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THE NEW WYOMING BUSINESS CORPORATION ACT

E. GEORGE RUDOLPH*

In its recent session, the Wyoming Legislature enacted a new and comprehensive business corporation act to become effective on July 1, 1961. Before considering the various provisions of the new statute it seems worthwhile to review briefly the actions of the Wyoming State Bar and of the Corporation Law Committee which led to its enactment.

The first formal action by the Wyoming State Bar looking toward the eventual adoption of a new corporation law based on the American Bar Association Model Business Corporation Act was taken at the meeting at Jackson Lake in 1958. At that time the Corporation Law Committee was authorized to spend such sums as might be necessary for the purchase of materials and supplies to carry forward its work. Shortly thereafter the committee acquired a limited number of copies of the Model Act and circulated these, along with a mimeographed memorandum comparing the Model Act with present Wyoming Statutes, among various members of the bar.

At its legislative meeting in 1959 the Bar endorsed the adoption of a constitutional amendment eliminating the one line of business restriction. The resolution proposing the amendment was enacted by the 1959 Legislature and the amendment was adopted in the general election of 1960. This cleared the way for several important provisions of the new statute.

At the annual meeting in Cheyenne in 1959 a resolution was adopted referring the Model Act to the various local bars for consideration and with instructions to determine the opinions of the membership and communicate these to the Corporation Law Committee. The committee thereafter distributed the necessary materials to each county in the state and exerted its best efforts to obtain action on the matter by the various county bars. The bar associations of Albany, Campbell, Carbon, Laramie, Natrona, Sweetwater and Park counties endorsed the enactment of a new corporation act based generally on the Model Act.

It should also be mentioned that during the past year the Park County Continuing Legal Education Panel discussed questions of partnership and corporation law before a number of local bar groups and this was very helpful to the work of the committee since the panel devoted a considerable part of its discussion to the relative advantages of the Model Act.

In the meantime the committee devoted considerable time and effort to an intensive study of the Model Act with a view to determining the changes from the Model Act which it should recommend for adoption in Wyoming. In this work the committee received a number of valuable

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suggestions from other lawyers and from the County Bar groups. Statistically the changes decided upon seem quite extensive. Nineteen Model Act sections were eliminated and one wholly new section was added. Changes of more or less substance were made in twenty-nine sections. In addition, minor changes were made in quite a few other sections simply to conform them to the substantive changes. The more important of these will be noted in the course of the discussion of the Act.

A draft act incorporating these changes was prepared and distributed in mimeograph form at the Casper meeting of the Bar last fall under the title, Proposed Wyoming Business Corporation Act. The meeting endorsed the enactment of the Proposed Act and authorized the committee to arrange for its introduction in the 1961 session of the Legislature.

This was done with the eventual outcome heretofore noted. During the course of its passage through the Legislature, several amendments were made to the bill. Without going into detail on these, it seems accurate to say that none of them made any substantive change so far as the practicing lawyers are concerned. It should probably also be mentioned that several minor changes were made by the committee following the Casper meeting and before the bill was introduced.

The balance of this paper will be devoted to discussing the more important features of the new Act.

ORGANIZATION

Under the new Act a corporation is formed by executing Articles of Incorporation and filing duplicate originals thereof with the Secretary of State.¹ The Articles may be executed by a single incorporator.² This, of course, represents a considerable simplification when compared to the present statutes, which, in addition to filing with the Secretary of State, also require filing with the county clerk, publication of notice, filing proof of publication and the filing of a separate statement designating the resident agent and resident office.

The new Act requires that the Articles be verified whereas the present statute requires acknowledgment. This may cause some uncertainty for a time. The Secretary of State's office has advised informally that it will accept Articles and other documents employing the verification forms included in the Official Forms for use under the Model Business Corporation Act.³

1. Wyoming Business Corporation Act, Section 47. At the time this is written session laws are not available. Hereafter the Act will be cited merely by section number. The numbers correspond to the legislative bill and the mimeographed draft distributed under the title, Proposed Wyoming Business Corporation Act.
2. Section 45. Both the present Wyoming statute and the Model Act require three incorporators. The committee changed this in the interest of logical consistency with the provision, to be discussed later, permitting one or two man Boards of Directors in some situations. The new Iowa statute is similar. While incorporators perform no significant function except to sign the Articles, the North Carolina Supreme Court recently held that the requirement for multiple incorporators prevented recognition of a one man corporation. *Park Terrace, Inc. v. Phoenix Indemnity Co.*, 243 N.C. 595, 91 S.E.2d 5841 (1956).
3. Available in pamphlet form from the Committee on Continuing Legal Education, 133 South 36th St., Philadelphia, 4, Pa., at \$1.25 per copy.

Upon the filing of the Articles and the payment of the prescribed fees the Secretary of State will, if he finds that the Articles of Incorporation conform to law, issue a Certificate of Incorporation.⁴ It should be noted that the new Act will clear up a problem that has given difficulty under the present statutes. Under the new Act it is entirely clear that the Secretary of State may refuse to accept for filing Articles and other documents that do not conform to law. Another section provides that such decisions of the Secretary of State may be appealed to the district court of the county in which the principal office of the corporation is situated.⁵

Corporate existence begins upon the issuance of the certificate of incorporation.⁶ However, before the corporation can begin business at least five hundred dollars in cash or property must be paid in as consideration for shares.⁷ While this amount is only nominal the requirement nonetheless seems desirable since it provides a clear answer on the necessity for an original paid in capital.⁸ It may also serve to protect shareholders from personal liability asserted on the ground of inadequate capitalization.⁹ The Model Act imposes liability on the directors for violation of this requirement. The committee felt this was not necessary to the purpose of the provision and eliminated it. Another section bearing on the question of corporate existence provides that all persons assuming to act as a corporation, but without authority to do so, shall be personally liable for all debts and liabilities incurred. This was apparently designed to preclude a finding of *de facto* existence in the absence of a certificate of incorporation.¹⁰

The content of the Articles of Incorporation under the new statute will be more or less the same as the Certificate of Incorporation under the present law.¹¹ Some differences should be noted however. The most significant is a provision permitting the use of a simple statement that the corporation shall have unlimited power to engage in any and all lawful businesses for which corporations may be organized.¹² This is probably the fullest possible implementation of the Constitutional amendment. It is hoped that it will do away with the apparent necessity for long and complicated purpose clauses. Another important change in Wyoming

4. Section 47.

5. Section 116.

6. Section 48.

7. Section 49.

8. See *Harle-Haas Drug Company v. Rogers Drug Co.*, 19 Wyo. 35, 113 Pac. 791 (1911).

9. See *Critzer v. Oban*, 52 Wash.2d 446, 326 P.2d 53 (1958).

10. Section 122. See draftmen's comment to Section 139 of the Model Act which is the same. See also Preface to 1950 Revision of the Model Act.

11. Section 46 sets forth the provisions to be included in the Articles. In the drafting of Articles and other documents, Wyoming lawyers will find useful the *Official Forms For Use Under the Model Business Corporation Act*, supra note 3. Some changes will, of course, be required because of the differing provisions of the new Wyoming statute.

12. Section 46(c). This provision was taken *verbatim* from the new Iowa corporation law. The desirability of such a provision was first suggested by the Carbon County Bar.

Law results from the provisions permitting the organization of corporations with perpetual existence.¹³

Unlike the present statutes the new act permits the inclusion of many optional provisions in the Articles. Certain of these are specifically authorized by a number of sections and will be referred to hereafter. In addition a more general provision permits including in the Articles any provision for the regulation of the internal affairs of the corporation including any provision required or permitted to be set forth in the by-laws.¹⁴ The apparent reason for this is that it will sometimes be desirable to protect such provisions against the relatively easy procedure for amending by-laws.

The new Act forbids the use of a name deceptively similar to the name of an existing domestic or qualified foreign corporation.¹⁵ It also authorizes the reservation of a name for a period of one hundred twenty days prior to incorporation or qualification.¹⁶ The Model Act requires that the name include one of the words, "corporation," "company," "incorporated," "limited" or an abbreviation of one of such words. The committee felt that this requirement did not serve any useful purpose. Since the word, "company" was included, the name, under the Model Act provision, could not be relied on as indicating corporate status. The committee also eliminated a Model Act provision permitting a foreign corporation to protect its name in the state by registration of the name without qualification to do business. Both of these deletions from the Model Act, in effect, conform to present Wyoming law.

Although it is probably not entirely necessary, the Act expressly provides for an organization meeting of directors to adopt by-laws and elect officers.¹⁷ The initial by-laws will in all cases be adopted by the directors. Likewise authority to amend by-laws will be in the directors unless reserved to the shareholders by the Articles.¹⁸ This is, in a sense, the reverse of the present statute on the subject. The Act requires a president, one or more vice presidents, a secretary and a treasurer but permits any two or more offices to be held by a single person except the offices of president and secretary.¹⁹

CORPORATE POWERS

The new Act includes a very comprehensive list of the general powers of all corporations.²⁰ These need not be set out in the Articles of Incorporation.²¹ Quite a number of these are not provided for by the present statutes and in this respect the new act results in considerable improve-

13. Sections 4 (a) and 46 (b).

14. Section 46 (i).

15. Section 7.

16. Section 8.

17. Section 50.

18. Section 24.

19. Section 42.

20. Section 4.

21. Section 46.

ment. For example, it expressly authorizes corporations to acquire and hold shares of other corporations, a matter on which some doubt has existed under the present law.²² In keeping with the modern tendency, the new Act expressly empowers corporations to make charitable contributions.²³ It also permits the indemnification of the litigation expenses of officers and directors who successfully defend a shareholders suit charging malfeasance or negligence.²⁴ The committee added a provision, not found in the Model Act, authorizing corporations to become members of partnerships, limited partnerships and joint ventures.²⁵

The new Act expressly authorizes corporations to establish pension, profit sharing, stock bonus and stock option plans for directors, officers and employees.²⁶ However the establishment of a stock option plan requires the affirmative vote of a majority of the shareholders.²⁷

One change which the committee made in the Model Act provisions in this area may be controversial. The Model Act includes a provision prohibiting loans to officers and directors. The committee felt that in the case of close corporations such loans will sometimes be desirable and entirely proper. Furthermore, the prohibition of loans seems to serve no strong policy under the Model Act since it apparently permits a corporation to guarantee the obligations of its officers and directors.²⁸ Therefore the committee elected to delete this provision. This required a conforming change in the powers section, and as that provision now stands such loans are expressly authorized.²⁹ However, it does not seem likely that it will be construed to validate such loans which are, under the particular facts, determined to the best interests of the corporation.

DIRECTORS

The new Act makes a number of significant changes with respect to the directors. As under the present statutes the names of the first directors are to be set forth in the Articles, and the Articles will therefore necessarily specify the number of directors constituting the original board.³⁰ Otherwise, however, the number of directors is controlled by the by-laws unless the by-laws are silent on the subject.³¹ This means, of course, that the number of directors may be increased or reduced by amendment of the by-laws, and it is probably appropriate to repeat here that the by-laws will ordinarily be subject to amendment by director action.³² The Act states that no decrease in the number of directors shall operate to shorten the term of an incumbent director.³³

22. Section 4 (g).

23. Section 4 (m).

24. Section 4 (o).

25. Section 4 (s).

26. Section 4 (p).

27. Section 17.

28. Section 4 (h) and Section 4 (f) which even in the Model Act form authorizes a Corporation to "otherwise assist" its officers and directors.

29. Section 4 (f).

30. Sections 46 (k) and 34.

31. Section 34.

32. Section 24.

33. Section 34.

The Act provides that the number of directors shall be not less than three except that, in cases where all the shares are owned by one or two persons, the number of directors may be either one or two but not less than the number of shareholders.³⁴ The provision for one or two man boards originated with the committee and is frankly an experiment. The only known precedent for it is the Iowa statute which requires no minimum number of directors at all. The committee felt the Iowa solution would not be consistent with the mandatory cumulative voting requirement of the new Act. The obvious purpose of this provision is to do away with the necessity for dummy directors and thereby obviate the difficulties that are often encountered in obtaining formal board action in the case of one and two man corporations. However, it must be added that this does not go the whole distance in authorizing one man corporations. It will still be necessary to have at least two officers, a president and a secretary.³⁵ In view of the long established practice with respect to the execution of formal corporate instruments, such as conveyances, it did not seem desirable to change this requirement.

The provision for one or two man boards necessitated two further additions. When the articles provide for such a board originally they must also provide for the election of a board of not less than three at such time as the shares become owned by more than two persons.³⁶ Secondly, provision is made for the election of directors by the executor or administrator of a deceased sole shareholder.³⁷ It should probably be emphasized that use of a one or two man board is entirely optional. In cases where one of the principal reasons for incorporating is to insure the orderly continuation of the business on the death of the sole shareholder the one man board, although legally available, probably would not be desirable.

Under the new Act directors need not be shareholders unless the Articles so require.³⁸ This, of course, constitutes a change from our present law and does away with the need for qualifying shares. The Act also states that directors need not be residents of the state, a matter on which the present statutes are silent.³⁹

Unless otherwise provided a majority of the directors constitute a quorum, and the act of a majority of the directors present at a meeting, assuming the presence of a quorum, constitutes the act of the board. However, the new Act expressly authorizes the fixing of higher quorum requirements and higher vote requirements by either the by-laws or Articles.⁴⁰ Presumably this would permit one hundred per cent quorum and unanimous vote requirements. Such provisions are often considered

34. Section 34.

35. Section 42.

36. Section 46(k).

37. Section 35.

38. Section 33.

39. Section 33.

40. Section 36.

desirable in close corporations to insure minority interests an effective voice in management. However, in at least one case, such by-laws were held invalid in the absence of express statutory authorization.⁴¹

An absent director may validate action taken at an improperly called meeting by signing a waiver of notice either before or after the meeting.⁴² Furthermore, directors may act without any meeting through the device of written consents signed by all the directors.⁴³ The latter provision is not found in the Model Act but was added by the Committee. A similar provision is included in the new Iowa law.

Under the new Act directors will be liable to the corporation for illegal dividends, share purchases and other distributions.⁴⁴ It should be noted that this liability is not conditioned upon the corporation's insolvency as it is in the case of illegal dividends under our present statutes. A director will not be liable under this provision if he acted in reliance upon financial statements prepared by either employees or outside accountants. Furthermore, a director who dissents will not be liable if his dissent is noted in the minutes or otherwise made a matter of record.

SHAREHOLDER ELECTIONS AND MEETINGS

As under present law directors must be elected by cumulative voting.⁴⁵ However, under the new Act it would apparently be possible to provide that certain director positions would be filled by the votes of certain classes of shares.⁴⁶ In addition it should be noted that the new Act expressly authorizes voting trusts and also voting agreements.⁴⁷ Conceivably the latter might be held invalid as in conflict with the requirement of cumulative voting in the absence of express authorization.⁴⁸

The provision on voting agreements was added by the committee. While it was patterned on a similar provision in the new North Carolina statute the Wyoming provision is considerably broader. Thus it authorizes shareholders to contract not only with respect to the election of directors but also on any other matter requiring a shareholder vote. For example, it would authorize a contract among the shareholders of a close corporation obligating all parties to vote their shares for dissolution upon the demand of any one, thus making possible a corporation at will similar to a partnership at will.⁴⁹ The section provides for the enforcement of voting agreements by injunction or other appropriate decree,

41. *Benintendi v. Kenton Hotel*, 294 N.Y. 112, 60 N.E.2d 829 (1945).

42. Section 120.

43. Section 121.

44. Section 41.

45. Section 30.

46. This seems to follow from the language of Section 30 that every shareholder entitled to vote shall have the right to vote for . . . "as many persons as there are directors to be elected and for whose election he has a right to vote. . . ." (Emphasis added.)

47. Section 31.

48. See *E. K. Buck Retail Stores v. Harkert*, 157 Neb. 867, 62 N.W.2d 288 (1954).

49. See *Israels*, "The Sacred Cow of Corporate Existence: Problems of Deadlock and Dissolution," 19 U. of Chi. L. Rev. 778 (1952).

including, in the discretion of the court, setting aside an election in violation of such agreement.

The new Act provides that the Articles of Incorporation may limit or deny voting rights for any class of shares.⁵⁰ However, as the Model Act Comment points out, even though shares are designated as non-voting they will have the right to vote on mergers, dissolution and some amendments, so that the chief significance of the designation is to deprive such shares of the right to vote for directors. More will be said of voting rights on dissolution, mergers and amendments under subsequent headings.

The annual meeting shall be held at the time and place designated by the by-laws.⁵¹ Notice of the meeting shall be given by delivering or mailing a written notice to each shareholder at the address shown on the share transfer books.⁵² This, of course, represents a change from present law which generally requires notice by publication.

Special meetings may be called by the president, directors, ten per cent of the shareholders or otherwise as provided in the by-laws.⁵³ In the case of a special meeting the written notice must specify the purpose of the meeting.⁵⁴

The new Act expressly authorizes the closing of the transfer books or the fixing of a record date, not less than ten or more than fifty days prior to the meeting, for the purpose of determining shareholders entitled to notice.⁵⁵ The Act also requires the preparation of a list of shareholders entitled to vote, and further requires that the list be available for inspection at the registered office for ten days prior to the meeting.⁵⁶ However, it is expressly provided that failure to comply with this requirement will not invalidate any action taken at the meeting.

SHARES: TYPES, ISSUE, PAYMENT, AND TRANSFER

At the outset a matter of terminology should be noted. The new Act, following the Model Act, uses the terms, "shares" and "shareholders." The terms "stock," "capital stock" and "stockholder" nowhere appear.⁵⁷

The new Act authorizes par and no par shares and preferred shares with such preferences as may be specified in the Articles. There are several changes from the present law with respect to preferred shares and these will be briefly mentioned. The seven per cent maximum on preferred dividends is eliminated. Shares convertible into a junior class of shares are authorized. The matter of permissible redemption provi-

50. Section 12.

51. Section 25.

52. Section 26.

53. Section 25.

54. Section 26.

55. Section 27. This also apply to determining shareholders entitled to receive a dividend.

56. Section 28.

57. See Sections 2(d) and 2(f).

sions is clarified.⁵⁸ Finally, the Act authorizes the issuance of a preferred class in series, and permits the Articles to delegate to the directors the authority to fix the dividend rate and certain other terms of the different series.⁵⁹ It does not seem likely that this provision will be found useful in many instances in the near future.

The authority to issue shares and to fix the issue price is vested in the directors. In the case of par value shares the issue price must be expressed in dollars and cannot be less than par.⁶⁰ This fills a strange void in Wyoming law since the present statutes nowhere state the legal significance of a par value. However, the new Act may be subject to some criticism in this respect because it does not specify the legal significance of an attempted issue at less than par nor provide any liability therefore. In this the new Act follows the Model Act.

Under the Act the directors may set the issue price for no par shares as they from time to time determine.⁶¹ This makes clear that the principal difference between par and no par shares is that in the case of par shares the par value serves as a minimum issue price. The present draft of the Model Act requires that the issue price for no par shares be expressed in dollars. The committee eliminated this, thereby, in effect, following an earlier version of the Model Act. The practical result is that under the new Act no par shares issued for property will be fully paid regardless of the value of the property, provided only that the particular property is the stated consideration for the shares.

A further section of the Act provides that a subscriber or shareholder shall be obligated to the corporation to pay the full consideration for which his shares were issued, but shall not be otherwise liable to the corporation or its creditors with respect to such shares.⁶² This provision furnishes the sole basis for liability for watered stock, and it would also seem to preclude any possibility of holding shareholders liable to creditors on some general theory of inadequate capitalization.⁶³ Another section provides that where shares are issued for property the judgment of the directors as to the value of the property will be conclusive in the absence of fraud.⁶⁴ It does not seem likely, however, that this provision can be relied on when the shares are issued to the directors themselves.⁶⁵ As previously noted, the problem will generally

58. All these matters are covered by Section 12.

59. Section 13.

60. Section 15.

61. Section 16. In the case of no par shares the Articles may reserve the right to fix the issue price to the shareholders.

62. Section 22.

63. Shareholder liability on such grounds has been much discussed by text and law review writers and occasionally found by courts. See Douglas and Shanks, *Subsidiary Corporations*, 39 *Yale L.J.* 192 (1929); Berle, *The Theory of Enterprise Entity*, 47 *Rocky Mt. L. Rev.* 343 (1947); *Herman v. Mobile Homes Corp.*, 317 *Mich.* 233, 26 *N.W.2d* 757 (1947); *Arnold v. Phillips*, 171 *F.2d* 497 (CCA 5th 1941); *Carlesimo v. Schwehel* 197 *P.2d* 167 (Cal. App. 1958). See also the discussion of the requirement of a minimum original paid in capital at note 9.

64. Section 16.

65. *Pipelife Corporation v. Bedford*, 145 *A.2d* 206. (Delaware Ch. 1958).

not arise when no par shares are used. On the other hand, it is clear under the new Act, whatever might be the situation otherwise, that no protection against stock watering liability is afforded by the practice of issuing par value shares at a price substantially higher than par.

From a qualitative point of view the consideration for shares may consist of money, tangible or intangible property, or labor or services actually rendered. Neither promissory notes nor future services are proper consideration.⁶⁶ These rules are much like the present statutory provisions except for the express authority to issue shares for labor or services.⁶⁷

The Act has a section on subscriptions for shares which includes as its most noteworthy feature a provision that preincorporation subscriptions shall be irrevocable for a period of six months. It also covers the subject of calls for payment and regulates provisions for forfeiture because of nonpayment.⁶⁸

The denial of preemptive rights by a provision in the Articles is authorized by the new Act,⁶⁹ and it also provides that such a provision may be added by amendment.⁷⁰ There has apparently been no way to eliminate preemptive rights under the present statutes and this has occasionally caused some inconvenience.⁷¹ The new Act further provides that preemptive rights shall not be recognized in shares issued to officers and employees pursuant to a plan approved by vote of two-thirds of the shares entitled to vote. This, of course, is the same vote that is required for stock option plans as previously noted.

The committee added a section on share transfer restrictions,⁷² a subject that is not covered by the Model Act. In view of the uncertainty of the law in this area and in view of the importance of such restrictions to close corporations, especially since the advent of Sub-Chapter S of the Internal Revenue Code, some statutory coverage seemed desirable. In general the section authorizes restrictions of the first option or first refusal type, restrictions imposed by a buy and sell agreement, and restrictions conditioning the right to make voluntary transfers upon the prior consent of the directors or shareholders. In authorizing the last type of restriction the provision probably goes beyond most of the case law on the subject. This type of restriction, and also restrictions imposed under buy and sell agreements, are authorized only for corporations having not more than twenty shareholders.

The section provides that the restriction may be imposed by a provision of the Articles, a by-law or an agreement among all the share-

66. Section 16.

67. See Note, Issuance of Par Value Stock for Services Under the Wyoming Corporation Law, 11 Wyo. L.J. 36 (1956).

68. Section 14.

69. Section 23.

70. Section 51 (p).

71. See Note, Elimination of Preemptive Rights in a Wyoming Corporation, 13 Wyo. L.J. 161 (1959).

72. Section 32.

holders. However, if the restriction is imposed by an amendment to the Articles or by-laws it will only be effective as to shares voted for the restriction and those subsequently issued. Obviously this precludes any effective restriction by a by-law adopted by directors. The section repeats, and elaborates upon, the requirement of the Uniform Stock Transfer Act, and of the Commercial Code, that the restriction be noted on the certificate.

It must be admitted that the section on share transfer restrictions is not a model of clear and concise drafting. There is an explanation of sorts for this. The section was patterned after a provision recently enacted in Texas and, while the Committee made considerable changes, it still retains some of the characteristics of the Texas original.⁷³

DIVIDENDS, PARTIAL LIQUIDATIONS AND SHARE PURCHASES

The cornerstone of the financial provisions of the new Act is the concept of Stated Capital.⁷⁴ Upon the issuance of par value shares Stated Capital will be created in an amount equal to the aggregate par value of such shares. On the issuance of no par shares Stated Capital will be created in such amount, not exceeding the consideration received, as the directors may determine. In this respect par value shares differ from no par shares in that the par value serves as a minimum per share credit to Stated Capital.

Surplus is defined by the Act as the excess of net assets, at any time, over Stated Capital.⁷⁵ Earned Surplus is that part of Surplus which is attributable to the earnings of the corporation since its beginning, with some exceptions and elaborations which will be noted hereafter.⁷⁶ Capital Surplus is the excess of Surplus over Earned Surplus and is thus a sort of residual balance in the net worth accounts.⁷⁷ Capital Surplus will include the so-called paid-in surplus which results when par value shares are issued at a price higher than par or when the directors credit to Stated Capital less than all the consideration received for no par shares.⁷⁸ Capital Surplus will also include the surplus which results from the reduction of Stated Capital in any of the various ways provided by the Act.⁷⁹

In one respect these definitions of the various kinds of surplus, which have been taken without change from the Model Act, may not be satisfactory. It is not clear whether a surplus resulting from an upward reevaluation of fixed assets, without any sale or other realization, should be treated as earned surplus or capital surplus. Most commentators feel that under the Model Act such surplus should not be considered earned,

73. The changes were prompted in part by the discussion of the Texas provision in O'Neal, *Recent Legislation Affecting Close Corporations*, 23 *Law and Contemporary Problems* 341 (1958).

74. Section 18. See also the definition, Section 2 (j).

75. Section 2 (k).

76. Section 2 (l).

77. Section 2 (m).

78. Section 18.

79. Section 62.

which is consistent with the general accounting view.⁸⁰ On the other hand, it is clear under the Act that an unrealized decline in the value of such assets need not be taken into account in computing earned surplus.⁸¹

Under the Model Act ordinary cash or property dividends may be paid only from earned surplus. It was the committee's opinion that this provision was unnecessarily restrictive, and that, as a practical matter, some existing Wyoming corporations might have difficulty in computing their earned surplus consistently with the statutory definition. The committee, therefore, added a so-called current earnings alternative which permits a corporation to pay a dividend on the basis of its earnings for the preceding accounting period even though, because of prior deficits, it may have no earned surplus.⁸² This provision was patterned very closely on the California statute and is similar to those of Delaware, Michigan and Nevada among others.

A further provision of the Act, which should be noted in connection with ordinary dividends, authorizes the directors to charge off any deficit, including one resulting from unfavorable operations, against capital surplus.⁸³ The effect of such a charge off will be to free future earnings which would otherwise be absorbed by the deficit. Stated differently all earnings after the charge off will reflect as earned surplus and be available for dividends. This, of course, considerably dilutes the apparent conservatism of the earned surplus test.

The new Act authorizes share dividends on the basis of either earned or capital surplus, and provides that on a distribution of previously unissued shares as a dividend an appropriate amount of surplus shall be transferred to Stated Capital.⁸⁴ In the case of par value shares the amount of surplus to be capitalized is, of course, the aggregate par value of the dividend shares. When a dividend of no par shares is distributed the amount of surplus to be capitalized is to be determined by the directors and must be reported to the shareholders. Treasury shares, that is shares which the corporation has previously repurchased, may also be distributed as a dividend but, for reasons that will become apparent later, this involves no capitalization of surplus.⁸⁵

A corporation engaged in exploiting natural resources may pay dividends from its depletion reserves if the Articles of Incorporation so provide.⁸⁶ Stated in more conventional fashion, this means that such corporations may compute surplus for dividend purposes without writing

80. See Hackney, *The Financial Provisions of the Model Business Corporation Act*, 70 *Harv. L. Rev.* 1357, 1377-1381 (1957).

81. Section 41, provides that a director shall not be liable for illegal dividends or share purchases if he considered assets to be of their book value.

82. Section 39 (a).

83. Section 62.

84. Section 39 (d).

85. Section 39 (c).

86. Section 39 (b).

down the depletable assets to reflect depletion. The Model Act draftsmen apparently chose to state the rule in terms of the depletion reserve to make it consistent with the general earned surplus test. The source of such dividends must be disclosed to the shareholders at the time of distribution.

Under the new Act corporations may make cash or property distributions in partial liquidation from capital surplus.⁸⁷ Such distributions must be clearly labelled to distinguish them from ordinary dividends. If the Articles so provide the directors may authorize such distributions. Otherwise they must be authorized by vote of two-thirds of the outstanding shares, and if there are more than one class of shares outstanding then by vote of two-thirds of the shares of each class. It should be noted that, if a corporation desires to make a distribution in partial liquidation but does not have sufficient capital surplus, the necessary capital surplus may be created by a reduction of stated capital. The various means for reducing stated capital will be considered later.

The section on partial liquidations had a curious history. The original Model Act provision authorized such distributions from stated capital as well as capital surplus. The Wyoming committee concluded that such distributions could not logically be made from Stated Capital and changed the provision accordingly. Shortly thereafter a similar change was made in the Model Act, and the Model Act then dropped the term, "distributions in partial liquidation," and substituted the term, "distributions from capital surplus." The committee elected to retain the "partial liquidation" phraseology as being more descriptive. It is probably unnecessary to add that a partial liquidation under this section will not necessarily be a partial liquidation for purposes of the Internal Revenue Code.

The new Act expressly provides that a corporation may purchase or otherwise acquire its own shares, but in general such purchases may only be made out of earned surplus, and the right is therefore conditioned upon the existence of a sufficient amount of such surplus.⁸⁸ However, if the Articles so provide such purchases may be made out of capital surplus. These provisions are, of course, quite similar to the provisions respecting dividends and partial liquidations, and were apparently drawn on the theory that purchases of treasury shares are in effect distributions, differing from other types of distributions in that they are made to some rather than all the shareholders and have the effect of liquidating the interests represented by the repurchased shares.

The committee made some changes in these provisions of the Model Act in order to clarify the method of accounting for purchases of treasury shares and the legal effect of a cancellation of such shares.⁸⁹ Under

87. Section 40.

88. Section 5.

89. See Rudolph, *Accounting for Treasury Shares Under the Model Business Corporation Act*, 73 *Harv. L. Rev.* 323 (1959).

the Wyoming Act earned surplus must be reduced by the cost of the treasury shares when such surplus is the basis for the purchase. Another section of the Act provides that the directors may by resolution cancel such shares, and thereupon stated capital is reduced by the amount attributable to the cancelled shares.⁹⁰ The surplus which results from the cancellation is capital surplus. Upon such cancellation the treasury shares revert to the status of authorized but unissued shares. If the treasury shares are resold instead of cancelled the new Act permits the directors to credit earned surplus for the amount of consideration received, not in excess of the cost of the shares to the corporation.⁹¹ This limitation reflects the commonly held view that a corporation should not treat as earnings any gain realized on the purchase and sale of its own shares. Treasury shares, so long as they are not cancelled, may be distributed as a dividend without any effect on stated capital or surplus.⁹²

While the redemption of preferred shares is somewhat similar to the purchase of treasury shares the Act states quite different rules for such redemptions in recognition of the fact that redeemable shares are not intended as a permanent part of a corporation's capital structure. Thus the right of a corporation to make such redemptions is not conditioned upon the existence of surplus. Redemptions may, in effect, be made from stated capital so long as net assets are not reduced below the aggregate liquidation preferences of shares remaining outstanding.⁹³ The redeemed shares are automatically cancelled and stated capital reduced by the par or stated value of such shares.⁹⁴ If the Articles provide that the shares shall not be reissued then the redemption also effects a reduction in the number of authorized shares.

The various sections on dividends, partial liquidations, share purchases and redemptions all contain similar provisions to the effect that the distribution, purchase or redemption shall not be made when the corporation is insolvent or if it will become insolvent as a result thereof. The term, "insolvent" is defined as inability of a corporation to pay its debts as they become due in the usual course of business.⁹⁵

The provisions of the new Act discussed in this section constitute much needed additions to Wyoming law.⁹⁶ The only comparable provision in the present statutes is one making directors liable for dividends which result in insolvency. Not only is this inadequate on the subject of dividends, but there has also been much uncertainty and confusion as to whether a corporation could purchase treasury shares at all or carry out a partial liquidation.

90. Section 60.

91. Except as otherwise noted all the rules with respect to treasury shares are included in Section 5.

92. See Section 39 (c).

93. Section 58.

94. Section 59.

95. Section 2 (n).

96. See Rudolph, *The Capital Margin Concept and the Wyoming Corporation Law*, 7 Wyo. L.J. 117 (1953).

AMENDMENTS AND CAPITAL REDUCTIONS

The new Act, in addition to authorizing a considerable number of specific types of amendments, also includes a provision that the Articles of Incorporation may be amended in any respect desired so long as the amended Articles only include provisions which would be lawful in original articles.⁹⁷ This is in considerable contrast to the present statutes, which authorize very limited specific types of amendments, and will undoubtedly prove to be the greatest improvement in this area. While the matter is not of great present importance in Wyoming it should probably be noted that the new Act expressly authorizes the elimination of accrued dividends by amendment, thereby setting at rest a problem that has given considerable difficulty in other jurisdictions.⁹⁸

The committee made one change in the Model Act provisions on the amendment procedure. The Model Act only provides for the proposal of amendments by the directors, and the committee broadened this so that amendments may also be initiated by petition of the owners of ten per cent of the shares.⁹⁹ A somewhat similar change was made in Colorado.

For adoption a proposed amendment must have the vote of two-thirds of the shares entitled to vote thereon, unless a class of shares is entitled to vote as a class, in which case the amendment must also have the vote of two-thirds of the shares of such class.¹⁰⁰ The Act specifies the circumstances in which class voting is required.¹⁰¹ In general a class of shares has a right to class voting on any amendment which might adversely affect the rights of such class. An obvious example would be an amendment to reduce the dividend rate of a class preferred shares. If a class has a right to vote under this provision then such shares may vote even though they are designated as non-voting shares by the Articles of Incorporation. Otherwise non-voting shares are not entitled to vote on amendments. This clears up a question which it is apparently impossible to answer under the present statutes.¹⁰²

A reduction of stated capital may be accomplished in a number of ways. It has already been seen that such a reduction will result from the cancellation of treasury shares or the redemption of redeemable preferred shares, and in these instances the matter is within the authority of the directors. However, most other methods of reducing stated capital require an amendment to the Articles of Incorporation.¹⁰³ The need for

97. Section 51.

98. See *Consolidated Film Industries, Inc. v. Johnson*, 22 Del. Ch. 407, 197 Atl. 489 (1937).

99. Section 52.

100. Section 52.

101. Section 53.

102. Wyo. Stat. 1957, § 17-24 requires the vote of "at least two-thirds of all the shares of stock lawfully issued and outstanding." However, this section was enacted before sections 17-70 and 17-72, authorizing no par and preferred stock and which first authorized non-voting stock.

103. Section 51.

such an amendment is obvious when the reduction is to be effected by reducing the par value of the shares. However, inasmuch as the Articles only set forth the number of authorized shares and not the number issued, an amendment would not seem necessary when the reduction is to be accomplished by issuing a lesser number of new shares of the same par value in exchange for the outstanding shares. The Act nonetheless apparently requires the amendment procedure to be followed in such cases. Another section of the Act provides a procedure for reducing stated capital when no amendment is required,¹⁰⁴ but the Model Act Comment to this section states that it is available only when the corporation has no par shares outstanding, and the reduction can, therefore, be accomplished simply by transferring an amount from stated capital to capital surplus. Only a majority vote is necessary for a capital reduction under this section.

The Act requires the filing of certificates with the Secretary of State for all amendments and for all reductions of stated capital, whether or not effected by amendment.

MERGERS AND SALES OF ASSETS

While the provisions of the new Act on mergers and consolidations are generally similar to the present statutes certain differences should be noted.

Under the new Act a merger plan may provide for amendments¹⁰⁵ to the Articles of Incorporation of the surviving corporation, and such amendments will become effective upon issuance of the certificate of merger.¹⁰⁶ Under the present statutes a separate amendment procedure would be necessary and in the case of some amendments, such as an increase in the authorized shares or a change of the purpose clause, the amendment would have to be adopted prior to the merger and when there is no assurance the merger will be finally carried through.

The merger plan, under the new Act, may expressly authorize the directors to abandon the plan even after it has been approved by the requisite vote of the shareholders.¹⁰⁷ Such abandonment may be desirable, or even necessary, because of the large number of shareholders who dissent and demand appraisal rights.

The new Act provides that all shares, even those generally non-voting, are entitled to vote on mergers. It also provides for class voting on mergers when appropriate.¹⁰⁸

Like all merger provisions the new Act gives dissenting shareholders the right to receive the value of their shares in cash.¹⁰⁹ In case of dis-

104. Section 61.

105. Section 63.

106. Section 67.

107. Section 65.

108. Section 65.

109. Sections 71 and 72.

agreement the value of the shares is to be determined by judicial action and provision is made so that a single determination will be binding on all dissenting shareholders. By way of contrast, under the present statutes, the value is to be determined by appraisal without court action.

As a substitute for merger the new Act authorizes the combining of two corporations through a sale of the assets of one for shares of the other.¹¹⁰ Sales of assets for other types of consideration are also authorized. In the absence of statute the general rule is that a corporation may not sell all its assets except with the consent of all the shareholders.¹¹¹ A sale of assets under the new Act requires the vote of two-thirds of all shares including those designated as non-voting, and again class voting is provided for when appropriate.¹¹² However, there is a significant difference as compared to a merger. Only shareholders of the selling corporation have the right to vote. Likewise only such shareholders have appraisal rights.¹¹³

The Model Act includes mortgages with sales of assets. The committee eliminated this in view of the general rule that, in the absence of any statutory provision, directors have authority to mortgage corporate assets as incidental to their authority to borrow.¹¹⁴ Beyond that the matter is covered expressly by the general powers section of the Act,¹¹⁵ and it therefore seemed neither necessary nor desirable to make the same requirements for the two very different types of transactions.

DISSOLUTION

At the outset it should be noted that in the new Act the term "dissolution," has a somewhat different meaning than in the present statutes. Under the latter dissolution occurs when the corporation ceases to be a going concern and is followed by the liquidation and winding up. Under the new Act the liquidation and winding up are a part of the dissolution procedure. The practical effect of this is to provide the Secretary of State with a degree of administrative control over the winding up, as will be more fully explained. It also apparently means that, once the dissolution is completed, corporate existence ceases for all purposes except as otherwise expressly provided. This latter proposition will also be considered in more detail later.

The new Act authorizes the incorporators to dissolve a corporation before any shares are issued and in such situations there will of course be no winding up or liquidation.¹¹⁶ It does not seem likely that this procedure will be used very frequently as it will ordinarily be easier to

110. Section 70.

111. *Smith v. Stone*, 21 Wyo. 62, 128 Pac. 612 (1912); *Claus v. Farmers State Bank*, 51 Wyo. 45, 63 P.2d 781 (1936).

112. Section 70(c).

113. Section 71.

114. *Morton v. Lovell Bldg. Co.*, 43 Wyo. 81, 297 Pac. 799 (1930).

115. Section 4(h).

116. Section 73.

simply abandon such a corporation and let the charter be forfeited for failure to file annual reports.

Voluntary dissolution may be authorized either by the written consent of all the shareholders¹¹⁷ or by vote of the holders of two-thirds of the shares.¹¹⁸ All shares are entitled to vote even those designated as non-voting by the Articles of Incorporation. This clears up a question on which the present statutes provide no satisfactory answer. The Act also provides for class voting but does not state the circumstances which will give a class the right to class voting on dissolution.

When the dissolution has been authorized a Statement of Intent to Dissolve is filed with the Secretary of State,¹¹⁹ and the corporation proceeds to liquidate and wind up.¹²⁰ It should be noted that the Act requires the mailing of notice to all creditors at the commencement of the liquidation. Upon completion of the liquidation Articles of Dissolution are executed and filed with the Secretary of State, who if he finds that such Articles conform to law, then issues a Certificate of Dissolution.¹²¹ The Act authorizes revocation of the dissolution procedure by appropriate shareholder action at any time prior to the issuance of the Certificate of Dissolution.¹²²

As mentioned above corporate existence ceases upon issuance of the Certificate of Dissolution.¹²³ However, the Act provides for the survival of both rights and liabilities after dissolution and authorizes actions by and against a dissolved corporation in the corporate name.¹²⁴ The Model Act provision imposes a two year limitation on such actions. The committee struck this out principally because of the difficulties it could present in quiet title suits. Actions against dissolved corporations will of course be subject to the regular statutes of limitations. The committee also added a provision, patterned closely on the present statutes, designating the last directors as trustees to act with respect to after discovered assets and other matters.¹²⁵ Again the committee was principally concerned with title problems and felt the present practice under which dissolved corporations can execute conveyances should be retained.

The Act confers jurisdiction on the district courts to liquidate the assets and business of a corporation in an action by a shareholder alleging one of the enumerated grounds.¹²⁶ Probably the most important of these are the provisions authorizing a shareholder to sue for liquidation in the event of a deadlock of either the directors or shareholders. Such deadlocks are likely in the case of close corporations having two equal factions

117. Section 74.

118. Section 75.

119. Section 77.

120. Section 78.

121. Sections 83 and 84.

122. Sections 80-82.

123. Section 84.

124. Section 94.

125. Section 84.

126. Section 86.

but, in the absence of an express statutory provision, courts have sometimes held that such deadlock did not furnish a sufficient basis for a decree of dissolution.¹²⁷

A creditor may also sue for liquidation under this section on the ground of the corporation's insolvency, and these provisions will therefore govern, and in a sense supercede, equity receiverships of insolvent corporations.¹²⁸ In such cases the Act authorizes the receiver to recover all amounts owed by shareholders on account of any unpaid portion of the consideration for shares. While this rule seems desirable to equalize losses among shareholders courts have sometimes denied recovery of such obligations or limited recovery to the amount of unpaid creditor claims.

Several sections are devoted to the appointment, qualifications and functions of the receiver, proof of claims and other administrative details of the liquidations.¹²⁹ Upon completion of the liquidation a decree of involuntary dissolution is entered which serves more or less the same purpose as the certificate of dissolution in a voluntary dissolution.¹³⁰ Finally it should be noted that liquidation may be had under these provisions upon application by the corporation in the case of a voluntary dissolution.¹³¹

The provisions of the present statutes on annual reports and license taxes¹³² are being retained for reasons that will be considered later. These provide for forfeiture by proclamation of the Governor of the certificates of incorporation of corporations failing to comply. The committee included in the new Act a somewhat similar section, patterned very closely on the present statute, providing for the forfeiture of the franchises, rights and privileges of corporations which fail to maintain a registered agent or registered office or fail to file the required statement of a change of registered agent or registered office.¹³³ In order to tie these provisions into the sections of the new Act on dissolution the committee added a provision authorizing a shareholder to bring suit for liquidation on the ground of such forfeiture.¹³⁴

FOREIGN CORPORATIONS

The procedure for qualifying a foreign corporation will be somewhat different under the new Act. In general it requires the filing of an application by the foreign corporation and the issuance of a Certificate of Authority by the Secretary of State.¹³⁵ The Act requires a statement in the application accepting the Wyoming Constitution, thus doing away

127. See Israels, "The Sacred Cow of Corporate Existence: Problem of Deadlock and Dissolution," U. of Chi. L. Rev. 778 (1952).

128. See Preface to 1950 Revision of the Model Act, p. ix of 1953 Revision.

129. Sections 87-89.

130. Section 91.

131. Section 86(c).

132. Wyo. Stat. 1957, §§ 17-46 to 17-49.

133. Section 85.

134. Section 86(a)(5).

135. Sections 99 and 100.

with the need for a separate document on this. Likewise the designation of the registered agent and registered office is made in the application. Foreign corporations which previously qualified under the present statutes will be validly qualified under the new Act.¹³⁶

Foreign corporations which do business in the state without qualifying are barred from maintaining any action in the courts of the state.¹³⁷ However, the Act expressly states that failure to qualify shall not impair the validity of any contract or act. This apparently represents a change in Wyoming law.¹³⁸ The Act further provides that foreign corporations doing business in the state without qualifying are liable for all fees and license taxes which would have been imposed had it properly qualified and an additional penalty in the amount of five hundred dollars.¹³⁹ The Attorney General is authorized to collect such amounts by suit. The Model Act includes an enumeration of various types of conduct which shall not be considered as doing business. Several lawyers expressed doubts concerning the desirability of this and the committee eliminated it.

The committee added a provision, not found in the Model Act, providing for service of process on the Secretary of State in an action against a foreign corporation doing business in the state without qualifying.¹⁴⁰ This is similar to a provision in the present statutes except that the latter is expressly restricted to actions arising out of business transacted in the state.¹⁴¹ It is arguable that the Federal Constitution requires reading a similar restriction into the new Act,¹⁴² but in any event it does not seem likely that there will be many occasions for bringing suit in a Wyoming court against a nonqualified foreign corporation on a cause of action arising outside the state.

In the interest of completeness it should be noted that the new Act includes provisions for the voluntary withdrawal of qualified foreign corporations,¹⁴³ revocation of certificates of authority for various specified reasons,¹⁴⁴ and the filing of appropriate statements for charter amendments¹⁴⁵ and mergers.¹⁴⁶

FEEES AND TAXES

As nearly as possible the new Act continues all present fees and taxes. The committee felt that a good deal of information which was not available would be necessary before any intelligent recommendations could

136. Section 112.

137. Section 113.

138. See *Gould Land and Cattle Co. v. Rocky Mountain Bell Telephone Co.*, 101 Pac. 939, 17 Wyo. 507 (1909), and *Interstate Construction Co. v. Lakeview Canal Company*, 224 Pac. 850, 31 Wyo. 191 (1924).

139. Section 113.

140. Section 104.

141. Wyo. Stat. 1957, § 17-44.

142. *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154 (1945).

143. Sections 108 and 109.

144. Sections 110 and 111.

145. Sections 105 and 107.

146. Sections 106 and 107.

be made with respect to changing either the bases or the rates for the various fees and taxes. In addition the committee was of the opinion that its authority did not extend to proposing changes in the revenue laws.

The present provisions on annual reports and license taxes¹⁴⁷ are not repealed by the new Act, and there will be no changes in practice with respect to these matters. This required eliminating the comparable provisions of the Model Act which provide for a similar tax but designate it as a franchise tax. It was also necessary to change a number of other sections, such as those on the qualification of foreign corporations and those on dissolution, to make them consistent with these provisions.

The matter of filing fees could not be handled so simply. The Model Act provides both for filing fees and an original license tax on the organization of a corporation or an increase in authorized shares. The present Wyoming statutes in effect combine both types of levy in a single schedule of filing fees. In order to fit the present scheme into the framework of the Model Act the committee eliminated the Model Act provisions on license taxes and rewrote the section on filing fees.¹⁴⁸ Although there are considerable changes in form and language, the fees under this section are largely the same as under present statutes. The new Act requires the filing of a number of documents not provided for by the present law, and for these the Model Act filing fee was included. On the other hand the present statutes require the filing of a separate statement on the appointment of the resident agent at the time of incorporation, and provided a two dollar and fifty cent fee for this. Since such a statement will not be necessary under the new Act the two dollars and fifty cents was added to the fee for Articles of Incorporation.

APPLICATION TO EXISTING CORPORATIONS

Upon its effective date the new Act will apply to all existing Wyoming business corporations of the type that can be organized under the Act.¹⁴⁹ It will not be necessary, however, for such corporations to take any particular affirmative action to qualify under it.¹⁵⁰ As previously noted both of these observations are also true with respect to foreign corporations which previously qualified to do business in the state.¹⁵¹

Going a step further the new Act purports to amend the Articles or Certificate of Incorporation of each existing corporation to provide for perpetual existence, unless the directors take affirmative action to reaffirm the corporations limited term within one hundred twenty days after the effective date of the Act.¹⁵² Admittedly this is a novel provi-

147. Wyo. Stat. 1957, §§ 17-46 to 17-49.

148. Section 114.

149. Section 123 (a). Section 3 provides that any type of business corporation, except those organized for banking and insurance, may be organized under the Act.

150. See Section 123 (D) which validates previous designations of resident agents and resident offices.

151. Section 112.

152. Section 123 (B).

sion, but the committee concluded that it was desirable and would probably be held to be a valid exercise of the legislature's reserved power over corporations. Without it an amendment to the certificate or articles would be necessary for an existing corporation to take advantage of the privilege of perpetual existence. The committee considered including a provision, similar to the one of the present law, authorizing directors to extend the term. However, it was concluded that most corporations would desire perpetual duration, and it would be better to relieve them of the burden of affirmative action. Lawyers who have doubts as to the validity of this provision will, no doubt, recommend an amendment procedure.

A somewhat similar provision attempts to validate corporations that were organized in violation of the late constitutional provision concerning one line or department of business.¹⁵³ While this will probably take care of the status of such corporations following the effective date of the Act it obviously leaves unsettled the question of such status prior thereto.

NON-PROFIT CORPORATIONS

While the committee's primary concern was with the business corporation laws it could not altogether ignore the subject of non-profit corporations. Since many of the present statutory provisions apply to both types their repeal by the new Business Corporation Act would leave a void so far as non-profit corporations are concerned. To take care of this the committee prepared, and the legislature enacted, two additional acts. The first amends the general non-profit corporation statute enacted in 1959¹⁵⁴ to make it self-sufficient so far as the incorporation procedure is concerned. The second act, which is applicable to all domestic non-profit corporations, regardless of the statute under which organized, and to foreign non-profit corporations, replaces for such corporations a number of provisions repealed by the Business Corporation Act. It includes the following: 1) A provision for amending articles or certificates of incorporation; 2) A provision for registered agents and registered offices; 3) A provision for the qualification of foreign non-profit corporations; and 4) a schedule of filing fees.

153. Section 123 (C).

154. Session Laws, 1959, ch. 189.