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Wyoming Business Corporation Act: Is it Time for a Change?

In 1950, the American Bar Association (ABA),¹ first published its Model Business Corporation Act (Model Act), drawing heavily on the Illinois Business Corporation Act of 1933.² In 1961, the Wyoming Legislature enacted its law of corporations,³ closely following the 1953 revisions to the 1950 Model Act.⁴ Because the Wyoming and Model Acts are very similar, the authors refer to them almost interchangeably in this Comment.

These Acts have always been illogically organized, arising from the original structure of the Illinois act,⁵ and states have constantly devised innovations to address this and other shortcomings.⁶ In addition, to keep the Model Act from becoming progressively outdated, the ABA amended and revised the 1950 Model Act several times, major revisions being completed in 1960, 1969, and 1980.⁷ As a result, the Model Act has become a confusing jumble of original provisions and haphazard additions, leaving its language internally inconsistent and its organization chaotic.⁸ To combat the growing disorder, the ABA finally rolled up its sleeves to discipline its unruly Act.

In 1984, the ABA released the Revised Model Business Corporations Act (RMBCA or Revised Act),⁹ which represents the first complete revision of the Model Act in more than thirty years.¹⁰ This revision addresses

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1. The ABA was originally assisted in its endeavor by the American Law Institute. Today, the American Bar Foundation and the Section of Corporation, Banking and Business Law of the ABA are primarily responsible for keeping the Model Act current. The ABA Section delegates the task to its Committee on Corporate Laws. See MODEL BUS. CORP. ACT ANN. xxi (3d ed. 1984) [hereinafter MBCA ANN.]. The reader should note and keep separate the Wyoming State Bar's Corporation Law Committee and the Wyoming Legislature's House and Senate Committees on Corporations. See, e.g., Rudolph, *The New Wyoming Business Corporation Act*, 15 Wyo. L.J. 185 (1961).

2. MBCA ANN., *supra* note 1, at xxiv.

3. The Wyoming Business Corporation Act, WYO. STAT. ANN. §§ 17-1-101 to -1011 (1977 & Supp. 1986) [hereinafter the Wyoming Act]. Generally, the authors have placed many cited statutes in an Appendix to this Comment. Sections of the Revised Model Business Corporations Act have been set out in the Appendix as necessary. Sections from the Wyoming Act have been only selectively appended. The Appendix is divided into two parts: the Wyoming Act and the RMBCA. Within each part, the sections are in ascending order.

4. Carney, *Close Corporations and the Wyoming Business Corporation Act: Time for a Change?* XII LAND & WATER L. REV. 537 (1977). Although the Wyoming Act's original enactment made some seemingly extensive changes in the Model Act, these changes were not of significant practical effect. Rudolph, *supra* note 1, at 185.

5. MBCA ANN., *supra* note 1, at xxv.

6. *Id.*

7. See *id.* at xxiv-xxvi. Thus, often, commentators refer to the 1960 Act, the 1969 Act, and the 1980 Amendments. The apparent confusion between which Act is which only exacerbated the turmoil that the ABA was perpetuating.

8. *Id.* at xxv.

9. The Revised Act is published officially in four volumes in MBCA ANN., *supra* note 1. Each section is set out in full, followed by its official comment, history, and a statutory comparison. Sections of the RMBCA are cited simply as "RMBCA §". Other materials in the MBCA Annotated are cited using ordinary bluebook form.

10. *Id.* at xxiv.

the need to make the Act internally consistent and uniform in both language and structure, grouping provisions together by subject matter.¹¹ In the interim, however, Wyoming has only tinkered with its original enactment; this course of inaction in the face of changing times has been criticized.¹²

The RMBCA takes a clearer, more flexible approach toward corporate law—a pattern that the legislator should carefully consider in revising the Wyoming Act. In all, the RMBCA comprises seventeen topics, which generally track typical corporate ‘life’.¹³ The editors of the *Model Business Corporation Act Annotated* note nine “substantive changes made during the revision process.”¹⁴ This Comment accordingly, though partially, follows their expert lead by discussing only major departures from the Wyoming Act and excluding many relatively minor changes.¹⁵ In an arrangement that roughly tracks the RMBCA’s organization, this discourse is divided into four general categories—the elimination of par value, the legal aspects of stock, corporate governance, and extraordinary events.

THE ELIMINATION OF PAR VALUE

Possibly the most pervasive change made in the Revised Act is the complete deletion of the concept of par value¹⁶ and the host of constructs that implemented it in the Model and Wyoming Acts. Because this con-

11. *Id.* at xxv.

12. See generally Carney, *supra* note 4, at 538. Although Professor Carney made his observations in 1977, they hold true today.

13. The topics are in seventeen Chapters, which are: (1) General Provisions, (2) Incorporation, (3) Purposes and Powers, (4) Name, (5) Office and Agent, (6) Shares and Distributions, (7) Shareholders, (8) Directors and Officers, (10) Amendments of Articles of Incorporation and Bylaws, (11) Merger and Share Exchange, (12) Sale of Assets, (13) Dissenters’ Rights, (14) Dissolution, (15) Foreign Corporations, (16) Records and Reports, and (17) Transition Provisions. Chapter Nine is reserved for future topics.

14. MBCA ANN., *supra* note 1, at xxx.

15. Were Wyoming to adopt the Revised Act, legislators should be aware that some provisions of the Wyoming Act would be eliminated. Some provisions, including the following, would be deleted because they would be redundant, unnecessary, or anachronistic: determination of amount of stated capital, WYO. STAT. ANN. § 17-1-118 (1977 & Supp. 1986), distributions in partial liquidation, *id.* § 17-1-140, restriction on redemption or purchase of redeemable shares, *id.* § 17-1-308 (1977), cancellation of redeemable shares by redemption or purchase, *id.* § 17-1-309, cancellation of other reacquired shares, *id.* § 17-1-310, reduction of stated capital without amendment of articles or cancellation of shares, *id.* § 17-1-311, special provisions relating to surplus and reserves, *id.* § 17-1-312, voluntary dissolution by consent of shareholders, *id.* § 17-1-602, filing of statement of intent to dissolve, *id.* § 17-1-604, effect of filing statement of intent to dissolve, *id.* § 17-1-605, procedure after filing statement of intent to dissolve, *id.* § 17-1-606; but see RMBCA §§ 14.05, .06; revocation of voluntary dissolution proceedings by consent of shareholders, WYO. STAT. ANN. § 17-1-607 (1977 & Supp. 1986); but see RMBCA § 14.04; revocation of voluntary dissolution proceedings by act of corporation, WYO. STAT. ANN. § 17-1-608 (1977 & Supp. 1986); but see RMBCA § 14.04; effect of statement of revocation of voluntary dissolution proceedings, WYO. STAT. ANN. § 17-1-610 (1977); but see RMBCA § 14.04; merger of foreign corporation authorized to transact business in this state, WYO. STAT. ANN. § 17-1-712 (1977 & Supp. 1986).

16. Par value is merely the purchase price stated on the face of a stock certificate. “Par” indicates little more than the share’s original issuing price. With the advent of reliable secondary markets in stock, the actual value of a share often has no relationship to its stated “par”. See R. HAMILTON, *CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED PARTNERSHIPS: CASES AND MATERIALS* 260 (3d ed. 1986).

cept permeates these Acts, its abrogation begets innumerable structural, stylistic, and organizational changes throughout the RMBCA. Further, by ending par value, the Revised Act loses the esoteric accounting rules that needlessly complicate the Model Act.¹⁷

The concept's roots, however, emerged from judicial and legislative attempts to prevent fraudulent shell corporations. In the early 1800s, unethical corporate promoters were setting up corporate shells to defraud unwary investors and creditors by thinly capitalizing a venture or simply absconding with the investors' money. Courts were soon called upon to force promoters to invest meaningful assets commensurate with those invested by other shareholders.¹⁸

Courts accomplished this by inventing "par" as a measure for shareholders' payment per share. Since this judicial rule prohibited stock to be authorized without a par value, the common law rule developed that a corporation could not issue stock for less than par. With par, the courts were able to control the minimum assets for which shares would be issued. In the early 1900s, the introduction of penny-par and no-par stock jeopardized the utility of par as a protective device. In response, the concept of "legal capital" was born.¹⁹ Under this doctrine, the legislature required corporations to set aside an arbitrary dollar amount, equal to the par value paid in for each issued share and equal to the consideration paid in for no-par shares. This ideally served as a protective reserve for creditors since it was not supposed to be distributable. This protection has proven illusory.²⁰

17. The concepts of par value and stated capital are critically important because they pervade the Wyoming Act's provisions on the three legal aspects of stock. Seemingly every stock transaction requires the corporation to invoke intricate accounting rules to allocate par and stated capital to the 'proper' equity accounts. The introduction of the par concept, however important in ending fraud on creditors, has bred its own inflexibility, which needlessly complicates share transactions.

Under WYO. STAT. ANN. § 17-1-112 (1977 & Supp. 1986), corporations have the power to create shares, which may be assigned any or no par value. The section also authorizes the corporation to issue shares of preferred or special classes. Issuing special classes, however, poses potential for abuse, and thus this issuing power is restricted. Because the par concept is so interwoven throughout the provisions on issuing shares, the section renders the process of conversion from no-par to par shares unnecessarily intricate. The restrictions found in § 17-1-112(b)(v) deal with converting shares to other classes of shares. Shares without par value cannot be converted into shares with par value, unless stated capital represented by the no-par shares equals the aggregate par value of the shares into which the no-par shares are to be converted, "or the amount of any deficiency is transferred from surplus to stated capital."

18. Manning, *Assets In and Assets Out: Chapter VI of the Revised Model Business Corporations Act*, 63 TEX. L. REV. 1527, 1527-28 (1985).

19. Legal capital is "[t]he amount of stated capital that . . . must remain permanently in the firm as protection for creditors." BLACK'S LAW DICTIONARY 803 (5th ed. 1979) (citing *Crocker v. Waltham Watch Co.*, 315 Mass. 397, 53 N.E.2d 230, 238 (1944)). Stated capital is "[t]he sum of the par value of all par value shares issued [and] the entire amount received for no-par shares". *Id.* at 1263; see also WYO. STAT. ANN. § 17-1-102(a)(x) (1977 & Supp. 1986). Note that the board of directors can "allocate to capital surplus any portion of the consideration received for the issuance of [no-par] shares." WYO. STAT. ANN. § 17-1-118(b).

20. Manning, *supra* note 18, at 1528; see also MBCA ANN., *supra* note 1, at 484 (history of § 6.40).

The Wyoming Act codifies this concept of par. Section 17-1-118 of the Wyoming Statutes²¹ establishes "stated capital", which is the "cornerstone of the financial provisions of the [Wyoming] Act."²² Stated capital is intimately related to the par concept because it is simply the amount paid for par shares or the amount paid for no-par shares as allocated to the stated capital account by the board of directors (Directors).²³

The doctrines of par and legal capital are today arcane and overly technical given the development of new legal tools to fulfill their functions of regulating both the consideration required for the issuance of shares and the distribution of corporate assets to shareholders. Today's protective mechanisms include disclosure requirements, blue sky laws, sophisticated standards of public accounting, elaborately negotiated indentures and other creditor contracts, security analysis, and credit investigation and reporting institutions.²⁴ Because the Wyoming Act retains these superfluous provisions on par and stated capital, the legislature should consider the readily available alternative—Chapter VI of the Revised Act, where nearly all of the material in the RMBCA relating to authorization, issuance, and distribution of shares is found.

LEGAL ASPECTS OF STOCK

Ordinarily, the corporation is concerned with three aspects of stock: first, the corporation determines how many and what kind of shares can be issued; second, it determines how it will issue the shares; and, third, it distributes earnings to shareholders in proportion to their respective holdings of corporation shares. The legal attributes of stock have been a problem in corporate law for decades.²⁵

The First Legal Aspect: Authorization of Shares

Sections 6.01 through 6.04 of the RMBCA are devoted to the authorization aspect of stock.²⁶ The Revised Act takes a novel, yet sensible,

21. WYO. STAT. ANN. § 17-1-118 (1977 & Supp. 1986) ("Determination of amount of stated capital"); see also *id.* §§ 17-1-112 ("Authorized shares"), -115 ("Consideration for shares").

22. Rudolph, *supra* note 1, at 195. Professor Rudolph succinctly defines other important terms concerning the legal aspects of stock.

Surplus is defined by the Act as the excess of net assets, at any time over Stated Capital. Earned Surplus is that part of Surplus which is attributable to the earnings of the corporation since its beginning, with some exceptions and elaborations . . . Capital Surplus is the excess of Surplus over Earned Surplus and is thus a sort of residual balance in the net worth accounts. 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. 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.

23. *Id.* In Professor Rudolph's words, "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."

24. Manning, *supra* note 18, at 1528-29.

25. See *id.* at 1527-29.

26. RMBCA §§ 6.01 to .04. Section 6.04 ("Fractional Shares") is not treated in this Comment.

approach²⁷ to par and stated capital; it eliminates them. This radical surgery on the Model Act,²⁸ that is, the death of legal capital, was quietly received by the world of corporate practice; par had few friends.²⁹ Although the Revised Act allows the use of par, it does not require it.³⁰ Given such a substantial revision, the practitioner and legislator should understand the Revised Act's simplified approach to appreciate the improvement.

Section 6.01 provides additional flexibility and simplification to both the shareholder and the corporation through use of more general terminology; consolidating distantly separated, but interconnected, provisions; by providing unlimited creativity in developing the equity structure; and by clarifying that a class of stock may be redeemable at the instance of a shareholder.³¹ The essence of section 6.01's improvement over the Wyoming Act's single provision³² is greater than merely eliminating the concepts of par and stated capital.

The section begins with two cosmetic changes. First, by using more general terminology, it reflects the flexibility that actually exists in modern corporate practice in authorizing classes of shares.³³ Second, section 6.01(a) requires that the articles of incorporation (Articles) prescribe the classes of shares and the number of shares of each class that the corporation is authorized to issue.³⁴ This requirement exists in the Wyoming Act but is found in two, very distant sections.³⁵ Section 6.01(a) consolidates them.³⁶

27. Technically, the changes were made in the 1980 Amendments to the Model Act. Since Wyoming effectively retains the 1950 Act, it really does not matter when the changes were made. From a practical perspective, the changes might just as well have been made with the Revised Act. The authors disregard this fine distinction.

28. To simplify share authorization, the Revised Act eliminates the outmoded concepts of stated capital and par value; it defines "distribution" broadly to govern dividends, share repurchases, and similar actions that should be governed by the same standard; it reformulates the statutory standards governing the making of distributions; it eliminates the concept of treasury stock; and it makes a number of technical changes in connection with the basic revisions. Committee on Corporate Laws, Am. Bar Ass'n, *Changes in the Model Business Corporations Act—Amendments to Financial Provisions*, 34 BUS. LAW. 1867 (1978); see also WYO. STAT. ANN. §§ 17-1-139, -140, -141, -308, -311 (regarding distributions and treasury stock).

29. Manning, *supra* note 18, at 1530. Of course, if the articles of incorporation require shares to be issued for par and provide procedures to implement this, then the Directors must follow their own rules. The point is that the RMBCA does not mandate the use of par; if a corporation's articles of incorporation require its use, then it is subject only to those provisions.

30. *Id.*

31. RMBCA § 6.01 ("Authorized Shares").

32. WYO. STAT. ANN. § 17-1-112 (1977 & Supp. 1986).

33. MBCA ANN., *supra* note 1, at 307 (official comment). Section 6.01 is entitled "Authorized Shares". In other words, the Revised Act does not mandate the articles of incorporation's dogmatic terminology, freeing practitioners' creativity. This freedom is evident throughout the RMBCA, not just in § 6.01.

34. *Id.* at 308 (official comment to § 6.01(a)).

35. See WYO. STAT. ANN. §§ 17-1-112(a), -202(a)(iv) to (vi) (1977 & Supp. 1986). Section 17-1-112(a) provides that "[e]ach corporation shall have power to create and issue the number of shares stated in its articles of incorporation." Section 17-1-202(a)(v) implements section 17-1-112 by stating that "[t]he articles of incorporation shall set forth, if the shares are to be divided into classes, the designation of each class and a statement of the preferences, limitations and relative rights in respect of the shares of each class".

36. Section 6.01(a) of the Revised Act states the matter very simply: "The articles of incorporation must prescribe the classes of shares and the number of shares of each class

The section also clarifies a more important right of the Directors. If more than one class of shares is authorized, the preferences, limitations, and relative rights of each class of shares must be described in the Articles before any shares of that class are issued or the Directors may be given the authority to establish them under section 6.02.³⁷ Though the Wyoming Act contains the former requirement,³⁸ it does not allow the latter's flexibility.³⁹

that the corporation is authorized to issue. If more than one class of shares is authorized, the articles of incorporation must prescribe a distinguishing designation for each class". RMBCA § 6.01(a).

37. MBCA ANN., *supra* note 1, at 308 (official comment to § 6.01). Section 6.02 permits the Articles not only to authorize the Directors to provide terms of a series within a class of shares but also permits the Articles to authorize the Directors to set the terms of a class. RMBCA § 6.02 ("Terms of Class or Series Determined by Board of Directors"); Manning, *supra* note 18, at 1532. Although this change may appear substantial, it has minimal operational significance since there is little, if anything, that a board can do with a blank-check class that it could not have done with a blank-check series. The Wyoming Act, on the other hand, is seriously more restrictive. Rather than allowing reasonable discretion to the Directors, it lists only seven specific variations that it permits between series. WYO. STAT. ANN. §§ 17-1-113(a)(i) to (vii) (1977 & Supp. 1986) ("Issuance of shares of preferred or special classes in series").

38. See WYO. STAT. ANN. § 17-1-112(b) (1977 & Supp. 1986).

39. See *supra* note 37. If revising the Wyoming Act to comport with the Revised Act, a legislator should realize how other jurisdictions address the question of how to define classes and series within classes. The statutory comparison, done by the ABA Committee on Corporate Laws, succinctly summarizes the states' various approaches. The Revisors use the term "jurisdiction" to distinguish Puerto Rico and the District of Columbia.

1. CREATION OF SERIES

All jurisdictions provide for the issuance of classes of shares in series, and all follow the Model Act pattern of providing that the articles of incorporation may authorize the board of directors to create one or more series of shares within a class and to determine the characteristics of each series.

2. DELEGATION OF POWER TO SET TERMS OF CLASSES OF SHARES

Eleven jurisdictions, Delaware, Hawaii, Indiana, Kansas, Minnesota, Missouri, Nevada, North Carolina, Pennsylvania, Puerto Rico, and Virginia permit the terms of the classes to be fixed by the board of directors if authority to do so is granted by the articles of incorporation. Delaware requires that a certificate of designation setting forth the resolution adopted by the board of directors be filed with the secretary of state. In Hawaii the determination may be made by the articles, by the board of directors, or by an affirmative vote of the holders of two-thirds of the outstanding shares of each class.

3. PERMITTED VARIATIONS

Ten jurisdictions are similar to the present Model Act in that they provide that the relative rights, preferences, limitations, and restrictions of different series of shares may vary without specifying them: Indiana, Louisiana, Maryland, Michigan, Nevada, New Jersey, New York, Pennsylvania, Virginia, and Washington.

Forty-three jurisdictions, like earlier versions of the Model Act, list specific variations permitted between series. Of these, 23 list dividend rates, redemption terms, dissolution rights, sinking fund provisions, convertibility options, and voting rights: Alabama, Alaska, Arizona, Arkansas, Colorado, the District of Columbia, Florida, Georgia, Idaho, Illinois, Iowa, Maine, Massachusetts, Nebraska, New Hampshire, New Mexico, Ohio, South Carolina, Tennessee, Texas, West Virginia, Wisconsin, and Wyoming. Eleven jurisdictions omit voting rights from this list: Connecticut, Mississippi, Missouri, Montana, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Utah, and Vermont. California and Hawaii omit dissolution rights. Seven jurisdictions omit sinking fund terms: California, Hawaii, Delaware, Kansas, Minnesota, Puerto Rico,

The flexibility granted in section 6.01(a) gives the corporation and Directors virtually unlimited creativity in developing the corporation's equity structure, permitting it to change with the times. The freedom is not, however, boundless; section 6.01(b) provides two common sense restrictions. Every corporation must authorize one or more classes of shares with two fundamental characteristics: (1) unlimited voting rights and (2) the right to receive the net assets of the corporation upon dissolution.⁴⁰ These characteristics need not be contained within a single class of shares but may be divided among various classes as desired.⁴¹ These restrictions obtain whether the shares are merely authorized or actually issued and outstanding.⁴² The Wyoming Act has no parallel.

The third method by which section 6.01 provides greater flexibility over the Wyoming Act is found in subsection (c), which is roughly similar to section 17-1-112(b) of the Wyoming Act.⁴³ Perhaps the subsection's principal virtue is that it clarifies how the Wyoming Act could deal with more exotic corporate financing devices that have become popular since the Model Act was first adopted. The Wyoming Act does not address two desirable stock characteristics: callable common shares⁴⁴ and some upstream conversion.⁴⁵ The Wyoming Act clearly prohibits upstream stock

and Rhode Island; Kentucky omits conversion options; Hawaii also omits dividend rates and redemption terms.

4. FILING REQUIREMENT

All jurisdictions except Connecticut, Louisiana, Maryland, and Oklahoma expressly require that a statement be filed with the secretary of state containing a copy of the board's resolution creating the new series or class (where that is permitted).

MBCA ANN., *supra* note 1, at 332-33. For a list of the appropriate sections of each state's statutes, see *id.* at 331-32.

40. RMBCA § 6.01(b).

41. MBCA ANN., *supra* note 1, at 309 (official comment to § 6.01(b)).

42. Section 6.03 ("Issued and Outstanding Shares") is a new provision requiring that there always be outstanding shares with unlimited voting rights and shares to receive residual assets. RMBCA § 6.03(c). Wyoming obviously does not have a comparable section. Only Virginia has adopted a similar provision. MBCA ANN., *supra* note 1, at 336 (statutory comparison).

43. See RMBCA § 6.01(c); WYO. STAT. ANN. § 17-1-112(b) (1977 & Supp. 1986).

44. Callable common stock is "a class of voting shares without preferential financial rights that is callable at the discretion of the corporation." MBCA ANN., *supra* note 1, at 309 (official comment to § 6.01(c)). A "callable" issue is one that the corporation may redeem, in whole or in part, "under definite conditions before maturity." BLACK'S LAW DICTIONARY 185 (5th ed. 1979). Strictly speaking, the Wyoming Act does not directly address this question; it offers no guidance concerning whether callable common is permitted under its provisions.

Some versions of the Model Act contain a direct prohibition against callable voting shares or callable common shares. Even with such a prohibition, by using consensual share transfer restrictions, it is possible to create what is essentially a callable voting share agreement. There is no reason why such a decision should not be directly and publicly put into the corporation's capital structure if desired. MBCA ANN., *supra* note 1, at 310 (official comment to § 6.01(c)).

45. Upstream conversion comes in two forms: A shareholder may desire to convert her shares into either (1) a class of shares that has preferential rights or (2) into debt securities of the corporation. These two forms can be labelled, respectively, upstream stock conversion and upstream debt conversion.

conversion,⁴⁶ while neglecting upstream debt conversion.⁴⁷ Without significant limitations, section 6.01(c) authorizes the creation of classes of shares with limited or residual rights,⁴⁸ which avoids pedantic terminology and allows more flexible stock characteristics.

The shortcomings of the Wyoming Act are highlighted when one recognizes that corporate creditors and shareholders with preferential rights are less seriously affected by conversion of shares into debt or into shares with preferential rights than they would be by redemption for cash,⁴⁹ which is already permitted under the Wyoming Act.⁵⁰ If the existing law permits a corporation to make shares redeemable for cash, then, a fortiori, it should also permit shares to be redeemable or convertible into other shares with preferential rights. The RMBCA eliminates restrictions on both upstream stock and debt conversion by permitting shares of any class to be made redeemable or convertible into cash, indebtedness, securities, or other property of the corporation or of another person⁵¹ at the instance of the corporation, the shareholder, or any third person.⁵² Thus, a shareholder may exchange her stock for corporate debt and then become a creditor.⁵³

46. WYO. STAT. ANN. § 17-1-112(b)(v) (1977 & Supp. 1986).

47. One could argue, however, that a broad reading of section 17-1-113(a)(ii) would allow the Directors to create a series that is redeemable into a debt security at the shareholder's option. *Id.* § 17-1-113(a)(ii) (1977 & Supp. 1986). *Id.* § 17-1-113(b) allows the Directors to implement this option only if the Articles vest them with that authority.

48. This section lists principal features that customarily distinguish different classes. RMBCA § 6.01(c). Section 6.01(d) makes clear that the 6.01(c) list is not exclusive. *Id.* § 6.01(d).

49. *Id.* § 6.01(c)(2)(ii); MBCA ANN., *supra* note 1, at 311 (official comment to § 6.01).

50. See, e.g., WYO. STAT. ANN. § 17-1-112(b)(1) (1977 & Supp. 1986). Three states permit broad redemption powers: Virginia, North Carolina, and Maryland. Thirteen other states recognize at least a limited power of redemption. Six of these limit redemption to shares of investment companies: Arizona, Georgia, Kansas, Maine, Michigan, and South Carolina. New Jersey limits redemption to common shares of investment companies and close corporations. New York and Tennessee allow redemption of common shares of investment companies or of any corporation which has another outstanding class of shares not subject to redemption. Delaware and California allow redemption only by investment companies, corporations licensed by a government agency, or members of a national securities exchange. Ohio allows redemption only upon a specified time or event. MBCA ANN., *supra* note 1, at 318 (statutory comparison).

51. RMBCA § 6.01(c)(2).

52. *Id.* § 6.01(c)(2)(i). A share that is redeemable at the option of the shareholder is a "put-able" share. A put is "[a]n option permitting its holder to sell a certain stock or commodity at a fixed price[,] for a stated quantity[,] and within a stated period." BLACK'S LAW DICTIONARY 1112 (5th ed. 1979). Put-able redemptions that are redeemed for a higher class of shares are effectively upstream stock conversions. Recognition of "put-able" redemptions is new with the Revised Act and is not permitted under twenty-five states' current statutes. These states are: Arkansas, Louisiana, Mississippi, New Hampshire, North Carolina, Rhode Island, Indiana, Vermont, Colorado, Kentucky, Montana, New Mexico, North Dakota, South Carolina, Texas, Washington, Idaho, Maine, Nebraska, Nevada, Oregon, South Dakota, Utah, West Virginia, and Wyoming. MBCA ANN., *supra* note 1, at 318 (statutory comparison). The remaining states do not expressly prohibit such conversions. *Id.* Regarding the Wyoming Act, see *supra* notes 46-47.

Prohibitions, however, serve no purpose because they are easily circumvented. Consensual share transfer restrictions can create a right that is indistinguishable from a right of redemption, and shareholders' right of redemption is expressly permitted by many states in certain specialized corporations. All redemptions are subject to the restrictions on distributions set out in section 6.40. MBCA ANN., *supra* note 1, at 310-11 (official comment to § 6.01).

53. RMBCA § 6.01(c).

In sum, the Revised Act improves greatly upon the Wyoming Act's approach to share authorization. It begins by eliminating the cumbersome and confusing restrictions of "par" and legal capital.⁵⁴ The RMBCA goes further, though, by creating a more flexible framework for both equity and debt structure. It does this first by stylistic and organizational improvements. It next frees the Directors' to establish various characteristics of stock as the need arises. Lastly, the Revised Act eradicates needless impediments to convertibility of shares and modern debt financing.

The Second Legal Aspect: Issuance of Shares

The preceding section dealt simply with the initial authorization of shares. Authorizing shares, however, is not the end of the story. After shares are authorized, they have no purpose unless issued. Upon determining the share characteristics of an issue, attention necessarily turns to the mechanics of actually getting the shares into stockholders' hands without "watering" the stock.

The Revised Act continues its innovative approach when dealing with both issuance and post-issuance questions. The RMBCA makes many changes in share issuance, which result from its deletion of the legal capital doctrine. On the issuance side, the Revised Act wipes out mandatory restrictions on consideration received for shares. The Act now more closely comports with the economic reality that contracts for future services are worthy consideration, for which shares can be issued. On the post-issuance side, questions of shareholders' preemptive rights and treasury shares come to fore. The RMBCA clarifies the Wyoming Act's contradictory positions on the former while eradicating the latter as unneeded in the absence of legal capital concerns.

Issuance. The "watering" issue really boils down to determining the adequacy of the consideration exchanged for shares. One persistent problem has been whether intangible property is adequate consideration. At common law and under the Wyoming Act, promissory notes and contracts for future services were not acceptable as payment for shares of stock.⁵⁵ For example, section 17-1-116(a) of the Wyoming Statutes⁵⁶ permits shares to be issued only in exchange for money, property actually received, and labor or services actually performed.⁵⁷ Section 17-1-116(b) expressly prohibits the use of promissory notes and promises for future services as payment for shares.⁵⁸ These two venerable but anachronistic hangovers from the nineteenth century impede sensible business transactions today.⁵⁹ Section 6.21(b) of the RMBCA, however, drops these prohibitions, conforming the law to business reality. Under the RMBCA, the corporation

54. See Manning, *supra* note 18, at 1529.

55. *Id.* at 1533.

56. WYO. STAT. ANN. § 17-1-116(a) (1977) ("Payment for shares").

57. *Id.* Forty-one other jurisdictions have similar provisions; eleven—California, Delaware, Florida, Hawaii, Kentucky, Massachusetts, Michigan, Minnesota, Nevada, Pennsylvania, and Puerto Rico—do not. MBCA ANN., *supra* note 1, at 370.

58. WYO. STAT. ANN. § 17-1-116(b) (1977).

59. Manning, *supra* note 18, at 1533.

receives acceptable consideration for shares at the time it receives the contract for services. No longer do service-providing shareholders have to wait until they actually perform their services.

Section 6.21 achieves this laudable goal by first expanding the available considerations for shares⁶⁰ and then providing an elective mechanism by which the corporation can protect itself as it deems necessary.⁶¹ In essence, the Revised Act takes the discretion from the statute's drafters and places it in the Directors, where it properly belongs. Section 6.21(b)'s substantive change is its inclusion, within the category of permissible consideration, of the new generic phrase, "benefit to the corporation".⁶² The Official Comment to section 6.21 adds that "'benefit' should be broadly construed to include, for example, a reduction of a liability, a release of a claim, or benefits obtained by a corporation by contribution of its shares to a charitable organization or as a prize in a promotion."⁶³

Once the corporation determines that the consideration is permissible, the Wyoming Act next requires either the Directors or the shareholders to determine the value of consideration received for shares.⁶⁴ They must undertake this chore because the legal capital doctrine requires the consideration to be equal to or greater than the shares' par value to avoid the evil of watered stock.⁶⁵ By eradicating the intricate accounting measures that deal with stated capital and par value, which measures ineffectually combatted dilution, and by expanding acceptable considerations to include some of uncertain value, the Revised Act abolishes this now wasteful task. Although section 6.21(c) does not require them to determine the value of consideration received for shares, the Directors must still determine that the consideration is adequate.⁶⁶ Determination

60. RMBCA § 6.21(b).

61. *Id.* § 6.21(e).

62. *Id.* § 6.21(b).

63. MBCA ANN., *supra* note 1, at 358 (official comment to § 6.21).

64. WYO. STAT. ANN. §§ 17-1-116(c) (1977), -115, -118 (1977 & Supp. 1986).

65. Section 6.21 eliminates the concepts of par and stated capital, which are still involved in the corresponding Wyoming sections. Compare RMBCA § 6.21 with WYO. STAT. ANN. §§ 17-1-115, -118 (1977 & Supp. 1986), -116, -120 (1977). Because shares need not have par value under § 6.21, there is no minimum price at which shares must be issued; therefore, there can be no watered stock liability for issuing shares below an arbitrarily fixed price. The price at which shares are issued is primarily a matter of concern to other shareholders whose interest may be diluted if shares are issued at unreasonably low prices or for overvalued property. This problem of fair treatment essentially involves honest and fair judgment by directors and cannot be effectively addressed by an arbitrary doctrine establishing a minimum price for shares such as "par value" provided under older statutes. MBCA ANN., *supra* note 1, at 357-60 (official comment to § 6.21), 360-67 (history of § 6.21).

The legislator should also realize how other states have addressed the concern over watered stock. Seven jurisdictions—California, Illinois, Minnesota, Montana, New Mexico, Virginia, and Washington—have generally eliminated the concept of par value. Montana, New Mexico, and Virginia have adopted the RMBCA pattern; Virginia has adopted it without change. Issuance of both par and no-par shares is authorized in all other jurisdictions. All but eleven jurisdictions require that the consideration paid for shares be no less than par. *Id.* at 369-71 (statutory comparison).

66. The Official Comment to section 6.21 states:

Accounting principles are not specified in the [Revised] Act, and the board of directors is not required by the statute to determine the "value" of noncash

of adequacy is conclusive with regard to the validity of the issuance of shares.⁶⁷

Post-Issuance. By its perplexing organization and by its extensive reliance on the par concept, the Wyoming Act creates two difficulties⁶⁸ that affect shares after issuance—shareholder preemptive rights⁶⁹ and treasury stock.⁷⁰ Primarily due to the Wyoming's Act's confused organization, its preemptive rights provisions⁷¹ appear contradictory. Section 17-1-123 provides that these rights may be limited or denied only to the extent permitted by the Articles.⁷² This section purportedly mandates preemptive rights but paradoxically subjects its 'mandate' to limitations or denial.⁷³ This could thus be construed as an "opt-out" provision since it declares this right but permits the corporation to "opt" it away. Section 17-1-202, on the other hand, states that the Articles "shall set forth" any preemptive rights to be granted to shareholders.⁷⁴ This section could be construed as an "opt-in" provision since the right can exist, by the

consideration received by the corporation (as was the case in earlier versions of the Model Act). In many instances, property or benefit received by the corporation will be of uncertain value; if the board of directors determines that the issuance of shares for the property or benefit is an appropriate transaction that protects the shareholders from dilution, that is sufficient under section 6.21. The board of directors does not have to make an explicit "adequacy" determination by formal resolution; that determination may be inferred from a determination to authorize the issuance of shares for a specified consideration.

MBCA ANN., *supra* note 1, at 359. *But cf.* RMBCA § 6.21(c). Section 6.21(c) states the Directors' duty somewhat more affirmatively: "Before the corporation issues shares, the board of directors must determine that the consideration received or to be received for shares to be issued is adequate."

67. RMBCA § 6.21(c); *see also* Manning, *supra* note 18, at 1534.

68. There is also a third change, which is of less importance. The Wyoming Act attempts to protect the rights of subsequent purchasers of shares by reducing the possibility that stock is watered. WYO. STAT. ANN. § 17-1-122 (1977) ("Liability of subscribers and shareholders"). The RMBCA, however, wisely leaves these matters to Article Eight of the Uniform Commercial Code. MBCA ANN., *supra* note 1, at 360 (official comment to § 6.21); *cf.* U.C.C. §§ 8-202, -301 (1977); WYO. STAT. ANN. §§ 34-21-821, -840 (1977 & Supp. 1986).

69. A preemptive right is "[t]he privilege of a stockholder to maintain a proportionate share of ownership by purchasing a proportionate share of any new stock issues." BLACK'S LAW DICTIONARY 1060 (5th ed. 1979).

70. Treasury stock is

[s]tock which has been issued as fully paid to stockholders and subsequently reacquired by the corporation to be used by it in furtherance of its corporate purposes [I]t may also be defined as s]hares which have been reacquired by [the] corporation, but not cancelled and returned to [the] status of authorized but unissued shares, and which occupy status of issued but not outstanding shares. . . . Such reacquisitions result in a reduction of stockholders' equity

Id. at 1346 (citations omitted). The Wyoming Act specifically defines "treasury shares" as shares of a corporation which have been issued, have been subsequently acquired by and belong to the corporation, and have not, either by reason of the acquisition or thereafter, been cancelled or restored to the status of authorized but unissued shares. Treasury shares shall be deemed to be "issued" shares, but not "outstanding" shares.

WYO. STAT. ANN. § 17-1-102(a)(viii) (1977 & Supp. 1986).

71. WYO. STAT. ANN. §§ 17-1-123 (1977), -202(a)(viii) (1977 & Supp. 1986).

72. *Id.* § 17-1-123(a) (1977).

73. *Id.*

74. *Id.* § 17-1-202(a)(viii) (1977 & Supp. 1986).

section's terms, only if affirmatively provided for in the Articles.⁷⁵ Section 6.30 of the RMBCA resolves the dilemma by adopting an "opt-in" provision for preemptive rights.⁷⁶ Consequently, under the RMBCA, preemptive rights do not exist unless specifically included in the Articles.⁷⁷ The apparent conflict in the Wyoming Act would be eliminated by enacting a provision similar to section 6.30.

The second post-issuance problem under the Wyoming Act is that of treasury shares. Treasury shares have a nebulous status between issued and nonissued shares.⁷⁸ This unique status "appears to have arisen at an early time in the practice of some companies, particularly mining companies, of issuing shares with low par value to promoters who then donated the shares to the corporation for resale at whatever price the market would bring."⁷⁹ The Wyoming Act still retains this dated concept.⁸⁰

Because the Revised Act deletes the par concept, from which the treasury share idea sprang, treasury shares are rendered unnecessary.⁸¹ Hence the RMBCA eliminates treasury shares⁸² without jeopardizing the corporation's power under the Wyoming Act to reacquire its outstanding stock. As a general rule, the Revised Act provides that, when a corporation buys back its own shares, they immediately revert to the status of

75. *Id.*

76. RMBCA § 6.30(a). Section 6.30(a) provides that "[t]he shareholders of a corporation do not have a preemptive right to acquire the corporation's unissued shares except to the extent the articles of incorporation so provide." No special words are required in the Articles to establish this right. *Id.* § 6.30(b).

77. Manning, *supra* note 18, at 1534.

78. MBCA ANN., *supra* note 1, at 465 (official comment to § 6.31). "So long as the par value concept [is] retained, treasury shares undeniably [provide] a useful device in many instances, since they allowed corporations to issue shares at realistic prices under [earlier times'] economic and financial conditions". *Id.* at 467 (history of § 6.31).

79. *Id.* at 467.

80. WYO. STAT. ANN. § 17-1-105 (1977 & Supp. 1986) ("Right of corporation to acquire and dispose of its own stock") specifically addresses the corporation's right to reacquire its outstanding shares. *Id.* § 17-1-102(a)(viii) defines "treasury shares." See also *supra* note 70.

The History of § 6.31 states that, "with the elimination of the par value and legal capital concepts, . . . the need to recognize the peculiar concept of treasury shares was eliminated." MBCA ANN., *supra* note 1, at 467. These "unique characteristics" include:

(1) Since treasury shares were "issued" shares:

(i) they could be resold by the corporation without regard to the original restraints imposed by the concept of par value;

(ii) their par value continued to be reflected in the stated capital of the corporation, and neither their acquisition by the corporation nor their subsequent resale by the corporation affected the stated capital account;

(iii) they could be disposed of without recognizing the preemptive rights of shareholders (though this issue was often dealt with expressly by statute or by provisions in the articles of incorporation); and

(iv) they could be distributed as a share dividend even if the corporation had no earned surplus.

(2) Since treasury shares were not "outstanding" shares:

(i) they could not be voted or counted as outstanding for quorum or voting purposes; and

(ii) dividends could not be declared on them.

Id. at 466-67.

81. *Id.* at 464 (official comment to § 6.31).

82. RMBCA § 6.31 ("Corporation's Acquisition of Its Own Shares").

authorized, but unissued, shares.⁸³ Authorized, but unissued, shares of the corporation can then be issued on the same basis and with the same freedom as treasury shares under the Wyoming Act.⁸⁴ The Articles may, however, prohibit reacquired shares from being reissued, in which case the RMBCA sensibly compels the reduction of the total number authorized.⁸⁵ The only difference is that the RMBCA's freedom is subject to a simple requirement to file a statement reflecting reduction of authorized shares.⁸⁶

The Third Legal Aspect: Distributions

Once a corporation has authorized and issued shares to stockholders, one object is getting assets out of the corporation and to the shareholders. Corporations could simply distribute, in cash or in kind, assets in proportion to each shareholder's respective ownership. Such a plan, however, might soon bleed off needed corporate assets if left unchecked. To keep creditors from ending up holding the bag, some protection is needed. The protection, as always, can be either straightforward or complex.

The Wyoming Act takes the complex route. Considerable intricacy results from the Wyoming Act's attempt to reconcile the difficult par value concept with common business practice. In broad terms the Wyoming Act contains four tests that seek to limit the corporation's ability to distribute assets to the detriment of creditors. The tests are even more labyrinthine because they apply differently (or not at all) depending upon the type of distribution.⁸⁷ The tests are: (1) the earned surplus test, (2) the capital

83. *Id.* § 6.31(a).

84. MBCA ANN., *supra* note 1, at 465 (official comment to § 6.31).

85. RMBCA § 6.31(b).

86. *Id.* § 6.31(c). California, Illinois, Minnesota, Montana, New Mexico, Virginia, and Washington have already eliminated the concept of treasury shares, following the RMBCA's lead. Twenty-three states, including Wyoming, retain the treasury share concept as stated in the 1969 Model Act. The other states are Alabama, Alaska, Arizona, Arkansas, Colorado, Idaho, Iowa, Kentucky, Maine, Mississippi, Nebraska, New Hampshire, North Dakota, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, West Virginia, and Wisconsin. Sixteen jurisdictions make minor modifications to the 1969 Model Act; they are Connecticut, Delaware, the District of Columbia, Georgia, Florida, Kansas, Louisiana, Maryland, Michigan, Missouri, New Jersey, New York, Oklahoma, Ohio, Puerto Rico, and Tennessee. Six states vary significantly from the 1969 Model Act—Hawaii, Indiana, Massachusetts, Nevada, North Carolina, and Pennsylvania. MBCA ANN., *supra* note 1, at 470-72 (statutory comparison).

87. Distributions come in four general forms: dividends, partial liquidations, share repurchases, and total liquidations. Repurchases are included here because, as an economic matter, payments made by corporations to repurchase their own shares amount to distributions, rather than acquisitions, of corporate assets. All states, except Massachusetts, expressly provide the financial circumstances under which a corporation may purchase its own shares. MBCA ANN., *supra* note 1, at 490 (statutory comparison).

The Wyoming Act's distribution statutes are: WYO. STAT. ANN. §§ 17-1-105 ("Right of corporation to acquire and dispose of its own stock"), -139 ("Dividends"), -140 ("Distributions in partial liquidation") (1977 & Supp. 1986), -308 ("Restriction on redemption or repurchase of redeemable shares") (1977). Other sections govern how the corporation must account for distribution of assets. *See infra* text accompanying notes 88-92 (the four accounting tests). Total liquidation or dissolution is a subject unto itself and is not subject to any of the four tests described below. Under the Wyoming Act, the dissolving corporation must first pay off its debts. It must then satisfy all accumulated preferred dividends that have

surplus test, (3) the stated capital test, and (4) the insolvency test.⁸⁸ Under the first test, distributions must first be paid only from the corporation's "unreserved earned surplus."⁸⁹ If there is no earned surplus, the corporation may then distribute from capital surplus.⁹⁰ Under the third test, a corporation may distribute stated capital by following detailed and byzan-

gone unpaid. Only then may it distribute the remaining assets to shareholders. See Wyo. STAT. ANN. § 17-1-606(a)(ii) (1977) (distribution procedures for voluntary dissolution). Procedures for involuntary dissolution are substantively the same as those in § 17-1-606 from the creditors' perspective, except that creditors are paid after the expenses of court-supervised liquidation. *Id.* § 17-1-615(b). Moreover, the corporation may petition a court to supervise a voluntary dissolution as if it were involuntary. *Id.* §§ 17-1-606(a)(iii) (1977) (permitting the corporation to petition), -614(a)(iii) (1977 & Supp. 1986) (granting jurisdiction in district courts to hear such petitions).

Although all jurisdictions impose some limitation on a corporation's power to make various types of distributions, Wyoming's dividend limitations follow the earlier Model Acts, as have other states: Alabama, Alaska, Arizona, Colorado, Connecticut, Florida, Georgia, Idaho, Indiana, Kentucky, Maine, Mississippi, North Carolina, New Hampshire, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, and Wisconsin. Virginia has adopted RMBCA § 6.40 without change. Other states having statutes similar to § 6.40 are South Carolina, California, Illinois, Minnesota, Montana, New Mexico, and Washington. The remaining eighteen jurisdictions vary substantially. MBCA ANN., *supra* note 1, at 490 (statutory comparison). The Committee on Corporate Laws is now considering further changes regarding dividends. These changes, if adopted, would alleviate perceived defects in the Revised Act's § 6.40 tests. These defects could have "the potential for harsh imposition of personal liability on directors for unlawful distributions, seemingly created by section 6.40". Committee on Corporate Laws, *Changes in the Model Business Corporation Act—Amendments Pertaining to Distributions*, 42 BUS. LAW. 259 (1986).

88. See MBCA ANN., *supra* note 1, at 483-87 (history of § 6.40).

89. See WYO. STAT. ANN. §§ 17-1-139(a)(i) (concerning dividends), -105(a) (concerning share repurchases but not using the "unrestricted" term) (1977 & Supp. 1986). Restricted earned surplus may be used only for purposes for which it was set aside or as otherwise "expressly permitted" by the Wyoming Act. *Id.* § 17-1-312 (1977). Even though section 17-1-105(a) uses "earned surplus" unqualifiedly, that section does not "expressly permit" repurchases using reserved funds. Thus, it might just as well include the qualification. Regarding partial liquidations, section 17-1-140(a) allows distributions to all shareholders from capital surplus and other assets, though it does not specifically provide for distributions from earned surplus. *Id.* § 17-1-140(a) ("out of capital surplus, a portion of its assets, in cash or property"). Such a distribution is subject to these express conditions: the corporation may not be made insolvent by it; the Articles or two-thirds of all shareholders must approve it; all accrued cumulative dividends must be paid; it cannot reduce net assets below that needed to satisfy preferred shareholders upon dissolution; it must include a statement that it is made in partial liquidation and disclose the amount per share distributed. *Id.*

90. Regarding repurchases of shares, *id.* § 17-1-105(a) (1977 & Supp. 1986) permits the corporation to repurchase using earned surplus. If it wishes to repurchase out of capital surplus, two-thirds of the voting shareholders must vote to do so. Regarding dividends, the corporation may pay dividends in reacquired (i.e., treasury) shares, *id.* § 17-1-139(a)(iii), and unissued shares, *id.* § 17-1-139(a)(iv). Since shareholders pay nothing for dividends from unissued shares, such a dividend violates the prohibition against issuing shares for less than par. Subsections 17-1-139(iv)(A) and -(B) artificially 'solve' this impasse by requiring the corporation to transfer surplus to stated capital in an amount equal to the sum of the shares' par values. This accounting procedure can be easily manipulated to create only the appearance that the shares were issued for real assets. Regarding partial liquidations, *id.* § 17-1-140(a) (1977 & Supp. 1986) permits distributions to all shareholders from capital surplus, subject to five conditions. See *supra* note 89. Section 17-1-140(b) permits distributions to shareholders who are owed cumulative dividends, unless the corporation is or would become insolvent. WYO. STAT. ANN. § 17-1-140(b).

All jurisdictions, except Massachusetts, expressly prescribe conditions under which a corporation may distribute from capital surplus. Twenty-two states follow a provision similar to Wyoming's § 17-1-140; they are: Alaska, Arizona, California, Connecticut, Georgia, Idaho,

time procedures.⁹¹ Finally, under the insolvency test, even if the corporation can meet all other tests, it may not distribute assets if it is insolvent or will be made insolvent by the distribution.⁹² All this complexity could be justified if it worked—but it does not. The net effect of these tests permits distribution to shareholders of all corporate assets if so desired.⁹³

To illustrate the weakness of the Wyoming Act, assume a closely-held corporation whose shareholders want to distribute as many assets as possible without violating the Wyoming Act's distribution statutes. Assume further that all shareholders are the directors and that there are no outside directors. Assume also that the corporation has earned and capital surpluses, positive stated capital, and assets in excess of liabilities. First, the corporation distributes assets and reduces earned surplus accordingly.⁹⁴ Once it has exhausted this account, it can then distribute any capital surplus.⁹⁵ The corporation now shows only stated capital in its equity accounts. To distribute its stated capital, the corporation need only jump through procedural hoops and reallocate stated capital to capital surplus. Once stated capital is transformed into capital surplus, it may then be distributed.⁹⁶ The corporation now has only assets and liabilities, having drained its equity accounts to zero. The insolvency test offers one last hope before the directors have completely wiped out the corporation's assets. Because the Wyoming Act prohibits only distributions that leave the corporation unable to pay its debts as they come due, our corrupt directors can distribute assets without running afoul of that restriction.⁹⁷ By

Indiana, Kentucky, Maine, Mississippi, New Hampshire, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, and Wisconsin. Twenty jurisdictions vary substantially from both the Revised and the Wyoming Acts. MBCA ANN., *supra* note 1, at 491 (statutory comparison).

91. The Directors may reduce stated capital without amending the Articles, but they cannot do it alone—they must convene a meeting of shareholders. WYO. STAT. ANN. § 17-1-311(a). Once convened, only a simple majority of the shareholders must approve the Directors' resolution to reduce stated capital. *Id.* Stated capital can also be reduced in two other ways. First, a corporation may amend its Articles to reduce the par value of shares even if they have already been issued. *Id.* § 17-1-301(b)(v) (1977). Upon doing so, the stated capital account is reduced since it must equal the sum of all issued shares' par values. *Id.* § 17-1-102(a)(x)(A). Second, the corporation may amend its Articles to change all par value shares, issued or not, into no-par shares. *Id.* § 17-1-301(b)(viii). The funds released by any of these methods are added to capital surplus, *id.* § 17-1-312(a), which may then be distributed as such, *see supra* note 90.

All jurisdictions, except Massachusetts, have express statutes authorizing reductions of stated capital. Twenty-two jurisdictions follow provisions similar to the Wyoming Act. Alabama, Alaska, Arizona, Arkansas, Colorado, District of Columbia, Idaho, Indiana, Iowa, Kentucky, Maine, Mississippi, Missouri, New Hampshire, North Dakota, Oregon, Rhode Island, South Dakota, Texas, Vermont, and West Virginia. Twenty jurisdictions vary substantially from both the Revised and Wyoming Acts. MBCA ANN., *supra* note 1, at 491-92 (statutory comparison).

92. WYO. STAT. ANN. §§ 17-1-105(b) (1977 & Supp. 1986) (share repurchases), -139(a) (dividends), -140(a)(i) (partial liquidations).

93. MBCA ANN., *supra* note 1, at 475 (official comment to § 6.40).

94. *See supra* note 89 and accompanying text.

95. *See supra* note 90 and accompanying text.

96. *See supra* note 91 and accompanying text.

97. It is not clear what "as they come due" means. The problematic question is whether "as they come due" means for some period of time or until paid off. If the former, the legislature could have easily stated that current assets shall not be less than current liabilities.

this point, corporate death is inevitable; the directors have pulled the plug. The haunting feature of this scenario is that the directors were able to do all this legally within the 'safeguards' of the Wyoming Act.

The Revised Act, on the other hand, protects creditors while taking a simpler route.⁹⁸ Although section 6.40 is the centerpiece of the RMBCA's modifications to the distribution rules, most changes reflect its elimination of the par concept, thus ending the need for the surplus or capital tests. Section 6.40's changes are tripartite. First, this section eliminates the distinctions among dividends, partial liquidations, and share repurchases; the same tests apply uniformly to all.⁹⁹ Secondly, of the four Wyoming Act tests, the Revised Act retains the only useful one—the insolvency test—which remains virtually unchanged.¹⁰⁰ Had the Revised Act stopped there, its only accomplishment would have been to simplify the process of draining assets.

Section 6.40(c)(2), however, adds an objective, balance sheet test. Under this test, even though it would not render the corporation insolvent, a distribution is prohibited if it would leave the "corporation's total assets . . . less than the sum of its total liabilities".¹⁰¹ The RMBCA thus

If the latter, the legislature could simply have required that the corporation shall retain assets sufficient to discharge all liabilities whenever they mature and all payments until then.

Harvard University Professor Robert Clark, in his textbook on corporate law, notes that this standard may, however, have some substance. He notes that

[t]his test focuses more on ability to meet current liabilities, and it is more flexible than a balance sheet test. In theory, the . . . insolvency test could be applied by courts in a way that would give creditors more real protection against excessive dividends than the earned surplus test does. But, while usually applauding the [Revised Act's] abandonment of the concept of legal capital, critics have objected to its failure to demand any "cushion" or margin of safety for creditors

R. CLARK, *CORPORATE LAW* § 14.3.9, at 624 (1986). Further, the insolvency test is a post hoc remedy, i.e., it is available only after possibly irreparable damage is done. A better solution would be to add substantive and objective prohibitions that creditors could invoke to prevent excessive distributions. Such a course could only improve the present system of locking the barn door after the livestock is gone.

98. Section 1.40 generally defines distribution to include virtually all transfers of money, indebtedness of the corporation or other property to a shareholder in respect of the corporation's shares. The section excludes transactions by corporations in which only its own shares are distributed to shareholders. RMBCA § 1.40(6). Such distributions are called "share dividends." MBCA ANN., *supra* note 1, at 476 (official comment to § 6.40).

Two common "share dividends" are the stock "split" and the stock "dividend". With the Revised Act's elimination of par, the distinction between these distributions has become surplusage. The problem under the Wyoming Act is that stock dividends violate the prohibition against issuing stock for less than par. See WYO. STAT. ANN. §§ 17-1-115, -139 (1977 & Supp. 1986); see also *supra* note 90. The Wyoming Act's solution is an artificial answer to an artificial problem, MBCA ANN., *supra* note 1, at 394 (official comment to § 6.21); the Revised Act simply does not need to recognize the distinction because it avoids the par problem. Instead, the RMBCA refers to both as share dividends. *Id.*

99. *Id.* at 476 (official comment to § 6.40).

100. RMBCA § 6.40(c)(1). That subsection reads: "No distribution may be made if, after giving it effect: . . . (1) the corporation would not be able to pay its debts as they become due in the usual course of business". The Wyoming Act defines insolvency as the "inability of a corporation to pay its debts as they become due in the usual course of its business." WYO. STAT. ANN. § 17-1-102(a)(xiv) (1977 & Supp. 1986).

101. RMBCA § 6.40(c)(2).

attempts to add a more substantial protection for creditors by preventing shareholders and Directors from leaving the corporation beyond the point where assets do not cover debts. The balance sheet approach, however, adds little more than objectivity to the insolvency test. Moreover, even if a corporation's total assets exceed total liabilities, creditors may remain unprotected since assets may be overvalued on the balance sheet. For example, equipment that is valued on the balance sheet at cost may be unsalable—hence worthless—as a practical matter. Thus, devious Directors could leave only overvalued assets in the corporation, distribute all other assets, and still meet the RMBCA's balance sheet test.¹⁰²

Although hailed for its simplifications, the Revised Act has been criticized for failing to protect creditors meaningfully.¹⁰³ The RMBCA could have incorporated provisions similar to those found in the Uniform Fraudulent Conveyance Act (UFCA)¹⁰⁴ or the Bankruptcy Code.¹⁰⁵ In addition to their own, near-identical, insolvency tests,¹⁰⁶ the UFCA and the Bankruptcy Code both prohibit distributions that would leave the corporation with "an unreasonably small capital".¹⁰⁷ Thus, creditors may void a distribution that is otherwise allowed under both the RMBCA and Wyoming Act,¹⁰⁸ rendering these Acts' protections nearly useless. Further post hoc protections include self-help,¹⁰⁹ the doctrine of equitable subordina-

102. Perhaps as a check, the Revisors added subsection (d) to § 6.40. That subsection eschews the common and ill-defined standard of "generally accepted accounting principles". See MBCA ANN., *supra* note 1, at 478-79 (official comments 4a & 4b to § 6.40). Instead § 6.40(d) requires that all determinations under the balance sheet test must be "prepared on the basis of accounting practices and principles . . . or on a fair valuation or other method that is reasonable in the circumstances." RMBCA § 6.40(d) (emphasis added). Thus, not any valuation will do; only those that are reasonable will meet the balance sheet test. By its terms, this subsection also applies to determinations under the insolvency test. Although this standard arguably tightens protection for creditors, the Official Comment implies that subsection (d) was added to free the Directors to adopt any standard they deemed "reasonable" using its "informed business judgment". MBCA ANN., *supra* note 1, at 478. Arguably, then, our unscrupulous directors may be even freer under the Revised Act to do their dirt.

103. R. CLARK, *supra* note 97, § 14.3.9, at 624 (1986); see also *id.* ch. 2 (detailing corporate duties to creditors), § 14.3 (describing in detail how tests like those in the Wyoming Act can be frustrated and other protections available outside of the Revised or Model Acts).

104. UNIF. FRAUDULENT CONVEYANCE ACT §§ 1-14, 7A U.L.A. 427-667 (1985); WYO. STAT. ANN. §§ 34-14-101 to -113 (1977 & Supp. 1986).

105. 11 U.S.C. § 548 (1982).

106. WYO. STAT. ANN. § 34-14-105 (UFCA § 4); 11 U.S.C. § 548(a)(1)(B)(i).

107. WYO. STAT. ANN. § 34-14-106 (UFCA § 5); 11 U.S.C. § 548(a)(1)(B)(ii).

108. Under the Bankruptcy Code, the power to void a distribution is vested in the trustee in bankruptcy, rather than in the creditors themselves. To some extent, this is a fine distinction since unsecured creditors can petition a debtor into bankruptcy, 11 U.S.C. § 303(b) (1982), and then elect the trustee, *id.* §§ 702, 705(a). Upon doing so, the trustee's actions have the same effect as if the creditors had voided the distribution themselves. Of course, a more extensive discussion of the UFCA or the Bankruptcy Code would exceed this Comment's scope.

109. R. CLARK, *supra* note 97, § 14.3.8 (Strictly speaking, of course, this is an ante hoc protection.). There Professor Clark describes standard terms in commercial loans that restrict the corporation's finances. He also notes that California has adopted a distribution statute that prohibits distributions when the corporation's total assets and total liabilities drop below a 1.25:1 ratio. *Id.*; see also CAL. CORP. CODE § 500(b) (West 1977 & Supp. 1987). The California statute also includes a balance sheet test similar to that in the Revised Act. Compare RMBCA § 6.40(c)(2) with CAL. CORP. CODE § 500(b) (West 1977 & Supp. 1987).

tion,¹¹⁰ and piercing the corporate veil.¹¹¹ One limited, though ante hoc, check is the Bulk Sales Act of the Uniform Commercial Code.¹¹²

With respect to distribution, then, the RMBCA would not significantly improve the Wyoming Act's weak-kneed distribution rules. Instead, its primary virtue is simplifying distribution by eliminating the par concept. What the Revised Act leaves in its wake is a test that is nearly identical to the Wyoming Act's insolvency test and a second test that injects an objective, balance sheet test. Neither test offers creditors meaningful protection, relegating them to existing, self-help and post hoc remedies. The Wyoming legislator would do well to consider incorporating a more substantial restraint on corporate mismanagement and thus better protect Wyoming creditors. Many alternatives are available.¹¹³

In sum, however, the RMBCA cuts through the intricate twists and snarls of the Wyoming Act's Gordian knot of par value and legal capi-

110. R. CLARK, *supra* note 97, § 2.3. Under this doctrine, claims of shareholders are subordinated to those of creditors. It applies, however, only in bankruptcy, *see id.* at 52 & n.1; 11 U.S.C. § 510(c) (1982), but its policy could be incorporated into a statutory rule. Such a rule would prohibit distributions arising from fraudulent conduct by an insider, mismanagement that leaves the corporation insolvent, or conduct that leaves the corporation imprudently undercapitalized. *See very generally* R. CLARK, *supra* note 97, at 53 (describing only the elements of equitable subordination, *not* recommending codification). The first element is similar to WYO. STAT. ANN. § 34-14-108 (1977) (UFCA § 7). The second element is similar to provisions of the RMBCA and Wyoming Acts, RMBCA § 6.40(c)(1); WYO. STAT. ANN. §§ 17-1-105(b), -139(a), -140(a)(i) (1977 & Supp. 1986), and to Wyoming's UFCA, WYO. STAT. ANN. § 34-14-105 (1977) (UFCA § 4). The third element is similar to the common law doctrine of piercing the corporate veil. *See infra* note 111. Thus, codifying the equitable subordination doctrine as a substantive check on corporate financing would not involve anything particularly novel. In fact, it would improve on the protections offered by the UFCA by providing protection before the damage is done.

111. R. CLARK, *supra* note 97, § 2.4, § 2.1, at 38-39 & n.3. Under this doctrine, the primary benefit of corporate status—limited liability—is stripped away, exposing the shareholders to direct, personal, unlimited liability. This extreme remedy is available usually when the corporate form has been abused, often when shareholders have undercapitalized the entity. *See id.* § 2.4.1 (attempting a rationalization of the piercing doctrine).

112. U.C.C. §§ 6-101 to -111 (1977) [hereinafter Article Six]; WYO. STAT. ANN. §§ 34-21-601 to -610 (1977). If a debtor's "principal business is the sale of merchandise from stock, including those who manufacture what they sell", WYO. STAT. ANN. § 34-21-602(c) (U.C.C. § 6-102(3)), Article Six requires the debtor to notify creditors before transferring a "major part of its materials, supplies, merchandise or other inventory" to a third party, *id.* § 34-21-602(a) (U.C.C. § 6-102(1)). This language should be broad enough to encompass shareholders. The "teeth" of Article Six is § 6-106, which imposes a duty upon the transferee "to assure" that its payment goes to satisfy the transferor's creditors. U.C.C. § 6-106. Some states have adopted § 6-106; Wyoming has not. As a result, Wyoming's Article Six offers creditors little more than notice and an opportunity to void the sale. The debtor, however, has no incentive to notify creditors since the burden of failing to comply lies on the buyer, upon whom the seller/debtor's creditors can levy. *See* WYO. STAT. ANN. § 34-21-605 (U.C.C. § 6-105); U.C.C. § 6-105, comment 3, 2A U.L.A. 281, 307 (1977).

Article Six is currently slated for major overhaul. *See* Hawkland, *Proposed Revisions to U.C.C. Article 6*, 38 BUS. LAW. 1729 (1983) (Chancellor Hawkland's proposal would primarily revise and clarify the existing statute.); Rapson, *U.C.C. Article 6: Should it be Revised or "Deep-Sixed"?* 38 BUS. LAW. 1753 (1983) (Professor Rapson's article boldly advocates that the statute be "scrapped[ed]," *id.* at 1754, and that "statutory euthanasia [may be] in order", *id.* at 1769.); Baker, *Bulk Transfers Act—Patch, Bury, or Renovate?* 38 BUS. LAW. 1771 (1983) (Mr. Baker's article offers an alternative to the proposed changes, which would stiffen Article Six's requirements while simplifying and clarifying it.).

113. *See supra* notes 109-112.

tal,¹¹⁴ simplifying the three legal aspects of stock—authorization, issuance, and distribution. Under the authorization heading, the RMBCA changes language, organization, expands the Directors' powers, and allows more flexible share characteristics. Under issuance, it relaxes the constraints on acceptable consideration for shares, eliminates the Directors' present duty to value that consideration, clarifies shareholders' preemptive rights, and abolishes the needless perplexities of treasury shares. Finally, under distributions, the Revised Act streamlines the tests governing asset transfers to shareholders. Wyoming corporations, directors, officers, and shareholders should expect their legislature to consider each RMBCA improvement, or the Revised Act in toto, and thereby modernize the Wyoming Act, injecting today's economic and business reality into Wyoming corporate law.

CORPORATE GOVERNANCE

Once shares are in the hands of the shareholders, corporate life turns to the practical question of how to run the corporation on a day-to-day basis. Corporate governance is accomplished in part by shareholder voting, director control, and judicial intervention. Concerning shareholder voting and rights, the RMBCA introduces the concept of the voting group, gives practical effect to a shareholder's abstaining vote, makes cumulative voting optional, and relaxes the stringent prerequisites to bringing derivative suits. Although the RMBCA makes few substantive changes in formal director control, it clarifies the mechanics that affect director conflicts of interest. Lastly, under judicial intervention, the Revised Act adds two provisions to alleviate malfunctions in the everyday functioning of the entity: ordering shareholder meetings and removal of directors. Overall, the RMBCA continues its formidable objective, simplifying the Model Act as typified by the Wyoming Act.

Voting

Voting is the cornerstone of shareholder governance under both the Revised and Wyoming Acts. By voting their shares, stockholders may have a voice in controlling the entity's general operation. Of course, shareholders may take no action unless a quorum is present at the shareholder meeting. The RMBCA does not change the Wyoming Act's approach to quorums. Under the Wyoming Act, "a majority of the shares entitled to vote [constitutes] a quorum".¹¹⁵ Under the Revised Act, "a majority of the votes entitled to be cast on the matter by the voting group constitutes a quorum of that voting group".¹¹⁶

114. The Gordian knot of mythology was "[a]n intricate knot tied by King Gordius of Phrygia and cut by Alexander the Great with his sword after hearing an oracle promise that whoever could undo it would be the next ruler of Asia." AMERICAN HERITAGE DICTIONARY 568 (2d college ed. 1985) (sense 1).

115. WYO. STAT. ANN. § 17-1-129 (1977) ("Quorum of shareholders"). All but six jurisdictions provide that a majority of the votes entitled to be cast at a meeting of shareholders constitutes a quorum. The six are Connecticut, Ohio, Kansas, Hawaii, Nevada, and Puerto Rico. MBCA ANN., *supra* note 1, at 649 (statutory comparison).

116. RMBCA § 7.25(a).

Although the RMBCA carries over the former quorum definition, it does so by adding an entirely new concept—the voting group. A “voting group” is a combination of “all shares of one or more classes or series that under the articles of incorporation or [the Revised] Act are entitled to vote and be counted together collectively on a matter at a meeting of shareholders.”¹¹⁷ Moreover, “[a]ll shares entitled by the articles of incorporation or [the Revised] Act to vote generally on the matter are for that purpose a single voting group.”¹¹⁸ The advantage of the voting group concept is that it permits a single section of the RMBCA to govern quorum and voting rules as they apply to a variety of voting situations.¹¹⁹ In short, the voting group simplifies voting.

Section 7.25 implements the RMBCA’s voting group concept. The concept reflects the implicit need to separately determine two questions. First, the corporation must determine which voting groups are eligible to vote on particular matters. Second, it must establish separate quorum and voting requirements of those eligible. As a result, different quorum and voting requirements may apply at different stages of a meeting, depending on the matter being considered.¹²⁰

As a practical matter, though, the advent of the voting group changes very little. Usually, shareholders’ meetings involve questions that must be voted upon by all voting shares. Under the Wyoming Act, the vote would be taken from all those shares present. Under the Revised Act, the same result obtains because the category of “all voting shares” is but one “voting group”. Consequently, the only significant task under the Revised Act is to determine what the voting group is.¹²¹

After adding this creative concept, the RMBCA then addresses the mechanics of using it. Sections 7.25(a) and (b) retain the traditional, Wyoming Act quorum rules,¹²² modifying the text only to comport with the new concept. Where other provisions of the Revised Act provide more stringent voting or quorum requirements, they control over section 7.25’s general terms.¹²³

Section 7.25(c) provides another and perhaps more significant change to voting mechanics in an attempt to resolve the anomaly of shareholders who abstain from voting. Under the Wyoming Act, “[i]f a quorum is present, the affirmative vote of the majority of the shares represented at the

117. *Id.* § 1.40(26).

118. *Id.*

119. MBCA ANN., *supra* note 1, at 641 (official comment to § 7.25).

120. *Id.* at 642.

121. *See generally id.* at 640-41.

122. *See supra* note 115 and accompanying text.

123. *See, e.g.,* RMBCA §§ 7.25(d) (cross-referencing § 7.27, which deals with supermajorities), 7.25(e) (cross-referencing to § 7.28, which deals with voting for directors).

meeting and entitled to vote on the subject matter shall be the act of the shareholders".¹²⁴ This provision, in effect, treats abstentions as negative votes.

For example, assume a corporation has 1000 shares outstanding in a single class; assume further that each share is entitled to a single vote. A quorum under either Act consists of 501 shares. Next assume that 600 shares are represented and vote on a proposed action at the meeting. The tally is 280 in favor, 225 opposed, and 95 abstaining; hence the proposal fails under the Wyoming Act since fewer than a majority of the shares attending (301 of 600) voted in favor of the matter. Ironically, had the abstaining shares been absent from the meeting, a quorum would still have been present, and the proposal would have passed.¹²⁵ Section 7.25(c) resolves the irony by providing that an action is approved by a voting group at a meeting at which a quorum is present if the votes cast in favor of the action exceed the votes cast opposing the action. The wisdom of this approach is that, by not counting abstentions, they are now treated as true abstentions, not as "nay" votes.¹²⁶

The Revised Act addresses a fourth aspect of shareholder voting—the ability to cumulate votes. Cumulative voting is designed to protect minority shareholders by ensuring that their representation on the corporation's board of directors is roughly proportionate to their respective share ownership. Opinion on the desirability of cumulative voting is sharply divided.¹²⁷ While the Wyoming Act mandates cumulative voting,¹²⁸ the Revised Act allows cumulative voting if shareholders choose to include it in their Articles.¹²⁹ The latter is an "opt-in" approach, that is, if shareholders wish to have cumulative voting they must provide for it; the Revised Act does not do it for them. This flexible provision allows a corporation to tailor its voting requirements to its own needs, which approach should be seriously considered for Wyoming.

The fifth method by which a shareholder can participate in corporate governance is the derivative proceeding.¹³⁰ Although the Wyoming Act permits such causes of action, it also imposes three restrictions upon their exercise: (1) The shareholder must hold at least one share of record;¹³¹ (2)

124. WYO. STAT. ANN. § 17-1-129 (1977).

125. This example is a modified version of that found in the Official Comment to § 7.25. MBCA ANN., *supra* note 1, at 644.

126. *Id.* at 643-44 (official comment to § 7.25).

127. *Id.* at 673 (history of § 7.25). For example, a significant minority of jurisdictions mandate cumulative voting—Arizona, Arkansas, California, Hawaii, Kansas, Kentucky, Mississippi, Missouri, Nebraska, North Dakota, Ohio, South Dakota, West Virginia, and Wyoming—fourteen in all. Thirty-five jurisdictions make cumulative voting optional. *Id.* at 675-76 (statutory comparison). The authors themselves split over this issue, one believing that the optional approach offers only illusory protection to minority shareholders; the other preferring the added flexibility.

128. WYO. STAT. ANN. § 17-1-130(d) (1977 & Supp. 1986).

129. RMBCA § 7.28(b).

130. A derivative action is "[a] suit by a shareholder to enforce a corporate cause of action. The corporation is a necessary party, and the relief which is granted is a judgment against a third person in favor of the corporation." BLACK'S LAW DICTIONARY 399 (5th ed. 1979).

131. WYO. STAT. ANN. § 17-1-141.1(a) (Supp. 1986) ("Provisions relating to actions by shareholders"). WYO. R. CIV. P. 23.1 provides the procedures for bringing derivative suits.

The shareholder must pay the other party's expenses if the action is brought without reasonable cause;¹³² and (3) The shareholder must post a bond if she is a less-than-five-percent shareholder or if her shares have a market value of less than twenty-five thousand dollars.¹³³

The RMBCA adopts an approach significantly different from that of the Wyoming Act.¹³⁴ In keeping with its goal of a more simple statute, the Revised Act drops two of these restrictions, leaving the other intact, but adds narrowly tailored protections to reduce frivolous claims. The RMBCA drops the limitation requiring a plaintiff to be a "shareholder of record," recognizing that the Model—hence Wyoming—Act had become removed from the practices by which shareholders hold stock.¹³⁵ Section 7.40(e) accomplishes this result by specially defining "shareholder" as including "a beneficial owner whose shares are held in a voting trust or held by a nominee on his behalf."¹³⁶

Also under the Revised Act, plaintiffs are no longer required to post security for expenses, expanding the shareholders' ability to sue. The Revisors' dilemma was to make the right to sue as widely available to the small shareholder as it was to the large, while preserving restrictions against obviously unfounded cases. They also realized that bond requirements do not exist for other extensive corporate litigation—for example, class actions, antitrust cases, or individual personal injury actions—that often is expensive to defend.¹³⁷ Although the Revised Act eliminates the bond requirement, the court may still require the plaintiff to pay the defendant's reasonable expenses including attorney fees.¹³⁸

The Revised Act, as noted, adds protections not found in the Wyoming Act. The shareholder must file a verified petition, attesting either that a demand on the Directors was refused or why a demand was not made.¹³⁹ The purpose of this provision is to stimulate the Directors to enforce the rights of the corporation on its own.¹⁴⁰ The requirement hinders groundless litigation without deterring suits brought in good faith.¹⁴¹ Strictly speaking, this 'addition' is not new to Wyoming. Similar requirements are currently found in Rule 23.1 of the Wyoming Rules of Civil Pro-

132. The expenses must be reasonable and include attorney fees that are "incurred by them in the defense of the action." WYO. STAT. ANN. § 17-1-141.1(b) (Supp. 1986).

133. *Id.* § 17-1-141.1(c).

134. RMBCA § 7.40 ("Procedure in Derivative Proceedings").

135. These practices include the widespread use of street name and nominee ownership. MBCA ANN., *supra* note 1, at 717 (official comment to § 7.40).

136. RMBCA § 7.40(e). Thus, under this section, beneficial owners of voting trusts can be plaintiffs if they desire.

137. MBCA ANN., *supra* note 1, at 719-20 (official comment to § 7.40).

138. RMBCA § 7.40(d).

139. *Id.* § 7.40(b).

140. MBCA ANN., *supra* note 1, at 718 (official comment to § 7.40). Moreover, the Revised Act provides the corporation additional practical protection by allowing for a stay of proceedings during the pendency of the corporation's investigation, thus preserving the right of the corporation to enforce its own claim. RMBCA § 7.40(b); MBCA ANN., *supra* note 1, at 719.

141. MBCA ANN., *supra* note 1, at 717 (official comment to § 7.40).

cedure.¹⁴² What the Revised Act has done is to integrate the Rule into the statutory provisions for derivative suits.¹⁴³ The legislator should consider adopting the RMBCA's approach, which would rid Wyoming of the need to rely on a mere procedural rule and strengthen the substantive protections of the Wyoming Act.¹⁴⁴

Director Conflicts of Interest

Although corporate governance is often a shareholder concern, it also exists on the director and officer level. The Revised Act's changes in this area are minimal, being largely stylistic and conforming. One change, however, is of more than passing note.

Section 8.31 elaborates on provisions, such as those found in the Wyoming Act, concerning director conflict of interest.¹⁴⁵ This section clarifies the language found in the Wyoming Act.¹⁴⁶ At common law, when a director had a personal interest in a transaction engaged in by her corporation, it was automatically void.¹⁴⁷ Both the Wyoming and Revised Acts statutorily limit this common law principle. Although section 8.31 contains primarily clarifying changes,¹⁴⁸ section 8.31(b) makes clear that indirect conflicts are as serious as direct conflicts. Subsection (b) treats directors as disinterested only if they have neither a direct nor an indirect interest in a transaction. A director is indirectly interested if "(1) another entity in which he has a material financial interest or . . . is a general partner . . . or (2) another entity of which he is a director, officer, or trustee is a party to the transaction and the transaction is or should be considered by the board of directors of the corporation."¹⁴⁹ This section also deals

142. WYO. R. CIV. P. 23.1 ("Derivative actions by shareholders").

143. Rule 23.1 provides the procedures for bringing derivative suits. It provides:

In a derivative action brought by one (1) or more shareholders . . . to enforce a right of a corporation . . . the corporation . . . having failed to enforce a right which may properly be asserted by it, the complaint shall be verified. The complaint shall allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors . . . and, if necessary, from the shareholders . . . and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders . . . similarly situated in enforcing the right of the corporation The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders . . . in such manner as the court directs.

Compare this language to that found in RMBCA § 7.40(b).

144. The legislator should also be aware that there may be difficulties if he desires to repeal the current Rule. The authors doubt whether a legislature may repeal a judicial rule of procedure. Nonetheless, a statute that provides substantive protections will supersede contrary procedural rules. For further discussion of this principle, see Note, *CRIMINAL PROCEDURE—Wyoming Recognizes a Substantive Right to Bail Pending Appeal of Conviction*, XXII LAND & WATER L. REV. 605, 610-14 (1987).

145. Compare RMBCA § 8.31 ("Director Conflict of Interest") with WYO. STAT. ANN. § 17-1-136.1 (Supp. 1986) ("Director; conflicts of interest").

146. MBCA ANN., *supra* note 1, at 966 (history of § 8.31).

147. *Id.* at 965.

148. For example, section 8.31(a)(1) adds the requirement that the material facts of the transaction, as well as the director's interest, be disclosed. RMBCA § 8.31(a)(1).

149. *Id.* § 8.31(b).

with the mechanics of ratification by disinterested shareholders and directors.¹⁵⁰ This section does not materially alter the existing provisions, rather it makes them more intelligible. The legislator should consider amending the Wyoming Act to comport with section 8.31. Such a course would facilitate the enforcement of these restraints on directorial corruption, advancing the purposes underlying the Wyoming provisions.

Judicial Intervention

Even with the best-laid plans, sometimes things go awry. The Revised Act provides for judicial intervention into corporate affairs, under restricted circumstances. Two provisions, which are new and have no Wyoming counterparts, merit discussion. Section 7.03¹⁵¹ authorizes a court to order a meeting of the shareholders (1) if no annual meeting is held within the earlier of 6 months after the end of the corporation's last fiscal year or 15 months after its last annual meeting,¹⁵² (2) if a special meeting is not called within 30 days of a demand,¹⁵³ or (3) if a meeting is not held in accordance with the notice calling the meeting.¹⁵⁴ This provision was added to provide a "remedy for shareholders if the corporation refuses or fails to hold a shareholders' meeting".¹⁵⁵ The court's powers, though enumerated, are broad.¹⁵⁶

Section 8.09 is the second new provision,¹⁵⁷ affording judicial removal of a director on petition of the corporation or of a shareholder who holds at least ten percent of the outstanding shares.¹⁵⁸ For a director to be removed, the director must be responsible for fraudulent or dishonest conduct or gross abuse of authority or discretion.¹⁵⁹ Additionally, removal can occur only if it is in the best interest of the corporation.¹⁶⁰ This section was added to permit the prompt and efficient removal of dishonest directors. Petitioners may not use it as a tool in mere corporate struggles.¹⁶¹

150. *Id.* §§ 8.31(c), -(d).

151. *Id.* § 7.03 ("Court-Ordered Meeting").

152. *Id.* § 7.03(a)(1).

153. *Id.* § 7.03(a)(2)(i).

154. *Id.* § 7.03(a)(2)(iii).

155. MBCA ANN., *supra* note 1, at 531 (official comment to § 7.03).

156. *See* RMBCA § 7.03(b).

157. *Id.* § 8.09 ("Removal of Directors by Judicial Proceeding").

158. *Id.* § 8.09(a).

159. *Id.* § 8.09(a)(1). One should realize that this terminology remains undefined in the RMBCA, although arguably an improvement over the Wyoming Act's "fair and reasonable" standard. *See* WYO. STAT. ANN. § 17-1-136.1(a)(iii) (Supp. 1986). The Revised Act, however, incorporates for directors the standard by which the Directors' removal of officers and agents are judged under the Wyoming Act. *Compare* RMBCA § 8.09(a)(2) ("in the best interest of the corporation") with WYO. STAT. ANN. § 17-1-143 (1977) ("the best interests of the corporation"). Of course, such a topic involves questions far broader than this Comment's scope. For an excellent and comprehensive discussion of corporate disloyalty generally and in Wyoming particularly, see Gelb, *Corporate Disloyalty—A Wyoming Case and the ALI Project*, XXI LAND & WATER L. REV. 111 (1986).

160. RMBCA § 8.09(a)(2).

161. MBCA ANN., *supra* note 1, at 852 (history of § 8.09). *See supra* note 159, where the authors indirectly suggest that the 'new' standard may only be an attempt to adopt the same standard for judging the removal of directors, officers, and agents.

The Revised Act's changes in corporate governance, then, are predominately concerned with shareholder voting. Changes to the other subjects—director conflicts and judicial intervention—pale in comparison. Changes to the former serve to explain ambiguities in the Wyoming Act; changes to the latter add new alternatives for enforcing existing shareholder rights. Fortunately, these matters arise infrequently, if normally, in corporate life.

EXTRAORDINARY EVENTS

Extraordinary events include various topics, such as merger, dissolution, wholesale liquidation of assets, and the rights of shareholders who dissent from such courses of action. The Revised Act does not appear to have made substantive changes from the Wyoming Act in all these areas. This Comment excludes discussion of all but two changes: dissenters' rights and unknown claims against the dissolved corporation. The remaining changes still merit attention by both the legislator and the practitioner even though excluded here.

Dissenters' Rights

Except for deleting par value and legal capital, perhaps the most ambitious change in the Revised Act is its vast restructuring and augmentation of the procedures for resolving dissenters' rights. The Wyoming Act follows the well-trodden path of other states in its attempt to resolve the tension between, on one hand, corporate aspirations to grow and develop and, on the other hand, the individual shareholder's desire to keep her investments stable. Because the revisions are so extensive and fill many gaps in the Wyoming Act, little purpose is served by detailing the Wyoming Act's failings. Understanding the broad structure of the Revised Act's new procedures for asserting dissenters' rights is eminently more sensible.

The dissenters' rights procedures are found in Chapter 13 of the Revised Act. Chapter 13's ultimate goal is to settle more efficiently the conflicting desires of the corporation and its shareholders by encouraging private negotiation and discouraging resort to courts. Although some of these provisions may be found helter-skelter in the Wyoming Act, that Act's organization is cumbersome, and its omissions leave important business questions to the uncertainty of litigation.¹⁶²

Chapter 13, on the other hand, sets forth a comprehensive, step-by-step framework for executing and enforcing these rights.¹⁶³ The Chapter

162. For the sake of reference, the Wyoming Act's dissenters' rights provisions are found in two sections, WYO. STAT. ANN. §§ 17-1-503, -504 (1977 & Supp. 1986), which are detailed over three-and-one-half, densely packed pages. Chapter 13 accomplishes a bolder task in fourteen, easily digestible sections. RMBCA §§ 13.01 to .31. Giving this topic the full treatment that it deserves could be a law review article by itself; more than cursory commentary, then, would exceed the scope of this Comment. For a fuller discussion, written by the Revisors themselves, see MBCA ANN., *supra* note 1, at 1353-447.

163. RMBCA §§ 13.01 to .31.

is divided into three subchapters: (1) right to dissent and obtain payment for shares, (2) procedure for exercise of dissenters' rights, and (3) judicial appraisal of shares. Almost as if it were an Act unto itself, the Chapter begins with definitions. Subchapter A defines specialized terms and lists all transactions that give rise to dissenters' rights.¹⁶⁴ Subchapter B logically lays out a detailed, nine-step procedure, which strongly emphasizes the Chapter's aim to keep these matters simple and unofficial. If followed, the process fosters settlement while discouraging unwarranted litigation.¹⁶⁵ Finally, if litigation is inevitable, Subchapter C provides the groundwork for this alternative.¹⁶⁶

Unknown Claims Against the Dissolved Corporation

The foregoing discussion condensed Chapter 13's elaborate yet integrated processes, sacrificing an extravagant discourse. In counterpoint, the other extraordinary event deserving mention is but one section of an entire Chapter.¹⁶⁷ Although that Chapter contains its fair share of changes, the more intriguing is the addition of section 14.07, which focuses on the "difficult question" of how a dissolved corporation can absolve itself of time-delayed tort claims.¹⁶⁸

The common law conceived the dissolution of a corporation as a "termination of legal existence. Ultimately all jurisdictions adopted statutes allowing suits to be brought by or against dissolved corporations and providing that pending litigation did not abate."¹⁶⁹ The development, however, of products liability and other claims that arise years after the original transaction has created entirely new problems that are not satisfactorily addressed by the Wyoming Act.¹⁷⁰ The Revised Act, however, does address them.¹⁷¹

Section 14.07 is straightforward. The section first requires the dissolving corporation to publish a notice¹⁷² if it wishes to take advantage of the section's protections.¹⁷³ Claims are barred if filed more than five years¹⁷⁴

164. *Id.* §§ 13.01 to .03.

165. *Id.* §§ 13.20 to .28.

166. *Id.* §§ 13.30 to .31.

167. *Id.* §§ 14.01 to .40 (Chapter 14, which deals with dissolution).

168. See MBCA ANN., *supra* note 1, at xxxi.

169. *Id.* at 1502 (history of § 14.07).

170. *Id.* at 1503. Obviously, then, the Wyoming Act has no directly comparable provision. The nearest corollary is WYO. STAT. ANN. § 17-1-622 (1977 & Supp. 1986). Although the section clearly addresses prior and existing claims, it is doubtful whether it would, or was designed to, reach a claim that arises after dissolution.

171. RMBCA § 14.07 ("Unknown Claims Against Dissolved Corporation").

172. *Id.* § 14.07(a). The published notice must (1) be in a newspaper of general circulation in the corporation's resident county, (2) describe how to bring a claim, and (3) state that claims are barred after five years from the notice. *Id.* § 14.07(b).

173. *Id.* § 14.07(c).

174. The Official Comment acknowledges that five years is an arbitrary choice. MBCA ANN., *supra* note 1, at 1501. Nonetheless, it does offer a potential plaintiff some improvement over the existing two-year period of limitations. See WYO. STAT. ANN. § 17-1-622 (1977 & Supp. 1986) (setting out this period). A Wyoming legislator should note that the general tort statute of limitations is only four years, *id.* § 1-3-105(a)(iv)(C) (1977), as it is for warran-

after publication.¹⁷⁵ The corporation may distribute its assets even though the period of limitations has not run. Unless there is insurance or some kind of escrow, claimants can retrieve distributed assets from shareholders.¹⁷⁶ If the corporation does not publish, the section's protections cannot be invoked, leaving uncertain what happens to a corporation that does not publish.¹⁷⁷

CONCLUSION

Overall, the Revised Model Business Corporations Act is a vast improvement over the existing Wyoming Act. The Revised Act's new-found clarity of language and organization reflects its refreshing flexibility. In comparison to the Wyoming Act, the RMBCA cuts back on excessive government entanglement in daily corporate life, placing responsibility in the corporation where it appropriately belongs. The smothering hand of government has led us to the currently confused and needlessly complex corporation statute. It is time for the legislature to act.

The Revised Act has kept the substantive changes to a minimum, though some have crept up on Wyoming. This Comment focuses on some of these changes, highlighting only the more significant. Four major topics—the elimination of par value, the legal aspects of stock, corporate governance, and extraordinary events—are the centerpiece. These topics are themselves divided into subtopics. Under legal aspects of stock are authorization, issuance, and distribution. Under corporate governance comes voting, director conflicts of interest, and judicial intervention. Finally, under extraordinary events are the subtopics of dissenters' rights and unknown claims against the dissolved corporation.

The responsibility lies now with the legislature to examine each change more fully; the many little changes may have peculiar impact on Wyoming's unique heritage and special needs. Wyoming will be well-served under the Revised Act. We should be ready to bid farewell to our now twenty-six-year-old friend. Adieu, Wyoming Business Corporation Act.

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TY, *id.* § 34-21-299.5 (1977). These limitations run from the time the injury is discovered, which could be decades after dissolution: Section 14.07's five-year period, however, runs from the date of publication. RMBCA § 14.07(c).

175. RMBCA § 14.07(c). This subsection lists three categories of plaintiffs that are specifically barred. There may be some ambiguity since the list does not purport to be illustrative.

176. *Id.* § 14.07(d)(2); MBCA ANN., *supra* note 1, at 1501-02 (official comment to § 14.07). This does not mean that barred claimants can go after shareholders' personal assets; individual shareholders are liable only to the extent of the distribution to them. RMBCA § 14.07(d)(2). Even though the dissolved corporation has some residual assets, the plaintiff may be able to proceed directly against shareholders' distributions, ignoring the corporation's assets. This appears so because subsections 14.07(d)(1) and (d)(2) are separated in the disjunctive.

177. Strictly speaking, section 14.07 does not address at all the question of failing to publish the notice. By negative inference, however, publication would serve no purpose if the same protections could be invoked by a corporation that did not publish.

Appendix

SELECTED SECTIONS OF THE WYOMING BUSINESS CORPORATION ACT

§ 17-1-102. Definitions.

(a) As used in this act . . . :

....

(viii) "Treasury shares" means shares of a corporation which have been issued, have been subsequently acquired by and belong to the corporation, and have not, either by reason of the acquisition or thereafter, been cancelled or restored to the status of authorized but unissued shares. Treasury shares shall be deemed to be "issued" shares, but not "outstanding" shares;

....

(x) "Stated capital" means, at any particular time, the sum of (A) the par value of all shares of the corporation having a par value that have been issued, (B) the amount of the consideration received by the corporation for all shares of the corporation without par value that have been issued, except the part of the consideration therefor as may have been allocated to capital surplus in a manner permitted by law, and (C) the amounts not included in clauses (A) and (B) of this paragraph as have been transferred to stated capital of the corporation, whether upon the issue of shares as a share dividend or otherwise, minus all reductions from the sum as have been effected in a manner permitted by law. Irrespective of the manner of designation thereof by the laws under which a foreign corporation is organized, the stated capital of a foreign corporation shall be determined on the same basis and in the same manner as the stated capital of a domestic corporation, for the purpose of computing fees, franchise taxes and other charges imposed by this act;

....

(xiv) "Insolvent" means inability of a corporation to pay its debts as they become due in the usual course of its business.

....

§ 17-1-105. Right of corporation to acquire and dispose of its own stock.

(a) A corporation has the right to purchase, take, receive or otherwise acquire, hold, own, pledge, transfer or otherwise dispose of its own shares, but purchases of its own shares, whether direct or indirect shall be made only to the extent of unreserved and unrestricted earned surplus available therefor, and, if the articles of incorporation so permit or with the affirmative vote of the holders of a majority of all shares entitled to vote thereon, to the extent of unreserved and unrestricted capital surplus available therefor.

(b) Repealed by Laws 1979, ch. 153, § 3.

(c) To the extent that earned surplus or capital surplus is used as the measure of the corporation's right to purchase its own shares, the surplus shall be restricted so long as the shares are held as treasury shares, and upon the disposition or cancellation of any shares the restriction shall be removed pro tanto.

(d) Notwithstanding the foregoing limitations, a corporation may purchase or otherwise acquire its own shares for the purpose of:

(i) Eliminating fractional shares;

(ii) Collecting or compromising indebtedness to the corporation;

(iii) Paying dissenting shareholders entitled to payment for their shares under the provisions of this act . . . ;

(iv) Effecting, subject to the other provisions of this act, the retirement of its redeemable shares by redemption or by purchase at not to exceed the redemption price.

(e) No purchase of or payment for its own shares shall be made at a time when the corporation is insolvent or when the purchase or payment would make it insolvent.

§ 17-1-112. Authorized shares.

(a) Each corporation shall have power to create and issue the number of shares stated in its articles of incorporation. Such shares may be divided into one (1) or more classes, any

or all of which classes may consist of shares with par value or shares without par value, with such designations, preferences, limitations, and relative rights as shall be stated in the articles of incorporation. The articles of incorporation may limit or deny the voting rights of or provide special voting rights for the shares of any class to the extent not inconsistent with the provisions of this act

(b) Without limiting the authority herein contained, a corporation, when so provided in its articles of incorporation, may issue shares of preferred or special classes:

- (i) Subject to the right of the corporation to redeem any of such shares at the price fixed by the articles of incorporation for the redemption thereof;
- (ii) Entitling the holders thereof to cumulative, noncumulative or partially cumulative dividends;
- (iii) Having preference over any other class or classes of shares as to the payment of dividends;
- (iv) Having preference in the assets of the corporation over any other class or classes of shares upon the voluntary or involuntary liquidation of the corporation;
- (v) Convertible into shares of any other class or into shares of any series of the same or any other class, except a class having prior or superior right and preferences as to dividends or distribution of assets upon liquidation, but shares without par value shall not be converted into shares with par value unless that part of the stated capital of the corporation represented by shares without par value is, at the time of conversion, at least equal to the aggregate par value of the shares into which the shares without par value are to be converted or the amount of any deficiency is transferred from surplus to stated capital.

§ 17-1-113. Issuance of shares of preferred or special classes in series. (Only subsections (a) and (b) are set out here.)

(a) If the articles of incorporation so provide, the shares of any preferred or special class may be divided into and issued in series. If the shares of any class are to be issued in series, then each series shall be so designated as to distinguish the shares thereof from the shares of all other series and classes. Any or all of the series of any class and the variations in the relative rights and preferences as between different series may be fixed and determined by the articles of incorporation, but all shares of the same class shall be identical except as to the following relative rights and preferences, as to which there may be variations between different series:

- (i) The rate of dividend;
- (ii) The price at and the terms and conditions on which shares may be redeemed.
- (iii) The amount payable upon shares in event of voluntary and involuntary liquidation;
- (iv) Repealed by Laws 1979, ch. 153, § 3.
- (v) Sinking fund provisions, if any, for the redemption or purchase of shares;
- (vi) The terms and conditions, if any, on which shares may be converted;
- (vii) Voting rights, if any.

(b) If the articles of incorporation shall expressly vest authority in the board of directors, then, to the extent that the articles of incorporation shall not have established series and fixed and determined the variations in the relative rights and preferences as between series, the board of directors shall have authority to divide any or all of such classes into series and, within the limitations set forth in this section and in the articles of incorporation, fix and determine the relative rights and preferences of the shares of any series so established.

§ 17-1-115. Consideration for shares.

(a) Shares having a par value may be issued for such consideration expressed in dollars, not less than the par value thereof, as shall be fixed from time to time by the board of directors.

(b) Shares without par value may be issued for such consideration as may be fixed from time to time by the board of directors unless the articles of incorporation reserve to the shareholders the right to fix the consideration. In the event that such right be reserved as to any shares, the shareholders shall, prior to the issuance of such shares, fix the consideration to be received for such shares, by a vote of the holders of a majority of all shares entitled to vote thereon.

(c) Treasury shares may be disposed of by the corporation for such consideration expressed in dollars as may be fixed from time to time by the board of directors.

(d) That part of the surplus of a corporation which is transferred to stated capital upon the issuance of shares as a share dividend shall be deemed to be the consideration for the issuance of such shares.

(e) In the event of the issuance of shares upon the conversion or exchange of indebtedness or shares, the consideration for the shares so issued shall be:

(i) The principal sum of, and accrued interest on, the indebtedness so exchanged or converted, or the stated capital then represented by the shares so exchanged or converted; and

(ii) That part of surplus, if any, transferred to stated capital upon the issuance of shares for the shares so exchanged or converted; and

(iii) Any additional consideration paid to the corporation upon the issuance of shares for the indebtedness or shares so exchanged or converted.

§ 17-1-116 Payment for Shares.

(a) The consideration for the issuance of shares may be paid, in whole or in part, in money, in other property, tangible or intangible, or in labor or services actually performed for the corporation. When payment of the consideration for which shares are to be issued shall have been received by the corporation, such shares shall be deemed to be fully paid and nonassessable.

(b) Neither promissory notes nor future services shall constitute payment or part payment, for shares of a corporation.

(c) In the absence of fraud in the transaction, the judgment of the board of directors or the shareholders, as the case may be, as to the value of the consideration received for shares shall be conclusive.

§ 17-1-118. Determination of the amount of stated capital.

(a) In case of the issuance by a corporation of shares having a par value, the consideration received therefor shall constitute stated capital to the extent of the par value of such shares, and the excess, if any, of such consideration shall constitute capital surplus.

(b) In case of the issuance by a corporation of shares without par value, the entire consideration received therefor shall constitute stated capital unless the corporation shall determine as provided in this section that only a part thereof shall be stated capital. Within a period of sixty (60) days after the issuance of any shares without par value, the board of directors may allocate to capital surplus any portion of the consideration received for the issuance of such shares. No such allocation shall be made of any portion of the consideration received for shares without par value having a preference in the assets of the corporation in the event of involuntary liquidation except the amount, if any, of such consideration in excess of such preference.

(c) If shares have been or shall be issued by a corporation in merger or consolidation or in acquisition of all or substantially all of the outstanding shares or of the property and assets of another corporation, whether domestic or foreign, any amount that would otherwise constitute capital surplus under the foregoing provisions of this section may instead be allocated to earned surplus by the board of directors of the issuing corporation except that its aggregate earned surplus shall not exceed the sum of the earned surpluses as defined in this act of the issuing corporation and of all other corporations, domestic or foreign, that were merged or consolidated or of which the shares or assets were acquired.

(d) The stated capital of a corporation may be increased from time to time by resolution of the board of directors directing that all or a part of the surplus of the corporation be transferred to stated capital. The board of directors may direct that the amount of the surplus so transferred is deemed to be stated capital in respect of any designated class of shares.

§ 17-1-122. Liability of subscribers and shareholders.

(a) A holder of or subscriber to shares of a corporation shall be under no obligation to the corporation or its creditors with respect to such shares other than the obligation to pay to the corporation the full consideration for which such shares were issued or to be issued.

(b) Any person becoming an assignee or transferee of shares or of a subscription for shares in good faith and without knowledge or notice that the full consideration therefor

has not been paid shall not be personally liable to the corporation or its creditors for any unpaid portion of such consideration.

(c) An executor, administrator, conservator, guardian, trustee, assignee for the benefit of creditors, or receiver shall not be personally liable to the corporation as a holder of or subscriber to shares of a corporation but the estate and funds in his hands shall be so liable.

(d) No pledgee or other holder of shares as collateral security shall be personally liable as a shareholder.

§ 17-1-123. Shareholders' preemptive rights.

(a) The preemptive right of a shareholder to acquire unissued or treasury shares of a corporation may be limited or denied to the extent provided in the articles of incorporation.

(b) Unless otherwise provided by its articles of incorporation, any corporation may issue and sell its shares to its officers or employees or to the officers or employees of any subsidiary corporation, without first offering such shares to its shareholders, for such consideration and upon such terms and conditions as shall be approved by the holders of two-thirds of all shares entitled to vote thereon or by its board of directors pursuant to like approval of the shareholders.

§ 17-1-129. Quorum of shareholders.

Unless otherwise provided in the articles of incorporation, a majority of the shares entitled to vote, represented in person or by proxy, shall constitute a quorum at a meeting of shareholders. If a quorum is present, the affirmative vote of the majority of the shares represented at the meeting and entitled to vote on the subject matter shall be the act of the shareholders, unless the vote of a greater number or voting by classes is required by this act . . . or the articles of incorporation or bylaws; provided, however, that any corporation organized without any purpose of direct gain to itself and whose constitution or bylaws provide that each member or stockholder shall have but one (1) vote, and whose total number of members or stockholders is less than one hundred (100), may provide that ten percent (10%) or more its membership shall constitute a quorum at any and all meetings of the membership; and provided further that such corporations may also provide in their bylaws that directors may be elected for staggered terms of office of one (1), two (2) or three (3) years, that the area or areas within which members or stockholders reside may be divided into districts and that the directors be elected by or according to such districts, and that, in balloting for directors, each member or stockholder shall cast only one (1) vote for the candidate for each office of director.

§ 17-1-130. Voting of shares. (There is no subsection (i) in the original.)

(a) Each outstanding share, regardless of class, is entitled to one (1) vote on each matter submitted to a vote at a meeting of shareholders, except as may be otherwise provided in the articles of incorporation. If the articles of incorporation provide for more or less than one (1) vote for any share, on any matter, every reference in this act to a majority or other proportion of shares shall refer to such a majority or other proportion of votes entitled to be cast.

(b) Neither treasury shares, nor shares of its own stock held by a corporation in a fiduciary capacity, nor shares held by another corporation if a majority of the shares entitled to vote for the election of directors of such other corporation is held by the corporation, shall be voted at any meeting or counted in determining the total number of outstanding shares at any given time.

(c) a shareholder may vote either in person or by proxy executed in writing by the shareholder or by his duly authorized attorney-in-fact. No proxy shall be valid after eleven (11) months from the date of its execution, unless otherwise provided in the proxy.

(d) At each election for directors every shareholder entitled to vote at such election shall have the right to vote, in person or by proxy, the number of shares owned by him for as many persons as there are directors to be elected and for whose election he has a right to vote, or to cumulate his votes by giving one (1) candidate as many votes as the number of such directors multiplied by the number of his shares shall equal, or by distributing such votes on the same principle among any number of such candidates.

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

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

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

(h) A shareholder whose shares are pledged shall be entitled to vote such 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.

(j) On and after the date on which written notice of redemption of redeemable shares has been mailed to the holders thereof and a sum sufficient to redeem such shares has been deposited with a bank or trust company with irrevocable instruction and authority to pay the redemption price to the holders thereof upon surrender of certificates therefor, such shares shall not be entitled to vote on any matter and shall not be deemed to be outstanding shares.

§ 17-1-136.1. Director; conflicts of interest.

(a) No contract or other transaction between a corporation and one (1) or more of its directors or any other corporation, firm, association or entity in which one (1) or more of its directors are directors or officers or are financially interested, shall be either void or voidable because of the relationship or interest or because the director or directors are present at the meeting of the board of directors or a committee thereof which authorizes, approves or ratifies the contract or transaction or because his or their votes are counted for the purpose, if:

(i) The fact of the relationship or interest is disclosed or known to the board of directors or committee which authorizes, approves or ratifies the contract or transaction by a vote or consent sufficient for the purpose without counting the votes or consents of the interested directors; or

(ii) The fact of the relationship or interest is disclosed or known to the shareholders entitled to vote and they authorize, approve or ratify the contract or transaction by vote or written consent; or

(iii) The contract or transaction is fair and reasonable to the corporation.

(b) Common or interested directors may be counted in determining the presence of a quorum at a meeting of the board of directors or a committee thereof which authorizes, approves or ratifies such contract or transaction.

§ 17-1-139. Dividends.

(a) The board of directors of a corporation may, from time to time, declare and the corporation may pay dividends on its outstanding shares in cash, property, or its own shares, except when the corporation is insolvent or when the payment thereof would render the corporation insolvent or when the declaration or payment thereof would be contrary to any restrictions contained in the articles of incorporation, subject to the following provisions:

(i) Dividends may be declared and paid in cash or property only out of the unreserved and unrestricted earned surplus of the corporation, except as otherwise provided in this section;

(ii) If the articles of incorporation of a corporation engaged in the business of exploiting natural resources so provide, dividends may be declared and paid in cash out of the depletion reserves, but each dividend shall be identified as a distribution of 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;

(iii) Dividends may be declared and paid in its own shares out of any treasury shares that have been reacquired out of surplus of the corporation;

(iv) Dividends may be declared and paid in its own authorized but unissued shares out of any unreserved and unrestricted surplus of the corporation upon the following conditions:

(A) If a dividend is payable in its own shares having a par value, such shares shall be issued at not less than the par value thereof and there shall be transferred

to stated capital at the time of such dividend is paid an amount of surplus at least equal to the aggregate par value of the shares to be issued as a dividend;

(B) If a dividend is payable in its own shares without par value, such shares shall be issued at such stated value as shall be fixed by the board of directors by resolution adopted at the time such dividend is declared, and there shall be transferred to stated capital at the time such dividend is paid an amount of surplus equal to the aggregate stated value so fixed in respect of such shares; and the amount per share so transferred to stated capital shall be disclosed to the shareholders receiving such dividend concurrently with the payment thereof;

(v) No dividend payable in shares of any class shall be paid to the holders of shares of any other class unless the articles of incorporation so provide or such payment is authorized by the affirmative vote or the written consent of the holders of at least a majority of the outstanding shares of the class in which the payment is to be made.

(b) A split-up or division of the issued shares of any class into a greater number of shares of the same class without increasing the stated capital of the corporation shall not be construed to be a share dividend within the meaning of this section.

§ 17-1-140. Distributions in partial liquidation.

(a) The board of directors of a corporation may, from time to time, distribute to its shareholders in partial liquidation, out of capital surplus of the corporation, a portion of its assets, in cash or property, subject to the following provisions:

(i) No such distribution shall be made at a time when the corporation is insolvent or when such distribution would render the corporation insolvent;

(ii) No such distribution shall be made unless the articles of incorporation so provide or such distribution is authorized by the affirmative vote of the holders of at least two-thirds of the outstanding shares of each class whether or not entitled to vote thereon by the provisions of the articles of incorporation of the corporation;

(iii) no such distribution shall be made to the holders of any class of shares unless all cumulative dividends accrued on all preferred or special classes of shares entitled to preferential dividends shall have been fully paid;

(iv) No such distribution shall be made to the holders of any class of shares which would reduce the remaining net assets of the corporation below the aggregate preferential amount payable in event of involuntary liquidation to the holders of shares having preferential rights to the assets of the corporation in the event of liquidation;

(v) Each such distribution, when made, shall be identified as a distribution in partial liquidation and the amount per share disclosed to the shareholders receiving the same concurrently with the distribution thereof.

(b) The board of directors of a corporation may also, from time to time, distribute to the holders of its outstanding shares having a cumulative preferential right to receive dividends, in discharge of their cumulative dividend rights, if at the time the corporation has no earned surplus and is not insolvent and would not thereby be rendered insolvent. Each such distribution, when made, shall be identified as a payment of cumulative dividends out of capital surplus.

§ 17-1-141.1. Provisions relating to actions by shareholders.

(a) No action shall be brought in this state by a shareholder in the right of a . . . corporation unless the plaintiff was a holder of record of shares or of voting trust certificates therefor at the time of the transaction of which he complains, or his shares or voting trust certificates thereafter devolved upon him by operation of law from a person who was a holder of record at the time.

(b) In any action hereafter instituted in the right of any domestic or foreign corporation by the holder or holders of record of shares of the corporation or of voting trust certificates therefor, the court having jurisdiction, upon final judgment and a finding that the action was brought without reasonable cause, may require the plaintiff or plaintiffs to pay to the parties named as defendant the reasonable expenses, including fees of attorneys, incurred by them in the defense of the action.

(c) In any action now pending or hereafter instituted or maintained in the right of any domestic or foreign corporation by the holder or holders of record of less than five percent (5%) of the outstanding shares of any class of [the] corporation or of voting trust certificates

therefor, unless the shares or voting trust certificates so held have a market value in excess of twenty-five thousand dollars (\$25,000.00), the corporation in whose right the action is brought shall be entitled at any time before final judgment to require the plaintiff or plaintiffs to give security for the reasonable expenses, including fees of attorneys, that may be incurred by it in connection with the action or may be incurred by other parties named as defendant for which it may become legally liable. Market value shall be determined as of the date that the plaintiff institutes the action or, in the case of an intervenor, as of the date that he becomes a party to the action. The amount of such security may from time to time be increased or decreased, in the discretion of the court, upon showing that the security provided has or may become inadequate or is excessive. The corporation shall have recourse to such security in such amount as the court having jurisdiction shall determine upon the termination of such action, whether or not the court finds the action was brought without reasonable cause.

§ 17-1-202. Articles of incorporation.

(a) The articles of incorporation shall set forth:

(i) The name of the corporation;

(ii) The period of duration, which may be perpetual;

(iii) Either (A) the purpose or purposes for which the corporation is organized; or (B) that the corporation shall have unlimited power to engage in and to do any lawful act concerning any or all lawful businesses for which corporations may be organized under this act . . .

(iv) The aggregate number of shares which the corporation shall have authority to issue; if such shares are to consist of one (1) class only, the par value of each of such shares, or a statement that all of such shares are without par value; or, if such shares are to be divided into classes, the number of shares of each class, and a statement of the par value of the shares of each such class or that such shares are to be without par value;

(v) If the shares are to be divided into classes, the designation of each class and a statement of the preferences, limitations and relative rights in respect of the shares of each class;

(vi) If the corporation is to issue the shares of any preferred or special class in series, then the designation of each series and a statement of the variations in the relative rights and preferences as between series insofar as the same are to be fixed in the articles of incorporation, and a statement of any authority to be vested in the board of directors to establish series and fix and determine the variations in the relative rights and preferences as between series;

(vii) If any preemptive right is to be granted to shareholders, the provisions therefor;

(viii) Repealed by Laws 1979, ch. 153, § 3.

(ix) Any provision, not inconsistent with law, which the incorporators elect to set forth in the articles of incorporation for the regulation of the internal affairs of the corporation, including any provision restricting the transfer of shares and any provision which under this act required or permitted to be set forth in the bylaws;

(x) The address of its initial registered office, and the name of its initial registered agent at such address;

(xi) The number of directors constituting the initial board of directors and the names of the persons who are to serve as directors until the first annual meeting of shareholders or until their successors be elected and qualify;

(xii) The name and address of each incorporator.

(b) It shall not be necessary to set forth in the articles of incorporation any of the corporate powers enumerated in this act.

§ 17-1-301. Right to amend articles of incorporation.

(a) A corporation may amend its articles of incorporation, from time to time, in any and as many respects as may be desired, so long as its articles of incorporation as amended contain only such provisions as might be lawfully contained in original articles of incorporation at the time of making such amendment, and, if a change in shares or the rights of shareholders, or an exchange, reclassification or cancellation of shares or rights of shareholders is to be made, such provisions as may be necessary to effect such change, exchange, reclassification or cancellation.

(b) In particular, and without limitation upon such general power of amendment, a corporation may amend its articles of incorporation, from time to time, so as:

.....

(v) To increase or decrease the par value of the authorized shares of any class having a par value, whether issued or unissued;

.....

(viii) To change shares having a par value, whether issued or unissued, into the same or a different number of shares without par value, and to change shares without par value, whether issued or unissued, into the same or a different number of shares having a par value;

.....

§ 17-1-311. Reduction of stated capital without amendment of articles or cancellation of shares.

(a) A reduction of the stated capital of a corporation, where such reduction is not accompanied by any action requiring an amendment of the articles of incorporation and not accompanied by a cancellation of shares, may be made in the following manner:

(i) The board of directors shall adopt a resolution setting forth the amount of the proposed reduction and the manner in which the reduction shall be effected, and directing that the question of such reduction be submitted to a vote at a meeting of shareholders, which may be either an annual or a special meeting;

(ii) Written or printed notice, stating that the purpose or one (1) of the purposes of such meeting is to consider the question of reducing the stated capital of the corporation in the amount and manner proposed by the board of directors, shall be given to each shareholder of record entitled to vote thereon within the time and in the manner provided in this act for the giving of notice of meetings of shareholders;

(iii) At such meeting a vote of the shareholders entitled to vote thereon shall be taken on the question of approving the proposed reduction of stated capital, which shall require for its adoption the affirmative vote of the holders of a least a majority of the shares entitled to vote thereon.

(b) When a reduction of the stated capital of a corporation has been approved as provided in this section, a statement shall be executed in duplicate by the corporation by its president or a vice-president and by its secretary or an assistant secretary, and verified by one (1) of the officers signing such statement, and shall set forth:

(i) the name of the corporation;

(ii) A copy of the resolution of the shareholders approving such reduction, and the date of its adoption;

(iii) The number of shares outstanding, and the number of shares entitled to vote thereon;

(iv) The number of shares voted for and against such reduction, respectively;

(v) A statement of the manner in which such reduction is effected, and a statement, expressed in dollars, of the amount of stated capital of the corporation after giving effect to such reduction.

(c) Duplicate originals of such statements shall be delivered to the secretary of state. If the secretary of state finds that such statement conforms to law, he shall, when all fees and license taxes have been paid as are by law prescribed:

(i) Endorse on each of such duplicate originals the word "Filed," and the month, day and year of the filing thereof;

(ii) File one (1) of such duplicate originals in his office;

(iii) Return the other duplicate or original to the corporation or its representative.

(d) Upon the filing of such statement, the stated capital of the corporation shall be reduced as therein set forth.

(e) No reduction of stated capital shall be made under the provisions of this section which would reduce the amount of the aggregate stated capital of the corporation to an amount equal to or less than the aggregate preferential amounts payable upon all issued shares having a preferential right in the assets of the corporation in the event of involuntary liquidation.

§ 17-1-312. Special provisions relating to surplus and reserves.

(a) The surplus, if any, created by or arising out of a reduction of the stated capital of a corporation shall be capital surplus.

(b) The capital surplus of a corporation may be increased from time to time by resolution of the board of directors directing that all or a part of the earned surplus of the corporation be transferred to capital surplus.

(c) A corporation may, by resolution of its board of directors, apply any part or all of its capital surplus to the reduction or elimination of any deficit arising from losses, however, incurred, but only after first eliminating the earned surplus, if any, of the corporation by applying such losses against earned surplus and only to the extent that such losses exceed the earned surplus, if any. Each such application of capital surplus shall, to the extent thereof, effect a reduction of capital surplus.

(d) A corporation may, by resolution of its board of directors, create a reserve or reserves out of its earned surplus for any proper purpose or purposes, and may abolish any such reserve in the same manner. Earned surplus of the corporation to the extent so reserved shall not be available for the payment of dividends or other distributions by the corporation except as expressly permitted by this act.

§ 17-1-606. Procedure after filing of statement of intent to dissolve. (There is no subsection (b) in the original.)

(a) After the filing by the secretary of state of a statement of intent to dissolve:

(i) The corporation shall immediately cause notice thereof to be mailed to each known creditor of the corporation;

(ii) The corporation shall proceed to collect its assets, convey and dispose of such of its properties as are not to be distributed in kind to its shareholders, pay, satisfy and discharge its liabilities and obligations and do all other acts required to liquidate its business and affairs, and, after paying or adequately providing for the remainder of its assets, either in cash or in kind, among its shareholders according to their respective rights and interests;

(iii) The corporation, at any time during the liquidation of its business and affairs, may make application to a court of competent jurisdiction within the state and judicial subdivision in which the registered office or principal place of business of the corporation is situated, to have the liquidation continued under the supervision of the court as provided in this act.

§ 17-1-614. Jurisdiction of court to liquidate assets and business of corporation. (Only subsection (a) is set out here.)

(a) The district courts shall have full power to liquidate the assets and business of a corporation:

(i) In an action by a shareholder when it is established:

(A) That the directors are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, and that irreparable injury to the corporation is being suffered or is threatened by reason thereof; or

(B) That the acts of the directors or those in control of the corporation are illegal, oppressive or fraudulent; or

(C) That the shareholders are deadlocked in voting power, and have failed, for a period which includes at least two (2) consecutive annual meeting dates, to elect successors to directors whose terms have expired or would have expired upon election of their successors; or

(D) That the corporate assets are being misapplied or wasted; or

(E) That the charter, certificate of incorporation or franchise of the corporation has been forfeited for failure to file annual reports, pay license taxes, appoint and maintain a resident agent or registered office and the time provided by law for reinstatement of the corporation has expired.

(ii) In an action by a creditor:

(A) When the claim of the creditor has been reduced to judgment and the execution thereon returned unsatisfied and it is established that the corporation is insolvent; or

(B) When the corporation has admitted in writing that the claim of the creditor is due and owing and it is established that the corporation is insolvent.

(iii) Upon application by a corporation which has filed a statement of intent to dissolve, as provided in this act, to have its liquidation continued under the supervision of the court.

§ 17-1-622. Survival of remedies after dissolution; extending period of duration.

The dissolution of a corporation either by the issuance of a certificate of dissolution by the secretary of state, or by a decree of court when the court has not liquidated the assets and business of the corporation as provided in this act . . . , or by expiration of its period of duration, shall not take away or impair any remedy available to or against the corporation, its directors, officers or shareholders, for any right or claim existing, or any liability incurred, prior to the dissolution if action or other proceeding thereon is commenced within two (2) years after the date of the dissolution. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name. The shareholders, directors and officers have power to take such corporate or other action as appropriate to protect such remedy, right or claim. If such corporation was dissolved by the expiration of its period of duration, such corporation may amend its articles of incorporation at any time during such period of two (2) years so as to extend its period of duration.

SELECTED SECTIONS OF THE REVISED MODEL BUSINESS CORPORATION ACT

§ 1.40 Act Definitions

In this Act:

(6) "Distribution" means a direct or indirect transfer of money or other property (except its own shares) or incurrence of indebtedness by a corporation to or for the benefit of its shareholders in respect of any of its shares. A distribution may be in the form of a declaration or payment of a dividend; a purchase, redemption, or other acquisition of shares; a distribution of indebtedness; or otherwise.

.....

(26) "Voting group" means all shares of one or more classes or series that under the articles of incorporation or this Act are entitled to vote and be counted together collectively on a matter at a meeting of shareholders. All shares entitled by the articles of incorporation or this Act to vote generally on the matter are for that purpose a single voting group.

§ 6.01 Authorized Shares

(a) The articles of incorporation must prescribe the classes of shares and the number of shares of each class that the corporation is authorized to issue. If more than one class of shares is authorized, the articles of incorporation must prescribe a distinguishing designation for each class, and prior to the issuance of shares of a class, the preferences, limitations, and relative rights of that class must be described in the articles of incorporation. All shares of a class must have preferences, limitations, and relative rights identical with those of other shares of the same class except to the extent otherwise permitted by section 6.02.

(b) The articles of incorporation must authorize (1) one or more classes of shares that together have unlimited voting rights, and (2) one or more classes of shares (which may be the same class or classes as those with voting rights) that together are entitled to receive the net assets of the corporation upon dissolution.

(c) The articles of incorporation may authorize one or more classes of shares that:

(1) have special, conditional, or limited voting rights, or not right to vote, except to the extent prohibited by this Act;

(2) are redeemable or convertible as specified in the articles of incorporation (i) at the option of the corporation, the shareholder, or another person or upon the occurrence of a designated event; (ii) for cash, indebtedness, securities, or other property; (iii) in a designated amount or in an amount determined in accordance with a designated formula or by reference to extrinsic data or events;

(3) entitle the holders to distributions calculated in any manner, including dividends that may be cumulative, noncumulative, or partially cumulative;

(4) have preference over any other class of shares with respect to distributions, including dividends and distributions upon the dissolution of the corporation.

(d) The description of the designations, preferences, limitations, and relative rights of share classes in subsection (c) is not exhaustive.

§ 6.02 Terms of Class or Series Determined by Board of Directors

(a) If the articles of incorporation so provide, the board of directors may determine, in whole or in part, the preferences, limitations, and relative rights (within the limits set forth in section 6.01) of (1) any class of shares before the issuance of any shares of that class or (2) one or more series within a class before the issuance of any shares of that series.

(b) Each series of a class must be given a distinguishing designation.

(c) All shares of a series must have preferences, limitations, and relative rights identical with those of other shares of the same series and, except to the extent otherwise provided in the description of the series, with those of other series of the same class.

(d) Before issuing any shares of a class or series created under this section, the corporation must deliver to the secretary of state for filing articles of amendment, which are effective without shareholder action, that set forth:

- (1) the name of the corporation;
- (2) the text of the amendment determining the terms of the class or series of shares;
- (3) the date it was adopted; and
- (4) a statement that the amendment was duly adopted by the board of directors.

§ 6.03 Issued and Outstanding Shares

(a) A corporation may issue the number of shares of each class or series authorized by the articles of incorporation. Shares that are issued are outstanding shares until they are reacquired, redeemed, converted, or cancelled.

(b) The reacquisition, redemption, or conversion of outstanding shares is subject to the limitations of subsection (c) of this section and to section 6.40.

(c) At all times that shares of the corporation are outstanding, one or more shares that together have unlimited voting rights and one or more shares that together are entitled to receive the net assets of the corporation upon dissolution must be outstanding.

§ 6.21 Issuance of Shares

(a) The powers granted in this section to the board of directors may be reserved to the shareholders by the articles of incorporation.

(b) The board of directors may authorize shares to be issued for consideration consisting of any tangible or intangible property or benefit to the corporation, including cash, promissory notes, services performed, contracts for services to be performed, or other securities of the corporation.

(c) Before the corporation issues shares, the board of directors must determine that the consideration received or to be received for shares to be issued is adequate. That determination by the board of directors is conclusive insofar as the adequacy of consideration for the issuance of shares relates to whether the shares are validly issued, fully paid, and nonassessable.

(d) When the corporation receives the consideration for which the board of directors authorized the issuance of shares, the shares issued therefor are fully paid and nonassessable.

(e) The corporation may place in escrow shares issued for a contract for future services or benefits or a promissory note, or make other arrangements to restrict the transfer of the shares, and may credit distributions in respect of the shares against their purchase price, until the services are performed, the note is paid, or the benefits received. If the services are not performed, the note is not paid, or the benefits are not received, the shares escrowed or restricted and the distributions credited may be cancelled in whole or part.

§ 6.30 Shareholders' Preemptive Rights

(a) The shareholders of a corporation do not have a preemptive right to acquire the corporation's unissued shares except to the extent the articles of incorporation so provide:

(b) A statement included in the articles of incorporation that "the corporation elects to have preemptive rights" (or words of similar import) means that the following principles apply except to the extent the articles of incorporation expressly provide otherwise:

- (1) The shareholders of the corporation have a preemptive right, granted on uniform terms and conditions prescribed by the board of directors to provide a fair and

reasonable opportunity to exercise the right, to acquire proportional amounts of the corporation's unissued shares upon the decision of the board of directors to issue them.

(2) A shareholder may waive his preemptive right. A waiver evidenced by a writing is irrevocable even though it is not supported by consideration.

(3) There is no preemptive right with respect to:

(i) shares issued as compensation to directors, officers, agents, or employees of the corporation, its subsidiaries or affiliates;

(ii) shares issued to satisfy conversion or option rights created to provide compensation to directors, officers, agents, or employees of the corporation, its subsidiaries or affiliates;

(iii) shares authorized in articles of incorporation that are issued within six months from the effective date of incorporation.

(iv) shares sold otherwise than for money.

(4) Holders of shares of any class without general voting rights but with preferential rights to distributions or assets have no preemptive rights with respect to shares of any class.

(5) Holders of shares of any class with general voting rights but without preferential rights to distributions or assets have no preemptive rights with respect to shares of any class with preferential rights to distributions or assets unless the shares with preferential rights are convertible into or carry a right to subscribe for or acquire shares without preferential rights.

(6) Shares subject to preemptive rights that are not acquired by shareholders may be issued to any person for a period of one year after being offered to shareholders at a consideration set by the board of directors that is not lower than the consideration set for the exercise of preemptive rights. An offer at a lower consideration or after the expiration of one year is subject to the shareholders' preemptive rights.

(c) For purposes of this section, "shares" includes a security convertible into or carrying a right to subscribe for or acquire shares.

§ 6.31 Corporation's Acquisition of Its Own Shares

(a) A corporation may acquire its own shares and shares so acquired constitute authorized but unissued shares.

(b) If the articles of incorporation prohibit the reissue of acquired shares, the number of authorized shares is reduced by the number of shares acquired, effective upon amendment of the articles of incorporation.

(c) The board of directors may adopt articles of amendment under this section without shareholder action and deliver them to the secretary of state for filing. The articles must set forth:

(1) the name of the corporation;

(2) the reduction in the number of authorized shares, itemized by class and series; and

(3) the total number of authorized shares, itemized by class and series, remaining after reduction of the shares.

§ 6.40 Distributions to Shareholders

(a) A board of directors may authorize and the corporation may make distributions to its shareholders subject to restriction by the articles of incorporation and the limitation in subsection (c).

(b) If the board of directors does not fix the record date for determining shareholders entitled to a distribution (other than one involving a repurchase or reacquisition of shares), it is the date the board of directors authorizes the distribution.

(c) No distribution may be made if, after giving it effect:

(1) the corporation would not be able to pay its debts as they become due in the usual course of business; or

(2) the corporation's total assets would be less than the sum of its total liabilities plus (unless the articles of incorporation permit otherwise) the amount that would be needed, if the corporation were to be dissolved at the time of the distribution, to satisfy the preferential rights upon dissolution of shareholders whose preferential rights are superior to those receiving the distribution.

(d) The board of directors may base a determination that a distribution is not prohibited under subsection (c) either on financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances or on a fair valuation or other method that is reasonable in the circumstances.

(e) The effect of a distribution under subsection (c) is measured:

(1) in the case of distribution by purchase, redemption, or other acquisition of the corporation's shares, as of the earlier of (i) the date money or other property is transferred or debt incurred by the corporation or (ii) the date the shareholder ceases to be a shareholder with respect to the acquire shares;

(2) in the case of any other distribution of indebtedness, as of the date the indebtedness is distributed;

(3) in all other cases, as of (i) the date the distribution is authorized if the payment occurs within 120 days after the date of authorization or (ii) the date the payment is made if it occurs more than 120 days after the date of authorization.

§ 7.03 Court-Ordered Meeting

(a) The [name or describe] court of the county where a corporation's principal office (or, if none in this state, its registered office) is located may summarily order a meeting to be held:

(1) on application of any shareholder of the corporation entitled to participate in an annual meeting if an annual meeting was not held within the earlier of 6 months after the end of the corporation's fiscal year or 15 months after its last annual meeting; or

(2) on application of a shareholder who signed a demand for a special meeting valid under section 7.02 if:

(i) notice of the special meeting was not given within 30 days after the date the demand was delivered to the corporation's secretary; or

(ii) the special meeting was not held in accordance with the notice.

(b) The court may fix the time and place of the meeting, determine the shares entitled to participate in the meeting, specify a record date for determining shareholders entitled to notice of and to vote at the meeting, prescribe the form and content of the meeting notice, fix the quorum required for specific matters to be considered at the meeting (or direct that the votes represented at the meeting constitute a quorum for actions on those matters), and enter other orders necessary to accomplish the purpose or purposes of the meeting.

§ 7.25 Quorum and Voting Requirements for Voting Groups

(a) Shares entitled to vote as a separate voting group may take action on a matter at a meeting only if a quorum of those shares exists with respect to that matter. Unless the articles of incorporation or this Act provide otherwise, a majority of the votes entitled to be cast on the matter by the voting group constitutes a quorum of that voting group for action on that matter.

(b) Once a share is represented for any purpose at a meeting, it is deemed present for quorum purposes for the remainder of the meeting and for any adjournment of that meeting unless a new record date is or must be set for that adjourned meeting.

(c) If a quorum exists, action on a matter (other than the election of directors) by a voting group is approved if the votes cast within the voting group favoring the action exceed the votes cast opposing the action, unless the articles of incorporation or this Act require a greater number of affirmative votes.

(d) An amendment of articles of incorporation adding, changing, or deleting a quorum or voting requirement for a voting group greater than specified in subsection (a) or (c) is governed by section 7.27.

(e) The election of directors is governed by section 7.28.

§ 7.28 Voting for Directors; Cumulative Voting (Brackets in original.)

(a) Unless otherwise provided in the articles of incorporation, directors are elected by a plurality of the votes cast by the shares entitled to vote in the election at a meeting at which a quorum is present.

(b) Shareholders do not have a right to cumulate their votes for directors unless the articles of incorporation so provide.

(c) A statement included in the articles of incorporation that "[all] [a designated voting group of] shareholders are entitled to cumulate their votes for directors" (or words of similar import) means that the shareholders designated are entitled to multiply the number of votes they are entitled to cast the product for a single candidate or distribute the product among two or more candidates.

(d) Shares otherwise entitled to vote cumulatively may not be voted cumulatively at a particular meeting unless:

- (1) the meeting notice or proxy statement accompanying the notice states conspicuously that cumulative voting is authorized; or
- (2) a shareholder who has the right to cumulate his votes gives notice to the corporation not less than 48 hours before the time set for the meeting of his intent to cumulate his votes during the meeting, and if one shareholder gives this notice all other shareholders in the same voting group participating in the election are entitled to cumulate their votes without giving further notice.

§ 7.40 Procedure in Derivative Proceedings

(a) A person may not commence a proceeding in the right of a domestic or foreign corporation unless he was a shareholder of the corporation when the transaction complained of occurred or unless he became a shareholder through transfer by operation of law from one who was a shareholder at that time.

(b) A complaint brought in the right of a corporation must be verified allege with particularity the demand made, if any, to obtain action by the board of directors and either that the demand was refused or ignored or why he did not make the demand. Whether or not a demand for action was made, if the corporation commences an investigation of the changes [sic] [charges?] made in the demand or complaint, the court may stay any proceeding until the investigation is completed.

(c) A proceeding commenced under this section may not be discontinued or settled without the court's approval. If the court determines that a proposed discontinuance or settlement will substantially affect the interest of the corporation's shareholders or a class of shareholders, the court shall direct that notice be given the shareholders affected.

(d) On termination of the proceeding the court may require the plaintiff to pay any defendant's reasonable expenses (including counsel fees) incurred in defending the proceeding if it finds that the proceeding was commenced without reasonable cause.

(e) For purposes of this section, "shareholder" includes a beneficial owner whose shares are held in a voting trust or held by a nominee on his behalf.

§ 8.09 Removal of Directors by Judicial Proceeding (brackets in original)

(a) The [name or describe] court of the county where a corporation's principal office (or, if none in this state, its registered office) is located may remove a director of a corporation from office in a proceeding commenced either by the corporation or by its shareholders holding at least 10 percent of the outstanding shares of any class if the court finds that (1) the director engaged in fraudulent or dishonest conduct, or gross abuse of authority or discretion, with respect to the corporation and (2) removal is in the best interest of the corporation.

(b) The court that removes a director may bar the director from reelection for a period prescribed by the court.

(c) If shareholders commence a proceeding under subsection (a), they shall make the corporation a party defendant.

§ 8.31 Director Conflict of Interest

(a) A conflict of interest transaction is a transaction with the corporation in which a director of the corporation has a direct or indirect interest. A conflict of interest transaction is not voidable by the corporation solely because of the director's interest in the transaction if any one of the following is true:

- (1) the material facts of the transaction and the director's interest were disclosed or known to the board of directors or a committee of the board of directors and the board of directors or committee authorized, ratified the transaction; or
- (2) the material facts of the transaction and the director's interest were disclosed or known to the shareholders entitled to vote and they authorized, approved, or ratified the transaction; or
- (3) the transaction was fair to the corporation.

(b) For purposes of this section, a director of the corporation has an indirect interest in a transaction if (1) another entity in which he has a material financial interest or in which he is a general partner is a party to the transaction or (2) another entity of which he is a director, officer, or trustee is a party to the transaction and the transaction is or should be considered by the board or directors of the corporation.

(c) For purposes of subsection (a)(1), a conflict of interest transaction is authorized, approved, or ratified if it receives the affirmative vote of a majority of the directors on the board of directors (or on the committee) who have no direct or indirect interest in the transaction, but a transaction may not be authorized, approved, or ratified under this section by a single director. If a majority of the directors who have no direct or indirect interest in the transaction vote to authorize, approve, or ratify the transaction, a quorum is present for the purpose of taking action under this section. The presence of, or a vote cast by, a director with a direct or indirect interest in the transaction does not affect the validity of any action taken under subsection (a)(1) if the transaction is otherwise authorized, approved, or ratified as provided in that subsection.

(d) For purposes of subsection (a)(2), a conflict of interest transaction is authorized, approved, or ratified if it receives the [affirmative?] vote of a majority of the shares entitled to be counted under this subsection. Shares owned by or voted under the control of a director who has a direct or indirect interest in the transaction, and shares owned by or voted under the control of an entity described in subsection (b)(1), may not be counted in a vote of shareholders to determine whether to authorize, approve, or ratify a conflict of interest transaction under subsection (a)(2). The vote of those shares, however, shall be counted in determining whether the transaction is approved under other sections of this Act. A majority of the shares, whether or not present, that are entitled to be counted in a vote on the transaction under this subsection constitutes a quorum for the purpose of taking action under this section.

§ 14.07 Unknown Claims Against Dissolved Corporation

(a) A dissolved corporation may also publish notice of its dissolution and request that persons with claims against the corporation present them in accordance with the notice.

(b) The notice must:

(1) be published one time in a newspaper of general circulation in the county where the dissolved corporation's principal office (or, if none in this state, its registered office) is or was last located;

(2) describe the information that must be included in a claim and provide a mailing address where the claim may be sent; and

(3) state that a claim against the corporation will be barred unless a proceeding to enforce the claim is commenced within five years after the publication of the notice.

(c) If the dissolved corporation publishes a newspaper notice in accordance with subsection (b), the claim of each of the following claimants is barred unless the claimant commences a proceeding to enforce the claim against the dissolved corporation within five years after the publication date of the newspaper notice:

(1) a claimant who did not receive written notice under section 14.06;

(2) a claimant whose claim was timely sent to the dissolved corporation but not acted on;

(3) a claimant whose claim is contingent or based on an event occurring after the effective date of dissolution.

(d) A claim may be enforced under this section:

(1) against the dissolved corporation, to the extent of its undistributed assets; or

(2) if the assets have been distributed in liquidation, against a shareholder of the dissolved corporation to the extent of his pro rata share of the claim or the corporate assets distributed to him in liquidation, whichever is less, but a shareholder's total liability for all claims under this section may not exceed the total amount of assets distributed to him.

