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CORPORATION LAW REVISION

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Although the opportunities for meetings of the Committee have been quite limited the individual members have given considerable study and consideration to the subject of corporation law revision and the following report represents, in general, the unanimous opinion of the committee members.

The report deals for the most part with the deficiencies of the present Wyoming Corporation statutes. These statutes date back to 1887. Since then a number of provisions have been added by amendment, such as the ones on no-par stock and preferred stock. In 1939 a considerable number of more or less obsolete sections were repealed. However, nothing was added to take the place of these repealed sections, so that at present we have only fragments of a statute.

The Committee recommends the adoption of a completely new statute, based generally on the Model Business Corporation Act prepared by the Corporation Law Committee of the American Bar Association. In general this report does not attempt to explain in detail the various provisions of the Model Act. These can be best understood and appreciated by reading the Act, and the Committee is attempting to make that opportunity available to as many members of the Bar as possible by circulating and recirculating a rather limited number of copies. As an exception to the above the report does contain a short explanation of some of the financial or accounting provisions of the Act. This is included because these provisions seem to be the most difficult to understand and some lawyers have raised questions about them. Certainly it should not be concluded that the Committee feels that these are the most important parts of the Act.

The report, in more or less outline form, follows:

I. INADEQUACIES OF THE PRESENT LAW

A. IT IS NOT A LIBERAL LAW NOR DOES IT PROVIDE ANY DEGREE OF FLEXIBILITY.

Corporations are entirely creatures of statutes. Therefore corporation statutes are primarily enabling acts. From this it follows that if particular corporate action or a particular corporate form is not expressly authorized it probably cannot legally be taken or used. At least that is the only safe advice that a careful lawyer can give. In view of this it is not possible to have an adequate statute which is also short and stated in general terms.

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B. SPECIFIC GAPS AND OMISSIONS IN THE PRESENT STATUTE.

1. The Act nowhere states the significance of par value or the difference between par and no-par stock.

2. The statute does not state whether or not a corporation which has an over-all deficit may pay dividends from current earnings.

3. The Act does not state any rule as to whether dividends may be paid from paid-in surplus.

4. No provision is made with respect to the right of a corporation to purchase its own shares.

5. No provision is made for partial liquidations or reductions of capital.

6. The provisions for amending certificates of incorporation are incomplete in the sense that only a few types of amendments are authorized and furthermore the statute is not clear even with respect to these.

7. There is no statutory provision defining pre-emptive rights nor providing for the elimination of such rights when that is desirable.

8. There is no provision permitting high quorum or high vote requirements for director or shareholder action although such provisions are often desirable to solve control problems in the case of closely held corporations.

9. There is no provision for dissolution because of a deadlock among the shareholders. Such provisions are generally considered desirable for close corporations.

10. There are no provisions protecting non-voting or minority shareholders in fundamental changes such as charter amendments or mergers.

11. There are no provisions defining the procedure for selling all the corporate assets.

12. The present provisions respecting foreign corporations are inadequate in not providing for the filing of charter amendments, or for voluntary withdrawal or for revocation of authority.

13. There is no provision authorizing the Secretary of State to reject documents not complying with the statute.

It should be pointed out with respect to most of these questions on which the Wyoming statutes are silent that no guidance can be obtained from the case law of other states since these matters are almost universally provided for by statute.

C. OBSOLETE AND UNSATISFACTORY PROVISIONS OF THE PRESENT WYOMING STATUTE.

1. The Wyoming requirement for publication of notice of incorporation is unusual and seems to serve no useful purpose. This is also true of the requirement for publication of notice of the annual meeting.

2. The provision limiting corporate existence to a term of fifty years is obsolete. Almost all other states permit perpetual existence.

3. The requirement that directors be shareholders serves no useful purpose and is awkward for one and two man corporations and for subsidiary corporations.

4. The insertion of provisions with respect to nonprofit corporations into the general business corporation statute has created confusion and uncertainty. See Wyoming Statutes, 1957, Section 17-1.

5. The repeal of certain sections has left dangling cross references in certain remaining sections. See Sections 17-75 and 17-26.

6. Some provisions added by amendment are not well coordinated with other sections. Compare 17-70 authorizing no-par stock with 17-1 which seems to require that the certificate of incorporation state the amount of authorized capital stock in dollars.

As a further example, the concept of non-voting stock first came into the Wyoming Statute with the amendments authorizing no-par stock and preferred stock (17-70 and 17-12). It is impossible to tell whether such stock is entitled to vote on amendments and dissolution since the sections on amendment and dissolution were enacted earlier and refer respectively to "two-thirds of all the shares of stock" and to "two-thirds of the entire stock." (17-26 and 17-65)

II. THE MODEL BUSINESS CORPORATION ACT

A. THE MODEL ACT IS NOT A UNIFORM STATUTE.

The field of corporation law is not one where uniformity is highly desirable for its own sake. The A.B.A. Committee recognized this. Its purpose in publishing the Model Act was to provide a working model, or starting point, for state bar or legislative groups assigned the task of preparing a new corporation law. In preparing the Model Act the A.B.A. Committee took the best, in its opinion, from existing statutes and avoided the introduction of new and revolutionary concepts. The Model Act therefore is an exceptionally well organized and well drafted statute, but is otherwise conventional and typical of modern legislation in this field.

The Model Act has been used in the manner intended by the A.B.A. Committee in almost all states that have revised their corporation laws in recent years. These include Wisconsin, Texas, Virginia, Colorado, North Dakota, Oregon and Iowa. It is presently being considered by bar committees in Utah, South Dakota and probably other states. In each state where it has been adopted substantial changes have been made to fit local conditions and attitudes. Some changes would undoubtedly be desirable in Wyoming and the Committee is presently giving consideration to this subject. The fact that such changes are found necessary in no way impeaches the usefulness of the Model Act for its intended purpose.

In spite of these changes it is evident that the Model Act is introducing considerable uniformity into the field of corporation law. This

will be particularly helpful in a state like Wyoming which has, and will have, relatively few reported decisions in the corporation field, since Wyoming lawyers will have the benefit of judicial construction of similar provisions by the courts of other states.

B. THE FINANCIAL OR ACCOUNTING PROVISIONS OF THE MODEL ACT.

Some Wyoming lawyers who have had an opportunity to study the Model Act apparently find the accounting provisions difficult to understand, or believe that such provisions are unnecessary in Wyoming. Actually provisions with the same general purposes have been more or less standard parts of corporation statutes for many years. The provisions of the Model Act differ from these older statutes chiefly in being more precise and easier to understand.

The cornerstone of the Model Act financial provisions is the concept of "stated capital." In general "stated capital" is a margin of net assets that must be preserved against dividend distributions to shareholders. In this respect the Model Act treats purchases of treasury shares as the equivalent of dividend distributions. Historically the purpose of this restriction is to insure, so far as possible, a margin of free assets for the protection of creditors. Under most modern statutes the rules with respect to stated capital are probably at least as significant in guaranteeing the shareholders that their investment will be used in the conduct of the business and not returned in the guise of dividends which would create a misleading appearance of prosperity.

The "stated capital" figure is built upon the issuance of shares. In the case of par value shares it will ordinarily be the aggregate par value of the issued shares, and under the Model Act it can never be less than this. In the case of no-par shares the amount credited to stated capital on the issuance of different shares may vary depending on the issue price and the allocation of the proceeds by the directors between stated capital and capital surplus. From this it will be observed that the principal legal significance of a par value is that it serves as a minimum issue price and a minimum per share credit to stated capital. On the other hand, in the case of no-par shares there is no minimum issue price and no minimum credit to stated capital.

The second major accounting concept which is a necessary part of any complete corporation law is that of "surplus." As defined in the Model Act and other modern statutes, surplus is the excess of net assets over stated capital. Subject to possible further restrictions or exceptions, this is the general measure of the corporation's ability to pay dividends.

It should be noted that surplus may be created by issuing par value shares for more than par. Likewise surplus will result on the issuance of no-par shares when the directors increase stated capital by an amount less than the total consideration received for such shares. This sort of surplus is generally referred to as paid-in surplus or, in the terminology of the Model Act, Capital Surplus. Under the Model Act such surplus

is not available for dividends. In general, the right to pay dividends under the Model Act depends on the existence of "earned surplus"—that is, surplus resulting from the profitable conduct of the corporation's business.

The Model Act includes rather complete provisions for reducing stated capital. In general this may only be done by shareholder action. In particular cases such a reduction may be desirable to eliminate a deficit and make future earnings available for dividends. In other cases the corporation may simply desire to return unneeded capital to the shareholders in a partial liquidation. A reduction of stated capital is frequently necessary in close corporations when one member desires to withdraw. Mechanically such a reduction can be accomplished by reducing the par value of the outstanding shares, reducing the number of such shares, or by simply reducing the stated capital figure in the case of no-par shares.

It has been suggested that it is unnecessary, and probably undesirable, for a corporation statute to invade the field of accounting to the extent that the Model Act does. This criticism appears to be based on a misunderstanding of the proper function of accountants. In this area at least the principal concern of the accountant is to see that the law is observed and to demonstrate that observance in the corporation's financial statements. Stated differently, the accounting principles follow the law on this subject rather than the opposite. From conversations with accountants it appears that they are just as much confused as lawyers by the lack of satisfactory statutory provisions in Wyoming.

C. THE LENGTH OF THE MODEL ACT AND THE MAGNITUDE OF THE LEGISLATIVE JOB.

It has been suggested by several lawyers that the Model Act contains much more detail than is necessary for most Wyoming corporations and that it would be better to merely adopt some of the better and more useful sections as amendments to the present law.

Certainly it would be entirely proper to eliminate some provisions of the Model Act that will be of no particular value in Wyoming. At the same time, care must be taken not to destroy the essential unity of the statute by this process. Also, and for reasons heretofore stated, care should be taken so that we don't again end up without any statutory provisions on important questions that are customarily covered by statute.

It does not seem feasible to remedy the deficiencies in the present law by piecemeal amendment. Substantially this process has been going on since 1887 with respect to the Wyoming corporation law and with the results previously mentioned. In the Committee's opinion a modern, comprehensive and coherent corporation law can best be obtained through the enactment of a wholly new statute patterned generally on the Model Act.