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THE NEW WYOMING BUSINESS CORPORATION ACT AND CLOSE CORPORATION SUPPLEMENT

Margaret M. "Margy" White*

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I. INTRODUCTION

In the spring of 1988, Mr. Thomas Long of Hirst and Applegate of Cheyenne, handled a continuance of a Canadian corporation into Wyoming. The continuance law empowers a corporation from another state or from a foreign country to become a Wyoming corporation without a break in corporate status.¹ Similarly, the transfer statute allows a

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1. See, e.g., Wyo. STAT. § 17-16-1710 (1989).

Wyoming corporation to transfer to another state or to a foreign country.² In addition, Wyoming has a domestication statute which permits a corporation from another state to domesticate into Wyoming and become a Wyoming corporation as if it had always been a Wyoming corporation.³ To the author's best knowledge, this trio of laws is unique to Wyoming.⁴

The Canadian corporation used the Wyoming continuance statute to come into the United States.⁵ After having effected the continuance, the new Wyoming corporation merged into a corporation of another state. It availed itself of a flexible Wyoming law but then did not stay here. Secretary of State Kathy Karpan was justifiably concerned and asked Mr. Long why the corporation left Wyoming. Mr Long's answer was clear and unequivocal. The 1961 Wyoming Business Corporation Act (WBCA) created a commercially hostile environment!⁶ The WBCA *required* cumulative voting.⁷ The law *mandated* a two-thirds vote by shareholders in a number of instances, including amendments to the articles of incorporation.⁸ The record date was set at fifty days.⁹

The WBCA had conflicting treatments on pre-emptive rights. Wyoming Statute section 17-1-202(a)(vii) provided that a corporation should include a provision on preemptive rights if "any preemptive right is to be granted to shareholders."¹⁰ This implied that a corporation needed to opt into pre-emptive rights. Another section seemed to impose an opt-out scheme.¹¹ Generally speaking, the WBCA imposed archaic restrictions on corporate finance and on corporate governance.

Upon hearing Mr. Long's complaints against the WBCA, Secretary Karpan decided that her office should undergo a complete review of the WBCA. Secretary Karpan wrote Senator Charles Scott, Chair of the Senate Corporations Committee and Representative Patti MacMillan, Chair of the House Corporations Committee. Senator Scott recognized the importance of this task and agreed to serve on the Secretary of State's Corporation Code Revision Committee (The Committee). Secretary Karpan asked Mr. Tom Long of Hirst and Applegate in Cheyenne, Mr. Donn McCall of Brown and Drew in Casper, Mr. Phil Whynott, a sole practitioner in Cheyenne, Mr. Phelps Swift of Mullikin, Larson

2. *Id.* § 17-16-1720.

3. *Id.* § 17-16-1701.

4. Delaware has a domestication and transfer statute which allows non-United States corporations to domesticate within the state. *See* DEL. CODE ANN. tit. 8 § 388 (Supp. 1988).

5. *Id.* § 17-1-803 (1977) (renumbered, current statute at *Id.* § 17-16-1710 (1989)).

6. *Id.* §§ 17-1-101 to 17-1-1101 (1977) (repealed 1989).

7. *Id.* § 17-1-130(d) (repealed 1989). The legislature allowed any corporation to exempt itself from mandatory cumulative voting by so amending its articles of incorporation; effective March 9, 1989. 1989 Wyo. Sess. Laws 607.

8. WYO. STAT. § 17-1-302(a)(iii) (repealed 1989).

9. *Id.* § 17-1-127 (repealed 1989). Most states have a sixty-day record date. Companies need the additional ten days to handle work with the Securities and Exchange Commission.

10. *Id.* § 17-1-202(a)(vii) (repealed 1989).

11. *Id.* § 17-1-123 (repealed 1989).

and Swift in Jackson, Mr. Curt Kaiser, an Investment Banker in Cheyenne and Mr. Dennis Stickley, Corporate Counsel of the Little America Corporation to also serve on the Committee. All of these gentlemen gave hundreds of volunteer hours on the Committee. The total work exceeded 1,800 hours! The Committee met in July, August, September and November of 1988 and presented a package of bills to the 1989 Wyoming Legislature. All were passed and received outstanding bi-partisan support in both chambers of our Legislature.

The Committee package consisted of the Revised Wyoming Business Corporations Act (RWBCA),¹² the Close Corporation Supplement (CCS),¹³ and the Management Stability Act.¹⁴

II. PURPOSE OF THIS ARTICLE

This article will not discuss the intricacies of corporate law. Rather, the purpose of this article is to provide a history of the Committee packet.

The Committee was mindful of the fact that a complete rewrite of a major commercial law should include background references for use by those in the future who would be called upon to interpret the act for clients or to resolve a dispute among litigants. To accomplish this, the Committee did *not* start from scratch and write the law itself. The Committee decided that the 1984 American Bar Association Revised Model Business Corporation Act¹⁵ and the 1984 American Bar Association Model Statutory Close Corporation Supplement should be the starting points.¹⁶

III. HISTORY BEHIND THE NEW ACTS

A. *The Official Comments of the ABA Committee on Corporate Laws*

The ABA Committee wrote a report, with Official Comment, on the revised Act.¹⁷ The Official Comment was adopted by the Wyoming Legislature as its Official Comment.¹⁸ This was done at the behest of the Committee. Section four of chapter 249 of the 1989 Wyoming Session Laws reads:

The legislature finds that this act is modeled from the Revised Model Business Corporation Act that was adopted by the Committee on Corporate Laws of the American Bar Association in

12. *Id.* §§ 17-16-101 to 17-16-1803 (1989).

13. *Id.* §§ 17-17-101 to 17-17-151.

14. *Id.* §§ 17-18-101 to 17-18-206.

15. REV. MODEL BUSINESS CORP. ACT §§ 1.01-7.05 (1984) (RMBCA).

16. MODEL CLOSE CORPORATION SUPP. (1984) (MCCS). The REVISED WYOMING BUSINESS CORPORATION ACT (RWBCA) is based largely on the 1984 Model Act.

17. MODEL BUSINESS CORP. ACT. ANNOT. (1984). The third edition of this four-volume set is available through Prentice-Hall, Law and Business, 910 Sylvan Ave., Englewood Cliffs, N.J. 07362.

18. 1989 Wyo. Sess. Laws 607.

1984 and that the comments to the Model Act should be used in interpreting this act.¹⁹

Although the Committee failed to ensure the same language appeared in Chapter 201 of the 1989 Wyoming Session Laws which created the Close Corporation Supplement, the author submits that the legislature was acutely aware that the Close Corporation Supplement was based on model legislation and, as a consequence, the Official Comment to the Model Close Corporation Supplement should be an interpretative tool. The comments appear after each section, explain the statute, and cite the applicable and specific case law which justifies the statute.

The 1984 ABA Model Act has sections numbered 1.01 through 17.05.²⁰ Wishing to avoid the problems created by the numbering of the Wyoming Uniform Commercial Code,²¹ the Committee adopted the same numbering scheme while still meeting the Wyoming Statutes numbering system. For instance, the Model Act section 1.20 is Wyoming Statute section 17-16-120 in the RWBCA. This should facilitate tracking between the two laws.

B. General Comments about the RWBCA

The Committee is confident that Wyoming practitioners will find the RWBCA "reader friendly," and well organized. In addition, the RWBCA has many sections which answer procedural questions such as what constitutes notice and when it is effective.²² The section of definitions is enlarged and improved.²³ In addition, the RWBCA contains a very helpful section detailing when, and on what basis, a corporation may accept the vote of a shareholder.²⁴

In general, the RWBCA is flexible. It allows the corporation to "opt into" restrictions as opposed to "opting out" of restrictions as required by the previous act. If a corporation wants cumulative voting,²⁵ preemptive rights,²⁶ super-majority voting requirements²⁷ or the other shareholder empowerments, then it must simply provide so in the articles of incorporation. The simplest articles confer the greatest power on the board of directors and corporate management. If the articles contain only the four basic requirements, then they do not confer the traditional shareholder protections.²⁸

19. *Id.* (emphasis added).

20. RWBCA §§ 1.01-17.05 (1984).

21. WYO. STAT. §§ 34-21-101 to 34-21-1002 (1977) (The author remembered Professor Van Baalen's frustration over this).

22. *Id.* § 17-16-141 (1989).

23. *Id.* § 17-16-140.

24. *Id.* § 17-26-724.

25. *Id.* § 17-16-728. (If a shareholder is entitled to cumulate his votes, he must give notice to the corporation of his intent to cumulate his votes.)

26. *Id.* § 17-16-630.

27. *Id.* § 17-16-1003(e).

28. *Id.* § 17-16-202(a)(i)-(iv). The articles must set forth a corporate name, the number of authorized shares, the corporation's initial registered address, and the name and address of each incorporator. *Id.*

The RWBCA has abolished senseless procedural requirements such as duplicate originals,²⁹ verification,³⁰ paid in capital,³¹ and initial boards of directors.³² Again, if counsel wishes to include these restrictions or impose these requirements, he or she may. The RWBCA allows any type of entity, human, political or corporate, to be an incorporator;³³ for instance, a water and sewer district, a trust or an estate may act as an incorporator.³⁴ Unless otherwise stated in the articles, a corporation is presumed to be perpetual and able to engage in any lawful purpose.³⁵

The secretary of state's duty of filing articles of incorporation becomes ministerial. Under the WBCA, the secretary of state was charged with reviewing all filings to ensure they "conformed to law."³⁶ Under the RWBCA, the filing officers are only required to check the minimum statutory requirements.³⁷ There is no presumption, though, that the corporation has been legally formed.

The RWBCA eliminates the concept of treasury shares; if a corporation reacquires any of its shares, then those shares are simply part of the authorized but unissued shares of the company.³⁸ The concepts of "par value" and "stated capital" are gone. The RWBCA recognizes that matters of internal corporate finance should not generally be subject to state regulation. It does restrict distributions when the corporation is insolvent or near to it.³⁹

The RWBCA contains a substantial list of activities which do not constitute "doing business."⁴⁰ This will be very helpful to the practi-

29. WYO. STAT. § 17-16-120.

30. *Id.*

31. *Id.* § 17-16-202.

32. *Id.*

33. *Id.* § 17-16-140(a)(xvii).

34. *Id.*

35. *Id.* §§ 17-16-301, 17-16-302.

36. *Id.* § 17-1-203 (repealed 1989).

37. *Id.* § 17-16-203 (1989).

38. *Id.* § 17-16-621.

39. *Id.* § 17-16-640(c).

40. *Id.* § 17-16-1501(b):

(b) The following activities, among others, do not constitute transacting business within the meaning of subsection (a) of this section:

- (i) Maintaining, defending or settling any proceeding;
- (ii) Holding meetings of the board of directors or shareholders or carrying on other activities concerning internal corporate affairs;
- (iii) Maintaining offices or agencies for the transfer, exchange and registration of the corporation's own securities or maintaining trustees or depositaries with respect to those securities;
- (v) Selling through independent contractors;
- (vi) Soliciting or obtaining orders, whether by mail or through employees or agents or otherwise, if the orders require acceptance outside this state before they become contracts;
- (vii) Creating or acquiring indebtedness, mortgages and security interests in real or personal property;
- (viii) Securing or collecting debts or enforcing mortgages and security interests in property securing the debts;

tioner in determining whether a foreign corporate client must register to do business because of certain transactions.

The following discussion will review each section of the Revised Model Business Corporations Act which the Committee chose to modify and explain where and why the Committee deviated from the Model Act when writing Wyoming's Act.⁴¹

IV. SECTION BY SECTION ANALYSIS

A. *Article 1. General Provisions*

Model section 1.20, dealing with filing requirements, provides that a document in a foreign language should be accompanied by a "reasonably authenticated English translation."⁴² The Committee changed this to read that the document in a foreign language should be accompanied by an "English translation acceptable to the secretary of state."⁴³ The Committee thought this would be simpler to administer.

Model section 1.20(g) simply states that a document must be signed.⁴⁴ The Committee added the word "manually" to denote that a document presented for filing should be originally signed with one conformed copy.⁴⁵

Model section 1.21 empowers the secretary of state to require certain mandatory forms.⁴⁶ By rule, the secretary of state has prescribed six mandatory forms:

- 1) A foreign corporation's Application for Certificate of Authority to Transact Business.
- 2) A foreign corporation's Application for Certificate of Withdrawal.

-
- (ix) Owning, without more, real or personal property;
 - (x) Conducting an isolated transaction that is completed within thirty (30) days and that is not one in the course of repeated transactions of a like nature; or
 - (xi) Transacting business in interstate commerce.

41. The following provisions incorporated the corresponding provisions of the Model Act and Official Comment in their entirety, apart from minor language changes. Wyo. STAT. §§ 17-16-101, 17-16-102, 17-16-123, 17-16-124, 17-16-127, 17-16-128, 17-16-129, 17-16-142, 17-16-201, 17-16-203, 17-16-204, 17-16-205, 17-16-301, 17-16-304, 17-16-402, 17-16-501 to 17-16-504, 17-16-602 to 17-16-604, 17-16-620 to 17-16-631, 17-16-640, 17-16-701, 17-16-702, 17-16-706, 17-16-707, 17-16-722 to 17-16-724, 17-16-726, 17-16-728, 17-16-730, 17-16-740, 17-16-801 to 17-16-805, 17-16-807 to 17-16-811, 17-16-821 to 17-16-824, 17-16-831, 17-16-832, 17-16-840, 17-16-841, 17-16-843, 17-16-844, 17-16-852 to 17-16-855, 17-16-1001 to 17-16-1007, 17-16-1009, 17-16-1020, 17-16-1101 to 17-16-1103, 17-16-1105, 17-16-1106, 17-16-1110 to 17-16-1114, 17-16-1201 to 17-16-1202, 17-16-1303 to 17-16-1331, 17-16-1401 to 17-16-1403, 17-16-1405, 17-16-1423 to 17-16-1433, 17-16-1501, 17-16-1504, 17-16-1505, 17-16-1508, 17-16-1509, 17-16-1510, 17-16-1531, 17-16-1532, 17-16-1601, 17-16-1603, 17-16-1604, 17-16-1621 (1989).

42. RMBCA § 1.20(e) (1984).

43. Wyo. STAT. § 17-16-120(e) (1989).

44. RMBCA § 1.20(g) (1984).

45. Wyo. STAT. § 17-16-120(g) (1989).

46. RMBCA § 1.21 (1984).

3) The Annual Report;

4) A foreign corporation's Application for Certificate of Continuance;

5) An Application for Certificate of Transfer;

6) A foreign corporation's Application for Certificate of Domestication.⁴⁷

Model Act section 1.22 contemplated that the filing fees would be set forth in the statute.⁴⁸ The Committee decided against this approach and instead agreed that filing fees should be based on the administrative cost of filing the document, and the legislature agreed.⁴⁹ Secretary Karpan has rules on file which contain the fee schedule⁵⁰ (see Appendix A).

Model section 1.25 eliminates the concept of a Certificate of Incorporation and other similar certificates.⁵¹ The Model Act and the RWBCA contemplate that the stamped "filed" copy which is returned to the submitter is adequate evidence of incorporation. The Committee believed that if the submitter wants a certificate evidencing the filing of the document, the secretary of state could issue one.⁵²

Model section 1.26 addresses how to appeal from the secretary of state's refusal to file a document.⁵³ The Committee added additional court locations beyond the district court of Laramie County to this section for persons appealing the secretary of state's refusal to file a document.⁵⁴

The Committee added language to Model section 1.30 giving the secretary of state explicit rule-making authority to carry out the purposes of the act.⁵⁵

The Committee added the definitions of "net assets" and "this Act" to the corresponding Model section.⁵⁶ The Committee amended the definitions of "entity," "governmental subdivision" and "person" to cover all types of entities, whether public or private.⁵⁷ Finally, the Committee added to Model section 1.41 that delivery can also be effected by a private mail carrier.⁵⁸

47. Permanent Rules of the Secretary of State (filed April 25, 1990).

48. RMBCA § 1.22 (1984).

49. WYO. STAT. § 17-16-122 (1989).

50. Permanent Rules *supra* note 47.

51. RMBCA § 1.25 (1984).

52. WYO. STAT. § 17-16-125 (1989).

53. RMBCA § 1.26 (1984).

54. WYO. STAT. § 17-16-126 (1989).

55. *Id.* § 17-16-130. The general consensus in Wyoming is that an agency must have explicit rule-making authority.

56. *Id.* § 17-16-140.

57. *Id.*

58. *Id.* § 17-16-141. "Federal Express" is an example of a private mail carrier.

B. Article 2. Incorporation

The Committee changed Model section 2.02, dealing with the Articles of Incorporation, to allow a corporation to have unlimited authorized shares.⁵⁹ The Committee wished to eliminate a trap for the unwary; namely that as a corporation grows, it issues shares in excess of the named authorized shares stated in the articles.

In addition, the Committee added that articles of incorporation must be accompanied by a written consent to serve signed by the named registered agent.⁶⁰ The Secretary of State's Corporations Division has found on several occasions that a corporation will name a registered agent without the person's knowledge or consent.

Model Act section 2.06 requires that initial bylaws be adopted and that bylaws may contain any provisions for managing the business which are not violative of the law or the articles.⁶¹ The section was silent on the consequences and procedures if bylaws are not adopted. The Committee added fail safe language outlining minimal corporate procedures such as when the annual meeting must be held and which corporate officers are necessary.⁶²

Model section 2.07 empowers the board to adopt emergency by-laws for use during an emergency.⁶³ An emergency is defined as an inability to assemble a quorum because of a catastrophic event.⁶⁴ The Committee decided to replace the word "catastrophic" with "extraordinary" because the latter is broader.⁶⁵ For example, a major airline may be on strike which makes it impossible for directors to get to a meeting. This is not catastrophic, but it is extraordinary.

C. Article 3. Purpose and Powers

The Model Act sets forth a list of corporate powers.⁶⁶ One of the powers is to transact any lawful business that "will aid governmental policy."⁶⁷ The Committee did not know what the drafters meant by the phrase "aiding governmental policy" so it deleted the language.⁶⁸

The Model Act grants a corporation emergency powers in response to catastrophic events.⁶⁹ The Committee again changed "catastrophic" to "extraordinary."⁷⁰

59. *Id.* § 17-16-202(a)(ii).

60. *Id.* § 17-16-202(d).

61. RMBCA § 2.06 (1984).

62. WYO. STAT. § 17-16-206(c) (1989).

63. RMBCA § 2.07 (1984).

64. *Id.* § 2.07(d).

65. WYO. STAT. § 17-16-207 (1989).

66. RMBCA § 3.02 (1984).

67. *Id.* § 3.02(14).

68. WYO. STAT. § 17-16-302 (1989).

69. RMBCA § 3.03 (1984).

70. WYO. STAT. § 17-16-303(d) (1989).

D. Article 4. Name

The Committee substantially deviated from the Model Act section 4.01 which deals with corporate names.⁷¹ The Model Act rejected the historic test that a proposed business entity name cannot be “deceptively similar” to a business entity name currently on file. Instead, the Model Act allows a corporate name to be filed so long as it is “distinguishable upon the records of the secretary of state.”⁷² Generally, this means that two names may be nearly identical but both can be filed so long as a filing officer can differentiate between the two; such as ABC Corporation and ABC Enterprises.

The Committee chose to keep the deceptively similar standard and the Wyoming Legislature agreed.⁷³ Secretary of State Kathy Karpan is having second thoughts about this choice. In researching the law on what is deceptively similar, Secretary Karpan learned that the Wyoming Supreme Court has ruled that state tradename laws are not intended to grant a property right, that is the exclusive right to use of the name, to the registrant.⁷⁴ To the contrary, the intent of these laws is to protect the public from being deceived.⁷⁵ A business is entitled to exclusivity based on usage (obtained from private litigation as opposed to registration with the state).⁷⁶ Of course, this case applies to a banking institution with a trade name. It is open for debate whether this precedent applies to corporation name statutes.

One confusion arising from the “deceptively similar” standard is that registrants might believe that the registration with the secretary of state’s office bestows a property right on them! Granted, if this office does reject a proposed name because there is a deceptively similar name on file, there is a consequential protection of the name on file. But is it worth the misunderstanding that somehow the secretary of state is the watchdog against unfair competition?

Secretary Karpan has discussed this issue with Mr. Tony Lewis, Acting Executive Director of the Wyoming State Bar. They agreed that this office and the Bar should study this issue and make recommendations. If Wyoming went with the Model Act, then the Secretary of State’s Corporations Division could quickly pass upon name availability questions.⁷⁷

71. *Id.* § 17-16-401.

72. RMBCA § 4.01 (1984).

73. WYO. STAT. § 17-16-401.

74. *First National Bank of Lander v. First Wyoming Savings and Loan* 592 P.2d 697, 704-05 (Wyo. 1979).

75. *Id.*

76. *Id.* at 704.

77. Under the rules promulgated by Secretary of State Karpan, whether a name is deceptively similar depends upon a two part test: Is the proposed name similar in appearance to, similar in sound to or has common words with the authorized name? If so, is the proposed business name user engaged in a similar business as the authorized business name user? Permanent Rules *supra* note 47.

The Committee did keep the Model Act provision allowing the secretary of state to file a deceptively similar name if the authorized name user irrevocably consents in writing.⁷⁸ This will be a helpful provision. However, if name registration statutes are to protect the public, should a business be able to consent to the use of another name which might confuse the public? The secretary of state recognizes these questions demand a great deal more attention and thought. The Committee removed the Model Act requirement that a corporate name must include the word "incorporated" or "limited" or abbreviations to that effect.⁷⁹

Section 4.03 of the Model Act allows a foreign corporation to register its name with different states for protection if it begins doing business in different states.⁸⁰ The Committee decided against inclusion of this concept, although meritorious, for very pragmatic reasons.⁸¹ To register names would require the adding of a new feature to the Corporations Division computer system. To implement this new feature would have required money and a fiscal note on the bill. The Committee did not want to jeopardize the bill because of a fiscal note. The reader should not confuse registering of a name with the reservation of a name. Any person or entity may reserve a business name for a one hundred and twenty day period, which is non-renewable.⁸²

E. Article 6. Shares and Distributions

The Committee adopted the Model Act section on share authorization. In addition, the Committee added the ability to authorize unlimited shares.⁸³

F. Article 7. Shareholders

Section 7.03 of the Model Act allows a court to order a special meeting of the shareholders under certain circumstances.⁸⁴ One circumstance is when a shareholder has demanded a special meeting and the special meeting is not held within a certain number of days from the demand.⁸⁵ The Model section requires the corporation to give notice of the meeting within thirty days of the demand; otherwise a court remedy is available.⁸⁶ The Wyoming section gives the corporation more time to prepare and notify shareholders of the meeting. The Committee increased the lag time from thirty to sixty days.⁸⁷

The language of Wyoming Statute section 17-16-704⁸⁸ differs from the Model Act language⁸⁹ even though the meanings of the provisions

78. WYO. STAT. § 17-16-401 (1989).

79. *Id.*

80. RMBCA § 4.03 (1984).

81. WYO. STAT. § 17-16-403 (1989).

82. *Id.* § 17-16-402(a).

83. *Id.* § 17-16-601.

84. RMBCA § 7.03 (1984).

85. *Id.* § 7.03(2)(i).

86. *Id.*

87. WYO. STAT. § 17-16-703(a)(ii)(A) (1989).

88. *Id.* § 17-16-704.

89. RMBCA § 7.04 (1984).

are synonymous. The Committee, in its original bill, changed this section to allow action without a meeting and with only a majority of the shareholders voting. The Model Act required unanimous consent for an action without a meeting. The Committee made this change not realizing that other provisions of the Act relied upon the unanimous consent aspect of this statute. Fortunately, Representative Lynn Dickey (D - Sheridan County) asked local attorneys to review the bills. Several Sheridan attorneys caught this error and reported it to Representative Dickey and the House Corporations Committee. In the House Corporations Committee, the bill was amended to restore unanimous consent. Under this statute, notice of the proposed action must be given to all voting shareholders and the action must be taken by holders of *all shares entitled to vote on the action*.⁹⁰

Model section 7.05 explains the record date for determining which shareholders are entitled to notice.⁹¹ Under subsection (d) of the Model Act, the record date is at the close of business on the day before the first notice is delivered unless the corporation fixes a different date.⁹² The Committee deleted the phrase "at the close of business."⁹³

Subsection (d) of section 7.20 relates to the judicial remedies available to a shareholder when a corporation does not allow a shareholder to inspect and copy the shareholder list prepared for a meeting.⁹⁴ The Committee added language providing that, in addition to the court ordering the corporation to copy the list at its own expense, the court may order the corporation to pay court costs and legal fees arising from the litigation.⁹⁵

The Committee adopted the Model language of section 7.21, dealing with voting entitlement of shares, except it deleted the phrase "absent special circumstances" found in Model subsection (b).⁹⁶ The Committee reasoned that the phrase "absent special circumstances" was meaningless and that removing the phrase gave the statute greater certainty.

Model section 7.25 covers quorum and voting requirements.⁹⁷ The Committee removed subsection (d) and made it a reserved section.⁹⁸ Subsection (a) of the Model Act referred to section 7.27 which the Committee chose not to include.⁹⁹ Because the Committee did not adopt section 7.27, it omitted the reference to section 7.27.

90. WYO. STAT. § 17-16-704(a).

91. RMBCA § 7.05 (1984).

92. *Id.* § 7.05(d).

93. WYO. STAT. § 17-16-705.

94. RMBCA § 7.20 (1984).

95. WYO. STAT. § 17-16-720(d) (1989).

96. *Id.* § 17-16-721.

97. RMBCA § 7.25 (1984).

98. WYO. STAT. § 17-16-725 (1989).

99. RMBCA § 7.27 (1984). Model section 7.27 does not appear in the RWBCA. Section 7.27(b) reads:

An amendment to the articles of incorporation that adds, changes or deletes a greater quorum or voting requirement must meet the same quorum

Under the language of Model section 7.27(b), if the proposed amendment is to increase an eighty percent (80%) requirement to ninety percent (90%), the amendment must be approved by a ninety percent (90%) affirmative vote.¹⁰⁰ The Committee opted against this because of its effect in a corporate takeover bid. If management wanted to thwart a takeover by increasing the voting requirement, then it would be helpful to do this by meeting the current voting requirement which, in the example, is 80%.

The Model Act allowed two or more shareholders to enter into voting agreements.¹⁰¹ The Committee expanded this to empower any shareholder to enter into a voting agreement with the corporation as well as another shareholder.¹⁰²

G. Article 8. Directors and Officers

Model section 8.06 allows staggering of directors' terms if there are nine or more directors.¹⁰³ The Committee decreased the number of directors to three¹⁰⁴ since the previous Wyoming corporations act contemplated staggered terms with boards of three or more.¹⁰⁵

Model section 8.20 provides for special board meetings by any "means of communication by which all directors participating may simultaneously hear each other . . ."¹⁰⁶ The Committee chose to replace the phrase "simultaneously hear" with "communicate with."¹⁰⁷ The Committee felt that this would give boards more flexibility. There may be new technologies where there can be "fax" conferences as opposed to the now existing conference call. Also, the Model language could create problems if there was a director who was deaf.

The Committee liberalized Model section 8.25 to allow committees of one.¹⁰⁸ The Model Act required a committee to have two or more members.¹⁰⁹ The Committee changed this to give the corporation more flexibility in this area.

The Committee also amended subsection (e) of section 8.25. Under the Model Act, subsection (e) sets forth eight board powers which a committee could not exercise.¹¹⁰ The Committee changed subsection (e) to

requirement and be adopted by the same vote and voting groups required to take action under the quorum and voting requirements then in effect or proposed to be adopted, whichever is greater.

100. *Id.*

101. *Id.* § 7.31.

102. WYO. STAT. § 17-16-731 (1989).

103. RMBCA § 8.06 (1984).

104. WYO. STAT. § 17-16-806 (1989).

105. *Id.* § 17-1-134.1 (1977) (repealed 1989).

106. RMBCA § 8.20 (1984).

107. WYO. STAT. § 17-16-820 (1989).

108. *Id.* § 17-16-825.

109. RMBCA § 8.25.

110. *Id.* § 8.25(e):

(e) A committee may not, however:

(1) authorize distributions;

read that a committee is prohibited from acting in these matters unless expressly authorized by the board of directors.¹¹¹ Again, the Committee enlarged the section to give more flexibility to the board.

Section 8.30 pertains to the standard of conduct for directors.¹¹² The Committee made what many may consider a major change.¹¹³ The Model Act section 8.30 stated that a director should act, in good faith, with the care an ordinarily prudent person could exercise in similar circumstances and in a manner he "*reasonably believes to be in the best interest of the corporation.*"¹¹⁴ The Wyoming Statute provides "in a manner he reasonably believes to be in, or at least not opposed to, the best interests of the corporation."¹¹⁵

Mr. Long, a member of the Committee, stated that the phrase "at least not opposed to" would give directors more flexibility and leeway in making decisions. If Wyoming "liberalized" the standard, Wyoming could possibly attract corporations, especially given the extremely favorable tax environment.

In general, the Model Act phrase "in the best interests of the corporation" is a traditional test and means what is best for the shareholders. Thus, if a director wished to meet the "best interests" standard of care, he or she would only consider the shareholders, that is what would increase bottom line earnings, even though it may have a detrimental effect on employees or the community in which the corporation is located. By adding the language or "at least not opposed to," directors are empowered to consider other interests and outcomes without the risk of breaching their duty as directors.

Mr. Salisbury Adams, a man with nationally distinguished law credentials, sat with the Committee when it met in Jackson. Mr. Adams was emphatic in his assertion that America is at a dangerous cross-road. He was concerned that talented, skillful and innovative people were refusing to serve on corporate boards of directors because of potential liability. Mr. Adams observed that corporate directors are fright-

(2) approve or propose to shareholders action that this Act requires be approved by shareholders;

(3) fill vacancies on the board of directors or on any of its committees;

(4) amend articles of incorporation pursuant to section 10.02;

(5) adopt, amend, or repeal bylaws;

(6) approve a plan of merger not requiring shareholder approval;

(7) authorize or approve reacquisition of shares, except according to a formula or method prescribed by the board of directors; or

(8) authorize or approve the issuance or sale or contract for sale of shares, or determine the designation and relative rights, preferences, and limitations of a class or series of shares, except that the board of directors may authorize a committee (or a senior executive officer of the corporation) to do so within limits specifically prescribed by the board of directors.

111. WYO. STAT. § 17-16-825(e).

112. RMBCA § 8.30 (1984).

113. WYO. STAT. § 17-16-830 (1989).

114. RMBCA § 8.30.

115. WYO. STAT. § 17-16-830.

ened by what courts are doing with director liability, by the absence of insurance, and by the dangers arising from recorded (or discoverable) open and candid board room debate.¹¹⁶ Mr. Adams and many members of the Committee envisioned that a less restrictive director standard may be what the future holds and attempted to position Wyoming at the forefront.

The author stresses this issue caused a major debate among the Committee members. No one wanted the duty of loyalty emasculated to the point where an injured shareholder or third party has no redress. The Committee, by a majority vote, agreed to the amendment, on the theory that the duty of loyalty should be broadened to empower directors to make a decision based on a number of factors, not just bottom line profits for the shareholders one hundred percent of the time.

Wyoming Statute section 17-16-830 as introduced in the Senate read in part:

A director shall discharge his duties as a director, including duties as a member of a committee:

- (i) In good faith;
- (ii) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
- (iii) In a manner he reasonably believes to be in or at least not opposed to the best interests of the corporation.¹¹⁷

The Senate adopted the Committee's theory on the directors' duties.¹¹⁸

In the House, it was a different story. Four Wyoming attorneys wrote to Representative Lynn Dickey (D - Sheridan County) concerned about the standard of conduct for directors. These attorneys wrote, "in any event, a reduction in the standards for corporate loyalty is probably not appropriate."¹¹⁹ Representative Steve Freudenthal (D-Laramie County) also harbored concerns about the change to the Model Act director duty standard. The House Corporations Committee Chair, Representative Patti MacMillan (R - Albany County) appointed a sub-committee to study the engrossed bill and make recommendations to the full House Corporations Committee. The sub-committee was comprised of

116. The Committee recommended to the Legislature that the RWBCA contain a provision on "executive meetings." The Committee hotly debated this concept and by a less than unanimous vote, adopted a method by which a corporate board of directors could go into executive session and protect any communications therein from discovery except in certain circumstances such as the issuance of a search warrant. The Senate embraced the idea. The House rejected it and the Senate ultimately agreed to the deletion of the proposed § 17-16-826 in order to save the bill. Of course, there are the obvious arguments against this concept, but many in the corporate world might argue it is necessary, if America is to regain its competitive edge against Pacific Rim countries.

117. S.F. 137, 50th Leg., Gen. Sess. § 17-16-830 (1989).

118. *Id.*

119. February 6, 1989 letter to Representative Lynn Dickey (D - Sheridan County).

Representative Eli Bebout (D - Fremont County), Representative John DeWitt (R - Park County), Representative Steve Freudenthal (D - Laramie County) and Representative Dorothy Perkins (R - Natrona County). The Sub-Committee submitted a report to Chairman MacMillan on February 14, 1989. The sub-committee chose not to make any recommendations to the full committee on the director/officer duty question.

In the House Corporations Committee hearing, it was apparent that the House committee was leaning towards the strict Model Act test. The House committee did not seem willing to go with the Senate's wishes that the standard simply read "in the best interests of, or at least not opposed to, the best interests of the corporation."¹²⁰ In the end, a compromise was reached. The House assented to the Senate's wishes that the standard be "liberalized." However, for that concession, Committee members agreed to, and the Senate ultimately approved, additional language specifically defining what other interests a director may consider.¹²¹

Subsection (e) was taken from a New Mexico statute.¹²² There are other states which have either the "not opposed to" standard, or in addition, the list of factors.¹²³ These different statutes were discussed by the House Corporations Committee and should be considered an important component of the legislative history of Wyoming's section 17-16-830.

There may be statutory language from other states which uses the term "contrary to" instead of "opposed to." The Committee believed these terms were synonymous and thus argues that any case law interpreting the phrase "contrary to" was applicable to the RWBCA duty provisions.

The reader should note that the Committee used section 8.33 pertaining to unlawful distributions from the 1988 Supplement of the Model Business Corporation Act Annotated.¹²⁴ Also, the Committee added subsection (c) to bar any proceeding against a director for unlawful distributions unless commenced within two years of a date specified in the statute.¹²⁵ This is not in the Model Act and the Committee intended it to attract the attention of management at larger corporations.

There is no equivalent to Wyoming Statute section 17-16-834 in the Model Act.¹²⁶ This section was carried over from the WBCA.¹²⁷ In

120. WYO. STAT. § 17-16-830(e) represents this compromise.

121. S.F. 137, 50th Leg., Gen. Sess., § 17-16-830(a)(iii) (1989).

122. N.M. STAT. ANN. § 53-11-35(B) (Supp. 1989).

123. OHIO REV. CODE ANN. § 1701.59 (Baldwin 1986). *See also* ME. REV. STAT. ANN. tit. 13-A, § 716 (Supp. 1989).

124. RMBCA § 8.33 (Supp. 1988).

125. WYO. STAT. § 17-16-833(c) (1989).

126. *Id.* § 17-16-834.

127. *Id.* § 17-1-202(c) (1977) (repealed 1989).

1987, the legislature approved the section allowing a corporation to eliminate or limit the personal liability of its directors except under four circumstances.¹²⁸ The 1987 law was based on a Delaware statute and the 1987 legislature clearly had that law in mind when it passed the statute.¹²⁹

The Committee and the legislature amended the standard for officers in the same way as for directors.¹³⁰

Because the Committee eliminated the distinction between "official capacity" and "other capacity,"¹³¹ it omitted the definition in Wyoming's provision.¹³² In the Model Act, the official capacity indemnification required the director act in the "best interests of" but contemplated the "at least not opposed to" standard for unofficial acts.¹³³ Since the Committee adopted the "at least not opposed to" standard for all acts of the director, this two-tiered concept was unnecessary.

The Committee added the language "current or former" to Model section 8.56 regarding officers, employees and agents.¹³⁴ The definition of director included former directors,¹³⁵ and the Committee wished to extend this to former officers, employees or agents.

The Model Act in section 8.58 mandates that any provisions concerning indemnification or advance of expenses to *directors* (not officers, employees or agents) which are contained in the corporation's articles of incorporation, by-laws, resolutions or contracts are "valid only if and to the extent the provision[s] [are] consistent with this sub-chapter."¹³⁶ The indemnification statute adopted by the Wyoming Legislature in 1987 took the opposite approach.¹³⁷ The prior Wyoming statute stated that:

[T]he indemnification and advancement of expenses authorized by this section shall not be exclusive of any other rights to which any director, officer, employee or agent may be entitled¹³⁸

The Committee found the official comment on exclusivity to be unpersuasive and consequently incorporated Wyoming Statute section 17-1-105.1(e) into the RWBCA as section 17-16-858(a).¹³⁹ The last sentence of Model Act section 8.58(a) became Wyoming Statute section 17-16-858(b),¹⁴⁰ and Model Act section 8.58(b) became Wyoming Statute section 17-16-858(c).¹⁴¹

128. 1987 Wyo. Sess. Laws 580.

129. DEL. CODE ANN. tit. 8 § 102(b)(7) (Supp. 1988).

130. WYO. STAT. § 17-16-842 (1989).

131. *Id.* § 17-16-851.

132. *Id.* § 17-16-850.

133. RMBCA § 8.51 (1984).

134. WYO. STAT. § 17-16-856 (1989).

135. *Id.* § 17-16-850.

136. RMBCA § 8.58 (1984).

137. 1987 Wyo. Sess. Laws 397.

138. WYO. STAT. § 17-1-105.1(e) (repealed 1989).

139. *Id.* § 17-16-858(a) (1989).

140. *Id.* § 17-16-898(b).

141. *Id.* § 17-16-858(c).

H. Article 10. Amendment of Articles of Incorporation and Bylaws

The Committee added "court-ordered" to the title of section 10.08, pertaining to article amendment.¹⁴² Other than that minor change, the Committee adopted the Model Act Section.

The Committee deleted the phrase "or proposed to be adopted, whichever is greater," which was found in subsection (a) of section 10.21, pertaining to bylaw adoption.¹⁴³ Again, the rationale for this explained in the comment to section 7.27. The Committee felt that if the shareholders propose an amendment that fixes a greater quorum or voting requirement, then the proposed amendment can be passed with existing quorum or voting requirements.¹⁴⁴

In Wyoming Statute section 17-16-1022, which deals with bylaws increasing quorum or voting requirement, the Model Act phrase about "or proposed . . . whichever is greater" was not included by the Committee.¹⁴⁵

I. Article 11. Merger, Share Exchange and Consolidation

Model Act section 11.04 sets forth a simplified merger when the subsidiary is merged with the parent.¹⁴⁶ The Model Act allowed a parent owning ninety percent (90%) of the shares of the subsidiary.¹⁴⁷ The Committee lowered the ninety percent (90%) to eighty percent (80%) so the simplified procedure would be available to more corporations.¹⁴⁸

The statutes of the RWBCA relating to consolidation were retained.¹⁴⁹

J. Article 13. Dissenters' Rights

The Committee adopted the 1987 language of Model section 13.01(6).¹⁵⁰ The original Model Act section in defining "beneficial shareholder" did not include shares held by "a voting trust."¹⁵¹ This was added later and adopted by the Committee.¹⁵²

The Committee also modified the Model Act provision pertaining to when dissenters' rights accrue.¹⁵³ The Model Act said nothing about

142. *Id.* § 17-16-1008.

143. RMBCA § 10.21 (1984).

144. Wyo. STAT. § 17-16-1021 (1989).

145. *Id.* § 17-16-1022.

146. RMBCA § 11.04 (1984).

147. *Id.*

148. Wyo. STAT. § 17-16-1104 (1989).

149. *Id.* §§ 17-16-1110 TO 17-16-1114.

Consolidation differs from merger. With a merger, A and B become A. With a consolidation, A and B become a new company, C. The Model Act did not include consolidation. Because it is one other option available to corporations, the Committee decided to retain it. These statutes correspond with, and were extracted from the WBCA provisions on merger and consolidation.

150. *Id.* § 17-16-1301(a).

151. RMBCA § 13.01 (Supp. 1988).

152. Wyo. STAT. § 17-16-1301(a).

153. RMBCA § 13.02 (1984).

consolidation giving rise to dissenters' rights because the Model Act did not contain consolidation procedures. The Committee added language that a consummation of consolidation does create dissenters' rights.¹⁵⁴

K. Article 14. Dissolution

The Committee added language to Model section 14.04 that provides if a corporation, once dissolved wishes to revoke its dissolution, within one-hundred and twenty days, the original name must be available under the statute and rules of the secretary of state governing name availability.¹⁵⁵ The Committee added the language to prevent another business whose name is deceptively similar to the name of the dissolved corporation, from filing during the one hundred and twenty day hiatus.

The Committee made a simple procedural amendment to Model section 14.06.¹⁵⁶ This law outlines the procedure for notifying claimants of a dissolved corporation.¹⁵⁷ The ABA drafters required the dissolved corporation to "notify known claimants in writing."¹⁵⁸ The Committee added the language "by mail or private carrier or by personal delivery" The Committee effected this language change to provide how a dissolved corporation notifies claimants.¹⁵⁹

Model Act section 14.07 sets forth the means by which a dissolved corporation notifies "unknown" claimants.¹⁶⁰ This is accomplished through constructive notice by newspaper publication.¹⁶¹ The Model Act provides that any claim under this section must be filed within five years after the publication of the notice; and the published notice must include this warning.¹⁶² The Committee believed, and the legislature agreed, that Wyoming should decrease the potential claim period to four years or the years specified in the specific statute of limitations, whichever is less.¹⁶³ Thus the Committee intended if there is a claim which the Wyoming Code of Civil Procedure nullifies after two years,¹⁶⁴ then the two year statute of limitations would apply. This could be an advantage to corporations and shareholders. Instead of waiting five

154. WYO. STAT. § 17-16-1302 (1989). The original Senate File 137 contained a sixth corporate action from which a shareholder could dissent; namely, when a corporation consummated a transfer out of Wyoming. The Committee included this to put up an additional roadblock when a company intends to leave Wyoming. The Committee theory did not prevail. The Senate deleted the transfer dissenters' rights subsection for pro-management reasons.

155. *Id.* § 17-16-1404; see *supra* notes 71 through 79 and accompanying text for a discussion of Model section 4.01.

156. *Id.* § 17-16-1406.

157. *Id.*

158. RMBCA § 14.06(b).

159. WYO. STAT. § 17-16-1401.

160. RMBCA § 14.07 (1984).

161. *Id.*

162. *Id.*

163. WYO. STAT. § 17-16-1407 (1984).

164. *Id.* § 1-3-115 (1988).

years for freedom from unknown contingent claims, a dissolved Wyoming corporation and its shareholders who received assets upon dissolution need only wait for four years or a lesser span depending upon what type of claims potentially exist.

Although the Committee intended for specific statutes of limitations to apply, there is a potential problem with the statutory language. Subsection (b)(iii) states that a claim against a dissolved corporation will be barred unless it is brought within four years or the applicable statute of limitations "whichever is less."¹⁶⁵ Subsection (b)(iii) is a procedural provision pertaining to the substance of the notice.¹⁶⁶ Subsection (c) states the substantive law that a claim is barred after four years.¹⁶⁷ Given this conflict, the author believes that subsection (c) prevails. Any claim, regardless of type, must be brought within four years.¹⁶⁸

The Committee assumed that a claimant under section 17-16-1407(d)(ii) could not enforce a judgment against a shareholder or shareholders for the liability of the corporation unless the claimant specifically joined the shareholder or shareholders in the litigation.¹⁶⁹

Under the Model Act, the secretary of state may commence a proceeding to administratively dissolve a corporation if:

- 1) The corporation does not pay its annual franchise tax within sixty days of the date it is due;
- 2) The corporation does not file its annual report within sixty days after it is due.
- 3) The corporation is without a registered office or agent for sixty days or more;
- 4) The corporation does not notify the secretary of state of a change or resignation of its registered office or that its registered office has been discontinued;
- 5) The period of duration stated in its Articles has expired.¹⁷⁰

The corresponding Wyoming Statute, at the behest of the Committee, does not include the grounds numbered 1 and 2 in the Model Act section 14.20.¹⁷¹ It does provide for administrative dissolution for grounds numbered 3, 4 and 5 in the Model section.¹⁷² The reason is simple and pragmatic. To start administrative dissolution proceedings for corporations not filing an annual report or not paying its annual license tax after sixty days would have required extensive changes to the com-

165. *Id.* § 17-16-1407(b)(iii).

166. *Id.*

167. *Id.* § 17-16-1407(c).

168. This language should be clarified by legislative amendment.

169. WYO. STAT. § 17-16-1407(d)(ii).

170. RMBCA § 14.20 (1984).

171. *Id.*

172. WYO. STAT. § 17-16-1420 (1989).

puter system with extraordinary attendant costs. The Committee wanted its package of bills to be expenditure-neutral. The administrative dissolution for the third and fourth grounds was no problem because the computers are already set up for these contingencies.¹⁷³ The fifth ground concerning the period of duration expiring is a simple data entry task.¹⁷⁴ In addition, the Committee felt that dissolving a corporation within sixty days for non-payment of taxes, as opposed to then current two year waiting period, was draconian.

The Committee made a simple change from the Model Act in section 17-16-1421.¹⁷⁵ The Model Act outlined the effect of an administrative dissolution.¹⁷⁶ The corporation can only engage in winding up type of activities. The Committee included revocation in section 17-16-1631¹⁷⁷ to make clear that once a corporation is revoked for not filing its annual report and paying the attendant franchise tax for two years, then it may not continue normal business but must commence winding up its affairs.¹⁷⁸

The Committee eliminated one clause in the Model Act section 14.22 which required a corporation to provide a certificate from the taxing authority certifying that all taxes owed by the corporation have been paid, to the secretary of state when the corporation was applying for reinstatement after administrative dissolution.¹⁷⁹ The Committee members concurred that this requirement could be an administrative nightmare. The Secretary of State would have to verify the corporation's payment record to Workers' Compensation, Employment Security Commission, Revenue and Taxation as well as other state and federal agencies.

The Committee deleted the phrase "or other appropriate state official" from model section 14.40.¹⁸⁰ This section applies to the state treasurer holding assets for known claimants who cannot be found. The state treasurer is the officer with this responsibility. To avoid confusion, the additional phrase was removed.

L. Article 15. Foreign Corporations

The Committee replaced the language of section 15.02(d) with a provision on fees, penalty and tax assessment.¹⁸¹ The Committee added an eighteen percent interest penalty on any amounts owing and

173. The consequences of not filing an annual report or paying the annual franchise tax are outlined in Wyoming Statute section 17-16-1631 (1989). To avoid computer changes, the two year hiatus before revocation was retained by the Committee.

174. Wyo. STAT. § 17-16-1420(a)(iii).

175. *Id.* § 17-16-1631.

176. RMBCA § 16.31 (1984).

177. Wyo. STAT. § 17-16-1631 (1989).

178. *Id.*

179. *Id.* § 17-16-1422.

180. *Id.* § 17-16-1440.

181. *Id.* § 17-16-1502.

increased the penalty from five hundred dollars to one thousand dollars.¹⁸² In addition, the new section makes it clear that the secretary of state may refuse to issue a Certificate of Authority until these penalties are paid.¹⁸³

The Committee added three additional statements to model section 15.03 for an application for a Certificate of Authority.¹⁸⁴ Wyoming must specifically require that any foreign corporation provide the value of property located here for annual tax purposes.¹⁸⁵ The Wyoming Constitution requires any foreign corporation doing business here to accept and abide by the Wyoming Constitution.¹⁸⁶ The third additional requirement is a catch-all phrase to ensure the secretary of state has adequate information before issuing a Certificate of Authority.¹⁸⁷ The Committee also added the requirement that the Certificate of Existence from the corporation's domicile not be more than sixty days old.¹⁸⁸ Finally, the Committee amended the application statute to require a written consent of the registered agent.¹⁸⁹

The Committee amended the Model foreign corporation name section 15.06 to impose the "deceptively similar" standard on foreign corporations.¹⁹⁰

The Committee added the language "manually or in facsimile" to the corresponding Model section.¹⁹¹ This allows a receipt to be signed by a person originally or stamped with a corporate officer's name.

Wyoming Statute section 17-16-1511 is not found in the Model Act.¹⁹² It was carried over from the old WBCA.¹⁹³ The Committee believed the provision to be helpful because it provides an outline for a foreign corporation which is a party to a merger.¹⁹⁴

182. *Id.*

183. *Id.* The secretary of state may issue a Certificate of Authority but then may require the attorney general to bring an action to collect the penalties.

184. *Id.* § 17-16-1503.

185. *Id.* § 17-16-1630.

186. WYO. CONST. art. 10, § 5.

187. WYO. STAT. § 17-16-1503.

188. *Id.* § 17-1-706 (repealed 1989). This provision mandated the Certificate of Existence be not more than thirty days old. This created a time crunch for corporations so the Committee doubled the "lag time."

189. *Id.* § 17-16-1503 (1989). See *supra* notes 59-60 discussing MBCA section 2.02.

190. *Id.* § 17-16-1506.

191. *Id.* § 17-16-1510.

192. *Id.* § 17-16-1511.

193. WYO. STAT. § 17-1-712 (repealed 1989).

194. A word of caution about section 17-16-1511 is in order. Recently, a Maine corporation which had substantial assets employed in Wyoming and which was authorized to do business in Wyoming merged into an Idaho corporation which was a shell corporation with no assets. The Idaho corporation was not authorized to do business in Wyoming. The Idaho corporation was the surviving corporation. Pursuant to an Attorney General Opinion dated September 15, 1989, the surviving Idaho corporation had to become authorized to do business. This cost the corporation approximately \$16,000.00. If before the merger the shell Idaho corporation had become authorized in Wyoming, the fee would have been \$50.00. It was an unfortunate result but unavoidable.

Subsections one and two of Model section 15.30 were deleted by the Committee.¹⁹⁵

M. Article 16. Records and Reports

Section 16.02 pertains to inspection of records by shareholders.¹⁹⁶ The Committee deliberately restricted this section to accomplish, in part, one of its goals; namely to catch the attention of larger corporations which have shareholder battles or which are fighting a raider.¹⁹⁷ The Model Act section 16.02 permits any shareholder to inspect the records described section 16.01 which are less important records.¹⁹⁸ Section 16.07 conditions shareholder inspection of more proprietary records (outlined in section 16.02) on the shareholder showing the inspection is for a proper purpose.¹⁹⁹ Under Wyoming Statute section 17-16-1602, *only* shareholders who have been of record for at least six months *and* who hold at least five percent of the shares may have access, upon a good faith showing, to the minutes, accounting records and shareholder list.²⁰⁰ Section 17-16-1602(c)(iv) contains a reference to section 17-16-826, which does not exist.²⁰¹ This minor error will be remedied hopefully at the next general session.²⁰² This is a major departure from the Model Act and may have the practical effect of barring any shareholder from inspection privileges.²⁰³

The Committee modified the Model provision, section 16.20, by inserting the language, "upon request" so that corporations would not be required to automatically send their annual financial statements to all shareholders. This could be costly.²⁰⁴ In addition, the legislature, at the recommendation of the Committee, included a statement that if detailed financial statements are not prepared for the corporation on an annual basis, then a copy of its federal income tax return will suffice for this section.²⁰⁵ The Committee did not want to burden smaller Wyoming corporations with the cost of preparing audited or otherwise detailed financial statements.

195. For the rationale, see *supra* notes 172-74 and accompanying text and the comment to section 14.20.

196. RMBCA § 16.02 (1984).

197. WYO. STAT. § 17-16-1602 (1989).

198. RMBCA § 16.02.

199. *Id.* § 16.07.

200. WYO. STAT. § 17-16-1602. The WBCA provision on inspection rights was in the disjunctive. Please see Wyo. Stat. § 17-1-144(a) (repealed 1989).

201. WYO. STAT. § 17-16-1602(c)(iv).

202. The original senate file 137 contained a section numbered 17-16-826. S.F. 137, 50th Leg., Gen. Sess. § 17-16-826 (1989). This section contained a concept of "executive session" for boards of directors. It proved to be very controversial and was deleted by the House.

203. Any practicing attorney who is concerned about this potential result should draft articles or by-laws expanding the right of inspection, pursuant to Wyoming Statute section 17-16-1602(a). The phrase "but may be expanded" was specifically added by the Committee to empower corporations to grant more liberal inspection rights to shareholders.

204. WYO. STAT. § 17-16-1620 (1989).

205. *Id.*

Model section 16.22 pertaining to annual reports was deleted entirely by the Committee. The annual report statute is Wyoming Statute section 17-16-1630.²⁰⁶

There are no counterparts to Wyoming Statute sections 17-16-1630 through 17-16-1633 in the Model Act.²⁰⁷ The Committee did add a new subsection to section 17-16-1630 outlining which date to use to determine whether information is current for annual report purposes.²⁰⁸ The previous Wyoming business act did not provide for this. Financial information called for by the annual report shall be current as of the end of the corporation's fiscal year immediately preceding the date the annual report is executed.²⁰⁹ All other information should be current as of the date the annual report is executed.

The WBCA provisions 17-1-201(c)(a) comprised the special fee schedule for transfers (when a Wyoming corporation transfers out of Wyoming to another jurisdiction).²¹⁰ This fee schedule in the RWBCA is found in the transfer provision itself.

The Committee modified Wyoming Statute section 17-2-102 and incorporated the balance into the RWBCA. The changes the Committee made are:

1) The Committee removed subsection (f) because the Committee eliminated the concept of "partial payment" of the license tax.²¹¹

2) The Committee amended section 17-2-102(h) to say that if a corporation pays an annual license tax which is less than what the secretary of state believes is due, the Secretary of State shall reject the entire amount.²¹² The WBCA contemplated the secretary of state would accept it as partial payment. The Committee deleted the ability to reinstate a corporation whose term of existence, as stated in its articles, has expired.²¹³

3) The Committee added a new subsection requiring all corporations to maintain suitable business records for three years in case the secretary of state wishes to audit the company to ensure the correct tax was paid.

206. *Id.* § 17-16-1630.

207. These statutes under the RWBCA are basically the provisions of WYO. STAT. § 17-2-101 (repealed, 1989), WYO. STAT. § 17-2-102 (repealed 1989); WYO. STAT. § 17-2-103 (repealed 1989) and WYO. STAT. § 17-2-104 (repealed 1989).

The provisions in the Model Act relating to payment of franchise taxes, the filing of annual reports and the procedure to reinstate a domestic or foreign corporation are under § 14.20 (for domestic corporations) § 15.30 (for foreign corporations).

208. *Id.* § 17-16-1630(c) (1989).

209. *Id.*

210. *Id.* 17-2-201(c) (repealed 1989).

211. *Id.* § 17-16-1720 (1989).

212. *Id.* § 17-16-1631(g).

213. *Id.*

N. Article 17. Domestication and Continuance of Foreign Corporations; Transfer of Domestic Corporations

*Legislative History of Domicile Transfer Statutes*²¹⁴

The continuance provisions now embodied in the revised Wyoming Business Corporation Act were carried forward in part from the prior continuance statute²¹⁵ and in part were derived from various Canadian statutes and from the other deliberations of the Secretary of State's Corporation Code Revision Committee. The prior statute was used as a basis from which certain changes were made. Below follows a discussion of each of the changes:

1. The first change made in subparagraph (a) of the prior statute was to delete the exception for banking and savings and loan business and insert an exception for "acting as a financial institution." This was intended to make clear that a company seeking continuation in Wyoming cannot engage in the business of being a trust company or a credit union, in addition to the traditional banking and savings and loan prohibitions.²¹⁶

2. Under subsection (a) as it formerly appeared, the secretary of state was given discretion to determine the laws of the jurisdiction of origin for a foreign corporation seeking continuance in Wyoming.²¹⁷ This in practice had been a difficult point, at least under the prior administration, and continuances were denied to several companies because the secretary of state did not agree with the corporation's assertion that the laws of the jurisdiction of original domicile indeed did authorize a continuance into Wyoming.²¹⁸ The Committee approved changing the statutory language to provide that a foreign jurisdiction need merely "acknowledge the corporation's termination of domicile in the foreign jurisdiction," in order to authorize the continuance.²¹⁹ The Committee felt it important to not have the secretary of state be in the business of construing the laws of foreign jurisdictions.²²⁰ It nevertheless felt it important that the foreign jurisdiction itself, and

214. *Id.* § 17-16-1632 (Supp. 1990).

215. *Id.* § 17-1-803 (1977) (renumbered as § 17-16-1710) (1989).

216. The definition of "financial institution" set out in WYO. STAT. § 13-1-101(c)(iv) (1989) includes direct references to trust companies and credit unions.

217. WYO. STAT. § 17-3-803(c) provided in part that a continuance would be authorized only "if it appears to the secretary of state to be so authorized by the laws of the jurisdiction in which (the foreign corporation) was incorporated"

218. Thyra Thomsom would not permit continuances from Panama or Liechtenstein based upon her interpretation of the laws of those jurisdiction, and in spite of documentation from governmental officials of those jurisdictions stating that the continuance to Wyoming was authorized by those jurisdictions.

219. The British Virgin Islands will accept a corporation continuing into the British Islands with no proof whatsoever as to whether a transfer out of the prior domicile is authorized by the laws where the governmental officials of the original jurisdiction, (cite the statute here).

220. The secretary of state has in fact adopted permanent rules. *See supra* note 47. These regulations require the Articles of Continuance to be accompanied by a document from an official of the foreign jurisdiction acknowledging termination of the domicile.

not just the corporation, be the source of information as to the authorization of continuance. The Committee was aware of the laws of at least one other jurisdiction,²²¹ but the Committee believed that troublesome conflicts of law issues could arise and that it would not substantially impede commerce or injure the business climate reputation of Wyoming to require some proof of termination of prior domicile. The function of the secretary of state under the new law will now be simply to determine the authenticity of the documentation submitted to show the foreign jurisdiction's acknowledgement of termination of domicile therein.²²² Finally, the Committee wished to eliminate any ambiguity which might have been associated with the prior law regarding what actually was required to have been "so authorized by the laws" of the prior jurisdiction. Under the interpretation given this language by the secretary of state's office,²²³ it was held that the foreign jurisdiction must have a transfer-type of statute similar to Wyoming's transfer statute.

3. The Committee discussed eliminating subparagraph(c)(vi) because of the potential that this could be interpreted as requiring the active transaction of business in Wyoming. The Committee felt that a reasonable interpretation of the statute as a whole could not lead to the conclusion that the corporation be required to have a physical presence in the State of Wyoming beyond the presence of its registered agent and registered office, and this section was therefore retained simply to provide additional information to the public regarding a continued corporation.

4. The Committee added the word "business" as a preface to the word "addresses" in subparagraph(c)(vii).²²⁴

5. The Committee added the phrase "other ownership units" to subparagraphs (c)(viii) and (c)(ix)²²⁵ in order to recognize and acknowledge that the business entities transferring to Wyoming may have a fair degree of variation in appearance and structure from a traditional Wyoming corporation, including capital structure.

221. The Wyoming Attorney General's office addressed an informal opinion dated April 30, 1982 to the secretary of state, concluded that the foreign jurisdiction must have a transfer statute. Memorandum from Howard M. Schrinar, Assistant Attorney General, to Thyra Thomson, Wyoming Secretary of State, p. 18 (April 30, 1982) (available from the Wyoming Secretary of State) [hereinafter the Memorandum]. The informal opinion rejected an interpretation that the language simply required the foreign jurisdiction to have a reciprocal continuance type of statute. Memorandum at 2, 17-18.

222. WYO. STAT. § 17-1-804 (1977) (renumbered as *id.* 17-16-1720 (1989)).

223. *Id.* § 17-1-803(c)(vi) (1977) (renumbered as *id.* § 17-16-1720(c)(vi) (1989)).

224. *Id.* § 17-1-803(c)(vii) (1977) (renumbered as § 17-16-1710(c)(vii) (1989)). This was simply intended to codify the practice of the secretary of state's office to accept business rather than residential offices for corporate officers. Another amendment to this section to require only the listing of "principal" officers was rejected, and the committee determined it would be most appropriate to have *all* of the corporation's directors and officers disclosed in the application to the secretary of state.

225. *Id.* §§ 17-1-803(c)(viii) and 17-1-803(c)(ix) (1977) (amended and renumbered as *id.* §§ 17-16-1710(c)(viii) 17-16-1710(c)(ix) (1989)).

6. Subparagraph (c)(x) was amended to simply allow the secretary of state to determine what information would be useful in establishing fees.²²⁶ The amount of stated capital was not useful to the secretary of state in determining fees under the prior version of the continuance statute, and was not a meaningful concept to corporations subsisting under the laws of foreign countries. It was also inferior to the information contained on the annual report,²²⁷ which at least would disclose the assessed value of assets located and employed in Wyoming.²²⁸ With the rather complete elimination of the concept of par value for Wyoming corporations, and the elimination of "stated capital" for Wyoming corporations, the Committee believed elimination of this requirement from the continuance statute to be required, and it was replaced with a statement that the secretary of state may require other information regarding capital structure as she deems appropriate.

7. A new subparagraph (c)(xiii)²²⁹ was added to accommodate the continuing corporation and allow it some flexibility in responding to another change made by which the articles of continuance are to be treated as the Articles of Incorporation by the continued corporation.²³⁰

8. An alteration was made to subparagraph (d)²³¹ by which the secretary of state's form was no longer mandated. The Secretary of State has in fact adopted a form²³² which does indeed set forth all necessary provisions, although it leaves no room on the form for the additional information which a corporation may wish to include and which would otherwise be permitted in Articles of Incorporation.²³³ This change also accommodates potential different denomination of officers by the company while it existed under the laws of a foreign jurisdiction. The change also eliminates the need for duplicate originals, much in the same fashion as duplicate originals have been eliminated for Wyoming corporations generally.²³⁴ The final change made in this subparagraph is to provide for execution by just one officer rather than two. The purpose of all of these changes was to simplify the process from the prospective of both the secretary of state and the applicant.

9. The final subparagraph of the prior statute was eliminated.²³⁵ That subparagraph provided that fees would be charged and collected based upon the aggregate par value of the authorized shares of the con-

226. *Id.* § 17-1-803(c)(x) (amended and renumbered as *id.* § 17-16-1710(c)(x) (1989)).

227. An annual report was required under prior law. WYO. STAT. 17-2-101 (1977) (renumbered as § 17-16-1630 (1989)).

228. WYO. STAT. § 17-16-1630 (1989) (formerly *id.* § 17-2-101 (1977)).

229. *Id.* § 17-16-1710(c)(xiii).

230. *See id.* § 17-16-1720(e) (1989). As to the actions and rationale of the Committee in specifying that the Articles of Continuance shall be deemed to be the Articles of Incorporation of the continued corporation.

231. *Id.* § 17-1-803(d) (1977) (amended and renumbered as *id.* 17-16-1720(d) (1989)).

232. Permanent Rules, *supra* note 47, ch. I, § 4. Note that the secretary of state is authorized to make certain forms mandatory, including an application for a Certificate of Continuance, under WYO. STAT. § 17-16-121(a)(v) (1989).

233. WYO. STAT. § 17-16-1720(c)(xiii) (1989).

234. *See id.* § 17-16-120(j).

235. *Id.* § 17-1-803(e) (1977) (renumbered as *id.* § 17-16-1710) (1989)).

tinuing corporation. This created the possibility of an infinitely high fee in the case of corporations having unlimited authorized shares. Under the new Wyoming Business Corporation Act, a Wyoming corporation can now have an unlimited number of authorized shares²³⁶, and the Committee therefore determined that another basis for assessing the fee would be most appropriate. Under the rules of the secretary of state, the fee is now set at the flat rate of \$90.²³⁷

10. The Committee in its deliberations and in the documentation reviewed by it continually referred to the certificate to be issued by the secretary of state upon completion of a continuance as a "Certificate of Registration." The new statute refers to both a "Certificate of Registration"²³⁸ or a "Certificate of Continuance"²³⁹ or a "Certificate of Continuation."²⁴⁰ The Committee's work used only the "Registration" Denomination and the changes in denomination were not intended to identify differing documents.

11. The first sentence of the new subparagraph (a)²⁴¹ is modeled after Alberta law.²⁴² The Committee looked to Alberta law because of the historical derivation of the continuance statute from the laws of Alberta.²⁴³ The function of this addition is to permit a continuing corporation to amend its basic charter to comply with the laws of Wyoming, all as part of one single action to give effect to the continuance.

O. Article 18. Transition Provisions

The Committee included the model transition provisions.²⁴⁴ Model section 17.01 simply states that the new law applies to existing corporations if the statute under which they incorporated reserved the power to amend.²⁴⁵ The Committee changed this general transition clause in two ways:

1) The Committee included the phrase "domestic nonprofit corporations which have not qualified under W.S. 17-6-108."²⁴⁶

236. *Id.* § 17-16-601(a) (1989).

237. Permanent Rules, *supra* note 47, ch. I, § 5(a)(x).

238. WYO. STAT. §§ 17-16-1710(a), 17-16-1710(b), 17-16-1710(c)(xiii) (1989).

239. *Id.* §§ 17-16-1710(e), 17-16-121(a)(v).

240. *Id.* § 17-16-1710(f).

241. *Id.* § 17-16-1710(e).

242. ALTA. REV. STAT. ch. B-15, § 181(2)(1981).

243. See Long, *Continuance and Transfer; Transnational Change of Corporate Domicile Under Wyoming Law*, 23 LAND & WATER L. REV. 445 (1988), and in particular the text accompanying notes 17-19.

244. RMBCA §§ 17.01-17.03 (1984).

245. *Id.* § 17.01.

246. WYO. STAT. § 17-16-1801 (1989). Mr. Don Sherard, a Wheatland attorney, raised a concern about the viability of Rural Electric Associations under the RWBCA. The REAs were established as a non-profit type of creature before the 1959 adoption of the Non Profit Corporations Act; WYO. STAT. §§ 17-6-101 to 17-6-117 (1989). The 1959 Act allowed earlier formed organizations to become non-profit corporations by a two thirds

2) The Committee anticipated a transition problem with the RWBCA. Under the WBCA, particularly sections 17-1-130(d)²⁴⁷ and 17-1-123(a)²⁴⁸, there was mandatory cumulative voting and pre-emptive rights unless the articles opted out of pre-emptive rights. As the author alluded to before, the pre-emptive right provisions in the WBCA were contradictory. Wyoming Statute section 17-1-202(a)(vii) read, "[i]f any pre-emptive right is to be granted to shareholders, the provisions therefor."²⁴⁹ This section implied that a corporation opts into pre-emptive rights. Wyoming Statute section 17-1-123 seemingly provided the exact opposite;²⁵⁰ that a corporation must opt out of pre-emptive rights, in whole or in part, in its articles. At any rate, for transition provisions, the Committee took the worse case scenario and assumed that under the WBCA, pre-emptive right must be "opted out of" in the articles.²⁵¹ With this approach, if a corporation's articles were silent, then the corporation granted pre-emptive rights to shareholders. Consequently, existing corporations had mandatory cumulative voting and may have had pre-emptive rights. Under the RWBCA, cumulative voting and pre-emptive rights are purely optional.²⁵² The Committee did not want to disturb the status quo and abolish these rights by operation of law. It could have created a trap for Wyoming corporations. Therefore, for corporations existing on January 1, 1990, cumulative voting and pre-emptive rights are continued until January 1, 1994.²⁵³ Of course, any corporation now may amend its Articles to opt out of cumulative voting and/or pre-emptive rights.²⁵⁴ The 1990 Legislature created a new Wyoming Statute section 17-16-1804.²⁵⁵ Effective on July 1, 1990, this act is intended primarily to benefit Rural Electric Associations or similar entities which may have a thousand or more members. These associations have a difficult time obtaining a quorum which of course nullifies, or at least endangers, any member-required action. The new section which can apply to any corporation as well as any cooperative, sets forth a method by which a corporation or cooperative can take action by a majority of those present or voting by proxy. There are restrictions in the bill with which the Bar should become familiar. One restriction is that proxy voting must either be totally prohibited or somehow restricted.²⁵⁶

vote of all members. Mr. Sherard has REA clients which have been unable to get the requisite number of people together to vote. To clear up any confusion as to what law applies to pre 1959 organizations which have not elected into the Non-Profit Act. The Committee agreed to the language suggested by Mr. Sherard and the Legislature gave its ultimate approval.

247. WYO. STAT. § 17-1-130(d) (repealed 1989).

248. *Id.* 17-1-123(a).

249. *Id.* § 17-1-202(a)(vii).

250. *Id.* § 17-1-123.

251. *Id.* § 17-16-1801 (1989).

252. *Id.* §§ 17-16-728(d), 17-16-630.

253. *Id.* § 17-16-1801(b).

254. *Id.*

255. S.F.74A, 51st Leg., Gen. Sess., § 17-16-1804 (1990).

256. *Id.*

V. CLOSE CORPORATION SUPPLEMENT

A. *General Comments*

For the first time in Wyoming's history, the state has corporations law tailored for smaller, family-type corporations. It is called the Wyoming Statutory Close Corporation Supplement (CCS).²⁵⁷ The ABA Committee on Corporate laws notes:

Under a statute with the flexibility of the Revised Model Act, it is usually possible to achieve any desired legal result within a closely held corporation without recourse to the Close Corporation Supplement by use of sophisticated contracts among the shareholders and special provisions in the Articles of incorporation and the bylaws. This Supplement therefore does not significantly change the results that may be obtained under the Revised Model Act, rather the advantages of the Supplement lie in the certainty and flexibility it provides.²⁵⁸

The CCS is not "enabling legislation" in the sense that it empowered one to do things one could not do before its enactment. It is rather a check list which a practitioner should review to determine which business organization would be most appropriate for his client.

1. Is the corporation acting more like a partnership exposing the corporation to a greater risk that a third party could "pierce the corporate veil?"

2. What happens when one of the major players dies or divorces?

3. What happens if the shareholder wants to sell or transfer his shares to a third party that the other shareholders don't like?

4. What happens if one shareholder who has direct control of the corporation is exerting his control oppressively?

5. What happens if the shareholders or board are deadlocked?

The author submits these questions and problems are the main problems associated with a small corporation. And smaller corporations probably have not addressed these problems in separate shareholder agreements or in the by-laws.

B. *History*

The Close Corporation Supplement is based on the 1984 American Bar Association Model Statutory Close Corporation Supplement. The Close Corporation Supplement is a supplement to the 1984 Revised Model Business Corporation Act or to a state law which has the flexibility and philosophy of the 1984 American Bar Association Revised Model Act. Also, the Committee made it quite clear to the legislature

257. *Id.* §§ 17-17-101 to 17-17-151.

258. Model Close Corp. Supplement (MCCS), introductory comment (1984).

that the form the Committee adopted is the Model Close Corporation Supplement, with some deviations.²⁵⁹ Consequently, the interpretation and application of the CCS should hinge upon the Official Comments of the American Bar Association Committee on Corporate Laws.²⁶⁰

VI. SECTION BY SECTION ANALYSIS

Article 1 - Provisions

The Model Act provides that a corporation with fifty or fewer shareholders can elect into close corporation status.²⁶¹ The Committee was wary of the number fifty because it could create a number of traps for a small corporation.²⁶² These traps revolve around federal taxation and federal and state securities laws.

A great number of Wyoming corporations operate as Subchapter S Corporations. Many S corporations are small family held or otherwise closely held companies. They seek limited liability afforded by corporate law but also seek pass-through taxation like a partnership, thus avoiding the corporate malady of double taxation. A Subchapter S corporation by definition must have 35 or fewer shareholders.²⁶³

Given the presumption that most small family corporations electing to be "statutory close corporations" would wish to make a Subchapter S tax election, the Committee anticipated a pitfall involving a close corporation legally formed under the Model Act with 38 shareholders. Thirty-eight shareholders is well within the safe harbor figure of 50 shareholders found in the Model Act; yet 38 shareholders could foreclose the corporation from enjoying Subchapter S status since an S corporation is limited to 35 shareholders.

The second factor the Committee considered, albeit of lesser importance, was compliance with federal and state securities law. Generally speaking, all securities must be registered or be exempt from registration before being sold.²⁶⁴

Closely held corporations may desire to issue common stock evidencing contributed shareholder capital. Conceptually speaking, most securities issued by a close corporation would fall within the parameters of private offering exemptions from registration. The more common exemptions are found in Federal Regulation D,²⁶⁵ or the Wyoming Uni-

259. The Committee and the Wyoming Legislature adopted the Model Act sections and Official Comment in their entirety in the following statutes: WYO. STAT. §§ 17-17-101, 17-17-102, 17-17-110, 17-17-112, 17-17-113 to 17-17-117, 17-17-120 to 17-17-122, 17-17-124, 17-17-125, 17-17-131, 17-17-132, 17-17-140, 17-17-142, 17-17-143, 17-17-151 (1989).

260. Please see *supra* pp. 4-5 of this article.

261. MCCS § 3 (1984).

262. In the original Senate File 137, the shareholder number limit was thirty five. The Senate increased it to fifty but the House restored the number to thirty-five. S.F. no. 137.

263. 26 U.S.C. § 1361 (1982).

264. 15 U.S.C. § 77a-77aa (1988); Wyo. Stat. § 17-4-107 (1989).

265. 17 C.F.R. §§ 230.501-230.508 (1989).

form Limited Offering Exemption²⁶⁶. Rules 230.505 and 230.506 of Federal Regulation D, upon which the Wyoming Uniform Limited Offering Exemption is based, exempts from registration issuances of securities to less than 35 nonaccredited investors.²⁶⁷

A close corporation formed under the Model Act claiming exemption under either section 505 or 506 of Regulation D could conceivably issue securities up to 50 persons and remain a close corporation.²⁶⁸ That issuance, though, would likely preclude the corporation from claiming the exemptions of sections 505 or 506 of Regulation D and the Uniform Limited Offering Exemption under state securities regulation.²⁶⁹

A Wyoming Close Corporations are restricted to 35 shareholders, thus never endangering Regulation D Rule 505 or 506 or Uniform Limited Offering Exemptions exempt status on the basis of numbers of purchasers.

The legislature amended another part of Model Act section 3. The Model Act contemplates that a corporation may elect close corporation status by amending its articles.²⁷⁰ This amendment requires a two-thirds affirmative vote of all shares whether or not the shares are entitled to otherwise vote on amendments.²⁷¹ The Model Act further provided that if such an amendment is passed, a shareholder who voted against the amendment may assert dissenters rights.²⁷²

The Committee adopted the Model Act approach in this regard. The Committee recognized the election into close corporation status does materially affect the rights of shareholders but since dissenters' rights attach, the provision could withstand muster. The Senate agreed and approved the Model Act language.²⁷³

In the House, the Delaware approach was specifically rejected and the Maryland and Texas theory specifically approved. The Senate concurred in the final days of the session.²⁷⁴ Pursuant to Wyoming Statute section 17-17-103(b), a corporation which existed before January 1, 1990, must have unanimous consent to elect close corporation status.²⁷⁵ Corporations formed on or after January 1, 1990 follow the two-thirds provision.²⁷⁶

266. K. KARPAN, SEC. OF STATE, WYOMING UNIFORM SECURITIES ACT & SECURITIES RULES & REGULATIONS ch. V, § 2(c) (1990).

267. 17 C.F.R. §§ 230.505(b)(2)(ii), 230.506(b)(2)(i) (1989).

268. MCCS § 3(b) (1984).

269. 17 C.F.R. §§ 230.505, 230.506 (1989).

270. MCCS § 3 (1984).

271. *Id.*

272. *Id.* § 3(b). This is the Delaware approach. The Official Comment reads: Some states, e.g. Maryland and Texas, require unanimous consent of the shareholders for an existing corporation to become a statutory close corporation. Most states however, follow the pattern of the Delaware Statute that requires a two-thirds vote of all outstanding shares. MODEL BUSINESS CORP. ACT ANNOT.

273. S.F. 98, 50th Leg., Gen. Sess. § 17-17-103(b).

274. *Id.*

275. WYO. STAT. § 17-17-103 (1989).

276. *Id.*

Four Wyoming attorneys were concerned with the Model Act (Delaware) approach. These gentlemen believed that election into close corporation status should always require unanimous shareholder approval because "it appears to be an unconstitutional elimination of a property right."²⁷⁷ The legislature, as explained above, did not embrace this concept.

In response to a very legitimate concern of Wyoming attorneys,²⁷⁸ the House added the language "or pursuant to a buy sell agreement entered into by all the shareholders."²⁷⁹ The concern centered around the fact that many corporations may have share transfer prohibitions unique to them which should remain private. The Model Act allows any close corporation to opt out of or amend the share transfer provisions of sections 11 and ⁸12 by doing so in its articles of incorporation.²⁸⁰ The specific Wyoming language permits a close corporation to accomplish this privately.²⁸¹

The Committee added "consolidation" to subsection (v).²⁸²

The Committee changed the Model section 14 language of "executor or administrator" to "personal representative" to comply with Wyoming Probate Code language.²⁸³ In addition, the Committee added the language "or the surviving joint tenant."²⁸⁴ The Model Act includes *optional* provisions concerning mandatory buy out of shares.²⁸⁵ The provisions must be "opted into" by providing so in the articles. The Model Act empowers a compulsory purchase right but did not address a non-probate type of devolvement of the shares to another person.²⁸⁶ The Committee thought it only fair that a surviving joint tenant also have the power to demand his or her shares be purchased, if the articles contain mandatory buy-out provisions.²⁸⁷

Section 23 of the Model Act explains when a close corporation must hold its annual meeting.²⁸⁸ The Model Act provides that if no annual meeting date is set by the articles of incorporation, bylaws or a shareholder agreement, then the meeting date is the first business day after May 31st.²⁸⁹ The Committee changed this to "the last business day of the third month following the close of the business year"²⁹⁰ to match the same provision in the WBCA.²⁹¹

277. Letter to Representative Lynn Dickey (D - Sheridan County) (February 6, 1989).

278. *Id.*

279. WYO. STAT. § 17-17-111 (1989).

280. MCCS §§ 11, 12 (1984).

281. WYO. STAT. § 17-17-111.

282. See *supra* note 150 for comment to Wyo. Stat. § 17-16-1110 (1989).

283. WYO. STAT. § 2-1-301(a)(xviii) (1988).

284. *Id.* § 17-17-114 (1989).

285. MCCS §§ 14-17 (1984).

286. *Id.* § 14.

287. WYO. STAT. § 17-17-114 (1989).

288. MCCS § 23 (1984). (Under the CCS, a close corporation need not hold an annual meeting unless one or more shareholders requests a meeting in writing.)

289. *Id.*

290. WYO. STAT. § 17-17-123 (1989).

291. *Id.* § 17-16-206(c)(1).

The Committee added the concept of consolidation to Model section 30.²⁹² The Committee specifically modified Model Act section 30(h) to include mortgage or encumbrance in the types of events which require two thirds shareholder approval.²⁹³ This amendment was intended to explicitly avoid the ruling by the Wyoming Supreme Court that mortgaging or encumbering assets does not require shareholder approval.²⁹⁴ The Committee believed it was appropriate and important to obtain shareholder approval for encumbrance transactions.

Section 33 of the Model Act empowers a close corporation, through its articles of incorporation, to authorize one or more shareholders to dissolve the corporation at will or when some event or contingency occurs.²⁹⁵ The section further sets forth that when such a dissolution demand is made in writing, the corporation must within thirty-one days begin winding up its affairs and liquidation.²⁹⁶ The Committee thought the thirty one day period was too restrictive and stringent. Consequently the Committee increased this time period to sixty days.²⁹⁷

Model section 41 outlines what judicial remedies are available for a close corporation which approaches a court for a judicial solution to problems such as deadlocked boards or oppressive actions by the controlling shareholder(s).²⁹⁸ Model Act section 8 implied that the stated remedies were the only remedies.²⁹⁹ The Committee thought this should not be an exhaustive list and added the language "it may order such relief as it deems appropriate *including* one (1) or more of the following types of relief . . ."³⁰⁰ The Committee also removed the word "vexatious" from the section because it was superfluous and not defined.³⁰¹

The Committee deleted subsection (b) of Model Act section 50. That section was intended to apply to a state having a close corporation law in effect at the time of passing the Model Close Corporation Supplement.³⁰² Obviously, this subsection was inapplicable to Wyoming.³⁰³

The Wyoming Statute on Practice of Profession was amended to specifically allow a Professional Corporation to be a Close Corporation.³⁰⁴

VII. A GENERAL ADMONITION AND CONCLUSION

Because of the opt into scheme of the RWBCA, all practitioners must be aware that the simplest articles confer the greatest powers on the corporation and management. The author did a quick review of arti-

292. *Id.* § 17-17-130.

293. *Id.* § 17-17-130(b).

294. *Carroll v. Wyo. Production Credit Association*, 755 P.2d 869 (Wyo. 1988).

295. MCCS § 33 (1984).

296. *Id.*

297. WYO. STAT. § 17-17-133 (1989).

298. MCCS § 41 (1984).

299. *Id.*

300. WYO. STAT. § 17-17-141 (1989).

301. *Id.*

302. MCCS § 50 (1984).

303. MCCS §§ 52-54 are also inapplicable to Wyoming.

304. WYO. STAT. § 17-3-101 (1989).

cles filed since January 1, 1990, and has found that many articles are silent on cumulative voting, pre-emptive rights and shareholder inspection rights. The author does not know what the drafting attorneys intended but the author is concerned that the attorneys involved may be using their "old forms," so to speak which may lead to trouble if, for instance, a small corporation thinks it has granted cumulative voting.³⁰⁵ Overall, the most important point to be derived from this article is that the legislature has specifically adopted the comments of the ABA Committee on Corporate laws as its official legislative history for the RWBCA. It is the committee's hope that this single accomplishment will empower us as we begin implementing the new laws.

305. Messrs. Phil Whynott and Bill Bagley, Cheyenne attorneys, are preparing a book of forms which contain several types of articles of incorporation. The author is confident that this packet of forms will be of tremendous help to the members of the Wyoming State Bar.

Appendix

DOMESTIC CORPORATION FILING FEES:

Articles of Incorporation-\$90.00 (Provided there are no deficiencies in the Articles. If the secretary of state fails to file the Articles by the close of the next business day after receipt, the fee is \$70.00)

Articles of Amendment-\$15.00

Amendment to Articles Involving Name Change-\$45.00

Articles of Correction-\$15.00

Restated Articles-\$15.00

Articles of Dissolution-\$10.00

Articles of Revocation of Dissolution-\$15.00

Certificate of Incorporation-\$5.00 (only given upon request)

Reinstatement After Administrative Dissolution-\$40.00 (This fee includes the written Notice and Certificate of Dissolution under W.S. 17-16-142)

Articles of Merger/Consolidation-\$25.00

Articles of Continuance-\$90.00

FOREIGN CORPORATION FILING FEES:

Application for Certificate of Authority-\$80.00

Application for Amended Certificate of Authority-\$35.00

Application for Amended Certificate of Authority Involving Name Change-\$65.00

Application for Certificate of Withdrawal-\$15.00

Evidence of merger of foreign corporation/Consolidation- \$15.00

Articles of Domestication-\$80.00

Fictitious Name of Foreign Corporation-\$5.00

Summons (as agent for service)-\$15.00

FOR BOTH DOMESTIC AND FOREIGN CORPORATIONS:

Statement of Change of Registered Agent, Registered Office or Resignation of Agent-\$20.00

Reservation of corporate name-\$30.00 (If articles of incorporation with the reserved name are filed within the 120 day period, then the fee for articles of incorporation is (\$90.00 - \$30.00 = \$60.00). If a foreign corporation files an Application for Certificate of Authority with the reserved name, then the fee for the application is (\$80.00 - \$30.00 = \$50.00).

Notice of Transfer of Reserved Name-\$5.00

Certificate of Existence or Authorization-\$5.00

Certificate of Evidence-\$15.00

Application for Certificate of Reinstatement-\$10.00 (following revocation for failure to file annual reports. Plus double the license fees for the years delinquent on the annual reports)

Certification-\$3.00

Certified copies-\$3.00

Duplicating charges-
\$.50 per page for first 10 pages.
\$.15 for each additional page.
\$1.00 minimum