orders for the payment of money, notes, or other evidences of indebtedness issued in the name of the corporation, shall be signed by such officer or officers, agent or agents of the Corporation and in such manner as shall from time to time be determined by resolution of the Board of Directors.

Deposits. All funds of the Corporation not otherwise employed shall be deposited from time to time to the credit of the Corporation in such banks, trust companies, or other depositories as the Board of Directors may select.

EXAMPLE

7. Matters involving the certificates of shares and their transfer⁹⁶—These provisions usually permit the board of directors to determine the form of the share certificates and prescribe which of the corporate officers will be required to sign them. Section 6.25 of the Model Business Corporation Act requires that if certificates are used by the corporation, each certificate representing shares shall set forth on its face that the corporation is organized under the laws of the particular state; the name of the person to whom issued; and the number and class of shares represented. In addition, if the corporation is authorized to issue different classes of shares, the certificates should specify the designations, preferences, limitations, and relative rights of the shares of each class. These statutory requirements need not be restated in the bylaws. If the incorporators wish to restrict the board of directors' use of uncertificated shares, a prohibitive provision to that effect should be stated in the bylaws. Any other special provisions respecting the transfer of shares and the method of keeping the stock transfer ledger should also be included under this bylaw section.

EXAMPLE**Certificates for Shares**

Certificates representing shares of the Corporation shall be in such form as shall be determined by the Board of Directors. Such certificates shall be signed by the President or a Vice President and by the Secretary or an Assistant Secretary and sealed with the corporate seal or a facsimile thereof. The signatures of such officers upon a certificate may be facsimiles if the certificate is countersigned by a transfer agent, or registered by a registrar, other than the Corporation itself or one of its employees. All certificates for shares shall be consecutively numbered or otherwise identified. The name and address of the person to whom the shares represented thereby are issued, with the number of shares and date of issue, shall be entered on the stock transfer books of the Corporation. All certificates surrendered to the Corporation for transfer shall be canceled and no new certificate shall be issued until the former certificate for a like number of shares shall have been surrendered and canceled, except that in case of a lost, destroyed, or mutilated certificate, a new one may be issued therefor upon such terms and indemnity to the Corporation as the Board of Directors may prescribe.

The board of directors shall not be permitted to issue "uncertificated" shares without the express approval of at least two-thirds of the then outstanding stock entitled to vote.

EXAMPLE**Transfer of Shares**

Transfer of shares of the Corporation shall be made only on the stock transfer books of the Corporation by the holder of record thereof or by his or her legal representative, who shall furnish proper evidence of authority to transfer, or by his or her attorney thereunto authorized by power of attorney duly executed and filed with the Secretary of the Corporation, and on surrender for cancellation of the certificate for such shares. The person in whose name shares stand on the books of the corporation shall be deemed by the Corporation to be the owner thereof for all purposes.

EXAMPLE**Transfer Agent**

The Secretary of the Corporation shall act as Transfer Agent of the certificates representing the shares of common stock and preferred stock of the Corporation. That person shall maintain a Stock Transfer Book, the stubs in which shall set forth, among other things, the names and addresses of the holders of all issued shares of the Corporation, the number of shares held by each, the certificate numbers representing such shares, the date of issue of the certificates representing such shares, and whether or not such shares originate from original issue or from transfer. The names and addresses of the stockholders as they appear on the stubs of the Stock Transfer Book shall be conclusive evidence as to who are the stockholders of record and as such entitled to receive notice of the meetings of stockholders; to vote at such meetings; to examine the list of the stockholders entitled to vote at meetings; to receive dividends; and to own, enjoy, and exercise any other property or rights deriving from such shares against the Corporation. Each stockholder shall be responsible for notifying the Secretary in writing of any change in his or her name or address, and failure to do so will relieve the Corporation and its directors, officers, and agents from liability for failure to direct notices or other documents, or pay over or transfer dividends or other property or rights, to a name or address other than the name and address appearing on the stub of the Stock Transfer Book.

8. The fiscal year of the corporation—The corporation is a separate legal person and, as such, can adopt a fiscal year for its business other than the calendar year. This allows the corporation to select any twelve-month period to account for its operations. Its tax returns must be filed within 75 days after the close of its fiscal year. A Subchapter S corporation must use the calendar year as its fiscal year because its shareholders declare its profits on their personal tax returns and those must be filed based upon a calendar year.

Fiscal Year

The fiscal year of the Corporation shall begin on the first day of January and end on the thirty-first day of December in each year.

EXAMPLE

9. Authority of the board of directors to declare and pay distributions on the outstanding shares of the corporation⁹⁷

Distributions

The Board of Directors may from time to time declare, and the Corporation may pay, dividends on its outstanding shares in the manner and upon the terms and conditions provided by law and its Articles of Incorporation.

EXAMPLE

10. Description of the corporate seal

Seal

The Board of Directors shall provide a corporate seal that shall be circular in form and shall have inscribed thereon the name of the Corporation, the state of incorporation, and the words “Corporate Seal.”

EXAMPLE

11. Provisions for adopting emergency bylaws and the term for which those bylaws will be in effect

Emergency Bylaws

The Emergency Bylaws provided in this Article shall be operative during any emergency in the conduct of the business of the Corporation resulting from a catastrophic event, notwithstanding any different provision in the preceding Articles of the Bylaws or in the Articles of Incorporation of the Corporation or in the Business Corporation Act. To the extent not inconsistent with the provisions of this Article, the Bylaws provided in the preceding Articles shall remain in effect during such emergency and upon its termination the Emergency Bylaws shall cease to be operative.

During any such emergency:

- a) A meeting of the Board of Directors may be called by any officer or Director of the Corporation. Notice of the time and place of the meeting shall be given by the person calling the meeting to such of the Directors as it may be feasible to reach by any available means of communication. Such notice shall be given at such time in advance of the meeting as circumstances permit in the judgment of the person calling the meeting.
- b) At any such meeting of the Board of Directors, a quorum shall consist of [*here insert the particular provision desired*].
- c) The Board of Directors, either before or during any such emergency, may provide, and from time to time modify, lines of succession in the event that during such an emergency any or all officers or agents of the Corporation shall for any reason be rendered incapable of discharging their duties.
- d) The Board of Directors, either before or during any such emergency, may, effective in the emergency, change the head office or designate several alternative head offices or regional offices, or authorize the officers so to do.

EXAMPLE

EXAMPLE*(continued)*

No officer, Director, or employee acting in accordance with these Emergency Bylaws shall be liable except for willful misconduct.

These Emergency Bylaws shall be subject to repeal or change by further action of the Board of Directors or by action of the shareholders, but no such repeal or change shall modify the provisions of the next preceding paragraph with regard to action taken prior to the time of such repeal or change. Any amendment of these Emergency Bylaws may make any further or different provision that may be practical and necessary for the circumstances of the emergency.

12. Provisions for amending, altering, or repealing the bylaws or adopting new bylaws

EXAMPLE**Amendment**

These Bylaws may be altered, amended, or repealed and new Bylaws may be adopted by the Board of Directors at any regular or special meeting of the Board of Directors.

Sample bylaws for a Delaware corporation appear as Exhibit I-10 in Appendix I.

KEY TERMS

promoters
 joint venture
 preincorporation share subscription
 common stock
 par value
 preferred stock
 paid-in capital
 domestic corporation
 foreign corporation
 ultra vires doctrine
 “blue-sky” requirements
 scrip
 redeemable shares
 convertible shares
 irrevocable proxies
 “wasting assets” provisions

trademark
 reservation of corporate name
 transfer of corporate name
 registration of corporate name
 “name-saver corporation”
 assumed name
 articles of incorporation
 equity securities
 debt securities
 no par value
 stated value
 capital surplus
 registered office
 registered agent
 corporate purposes
 corporate powers

treasury shares
 director and officer liability
 insurance
 indemnify
 stock option
 quorum
 dividend
 depletion reserve
 interlocking director
 de jure corporation
 organizational meeting
 minute book
 stock transfer ledger
 corporate seal
 voting list

WEB RESOURCES

Forms and information concerning the formation of corporations are available from the Web sites of the various Secretaries of State and the Departments of Commerce where corporate documents are filed. Nearly every office offers incorporation forms and guidance on their local filing and documentation rules. These state sites may be accessed through links on the National Secretary of State Association site:

<http://www.nass.org>

Access to state corporate laws may be obtained through the Legal Information Institute maintained at the Cornell Law School:

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

A variety of business forms and articles are available as Law Commerce™, a member of the LexisNexis Group. Several research pages and best selling forms and agreements are available in an electronic marketplace at

<http://www.lawcommerce.com>

Various resources are available for sample forms and information about the formation and the operation of corporations, including the following:

<<http://www.toolkit.cch.com>>
 <<http://www.findlaw.com>>
 <<http://www.tannedfeet.com>>
 <<http://www.lectlaw.com>>
 <<http://www.ilrg.com>>

Information on international corporations and transnational business research may be reviewed at

<<http://www.hg.org>>

Delaware corporate law, including selected filings and opinions in corporate and other business litigation in the Delaware Court of Chancery is available through a project with the Widener University School of Law and Stanford University School of Law. This information is located at

<<http://www.corporate-law.widener.edu>>

The Small Business Administration provides a number of forms, advice, and guidance to small businesses. Information on business law, regulations, and financing can be accessed at

<<http://www.sba.gov>>



CASES

CHARLES A. TORRENCE COMPANY v. CLARY

121 N.C.App. 211, 464 S.E.2d 502 (1995)

GREEN, JUDGE

The undisputed facts show that plaintiff provided services to Clary, Martin, McMullen & Associates, Inc. (the Corporation), between 24 April 1991 and 26 March 1992, upon which there remains an account balance of \$14,230.49, plus interest. The Corporation's charter was suspended on 17 November 1989, pursuant to N.C.Gen.Stat. § 105-230, for failure to pay franchise taxes and remained in a state of suspension through the date of the trial of this action. The defendant, a shareholder, president and director of marketing of the Corporation, did not learn of the corporate charter suspension until September 1992. All invoices and statements for monies due to plaintiff were sent to the Corporation and not to any of its owners, including defendant. The defendant did not guarantee any of the Corporation's debt owed to plaintiff. The trial court concluded that because the defendant had no knowledge that the charter had been

suspended at the time the debt was incurred, the defendant could not be held personally liable for the Corporation's debt to plaintiff.

The dispositive issue is whether an officer of a corporation whose charter has been suspended has any personal liability for debts incurred by the corporation during the period of suspension.

Our legislature has provided that any person who "shall exercise or by any act attempt to exercise any powers, privileges, or franchises under articles of incorporation or certificate of authority after the same are suspended . . . shall pay a penalty." N.C.G.A. § 105-231 (1992). Our statutes are silent on whether the shareholders, directors and officers have any personal liability for debts incurred on behalf of a corporation during the time the charter is suspended. The general rule is that the shareholders of a corporation whose charter has been suspended "are not made individually liable for its debts incurred during the suspension." 19 Am.Jur2d *Corporations* § 2887 (1986). "The 'corporate veil' is not pierced, because the suspension was only designed to put 'additional bite' into the collection of franchise taxes, but not to deprive the shareholders of the normal protection of limited liability." *Id.* On the other hand, directors and officers are personally liable for corporate obligations incurred by them on behalf of the corporation, or by others with their acquiescence, if at that time they were aware that the corporate charter was suspended. *Id.*; *Pierce Concrete, Inc. v. Cannon Realty & Constr. Co.*, 77

N.C.App. 411, 414, 335 S.E.2d 30, 31-32 (1985); see N.C.G.S. § 55-8-30(c) (1990); N.C.G.S. § 55-8-42(c) (1990). Shareholders, directors and officers “of a pretended corporation which is neither a *de jure* nor a *de facto* corporation are generally held personally and individually liable . . . for the debts of the pretended corporation . . . without any reference to whether the persons sought to be held liable, actively participated in contracting the debt.” *Guilford Builders Supply Co. v. Reynolds*, 249 N.C. 612, 616, 107 S.E.2d 80, 83 (1959).

In this case, the evidence is that the defendant was an officer of a lawful corporation but had not knowledge, at the time the debt was incurred on behalf of the Corporation, that the corporate charter was suspended. Accordingly, the defendant has no personal liability for the Corporation’s debt to the plaintiff and the trial court correctly dismissed the complaint.

Affirmed.

MARK D. MARTIN and McGEE, JJ., concur.

MURPHY v. CROSLAND

886 P.2d 74 Utah (1994)

JACKSON, JUDGE

Crosland Industries, Inc. (CI) was properly incorporated in Utah on January 28, 1986. At all times relevant to this appeal, Todd Crosland was president, a director, and principal shareholder of CI, while Jeff Crosland was vice president and a director.

On March 1, 1987, CI’s certificate of incorporation was suspended pursuant to Utah Code Ann. § 16-10-88.2 (1987) (repealed 1992) for failure to file its annual report.

The Murphys owned Granny’s Buns, a cinnamon roll store in Las Vegas, Nevada. On January 8, 1988, the Murphys entered into a contract to sell Granny’s Buns to Arnold Swenson. On that date, Mr. Swenson executed a promissory note in the Murphys’ favor for a principal amount of \$70,000. On that same date, and during the period of its suspension, CI agreed to guarantee Mr. Swenson’s performance on both the sales contract and the note. Todd Crosland negotiated the guarantees on CI’s behalf, and Jeff Crosland executed the guarantees in his capacity as an officer of CI.

Subsequently, Mr. Swenson defaulted under the terms of both the sales contract and the note, and CI failed to honor its guarantees. Having failed to remedy its suspended status and to restore its good standing, CI was involuntarily dissolved on March 1, 1988, pursuant to Utah Code Ann. § 16-10-88.2 (1987) (repealed 1992).

On July 27, 1989, the Murphys obtained a default judgment against CI in the amount of \$72,987.46 plus interest, resulting from CI’s failure to honor the guarantees. The Murphys then brought the present suit seeking to hold Todd and Jeff Crosland jointly and severally liable, under Utah Code Ann. § 16-10-139 (1987) (repealed 1992), for the judgment against CI. The Murphys claimed that by negotiating, authorizing, and executing CI’s guarantees while the corporation was suspended, the Croslands “assumed to act as a corporation without authority so to do” in violation of Utah Code Ann. § 16-10-139.

* * *

ANALYSIS

I. Development of the MBCA

“In the United States the granting of corporate franchises has been regarded from the beginning as a prerogative of the legislature. The early American corporations were chartered by special acts of state legislatures.” Model Business Corp. Act Ann., § 1 cmt., at 2 (1971). Later, “A procedure for incorporating under laws of general application was developed.” *Id.* at 2-3.

The general laws enacted throughout the country shared similarities, but varied from state to state in scope and structure. Indeed, several states began to take advantage of these differences, enacting competitive statutes intended to induce corporations to organize in their jurisdictions. *Id.* at 3.

In addition, several common law concepts developed in the area of corporate law, supplementing the statutes. For example, “[a]t common law, corporations could be either *de jure*, *de facto*, or by estoppel.” *American Vending Servs., Inc. v. Morse*, 881 P.2d 917, 920 (Utah App.1994).

A *de jure* corporation is ordinarily thought of as one which has been created as the result of compliance with all of the constitutional or statutory requirements of a particular governmental entity. A *de facto* corporation, on the other hand, can be brought into being when it can be shown that a bona fide and colorable attempt has been made to create a corporation, even though the efforts at incorporation can be shown to be irregular, informal or even defective. Corporations by estoppel come about when the parties thereto are estopped from denying a corporate existence. In other words, the parties may, by their agreements or conduct, estop themselves from denying the existence of the corporation. [Citations omitted]

Beginning in the late 1920s, the states began to modernize their corporation laws by enacting entirely new statutes. Model Business Corp. Act Ann., § 1 cmt., at 3 (1971). As part of this revisionary movement, a committee of the American Bar Association drafted the Model Business Corporation Act (MBCA), first published as a complete act in 1950. *Id.* “The MBCA strove to codify a uniform set of laws regarding corporations and to provide some clarity and bright-line tests to previously

clouded areas.” *Morse*, 881 P.2d at 921. Furthermore, the MBCA eliminated the common law concepts of de facto corporations, de jure corporations, and corporations by estoppel. See 3A William M. Fletcher, *Fletcher Cyclopedic of the Law of Private Corporations* § 1229 (1990) (Fletcher).

* * *

Accordingly, the MBCA contemplated three relevant periods in the life of a corporation: (1) the preincorporation period—during which those who assumed corporate powers would be held personally liable under the MBCA, thereby negating the doctrines of de facto corporation and corporation by estoppel; (2) the incorporation period—during which the corporation enjoyed all the powers, rights, and privileges conferred by law; and (3) the postdissolution period—for which no statutory change was made because the common law already held personally liable those who carried on the business in an unauthorized manner. The MBCA’s scheme did not include corporate suspension as a step prior to dissolution; hence, the MBCA’s drafters had no need to consider the effect of any of the Act’s provisions on a corporation that had been suspended.

* * *

We conclude that corporate suspension under UBCA section 16-10-88.2 resulted in suspension of a corporation’s authority to conduct business as usual. A corporation suspended under this statute could engage only in activities necessary to wind up its affairs or to remedy its suspension. UBCA section 16-10-139 applies to a suspended corporation; anyone acting on the corporation’s behalf who exceeds the corporation’s remaining authority is jointly and severally liable for debts and liabilities incurred as a result.

CONCLUSION

Todd and Jeff Crosland exceeded their suspended corporation’s authority in negotiating and executing guarantee agreements for CI. Thus, they are jointly and severally liable for the default judgment entered against CI because the judgment represents corporate liability arising from the Crosland’s unauthorized actions. We affirm the trial court’s grant of summary judgment. . . .

BILLINGS and GREENWOOD, JJ., concur.

PROBLEMS

- When the corporate veil is pierced, who are the persons held liable for the debt or injury?
- ABC Corporation has 103 shares issued and outstanding. If Renee Crumb owns 30 shares, Mary Hanko owns 35 shares, Susan Stroud owns 38 shares, and there are seven directors to be elected, how many votes will be needed to elect one director? How many directors may Susan Stroud elect?
- What is the difference between corporate “purpose” and corporate “powers”? Which is easier to change?
- What are the qualifications of an incorporator under the model act?
- What is the difference between a “staggered” board of directors and a “dummy” board of directors?
- If the articles of incorporation do not identify the initial board of directors, who must hold an organizational meeting and what business must be conducted?
- What is the difference between articles of incorporation and bylaws? Which is easier to change and why?

PRACTICE ASSIGNMENTS

- Review your local corporation statute and make a list of the following:
 - the items required to be specified in the articles of incorporation;
 - the items permitted to be modified by the articles of incorporation alone;
 - the items permitted to be modified by the articles of incorporation or the bylaws; and
 - the items that could not be modified by the articles or bylaws even if a contrary provision were included in the document.
- Find a friend or relative who is involved with a corporation. Ask them to show you copies of their articles of incorporation or bylaws and to explain their business to you. Review the articles of incorporation and bylaws

and either critique or justify the provisions based upon the unique requirements of the business and your local corporation statute.

3. Steven Levine owns a lumber business, which he founded thirty years ago. His business, Emperor Lumber Company, has business offices at 200 West 14th Avenue, New York, New York; a lumber yard and mill in Atlanta, Georgia; and sells retail lumber to consumer customers. The business has been improving, and presently nets approximately \$450,000 per year before taxes. Levine has operated the business as a sole proprietor with seven full-time employees, including an employee-manager of the lumber yard, Rick Duffy. Levine's son, Magic Levine, has been working with the business since he graduated from high school. Magic is presently 18 years old. In addition to his lumber business, Steven owns other investments and nonbusiness property that afford him approximately \$100,000 per year in income.

Steven is exploring several possibilities for the direction of the business, and he is excited about the possibility of adding a retail hardware inventory to his retail lumber business. The addition of a hardware line would require approximately \$650,000 in capital, the addition of a new store at another location, and hiring approximately ten to fifteen new employees.

Steven says he has the following alternatives: (1) he may continue the business alone and eventually give it or will it to his children; or (2) he may add his employee-manager as a partner to the business, with a contribution of approximately \$300,000 in capital by the employee-manager; or (3) he may consider incorporating the business if you so advise.

If a partnership is to be formed, Steven would contribute the lumber mill valued at \$500,000, timber lands worth \$150,000, and inventory items worth approximately \$120,000. The goodwill of the business is

valued at approximately \$250,000. In a partnership arrangement with Duffy, the employee-manager, Levine is willing to share profits fifty-fifty.

If a corporation is to be formed, Levine suggests that his son and his employee-manager join him as the directors of the business. It is extremely important to Levine that these three people maintain complete control over the business. Although his son does not have any individual capital to contribute, Levine would like him to maintain an ownership interest in the corporation.

Recognizing the need for capital to begin the retail hardware business, Steven has located three potential outside investors who will provide capital no matter what form the business assumes. These people include Donna Skibbe and Richard Conviser, each of whom will contribute or invest \$150,000, and are interested in a minimum annual return of ten percent and capital appreciation. Neither Skibbe nor Conviser have any interest in management or control, but they insist on some sort of protection should they fail to receive their desired return on investment for any substantial period of time. A third investor, Stanley Chess, will contribute or invest up to \$250,000 provided he receives a guaranteed fifteen percent minimum annual return. He is not concerned about control or capital appreciation. Levine is willing to meet all these demands, but Levine wants to be able to retire or redeem any business obligations that might make subsequent investment or acquisition of outside capital unattractive.

- a. Prepare a memorandum on the advantages of incorporation or partnership for this business.
- b. Prepare a skeletal structure for both a partnership and a corporation and a list of questions and issues you think would be appropriate to discuss with Levine during your second interview.
- c. Draft all documents necessary to form a corporation for Levine's business under your local corporation code.

ENDNOTES

1. The advice must consider the particular needs of the business, including ownership rights, management responsibilities, duration, need for capital, potential liability, and taxation. If a corporation is selected as the appropriate business form, certain special information must be obtained from the organizers. A preincorporation checklist appears as Exhibit I-8 in Appendix I.

2. E.g., Pennsylvania, 15 Pa. Stat. Ann. §§ 1201-1204(8).

3. Several states require \$1,000 minimum paid-in capital (e.g., Texas, Tex. Bus. Corp. Act Ann. § 3.02(7)). A few states require that if an initial amount of capital is desired, it must be stated in the articles of incorporation (e.g., Ohio, Ohio Rev. Code § 1701.04 [Baldwin]).

4. E.g., New York, three months, N.Y. Bus. Corp. Law § 503 (McKinney); and Louisiana, one year, La. Rev. Stat. Ann. § 12:71 (West).

5. E.g., New Jersey, six months or sixty days after filing certificate of incorporation, N.J. Stat. Ann. § 14A:7-3 (West).

6. See Model Business Corporation Act (hereafter M.B.C.A.) § 6.20.

7. 15 Pa. Stat. § 1207.

8. Oklahoma, Okla. Stat. Ann. tit. 18, § 1010.

9. M.B.C.A. § 6.20(d).

10. See Chapter 14.

11. Reprinted with permission from H. Henn and J. Alexander, *Handbook of the Law of Corporations and Other Business Enterprises* 179–185 (3d ed. 1983) (copyright 1983 by West Publishing Company).

12. For example, it may be particularly important for management to be able to declare dividends out of current profits even if the corporation did not have an “earned surplus.” This is permitted in Oklahoma. Okla. Stat. Ann. tit. 18, § 1049. It would not be permitted in Texas. Tex. Bus. Corp. Act. Ann. art. 2.38.

13. M.B.C.A. § 4.01.

14. See 1 Prentice-Hall, *Corporation Reporter*, Corporation Checklists ¶ 9002, subparagraph 14 under each state.

15. See, e.g., M.B.C.A. § 4.01(b). Some jurisdictions and the Model Business Corporation Act allow the use of a similar corporate name, provided the written consent of the holder of the name is obtained and a distinguishing word is added to the name.

16. Many states use a thirty-day period for reservation of corporate names (e.g., Maryland, Md. Corps. & Ann. art. 23, § 6; and Massachusetts, Mass. Gen. Laws Ann. ch. 155, § 9(a)).

17. M.B.C.A. § 4.02.

18. M.B.C.A. § 4.03.

19. See Chapter 14 on the qualification of foreign corporations.

20. E.g., Colorado, Colo. Rev. Stat. § 7-71-101.

21. The Model Business Corporation Act and most jurisdictions use the term *articles of incorporation*. M.B.C.A. §§ 1.40(I), 2.02.

22. See “Amendment of the Articles of Incorporation” in Chapter 15.

23. M.B.C.A. § 2.02.

24. Examples of articles of incorporation appear as Exhibits I–6 and I–9 in Appendix I.

25. See “Selection and Reservation of Corporate Name” earlier in this chapter.

26. The details and flexibility of the corporate financial structure are discussed more fully in Chapter 9.

27. This summary paraphrases the requirements of M.B.C.A. § 6.01, except that the act does not require any statement concerning par value of shares. Most states still require this designation for shares.

28. M.B.C.A. § 6.01(b).

29. M.B.C.A. § 6.01(c).

30. See Chapter 9.

31. See “Par Value or No Par Value” and “Consideration for Shares” in Chapter 9.

32. M.B.C.A. § 6.21 permits shares to be issued at a price set by the board of directors, and the price set is entirely at the directors’ discretion if par value is not required in the articles of incorporation. See M.B.C.A. § 2.02.

33. E.g., Alabama places a value of \$50 on each no par share for computation of the initial taxes. In this state, a corporation can authorize fifty times as many \$1 par value shares as no par shares for the same tax.

34. See “Sources of Funds for Distribution” in Chapter 11.

35. See “Preferred Stock Rights” in Chapter 9 and “Share Transfer Restrictions and Buy-out Agreements” in Chapter 13.

36. See M.B.C.A. § 14.20; “Involuntary Dissolution” in Chapter 15.

37. See “Ownership and Management of a Corporation” in Chapter 6.

38. M.B.C.A. § 2.02(b)(1).

39. See “Ownership and Management of a Corporation” in Chapter 6.

40. See “Voluntary Dissolution” and “Involuntary Dissolution” in Chapter 15.

41. M.B.C.A. § 3.04.

42. E.g., New York, N.Y. Bus. Corp. Law § 622 (McKinney).

43. E.g., Delaware, Del. Code Ann. tit. 8, § 102(b)(3).

44. Treasury shares are defined in most corporation statutes. On preemptive rights and treasury shares, see clause 9 in Delaware Articles of Incorporation, Exhibit I–9, in Appendix I.

45. See “Ownership and Management of a Corporation” in Chapter 6; “Shareholder Business and Vote Required” in Chapter 10.

46. M.B.C.A. § 2.02(b)(3).

47. See “Amendment of the Articles of Incorporation” in Chapter 15.

48. M.B.C.A. § 8.01.

49. M.B.C.A. § 8.11.

50. M.B.C.A. § 7.28.

51. M.B.C.A. § 8.04.

52. M.B.C.A. § 8.06.

53. M.B.C.A. § 8.08.

54. M.B.C.A. § 8.10.

55. Del. Code Ann. tit. 8, § 102(b)(7).

56. 15 Pa. Stat. Ann. § 1713.

57. Del. Code Ann. tit. 8, § 102(b)(7).

58. Ind. Code Ann. § 23-1-35-1(e). In Indiana, Florida, and Maine, the limitation on liability applies to suites by third parties as well as by shareholders, and there is no provision for a corporation formed in any of these three states to eliminate the statutory limitation of

liability even if the corporation’s shareholders so desire.

59. Va. Code Ann. § 13-1.692.1(A) (Michie). The Virginia limitation is the greater of (1) \$100,000, or (2) “the amount of cash compensation received by the officer or director from the corporation during the 12 months immediately preceding the act or omission for which liability was imposed;” but the statute permits the shareholders to reduce or eliminate (but not increase) this limit to “monetary amounts specified” in a provision of either the articles of incorporation or the bylaws.

60. E.g., California, Cal. Corp. Code § 317 (West).

61. M.B.C.A. § 6.31.

62. M.B.C.A. § 8.24.

63. M.B.C.A. § 8.21.

64. M.B.C.A. § 10.20.

65. M.B.C.A. § 10.21.

66. M.B.C.A. § 6.40; see “Sources of Funds for Distribution” and “Cash and Property Dividends” in Chapter 11.

67. See, e.g., Delaware, Del. Code Ann. tit. 8, § 170.

68. See, e.g., Delaware, Del. Code Ann. tit. 8, § 170(b).

69. See “Ownership and Management of a Corporation” in Chapter 6.

70. M.B.C.A. § 8.02.

71. M.B.C.A. § 55.

72. E.g., Delaware, Del. Code Ann. tit. 8, § 103(c)(5).

73. N.Y. Bus. Corp. Law § 402(a) (McKinney).

74. E.g., Arizona, Ariz. Rev. Stat. Ann. § 10-055.

75. Alabama, Ala. Bus. Corp. Act § 10-2B-1.25.

76. E.g., Pennsylvania, 15 Pa. Stat. Ann. § 205.

77. The myriad variations of filing requirements may be easily reviewed by consulting 1 Prentice-Hall, *Corporation Reporter*, Corporation Checklists, ¶ 9002 *et seq.*

78. E.g., Nevada, Nev. Rev. Stat. § 78.050.

79. M.B.C.A. § 2.03.

80. M.B.C.A. § 2.05.

81. E.g., New York, N.Y. Bus. Corp. Law § 404 (McKinney).

82. Checklists and a full discussion of organizational meetings are contained in Chapter 10.

83. See M.B.C.A. § 2.02(b)(3).

84. Some state statutes prescribe certain specific matters that must be contained in the bylaws. E.g., California, Cal. Corp. Code § 212 (West).

85. See M.B.C.A. § 2.06.

86. E.g., Nebraska, Neb. Rev. Stat. § 21-2026.

87. M.B.C.A. § 2.05.

88. E.g., Kentucky, Ky. Rev. Stat. Ann. § 271A.145 (Baldwin).

89. See “Shareholder Meetings” in Chapter 10.

90. See “Ownership and Management of a Corporation” in Chapter 6.

91. The Model Business Corporation Act requires that a classification provision ap-

pear in the articles of incorporation, and a bylaw provision would be ineffective. See M.B.C.A. § 2.01; “Filing and Other Formalities” earlier in this chapter. However, several states permit classification of the board of directors to be accomplished in the bylaws. E.g., New York, N.Y. Bus. Corp. Law § 704 (McKinney); Pennsylvania, 15 Pa. Stat. Ann. § 403.

92. See “Directors’ Regular and Special Meetings” in Chapter 10.

93. See “Taxation of a Corporation” in Chapter 6.

94. See M.B.C.A. § 2.15.

95. See “Ownership and Management of a Corporation” in Chapter 6.

96. See Certificate for Shares” earlier in this chapter; “Share Transfer Restrictions and Buy-out Agreements” in Chapter 13.

97. See “Cash and Property Dividends” and “Share Dividends” in Chapter 11.