PRELIMINARY DRAFT

OF

TITLE 14A

THE NEW JERSEY BUSINESS CORPORATION ACT

REVISING TITLE 14, CORPORATIONS, GENERAL
OF THE REVISED STATUTES

VOLUME 1
THE STATUTE

N.J. CORPORATION LAW REVISION COMMISSION
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TITLE 14A

THE NEW JERSEY BUSINESS CORPORATION ACT

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F O R E W O R D

The accompanying draft statute and comments were prepared by the Corporation Law Revision Commission, organized pursuant to P.L. 1958, c. 10, which charged the Commission with the duty

> "to study and prepare a revision or revisions of the statute laws of this State relating to business corporations as stated in Title 14 of the Revised Statutes and, if deemed advisable by the commission, as stated in other titles of the Revised Statutes, and the statutes enacted prior and subsequent thereto relating to business corporations, for enactment by the Legislature, if it shall so determine. It shall be the purpose of such revision or revisions to modernize the corporation laws of this State so as to embody principles and procedures representing the best in modern American statutory law applicable to business corporations in general, to eliminate ambiguities, outmoded procedures and conflicting overlapping and redundant provisions, and to present statutes applicable to business corporations, in a logical, clear and concise manner."

In drafting the Revision presented herewith, the Commission kept constantly in mind the Legislative admonition that it create a statutory vehicle representing the best in modern American statutory law applicable to business corporations. With this end in mind, the Commission studied and analyzed not only the statutes of many of the states of the United States, but also, in some instances, those of Canada and the United Kingdom. Close attention was paid to the Model Business Corporation Act prepared by the Committee on Corporate Laws (Section of Corporation, Banking and Business Law) of the American Bar Association, and many of its provisions were followed, in spirit if not in letter. Ideas were also borrowed from the statutes of such leaders in corporate law as Delaware, New York, Illinois and others.

The job is by no means complete. Chapter 14, revising Chapter 14 of Title 14 (Insolvency, Receivers and

Reorganization) is still in the drafting stage because of its complexities and, in some instances, controversial nature. It is expected that this Chapter will be completed and released in the near future.

The Commissioners realize that an undertaking of the magnitude of a revision of the corporation law of an industrial, insurance, agricultural and financial State such as New Jersey is one that should have as many trained minds as possible directed toward its product. The Revision, in the form presented here, is, therefor, submitted to members of the Bar of this State and other States in an effort to draw constructive suggestions and criticisms from as many sources as possible.

Because of the comprehensive scope of the Comments of the Commissioners, no effort will be made in this foreword to summarize the almost innumerable changes from present law made by the Revision.

The work of the Commission was temporarily interrupted by the illness and untimely death of its original Chairman, Edward J. O'Mara, who made a significant contribution to the Commission's work in the relatively short time allotted to him.

The Commission acknowledges the valuable assistance of Professor Sidney Posel of Rutgers University Law School, Donald G. Marshall, Secretary to the Commission until his appointment this year to the faculty of the University of Minnesota Law School, Israel Spicer and Harold Wallum.

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October, 1967

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NEW JERSEY BUSINESS CORPORATION ACT

CHAPTER 1

GENERAL PROVISIONS

Sec.

14A:1-1. Short Title.

This Act shall be known and may be cited as the "New Jersey Business Corporation Act."

14A:1-2. Definitions.

As used in this Act, unless the context otherwise requires, the term:

(a) "Attorney General" means the Attorney General of New Jersey.

(b) "Authorized shares" means the shares of all classes which the corporation is authorized to issue.

(c) "Board" means board of directors. "Entire board" means the total number of directors which the corporation would have if there were no vacancies.

(d) "Bonds" includes secured and unsecured bonds, debentures, notes and other written obligations.

(e) "Capital surplus" means the entire surplus of a corporation other than its earned surplus.

(f) "Certificate of incorporation" includes

(i) the original certificate of incorporation or any other instrument filed or issued under any statute to form a domestic or foreign corporation, as amended, supplemented or restated by certificates of amendment, merger or consolidation or other certificates or instruments filed or issued under any statute; or

(ii) a special act or charter creating a domestic or foreign corporation, as amended, supplemented or restated.

(g) "Corporation" or "domestic corporation" means a corporation for profit organized under this Act, or existing on its effective date and theretofore organized under any other law of this State for a purpose or purposes for which a corporation may be organized under this Act.

(h) "Director" means any member of the governing board of a corporation, whether designated as director, trustee, manager, governor, or by any other title.

(i) "Earned surplus" means the portion of the surplus that represents the net earnings, gains and profits after deduction of all losses, that have not been distributed to the shareholders as dividends or transferred to stated capital or capital surplus, or applied to other purposes permitted by law.

(j) "Foreign corporation" means a corporation for profit organized under laws of a jurisdiction other than this State for a purpose or purposes for which a corporation may be organized under this Act.

(k) "Insolvent," except as used in Chapter 14 of this Act, means being unable to pay debts as they become due in the usual course of the debtor's business.

(l) "Net assets" means the amount by which the assets of a corporation exceed its liabilities. Treasury shares are not assets and stated capital and surplus are not liabilities.

(m) "Secretary of State" means the Secretary of State of New Jersey.

(n) "Shareholder" means one who is a holder of record of shares in a corporation.

(o) "Shares" means the units into which the proprietary interests in a corporation are divided.

(p) "Stated capital" means, at any particular time, the sum of

(i) the par value of all shares of the corporation having a par value that have been issued;

(ii) the amount of the consideration received by the corporation for all shares of the corporation without par value that have been issued, except such part of the consideration therefor as may have been allocated to surplus in a manner permitted by law; and

(iii) such amounts not included in paragraphs 14A:1-2(p)(i) and 14A:1-2(p)(ii) as have been transferred to stated capital of the corporation, whether upon the issue of shares as a share dividend or otherwise, minus all reductions from such sum as have been effected in a manner permitted by law.

(q) "Subscriber" means one who subscribes for shares in a corporation, whether before or after incorporation.

(r) "Surplus" means the excess of the net assets of a corporation over its stated capital.

(s) "Treasury shares" means

(i) shares of a corporation which have been issued, have been subsequently acquired by the corporation under circumstances which do not result in automatic cancellation and have not been cancelled by action of the board; and

(ii) shares which have been distributed as a share dividend upon treasury shares pursuant to paragraph 14A:7-15(1)(c).

Treasury shares are issued shares, but not outstanding shares.

14A:1-3. Application of Act.

This Act shall apply to

(1) every corporation which is organized under this Act;

(2) every corporation which reincorporates under this Act pursuant to section 14A:1-4;

(3) every corporation which was organized under or became subject to, any heretofore enacted law of this State with respect to which power to amend or repeal was reserved to the Legislature, and which provided for the organization of a corporation or corporations for a purpose or purposes for which a corporation may be organized under this Act;

(4) every corporation organized under or subject to any other law of this State providing for the organization of corporations for any purpose for which a corporation may not be organized under this Act

(a) to the extent that this Act provides that this Act shall be applicable, in whole or in part, to any such corporation; or

(b) to the extent that the law applicable to any such corporation provides that this Act shall be applicable to any such corporation;

(5) to foreign corporations to the extent provided in section 14A:13-3.

14A:1-4. Reincorporation Under This Act by Certain Corporations Organized Under Special Acts.

Any corporation which has been organized by special act of the Legislature for any of the purposes permitted by this Act, and to which this Act does not apply pursuant to section 14A:1-3, may come under and be subject to the provisions of this Act, and continue in existence and operation as if organized hereunder, by amending its certificate of incorporation pursuant to the provisions of this Act and filing a certificate of such amendment in the office of the Secretary of State, together with a certificate waiving any right of exemption from

taxation and from privileges and advantages arising under such special act of incorporation. Thereupon, such corporation shall be deemed to be incorporated under this Act and to be free from the liabilities and provisions of the act or acts under which it was formerly incorporated. Nothing in this section shall be held to affect such transactions, liabilities or debts of any such corporations, occuring before the filing of such certificate.

14A:1-5. Reservation of Power.

This Act may be supplemented, altered, amended or repealed by the Legislature, and every corporation, domestic or foreign to which this Act applies shall be bound thereby.

14A:1-6. Execution and Filing of Documents.

(1) If a document relating to a domestic or foreign corporation is required or permitted to be filed in the office of the Secretary of State under this act:

(a) The document shall be in the English language, except that the corporate name need not be in the English language if written in English letters or Arabic or Roman numerals, and except that this requirement shall not apply to a certificate of good standing under paragraph 14A:2-4(2)(b), section 14A:2-5, or subsection 14A:13-4(2).

(b) The filing shall be accomplished by delivering the document to the office of the Secretary of State together with the fees and any accompanying documents required by law. Thereupon, the Secretary of State shall endorse upon it the word "Filed" with his official title and the hour, day, month and year of the filing thereof, and shall file it in his office.

(c) The transaction in connection with which the document has been filed shall be effective at the date and hour of filing, unless a subsequent effective time is set forth in such document pursuant to any other provision of this

Act, in which case such transaction shall be effective at the time so specified, which shall in no event be later than 30 days after the date and hour of filing.

(2) If a document relating to a domestic corporation or a foreign corporation is required or permitted to be filed under this Act and is also required by this Act to be executed on behalf of such corporation, the document shall be signed by the chairman of the board, or the president or a vice president. The name of any person so signing such a document, and the capacity in which he signs, shall be stated beneath or opposite his signature. The document may, but need not, contain

(a) the corporate seal; or

(b) an attestation by the secretary or an assistant secretary of the corporation; or

(c) an acknowledgment or proof.

If the corporation is in the hands of a receiver, trustee, or other court appointed officer, the document shall be signed by such fiduciary or the majority of them, if there are more than one.

14A:1-7. Repeal of Prior Acts.

The repeal by this Act of the whole or any part of any act under which there was organized any corporation in existence on the effective date of this Act, shall not work a dissolution of such corporation, but such corporation, its officers, directors and shareholders shall have the same rights, and shall be subject to the same limitations, restrictions, liabilities and penalties as those prescribed by this Act for corporations organized under this Act, their officers, directors and shareholders; nor shall such repeal affect any right which accrued to or liability incurred by any such existing corporation, its officers, directors and shareholders prior to the effective date of this Act.

14A:1-8. Notices.

In computing the period of time for the giving of any notice required or permitted by this Act, or by a certificate of incorporation or by-laws or any resolution of directors or shareholders, the day on which the notice is given shall be excluded, and the day on which the matter noticed is to occur shall be included. If notice is given by mail, the notice shall be deemed to be given when deposited in the mail addressed to the person to whom it is directed at his last address as it appears on the records of the corporation, with postage prepaid thereon.

14A:1-9. Certificates and Certified Copies as Evidence.

(1) Upon request of any person, the Secretary of State shall furnish certified copies of documents filed in his office in accordance with the provisions of this Act. Such copies shall be received in all courts and places as prima facie evidence of the facts therein stated.

(2) Upon request of any person, the Secretary of State shall certify to the existence or non-existence of any facts on record in his office relating to domestic or foreign corporations. Such certificate shall be received in all courts and places as prima facie evidence of the existence or non-existence of the facts therein stated.

CHAPTER 2

FORMATION

Sec.

14A:2-1. Purposes.

A corporation may be organized under this Act for any lawful business purpose or purposes except to do in this State any business for which organization is permitted under any other statute of this State unless such statute permits organization under this Act.

14A:2-2. Corporate Name of Domestic or Foreign Corporations.

(1) The corporate name of a domestic corporation or of a foreign corporation authorized to transact business in this State

(a) shall not contain any word or phrase, or abbreviation or derivative thereof, which indicates or implies that it is organized for any purpose other than one or more of the purposes set forth in its certificate of incorporation;

(b) shall not be the same as, or confusingly similar to, the corporate name of any domestic corporation or any foreign corporation authorized to transact business in this

State or any corporate name reserved or registered under this Act, unless the written consent of such other domestic or foreign corporation to the adoption of its name, or a confusingly similar name, is filed in the office of the Secretary of State with the certificate of incorporation or the application for authority to transact business in this State;

(c) shall not contain any word or phrase, or any abbreviation or derivative thereof, the use of which is prohibited or restricted by any other statute of this State, unless any such restrictions have been complied with.

(2) This section shall not require any domestic corporation organized prior to the effective date of this Act or any foreign corporation authorized to transact business in this State prior to the effective date of this Act to change its corporate name in order to comply with this section, if such name is otherwise lawful on the effective date of this Act. No such corporation shall change its corporate name on or after the effective date of this Act to a name which is not available for corporate use under this section.

(3) The corporate name of a domestic corporation which has been dissolved and any name confusingly similar to the name of a domestic corporation which has been dissolved shall not be available for corporate use for 2 years after the effective time of dissolution, unless, within such 2 year period, the written consent of such dissolved corporation to the adoption of its name, or a confusingly similar name, is filed in the office of the Secretary of State with the certificate of incorporation of another domestic corporation or the application for authority to transact business in this State of a foreign corporation.

(4) The filing in the office of the Secretary of State of the certificate of incorporation of a domestic corporation or the issuance by the Secretary of State of a certificate to a foreign corporation authorizing it to transact business in this State shall not preclude an action by this State to enjoin a violation of this section or an action by any person adversely affected to enjoin such violation or the use of a corporate name in violation of the rights of such person, whether on principles of unfair competition or otherwise. The court in any such action may grant any other appropriate relief.

14A:2-3. Reserved Name.

(1) The exclusive right to the use of a corporate name may be reserved upon compliance with the provisions of this section.

(2) The reservation shall be made by filing in the office of the Secretary of State an application to reserve a specified corporate name, executed by or on behalf of the applicant. If the Secretary of State finds that the name complies with the provisions of subsections 14A:2-2(1) and 14A:2-2(3), he shall reserve it for the exclusive use of the applicant for a period of 60 days from the date of filing of the application and shall issue a certificate of reservation.

(3) The right to the exclusive use of a specified corporate name so reserved may be transferred by filing in the office of the Secretary of State a notice of such transfer, executed by or on behalf of the applicant for whom the name was reserved, and specifying the name and address of the transferee.

14A:2-4. Registered Name.

(1) Any foreign corporation may register its corporate name under this Act, provided its corporate name is not the same as, or confusingly similar to, the corporate name of any domestic corporation or any foreign corporation authorized to transact business in this State, or any corporate name reserved or registered under this Act.

(2) Such registration shall be made by filing in the office of the Secretary of State:

(a) An application for registration executed on behalf of the corporation, setting forth the name of the corporation, the jurisdiction of its incorporation, the date of its incorporation, a statement that it is carrying on or doing business, and a brief statement of the business in which it is engaged; and

(b) A certificate setting forth that such corporation is in good standing under the laws of the jurisdiction

of its incorporation, executed by the official of such jurisdiction who has custody of the records pertaining to corporations. If such certificate is in a foreign language, a translation thereof under oath of the translator shall be attached thereto.

(3) Such registration shall be effective until the close of the calendar year in which the application for registration is filed.

14A:2-5. Renewal of Registered Name.

A corporation which has a registration of its corporate name in effect may renew such registration from year to year by annually filing in the office of the Secretary of State an application for renewal setting forth the facts required to be set forth in an original application for registration, together with a certificate of good standing as required for the original registration. A renewal application may be filed between the first day of October and the thirty-first day of December in each year, and shall extend the registration for the following calendar year.

14A:2-6. Incorporators.

(1) One or more individuals or domestic or foreign corporations, may act as incorporator or incorporators of a corporation by signing and filing in the office of the Secretary of State a certificate of incorporation for such corporation. Individuals acting as incorporators shall be at least 21 years of age. Incorporators need not be United States citizens or residents of this State or subscribers to shares in the corporation.

(2) Except as otherwise provided in the certificate of incorporation, any action required or permitted by this Act to be taken by incorporators may be taken without a meeting.

(3) When there are two or more incorporators, if any dies or is for any reason unable to act, the other or others may act. If there is no incorporator able to act, any person for whom an incorporator was acting as agent may act in his stead, or if such other person also dies or is for any reason unable to act, his legal representative may act.

14A:2-7. Certificate of Incorporation.

(1) The certificate of incorporation shall set forth:

(a) The name of the corporation;

(b) The purpose or purposes for which the corporation is organized. It shall be a sufficient compliance with this paragraph to state, alone or with specifically enumerated purposes, that the corporation may engage in any activity within the purposes for which corporations may be organized under this Act, and all such activities shall by such statement be deemed within the purposes of the corporation, subject to expressed limitations, if any;

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

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

(e) If the corporation is to issue the shares of any class in series

(i) the designation of each series, the number of shares in each series, and a statement of the preferences, limitations and relative rights of the shares of each series, to the extent that the same are fixed in the certificate of incorporation,

(ii) a statement of any authority vested in the board to divide the shares of any class into series and to determine for any series its designation, number of shares and any preference, limitation or relative right not fixed by the certificate of incorporation;

(f) Any provision not inconsistent with this Act or any other statute of this State, which the incorporators elect to set forth for the management of the business and the conduct of the affairs of the corporation, or creating, defining, limiting and regulating the powers of the corporation, its directors and shareholders or any class of shareholders, including any provision which under this Act is required or permitted to be set forth in the by-laws;

(g) The address of the corporation's registered office, and the name of the corporation's registered agent at such address;

(h) The number of directors constituting the board, or a provision that the number of directors shall be not less than a stated minimum or more than a stated maximum;

(i) If the number of directors constituting the board is specified, the names of those constituting the first board. If a provision is inserted that the number of directors shall be not less than a stated minimum nor more than a stated maximum, the number of directors constituting the first board and their names;

(j) The names of the incorporators;

(k) The duration of the corporation if other than perpetual; and

(l) If, pursuant to subsection 14A:2-7(2), the certificate of incorporation is to be effective on a date subsequent to the date of filing, the effective date and hour of the certificate.

(2) The certificate of incorporation shall be filed in the office of the Secretary of State. The corporate existence shall begin upon the effective date of the certificate, which shall be the date and hour of the filing or such later time, not to exceed 30 days from the date and hour of filing, as may be set forth in the certificate. Such filing shall be conclusive evidence that all conditions precedent required to be performed by the incorporators have been complied with and that the corporation has been incorporated under this Act, except as against this State in a proceeding to cancel or revoke the certificate of incorporation or for involuntary dissolution of the corporation.

14A:2-8. Organization Meeting of Directors.

After the effective date of the certificate of incorporation, an organization meeting of the board named in the certificate of incorporation shall be held, at the call of a majority of the incorporators, to adopt by-laws, elect officers, and transact such other business as may come before the meeting. The incorporators calling the meeting shall give at least 5 days' notice thereof by mail to each director named in the certificate of incorporation, which notice shall state the time and place of the meeting.

14A:2-9. By-laws; Making and Altering.

(1) The initial by-laws of a corporation shall be adopted by the board at its organization meeting. Thereafter, the board shall have the power to make, alter and repeal by-laws unless such power is reserved to the shareholders in the certificate of incorporation, but by-laws made by the board may be altered or repealed, and new by-laws made, by the shareholders. The shareholders may prescribe in the by-laws that any by-law made by them shall not be altered or repealed by the board.

(2) The initial by-laws of a corporation adopted by the board at its organization meeting shall be deemed to have been adopted by the shareholders for purposes of this Act.

(3) Any provision which this Act requires or permits to be set forth in the by-laws shall have equal force and effect if set forth in the certificate of incorporation.

14A:2-10. By-laws and Other Powers in Emergency.

(1) The board of a corporation may adopt emergency by-laws, subject to repeal or change by action of the shareholders, which shall, notwithstanding any different provision elsewhere in this Act or in the certificate of incorporation or by-laws, be operative during any emergency in the conduct of the business of the corporation resulting from an attack on the United States or any nuclear or atomic disaster. The emergency by-laws may make any provision that may be practical and necessary for the circumstances of the emergency, including provisions that

(a) a meeting of the board may be called by any officer or director in such manner and under such conditions as shall be prescribed in the emergency by-laws;

(b) the director or directors in attendance at the meeting, or any greater number fixed by the emergency by-laws, shall constitute a quorum; and

(c) the officers or other persons designated in a list approved by the board before the emergency, all in such order of priority and subject to such conditions and for such period of time, not longer than reasonably necessary after the termination of the emergency, as may be provided in the emergency by-laws or in the resolution approving the list, shall, to the extent required to provide a quorum at any meeting of the board, be deemed directors for such meeting.

(2) Before or during any such emergency, the board may provide, and from time to time modify, lines of succession in the event that during such an emergency any or all officers or agents of the corporation shall for any reason be rendered incapable of discharging their duties.

(3) Before or during any such emergency, the board may change the head office or designate several alternative head offices or regional offices, or authorize the officers so to do, said change to be effective during the emergency.

(4) To the extent not inconsistent with any emergency by-laws so adopted, the by-laws of the corporation shall remain in effect during any such emergency and upon its termination the emergency by-laws shall cease to be operative.

(5) Unless otherwise provided in emergency by-laws, notice of any meeting of the board during any such emergency need be given only to such of the directors as it may be feasible to reach at the time and by such means as may be feasible at the time, including publication, or other means of mass communication.

(6) To the extent required to constitute a quorum at any meeting of the board during any such emergency, the officers of the corporation who are present shall, unless otherwise provided in emergency by-laws, be deemed, in order of rank and within the same rank in order of seniority, directors for such meeting.

(7) No officer, director or employee acting in accordance with any emergency by-laws shall be liable except for willful misconduct. No officer, director or employee shall be liable for any action taken by him in good faith in such an emergency in furtherance of the ordinary business affairs of the corporation even though not authorized by the by-laws then in effect.

CHAPTER 3

POWERS

Sec.

14A:3-1. General Powers.

(1) Each corporation, subject to any limitations provided in this Act or any other statute of this State, or in its certificate of incorporation, shall have power in furtherance of its corporate purposes

(a) to have perpetual duration unless a limited period is stated in its certificate of incorporation;

(b) to sue and be sued, complain and defend, in its corporate name;

(c) to have a corporate seal which may be altered at pleasure, and to use the same by causing it, or a facsimile thereof, to be impressed or affixed or in any other manner reproduced;

(d) to purchase, lease or otherwise acquire, own, hold, improve, use and otherwise deal in and with, real or personal property, or any interest therein, wherever situated;

(e) to sell, convey, mortgage, create a security interest in, lease, exchange, transfer and otherwise dispose of all or any part of its property and assets;

(f) to purchase, subscribe for, or otherwise acquire, own, hold, vote, use, employ, sell, mortgage, lend, create a security interest in, or otherwise dispose of, and otherwise use and deal in and with, shares or other interests in, or obligations of, other domestic or foreign corporations, associations, partnerships or individuals, or direct or indirect obligations of any domestic or foreign government or instrumentality thereof;

(g) to make contracts and guarantees and incur liabilities, borrow money, issue its bonds, and secure any of its obligations by mortgage of or creation of a security interest in all or any of its property, franchises and income;

(h) to lend money, invest and reinvest its funds, and take and hold real and personal property as security for the payment of funds so loaned or invested;

(i) to conduct its business, carry on its operations, and have offices and exercise the powers granted by this Act anywhere in the universe;

(j) to elect or appoint officers, employees and agents of the corporation, and define their duties and fix their compensation;

(k) to make and alter by-laws for the administration and regulation of the affairs of the corporation;

(l) to pay pensions and establish pension plans, profit-sharing plans, savings plans, deferred compensation plans, stock bonus plans, stock option and stock purchase plans, incentive plans, and plans of similar nature for, and to furnish medical services, life, sickness, accident, disability or unemployment insurance and benefits, education, housing, social and recreational services and other similar aids and services to any or all of its directors, officers and employees, their families, dependents or beneficiaries;

(m) to be a promoter, incorporator, partner, member, associate or manager of other business enterprises or ventures;

(n) at the request of the United States government or of any of its agencies, to transact any lawful business in time of war or other national emergency, notwithstanding the purpose or purposes set forth in its certificate of incorporation;

(o) to have and exercise all other powers necessary or convenient to effect any or all of the purposes for which the corporation is organized.

(2) It shall not be necessary to set forth in the certificate of incorporation any corporate powers enumerated in subsection 14A:3-1(l).

14A:3-2. Ultra Vires Transactions.

No act of a corporation and no conveyance or transfer of real or personal property to or by a corporation shall be invalid by reason of the fact that the corporation was without capacity or power to do such act or to make or receive such conveyance or transfer, but such lack of capacity or power may be asserted:

(a) In a proceeding by a shareholder against the corporation to enjoin the doing of any act or acts or the transfer of real or personal property by or to the corporation. If the unauthorized acts or transfer sought to be enjoined are being, or are to be, performed or made pursuant to any contract to which the corporation is a party, the court may, if all of the parties to the contract are parties to the proceeding and if it deems the same to be equitable, set aside and enjoin the performance of such contract, and in so doing may allow to the corporation or to the other parties to the contract, as the case may be, compensation for the loss or damage sustained by either of them which may result from the action of the court in setting aside and enjoining the performance of such contract, but anticipated profits to be derived from the performance of the contract shall not be awarded by the court as a loss or damage sustained.

(b) In a proceeding by the corporation, whether acting directly or through a receiver, trustee, or other legal representative, or through shareholders in a representative suit, against the incumbent or former officers or directors of the corporation.

(c) In a proceeding by the Attorney General, as provided in this Act, to dissolve the corporation, or in a proceeding by the Attorney General to enjoin the corporation from the transaction of unauthorized business.

14A:3-3. Guaranty Authorized by Shareholders.

A guaranty may be given by a corporation, although not in furtherance of its corporate purposes, when authorized at a meeting of shareholders by vote of the holders of two-thirds of all outstanding shares entitled to vote thereon. If authorized by a like vote, such guaranty may be secured by a mortgage of, or the creation of a security interest in, all or any part of the corporate property, or any interest therein, wherever situated.

14A:3-4. Contributions by Corporations.

(1) Any corporation organized for any purpose under any general or special law of this State, unless otherwise provided in its certificate of incorporation or by-laws, shall have power, irrespective of corporate benefit, to aid, singly or in cooperation with other corporations and with natural persons, in the creation or maintenance of institutions or organizations engaged in community fund, hospital, charitable, philanthropic, educational, scientific or benevolent activities or patriotic or civic activities conducive to the betterment of social and economic conditions, and the directors may appropriate, spend or contribute for such purposes such reasonable sums as they may determine; provided, that a contribution shall not be authorized hereunder if at the time of the contribution or immediately thereafter the donee institution shall own more than 10% of the voting stock of the donor corporation or one of its subsidiaries; and provided, further, that in the case of a corporation having shares, contributions in any fiscal year shall not in the aggregate exceed 5% of the stated capital and surplus as of the end of the preceding fiscal year, unless any contribution or contributions in excess of 5% of such stated capital and surplus shall be authorized by the shareholders of the corporation.

(2) The provisions of this section shall not be construed as directly or indirectly minimizing or interpreting the rights and powers of corporations, as heretofore existing, with reference to appropriations, expenditures or contributions of the nature above specified.

14A:3-5. Indemnification of Directors, Officers and Employees.

(1) As used in this section,

(a) "corporate agent" means any person who is or was a director, officer or employee of the indemnifying corpo-

ration and any person who is or was a director, officer or employee of any other enterprise, serving as such at the request of the indemnifying corporation, or the legal representative of any such director, officer or employee;

(b) "other enterprise" means any corporation, other than the indemnifying corporation, and any partnership, joint venture, sole proprietorship, trust or other enterprise, whether or not for profit, served by a corporate agent;

(c) "expenses" means reasonable costs, disbursements and counsel fees;

(d) "liabilities" means amounts paid or incurred in satisfaction of settlements, judgements, fines and penalties;

(e) "proceeding" means any pending or threatened civil, criminal, administrative or arbitrative action, suit or proceeding, and any appeal therein and any inquiry or investigation which could lead to such action, suit or proceeding.

(2) Any corporation organized for any purpose under any special or general law of this State shall have the power to indemnify a corporate agent against his expenses and liabilities in connection with any proceeding involving the corporate agent by reason of his being or having been such a corporate agent, other than a proceeding by or in the right of the corporation, if

(a) such corporate agent acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation; and

(b) with respect to any criminal proceeding, such corporate agent had no reasonable cause to believe his conduct was unlawful.

The termination of any proceeding by judgment, order, settlement, conviction or upon a plea of nolo contendere or its equivalent, shall not, of itself create a presumption that such corporate agent did not meet the requirements of paragraphs 14A:3-5(2)(a) and 14A:3-5(2)(b).

(3) Any corporation organized for any purpose under any general or special law of this State shall have the power to indemnify a corporate agent against his expenses in connection with any proceeding by or in the right of the corporation to procure a judgment, in its favor, which involves the corporate agent by reason of his being or having been such corporate agent, if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation. However, in such proceeding no indemnification shall be provided in respect of any claim, issue or matter as to which such corporate agent shall have been adjudged to be liable for negligence or misconduct, unless and only to the extent that the court in which such proceeding was brought shall determine upon application that despite the adjudication of liability, but in view of all circumstances of the case, such corporate agent is fairly and reasonably entitled to indemnity for such expenses as the court shall deem proper.

(4) Any corporation organized for any purpose under any general or special law of this State shall indemnify a corporate agent against expenses in connection with any proceeding involving the corporate agent by reason of his being or having been such corporate agent, where such corporate agent has been wholly successful on the merits or otherwise in defense of such proceeding.

(5) Any indemnification under subsection 14A:3-5(2) and, unless otherwise ordered by a court, under subsection 14A:3-5 (3), shall be made by the corporation upon a determination that indemnification is proper in the circumstances because the corporate agent met the applicable standard of conduct set forth in subsections 14A:3-5(2) and 14A:3-5(3). Such determination shall be made

(a) by the board of directors by a majority vote of a quorum consisting of directors who were not parties to the proceeding; or

(b) if such a quorum is not obtainable, or, even if obtainable and a quorum of the disinterested directors so directs, by independent legal counsel in a written opinion;or

(c) by the shareholders.

(6) Expenses incurred by a corporate agent in connection with a proceeding may be paid by the corporation in advance of the final disposition of the proceeding upon receipt of an undertaking by or on behalf of the corporate agent to repay such amount unless it shall ultimately be determined that he is entitled to be indemnified as provided in this section.

(7) Any indemnification provided by this section shall not exclude any other rights to which a corporate agent may be entitled under any by-law, agreement, vote of shareholders, or otherwise.

(8) Any corporation organized for any purpose under any general or special law of this State shall have the power to purchase and maintain insurance on behalf of any corporate agent against any expenses incurred in any proceeding and any liabilities asserted against him in his capacity as corporate agent, whether or not the corporation would have the power to indemnify him against such liability under the provisions of this section.

14A:3-6. Provisions Relating to Actions by Shareholders.

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

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

(3) In any action now pending or hereafter instituted or maintained in the right of any such corporation by the holder or holders of less than 5% of the outstanding shares of any class of such corporation or of voting trust certificates therefor, unless the shares or voting trust certificates so held have a market value in excess of $25,000.00, the corporation in whose right such action is brought shall be entitled at any time before final judgment to require the plaintiff or plaintiffs to give security for the reasonable expenses, including fees of attorneys, that may be incurred by it in connection with such action or may be incurred by other parties named as defendant for which it may become legally liable. Market value shall be determined as of the date that the plaintiff institutes the action or, in the case of an intervener, as of the date that he becomes a party to the action. The amount of such security may from time to time be increased or decreased, in the discretion of the court, upon showing that the security provided has or may become inadequate or excessive. The corporation shall have recourse to such security in such amount as the court having jurisdiction shall determine upon the termination of such action.

CHAPTER 4

REGISTERED OFFICE AND REGISTERED AGENT; ANNUAL REPORT

Sec.

14A:4-1. Registered Office and Registered Agent.

(1) Every corporation organized for any purpose under any general or special law of this State and every foreign corporation authorized to transact business in this State shall continuously maintain a registered office in this State, and a registered agent having a business office identical with such registered office.

(2) The registered office may be, but need not be, the same as a place of business of the corporation which it serves.

(3) The registered agent may be a natural person of the age of 21 years or more, or a domestic corporation or a foreign corporation authorized to transact business in this State, whether or not any such agent corporation is organized for a purpose or purposes for which a corporation may be organized under this Act.

14A:4-2. Function of Registered Agent and Office; Service of Process, Notice or Demand.

(1) Every registered agent shall be an agent of the corporation which has appointed him, upon whom process against the corporation may be served.

(2) Whenever any law of this State requires or permits any notice or demand to be given to or made upon a domestic corporation or a foreign corporation authorized to transact business in this State, its officers or directors, such notice or demand may be sent by mail or otherwise, as the law may require or permit, to the registered office of the corporation in this State, and such notice so given or demand so made shall be sufficient notice or demand.

(3) The provisions of this section shall not exclude any other method provided by law for service of process upon a corporation, domestic or foreign, or for service of a notice or demand upon such corporation, its officers or directors.

(4) Whenever any law of this State requires that any certificate, report or statement made, published, filed or recorded by any corporation, domestic or foreign, state the residence or post office address of any incorporator, shareholder, director or officer, it shall be sufficient if the address of the registered office of the corporation in this State is stated.

14A:4-3. Change of Registered Office or Registered Agent.

(1) A domestic corporation or a foreign corporation authorized to transact business in this State may change its registered office or its registered agent, or both. When the registered office is changed, or when the registered agent is changed, or dies, resigns or becomes disqualified, the corporation shall, by resolution of the board, forthwith fix the address of the new registered office or designate the successor registered agent or both, as the case may be.

(2) A domestic corporation shall forthwith file in the office of the Secretary of State a certificate of amendment of the certificate of incorporation executed on behalf of the corporation and setting forth

(a) the name of the corporation;

(b) if the registered agent is not being changed, the name of the registered agent;

(c) if the registered agent is being changed, the names of the registered agent being succeeded and of the the successor registered agent;

(d) if the registered office is not being changed, the address of the then registered office;

(e) if the registered office is being changed, the address of the registered office immediately prior to the change, and the address of the new registered office;

(f) that the address of its registered office and the address of its registered agent will be identical after the change; and

(g) that the change in registered office, or registered agent, or both, is made pursuant to resolution of the board.

(3) A foreign corporation shall forthwith file in the office of the Secretary of State a certificate executed on behalf of the corporation and setting forth the same statements as are required by subsection 14A:4-3(a) to be made by a domestic corporation.

14A:4-4. Resignation of Registered Agent.

(1) The registered agent of a domestic corporation or a foreign corporation authorized to transact business in this State may resign by complying with the provisions of this section.

(2) The registered agent shall serve a notice of resignation by certified mail, return receipt requested, upon the president, or any vice president, or the secretary or treasurer of the corporation at the address last known to the agent, and shall make an affidavit of such service. If such service cannot be made, the affidavit shall so state, and shall state briefly why such service cannot be made. The affidavit, together with a copy of the notice of resignation, shall be filed in the office of the Secretary of State.

(3) Such resignation shall become effective upon the expiration of 30 days after the filing in the office of the Secretary of State of the affidavit under this section or upon the designation by the corporation of a new registered agent pursuant to this Act, whichever is earlier.

14A:4-5. Annual Report to Secretary of State.

(1) Every domestic corporation and every foreign corporation authorized to transact business in this State shall file in the office of the Secretary of State, within the time prescribed by this section, an annual report setting forth

(a) the name of the corporation and, in the case of a foreign corporation, the jurisdiction of its incorporation;

(b) the address of the registered office of the corporation in this State, and the name of its registered agent in this State at such address, and, in the case of a foreign corporation, the address of its principal office in the jurisdiction of its incorporation;

(c) the names of the directors and officers of the corporation and when the term of office of each expires; and

(d) the date appointed for the next annual meeting of the shareholders for the election of directors.

(2) Such report shall be filed within 30 days after the time appointed for holding the annual election of directors, commencing with the time appointed for the first annual election of directors following the date of incorporation or of registering to transact business.

(3) If the report is not so filed, the corporation shall, after written demand therefor by the Secretary of State by certified mail addressed to the corporation at the last address appearing of record in his office, forfeit to the State a penalty of $200.00 for each report required to have been filed not more than 5 years prior thereto and remaining unfiled, to be recovered with costs in a civil action prosecuted by the Attorney General. No corporation shall be subject to penalty if it shall, within 30 days after such written demand, file the reports required

by law and shall pay to the Secretary of State a fee of $10.00 for the filing of each such report. In lieu of such civil action, the Secretary of State, after expiration of such 30-day period, may issue a certificate to the Clerk of the Superior Court that the corporation is indebted for the payment of such penalty, and thereupon the Clerk shall immediately enter upon his record of docketed judgments the name of such corporation as the judgment debtor, and of the State as the judgment creditor, a statement that the penalty is imposed under this section, the amount of the penalty, and the date of such certificate. Such entry shall have the same force as a judgment docketed in the Superior Court. The Secretary of State within 5 days after such entry shall give notice thereof to the corporation by certified mail addressed to the corporation at the last address appearing of record in his office.

(4) The Secretary of State shall furnish annual report forms, shall keep in his office all such reports and shall prepare an alphabetical index thereof, which reports and index shall be open to public inspection at proper hours.

(5) This section shall not apply to corporations under the supervision of the Department of Banking and Insurance.

CHAPTER 5

SHAREHOLDERS' MEETINGS AND ELECTIONS; RIGHTS AND LIABILITIES OF SHAREHOLDERS IN CERTAIN CASES

Sec.

14A:5-1. Place of Shareholders' Meetings.

Meetings of shareholders of every corporation organized for any purpose under any general or special law of this State may, unless otherwise provided by law, be held at such place, within or without this State, as may be provided in the by-laws or as may be fixed by the board pursuant to authority granted by the by-laws. In the absence of any such provision, all meetings shall be held at the registered office of the corporation.

14A:5-2. Annual Meeting of Shareholders.

An annual meeting of the shareholders shall be held at such time as may be provided in the by-laws and, in the absence of such provision, at noon on the first Tuesday of April. Failure to hold the annual meeting at the designated time, or to elect directors at such meeting or any adjournment thereof, shall not work a forfeiture or dissolution of the corporation, but the Superior Court may, upon the application of any shareholder, summarily order the meeting or the election, or both, to be held, at such time and place, upon such notice and for the transaction of such business as may be designated in such order. At any meeting ordered to be called pursuant to this section, the shareholders attending and having voting powers shall constitute a quorum for the transaction of the business designated in such order.

14A:5-3. Call of Special Meetings of Shareholders.

Special meetings of the shareholders may be called by the president or the board, or by such other officers, directors or shareholders as may be provided in the by-laws. Notwithstanding any such provision, upon the application of

the holder or holders of not less than 10% of all the shares entitled to vote at a meeting, the Superior Court, in an action in which the court may proceed in a summary manner, for good cause shown, may order a special meeting of the shareholders to be called and held at such time and place, upon such notice and for the transaction of such business as may be designated in such order. At any meeting ordered to be called pursuant to this section, the shareholders attending and having voting powers shall constitute a quorum for the transaction of the business designated in such order.

14A:5-4. Notice of Shareholders' Meetings.

(1) Written notice of the time, place and purpose or purposes of every meeting of shareholders shall be given not less than 10 nor more than 50 days before the date of the meeting, either personally or by mail, to each shareholder of record entitled to vote at the meeting.

(2) When a meeting is adjourned to another time or place, it shall not be necessary, unless the by-laws otherwise provide, to give notice of the adjourned meeting if the time and place to which the meeting is adjourned are announced at the meeting at which the adjournment is taken and at the adjourned meeting only such business is transacted as might have been transacted at the original meeting. However, if after the adjournment the board fixes a new record date for the adjourned meeting, a notice of the adjourned meeting shall be given to each shareholder of record on the new record date entitled to notice under subsection 14A:5-4(1).

14A:5-5. Waiver of Notice or Lapse of Time.

(1) Notice of a meeting need not be given to any shareholder who signs a waiver of such notice, in person or by proxy, whether before or after the meeting. The attendance of any shareholder at a meeting, in person or by proxy, without protesting prior to the conclusion of the meeting the lack of notice of such meeting, shall constitute a waiver of notice by him.

(2) Whenever shareholders are authorized to take any action after the lapse of a prescribed period of time, the action may be taken without such lapse if such requirement is waived in writing, person or by proxy, before or after the taking of such action, by every shareholder entitled to vote thereon as at the date of the taking of such action.

14A:5-6. Action by Shareholders Without a Meeting.

(1) Any action required or permitted by this Act or the certificate of incorporation or by-laws of a corporation to be taken at a meeting of shareholders may be taken without a meeting if all the shareholders entitled to vote thereon sign a consent thereto.

(2) Such consent shall have the same effect as a unanimouse vote of shareholders for all purposes, and may be stated as such in any document filed with the Secretary of State.

14A:5-7. Fixing Record Date.

(1) For the purpose of determining the shareholders entitled to notice of or to vote at any meeting of shareholders or any adjournment thereof, or to express consent to or dissent from any proposal without a meeting, or for the purpose of determining shareholders entitled to receive payment of any dividend or the allotment of any right, or for the purpose of any other action, the by-laws may provide for fixing or, in the absence of such provision, the board may fix, in advance, a date as the record date for any such determination of shareholders. Such date shall not be more than 50 nor less than 10 days before the date of such meeting, nor more than 50 days prior to any other action.

(2) If no record date is fixed

(a) the record date for the determination of shareholders entitled to notice of or to vote at a meeting of shareholders shall be the close of business on the day next preceding the day on which notice is given, or, if no notice is given, the day next preceding the day on which the meeting is held; and

(b) the record date for determining shareholders for any purpose other than that specified in paragraph 14A:5-7(2)(a) shall be at the close of business on the day on which the resolution of the board relating thereto is adopted.

(3) When a determination of shareholders of record entitled to notice of or to vote at any meeting of shareholders has been made as provided in this section, such determination shall apply to any adjournment thereof, unless the board fixes a new record date under this section for the adjourned meeting.

14A:5-8. Voting List.

(1) Except when a shareholders' meeting shall be held on less than 10 days' notice, pursuant to the provisions of section 14A:5-5, the officer or agent having charge of the stock transfer books for shares of a corporation shall make and certify, at least 10 days before each meeting of shareholders, a complete list of the shareholders entitled to vote at such meeting or any adjournment thereof. Such list shall be arranged by class in alphabetical order, with the address of, and the number of shares held by, each shareholder. For a period of 10 days prior to such meeting, such list shall be kept on file at the registered office of the corporation and shall be subject to inspection by any shareholder at any time during usual business hours. Such list shall be produced at the time and place of the meeting and shall be subject to the inspection of any shareholder during the whole time of the meeting. Such list shall be prima facie evidence as to who are the shareholders entitled to examine such list or to vote at any meeting.

(2) If the requirements of this section have not been complied with, the meeting shall, on the demand of any shareholder in person or by proxy, be adjourned until the requirements are complied with. Failure to comply with the requirements of this section shall not affect the validity of any action taken at such meeting prior to the making of any such demand.

14A:5-9. Quorum of Shareholders.

(1) Unless otherwise provided in the certificate of incorporation, the holders of a majority of the shares entitled to vote at a meeting shall constitute a quorum at such meeting. The shareholders present at a duly organized meeting may continue to do business until adjournment, notwithstanding the withdrawal of enough shareholders to leave less than a quorum. Less than a quorum may adjourn.

(2) Whenever the holders of any class or classes of shares are entitled to vote separately on a specified item of business, the provisions of this section shall apply in determining the presence of a quorum of such class or classes for the transaction of such specified item of business.

14A:5-10. Voting of Shares.

Each outstanding share of any class shall be entitled to one vote on each matter submitted to a vote at a meeting of shareholders, unless otherwise provided in the certificate of incorporation.

14A:5-11. Votes Required.

(1) Whenever any corporate action, other than the election of directors, is to be taken by vote of the shareholders, it shall be authorized by a majority of the votes cast at a meeting of shareholders by the holders of shares entitled to vote thereon, unless a greater vote is required by the certificate of incorporation or another section of this Act.

(2) Where voting as a class is provided in the certificate of incorporation, it shall be by the proportionate vote provided in the certificate or, if no proportionate vote is so provided, then for any corporate action other than the election of directors, by a majority of the votes cast at such meeting by the holders of shares of such class entitled to vote thereon.

(3) Where voting as a class is required by this Act to authorize any corporate action, such action shall be authorized by a majority of the votes cast at such meeting by the holders of shares of each such class entitled to vote thereon, unless a greater vote is required by the certificate of incorporation.

14A:5-12. Greater Voting Requirements.

(1) Whenever, with respect to any action to be taken by the shareholders of a corporation, the certificate of incorporation requires the vote or concurrence of the holders of a greater proportion of the shares, or of any class thereof, than required by this Act with respect to such action, the provisions of the certificate of incorporation shall control.

(2) An amendment of the certificate of incorporation which changes or deletes a provision permitted by this section shall be authorized by vote of the holders of at least such proportion of shares, or classes thereof, as is required by the provision being amended.

14A:5-13. Shares Owned or Controlled by the Corporation Not Voted or Counted.

Neither treasury shares nor shares held by another domestic or foreign corporation, of any type or kind, if a majority of the shares entitled to vote for the election of directors of such other corporation is held by the corporation, shall be voted at any meeting or counted in determining the total number of outstanding shares at any given time.

14A:5-14. Shares Held by Another Corporation.

Shares standing in the name of another domestic or foreign corporation, of any type or kind, may be voted by the chairman of its board, its president or a vice president, or by proxy appointed by any of them unless some other person, by resolution of its board or pursuant to its by-laws, shall be appointed to vote such shares, in which case such person shall be entitled to vote upon the production of a certified copy of such resolution or such by-law.

14A:5-15. Shares Held by Fiduciaries.

Shares held by any person in any representative or fiduciary capacity may be voted by him without a transfer of such shares into his name. Where shares are held jointly by any number of fiduciaries, and the instrument or order appointing such fiduciaries does not otherwise direct, such shares shall be voted as the majority of such fiduciaries shall determine. If the fiduciaries are equally divided as to how the shares shall be voted, any court having jurisdiction of their accounts may, in an action brought by any of such fiduciaries or by any beneficiary, appoint an additional person to act with such fiduciaries in such matter, and the stock shall be voted by the majority of such fiduciaries and such additional person. The court may proceed in the action in a summary manner or otherwise.

14A:5-16. Shares Held Jointly or as Tenants in Common.

Shares held by two or more persons as joint tenants or as tenants in common may be voted at any meeting of the shareholders by any one of such persons, unless another joint tenant or tenant in common seeks to vote any of such shares in person or by proxy. In the latter event, the written agreement, if any, which governs the manner in which such shares shall be voted, shall control if presented at the

meeting. If there be no such agreement presented at the meeting, the majority in number of such joint tenants or tenants in common present shall control the manner of voting. If there be no such majority, or if there be two such joint tenants or tenants in common, both of whom seek to vote such shares, the shares shall, for the purpose of voting, be divided equally among such joint tenants or tenants in common present.

14A:5-17. Voting of Pledged Stock.

A shareholder whose shares are pledged shall be entitled to vote such shares unless in the transfer to the pledgee on the books of the corporation he shall have expressly empowered the pledgee to vote the shares, in which case only the pledgee may vote the shares.

14A:5-18. When Redeemable Shares No Longer Entitled to Vote.

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

14A:5-19. Proxy Voting.

(1) Every shareholder entitled to vote at a meeting of shareholders or to express consent or dissent without a meeting may authorize another person or persons to act for him by proxy. Every proxy shall be executed in writing by the shareholder or his agent and shall be filed with the secretary of the corporation. No proxy shall be valid after 11 months from the date of its execution, unless a longer time is expressly provided therein, but in no event shall a proxy be valid after 3 years from the date of execution.
Unless it is coupled with an interest, a proxy shall be revocable at will, but its revocation shall not be effective until written notice of such revocation is filed with the secretary of the corporation. A proxy shall not be revoked by the death or

incapacity of the shareholder but such proxy shall continue in force until revoked by the personal representative or guardian of the shareholder. The presence at any meeting of any shareholder who has given a proxy shall not revoke such proxy unless the shareholder shall file written notice of such revocation with the secretary of the meeting prior to the voting of such proxy.

(2) A person named in a proxy as the attorney or agent of a shareholder may, if the proxy so provides, substitute another person to act in his place, including any other person named as an attorney or agent in the same proxy. The substitution shall not be effective until an instrument effecting it is filed with the secretary of the corporation.

(3) While a meeting of shareholders is in progress, the filing with the secretary of the corporation required by this section shall be made with the secretary of the meeting.

14A:5-20. Voting Trust.

(1) One or more shareholders of a corporation may confer upon a trustee or trustees the right to vote or otherwise represent his or their shares, for a period not to exceed 21 years, by entering into a written voting trust agreement specifying the terms and conditions of the voting trust, by filing an executed counterpart of the agreement at the registered office of the corporation and by transferring his or their shares to such trustee or trustees for the purposes of the agreement. The certificates for shares so transferred shall be surrendered and cancelled and new certificates therefor issued to such trustee or trustees stating that they are issued under such agreement, and in the entry of such ownership in the records of the corporation that fact shall also be noted, and such trustee or trustees may vote the shares so transferred during the term of such agreement. The copy of the voting trust agreement so filed shall be subject to inspection at any reasonable time by any shareholder of the corporation or by any holder of a beneficial interest in the voting trust, in person or by agent or attorney. Voting trust certificates may be issued to evidence beneficial interests in the voting trust.

(2) A trustee who votes shares subject to a voting trust shall incur no responsibility as shareholder, trustee, or otherwise, except for his own dereliction of duty.

(3) Where two or more persons are designated as voting trustees, and the right and method of voting any shares standing in their names at any meeting of the corporation are not fixed by the agreement appointing the trustees, the right to vote said shares and the manner of voting the same at any such meeting shall be determined by a majority of the trustees. If the trustees are equally divided as to how the shares shall be voted, the Superior Court or county court having jurisdiction may, in an action brought by any of such trustees, appoint an additional person to act with such trustees in such matter, and the right to vote said shares and the manner of voting the same at any such meeting shall be determined by a majority of the trustees and such additional person. The court may proceed in the action in a summary manner or otherwise.

(4) At any time within 1 year prior to the time of expiration of any such voting trust agreement as originally fixed or as extended as herein provided, one or more beneficiaries of the voting trust may, by agreement in writing and with the written consent of such voting trustees, extend the duration of such voting trust agreement for an additional period not exceeding 21 years. The voting trustees shall, prior to the time of expiration of any such voting trust agreement, as originally fixed or as previously extended, as the case may be, file in the registered office of the corporation an executed counterpart of such extension agreement and of their consent thereto, and thereupon the duration of such voting trust agreement shall be extended for the period fixed in such extension agreement; but no such extension agreement shall affect the rights or obligations of persons not parties thereto.

(5) The validity of a voting trust or of an extension thereof, otherwise lawful, shall not be affected during a period of 21 years from the date of its commencement by the fact that by its terms it will or may last beyond such 21-year period; but it shall become in operative at the end of such 21-year period.

14A:5-21. Agreements as to Voting; Provision in Certificate of Incorporation as to Control of Directors.

(1) An agreement between two or more shareholders, if in writing and signed by the parties thereto, may provide

that in exercising any voting rights, the shares held by them shall be voted as therein provided, or as they may agree, or as determined in accordance with a procedure agreed upon by them.

(2) A provision in the certificate of incorporation otherwise prohibited by law as improperly restrictive of the discretion or powers of the board in its management of corporate affairs as provided in this Act shall nevertheless be valid if all the incorporators or holders of record of all outstanding shares, whether or not having voting power, have authorized such provision in the certificate of incorporation or an amendment thereof.

(3) A provision authorized by subsection 14A:5-21(2) shall become invalid if

(a) subsequent to the adoption of such provision, shares are transferred or issued to any person who does not have knowledge or notice thereof, unless such person consents in writing to such provision; or

(b) any shares of the corporation are listed on a national securities exchange or regularly quoted in an over-the-counter market by one or more members of a national or affiliated securities association.

(4) If a provision authorized by subsection 14A:5-21 (2) shall have become invalid as provided in subsection 14A:5-21(3), the board shall amend the certificate of incorporation to delete such provision by filing a certificate of amendment in the office of the Secretary of State. The certificate shall be executed on behalf of the corporation and shall set forth

(a) the name of the corporation;

(b) the date of the adoption of the amendment;

(c) the deleted provision; and

(d) the event set forth in subsection 14A:5-21(3) by reason of which the provision has become invalid.

(5) The effect of any such provision authorized by subsection 14A:5-21(2) shall be to relieve the directors and impose upon the shareholders the liability for managerial acts or omissions that is imposed on directors by this Act to the extent that, and so long as, the discretion or powers of the directors in their management of corporate affairs is controlled by any such provision.

(6) If the certificate of incorporation of any corporation contains a provision authorized by subsection 14A:5-21 (2), the existence of such provision shall be noted conspicuously on the face of every certificate for shares issued by such corporation, and each holder of such certificate shall conclusively be deemed to have notice of such provision.

14A:5-22. Infant Shareholders and Bondholders.

(1) A corporation may treat an infant who holds shares or bonds of such corporation as having capacity to receive and to empower others to receive dividends, interest, principal and other payments and distributions, to vote or express consent or dissent, and to make elections and exercise rights relating to such shares or bonds, unless, in the case of shares, the corporate officer responsible for maintaining the list of shareholders or the transfer agent of the corporation or, in the case of bonds, the treasurer or paying officer or agent, has received written notice that such holder is an infant.

(2) An infant holder of shares or bonds of a corporation who has received or empowered others to receive payments or distributions, voted or expressed consent or dissent, or made an election or exercised a right relating thereto, shall have no right thereafter to disaffirm or avoid, as against the corporation, any such act on his part, unless prior to such receipt, vote, consent, dissent, election or exercise, as to shares, the corporate officer responsible for maintaining the list of shareholders or its transfer agent or, in the case of bonds, the treasurer or paying officer had received written notice that such holder was an infant. In the absence of such written notice within the time herein provided, any such act on the part of the infant shall, as against the corporation, be valid and binding in all respects.

(3) This section does not limit any other statute which authorizes any corporation to deal with an infant or limits the right of an infant to disaffirm his acts.

14A:5-23. Voting Powers of Bondholders; Right to Inspect.

The certificate of incorporation may confer upon the holders of bonds issued by the corporation the power to vote for the election of directors and in respect to other corporate affairs and management, upon such terms and conditions as the certificate of incorporation shall provide. The certificate of incorporation or by-laws may provide for the manner of exercising such voting powers. The holders of bonds with voting powers shall, when entitled by the terms of such bonds to exercise such voting powers, have the same rights as those accorded to shareholders under section 14A:5-28.

14A:5-24. Elections of Directors; Cumulative Voting.

(1) Elections of directors need not be by ballot unless a shareholder demands election by ballot at the election and before the voting begins, or unless the by-laws so require.

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

(3) Except as otherwise provided by the certificate of incorporation, directors shall be elected by a plurality of the votes cast at an election.

14A:5-25. Selection of Inspectors.

(1) Unless the by-laws otherwise provide, the board may, in advance of any shareholders' meeting, appoint one or more inspectors to act at the meeting or any adjournment thereof.

(2) If inspectors are not so appointed by the board or as otherwise provided in the by-laws or shall fail to qualify, the person presiding at a shareholders' meeting may, and on the request of any shareholder entitled to vote thereat, shall, make such appointment.

(3) In case any person appointed as inspector fails to appear or act, the vacancy may be filled by appointment made by the board in advance of the meeting or at the meeting by the person presiding at the meeting.

(4) If the by-laws require inspectors at any shareholders' meeting, such requirement may be waived unless compliance therewith is requested by a shareholder entitled to vote at such meeting.

(5) Each inspector, before entering upon the discharge of his duties, shall take and sign an oath faithfully to execute the duties of inspector at such meeting with strict impartiality and according to the best of his ability.

(6) No person shall be elected a director at a meeting at which he has served as an inspector.

14A:5-26. Duties of Inspectors.

The inspectors shall determine the number of shares outstanding and the voting power of each, the shares represented at the meeting, the existence of a quorum, the validity and effect of proxies, and shall receive votes or consents, hear and determine all challenges and questions arising in connection with the right to vote, count and tabulate all votes or consents, determine the result, and do such acts as are proper to conduct the election or vote with fairness to all shareholders. If there are 3 or more inspectors, the act of a majority shall govern. On request of the person presiding at the meeting or any shareholder entitled to vote thereat, the inspectors shall make a report in writing of any challenge, question or matter determined by them. Any report made by them shall be prima facie evidence of the facts therein stated, and such report shall be filed with the minutes of the meeting.

14A:5-27. Review of Elections by Superior Court.

Any election by shareholders may be reviewed by the Superior Court in a summary manner, or otherwise, in an action brought by a shareholder entitled to vote at such election upon notice to the persons elected, the corporation and such other persons as the court may direct. The court may confirm the election, order a new election or provide such other relief as justice may require.

14A:5-28. Books and Records; Right of Inspection.

(1) Each corporation shall keep books and records of account and minutes of the proceedings of its shareholders, board and executive committee, if any. Unless otherwise provided in the by-laws, such books, records and minutes may be kept outside this State. The corporation shall keep at its registered office, or at the office of its transfer agent in this State, a record or records containing the names and addresses of all shareholders, the number and class of shares held by each and the dates when they respectively became the owners of record thereof, except that in the case of shares listed on a national securities exchange, the records of the holders of such shares may be kept at the office of the corporation's transfer agent within or without this State.

Any of the foregoing books, minutes or records may be in written form or in any other form capable of being converted into written form within a reasonable time.

(2) Upon the written request of any shareholder, the corporation shall mail to such shareholder its balance sheet as at the end of the preceding fiscal year, and its profit and loss and surplus statements for such fiscal year.

(3) Any person who shall have been a shareholder of record of a corporation for at least 6 months immediately preceding his demand, or any person holding, or so authorized in writing by the holders of, at least 5% of the outstanding shares of any class, upon at least 5 days' written demand shall have the right for any proper purpose to examine at its registered office, in person or by agent or attorney, during usual business hours, its minutes of the proceedings of its shareholders and record of shareholders and to make extracts therefrom.

(4) Nothing herein contained shall impair the power of any court, upon proof by a shareholder of proper purpose, irrespective of the period of time during which said shareholder shall have been a shareholder of record, and irrespective of the number of shares held by him, to compel the production for examination by such shareholder of the books and records of account, minutes and record of shareholders of a corporation.

(5) Holders of voting trust certificates representing shares of the corporation shall be regarded as shareholders for the purpose of this section.

14A:5-29. Preemptive Rights.

Except as otherwise provided in the certificate of incorporation, a corporation may issue unissued or treasury shares or option rights or securities having conversion or option rights, without first offering them to existing shareholders of any class or classes.

14A:5-30. Liability of Subscribers and Shareholders.

(1) A holder of or subscriber for shares of a corporation shall be under no obligation to the corporation or its

creditors to pay for such shares other than the obligation to pay to the corporation the unpaid portion of the consideration for which such shares were issued or to be issued, which in no event shall be less than the amount of the consideration for which such shares could be lawfully issued.

(2) A person holding stock in a fiduciary or representative capacity shall not be personally liable to the corporation as the holder of or subscriber for shares of a corporation but the estate and funds in his hands shall be so liable.

(3) Any person becoming an assignee or transferee of shares or of a subscription for shares in good faith and without knowledge or notice that the full consideration therefor has not been paid shall not be liable to the corporation or its creditors for any unpaid portion of such consideration, but the original holder or subscriber and any assignee or transferee prior to an assignment or transfer to a person taking in good faith and without such knowledge or notice shall remain liable therefor.

(4) No pledge or other holder of shares as collateral security shall be liable as a shareholder.

CHAPTER 6

DIRECTORS AND OFFICERS

Sec.

14A:6-1. Board of Directors.

The business and affairs of a corporation shall be managed by its board, except as in this Act or in its certificate of incorporation otherwise provided. Directors shall be at least 21 years of age and need not be United States citizens or residents of this State or shareholders of the corporation unless the certificate of incorporation or by-laws so require. The certificate of incorporation or by-laws may prescribe other qualifications for directors.

14A:6-2. Number of Directors.

The number of directors of a corporation shall be not less than three, except that in cases where all the shares with voting powers

of a corporation are owned beneficially and of record by either one or two shareholders, the number of directors may be less than three but not less than the number of shareholders. Subject to such limitation, the certificate of incorporation shall specify the number of directors or shall provide that the number of directors shall be not less than a stated minimum nor more than a stated maximum. If the certificate of incorporation provides that the number of directors shall be not less than a stated minimum nor more than a stated maximum, the number of directors within the minimum and maximum limits shall be determined from time to time in the manner prescribed by the by-laws.

14A:6-3. Term of Directors.

The directors named in the certificate of incorporation shall hold office until the first annual meeting of shareholders, and until their successors shall have been elected and qualified. At the first annual meeting of shareholders and at each annual meeting thereafter the shareholders shall elect directors to hold office until the next succeeding annual meeting, except in case of the classification of directors as permitted by this Act. Each director shall hold office for the term for which he is elected and until his successor shall have been elected and qualified. A director may resign by written notice to the corporation. The resignation shall be effective upon receipt thereof by the corporation or at such subsequent time as shall be specified in the notice of resignation.

14A:6-4. Classification of Directors; Restriction of Right to Choose Directors.

(1) A corporation may provide in its certificate of incorporation for the classification of its directors in respect to the time for which they shall severally hold office, but no class of directors shall hold office for a term shorter than one year or longer than five years, and the term of office of at least one class shall expire in each year. No classification of directors shall be effective prior to the first annual meeting of shareholders.

(2) Any corporation having more than one class of shares may provide in its certificate of incorporation for the election of one or more directors by the shareholders of any class or classes, to the exclusion of the shareholders of the other class or classes.

14A:6-5. Vacancies and Newly Created Directorships.

(1) Unless otherwise provided in the certificate of incorporation or the by-laws, any vacancy occurring in the board may be filled by the affirmative vote of a majority of the remaining directors though less than a quorum of the board. A director elected to fill a vacancy shall be elected for the unexpired term of his predecessor in office.

(2) Unless otherwise provided in the certificate of incorporation or by-laws, when one or more directors shall resign from the board effective at a future date, a majority of the directors then in office, including those who have so resigned, shall have power to fill such vacancy or vacancies, the vote thereon to take effect when such resignation or resignations shall become effective, and each director so chosen shall hold office as herein provided in the filling of other vacancies.

(3) Any directorship to be filled by reason of an increase in the number of directors shall be filled by election at an annual meeting or at a special meeting of shareholders called for that purpose, except that the certificate of incorporation or a by-law adopted by the shareholders may authorize the board to fill any such directorship. A director elected by the board to fill any such directorship shall hold office until the next succeeding annual meeting of shareholders and until his successor shall have been elected and qualified.

(4) If by reason of death, resignation or other cause a corporation has no directors in office, any shareholder or the executor or administrator of a deceased shareholder may call a special meeting of shareholders for the election of directors and, over his own signature, shall give notice of said meeting in accordance with section 14A:5-4 except to the extent that such notice is waived pursuant to section 14A:5-5.

14A:6-6. Removal of Directors.

(1) One or more or all the directors of a corporation may be removed for cause by the shareholders by a vote of the holders of a majority of the shares entitled to vote for the election of directors. If the certificate of incorporation or a by-law adopted by the shareholders so provides, one or more or all the directors may be removed without cause by like vote of the shareholders.

(2) The removal of directors, with or without cause, by vote of the shareholders as provided in subsection 14A:6-6(1) is subject to the following qualifications

(a) in any case where cumulative voting is authorized, if less than the total number of directors then serving on the board is to be removed by the shareholders, no one of the directors may be so removed if the votes cast against his removal would be sufficient to elect him if then voted cumulatively at an election of the entire board; or, if there are classes of directors, at an election of the class of directors of which he is a part;

(b) whenever the holders of the shares of any class are entitled to elect one or more directors, the provisions of this section shall apply, in respect to the removal by the shareholders of a director or directors so elected, to the vote of the holders of the outstanding shares of that class and not to the vote of the holders of the outstanding shares as a whole.

(3) The certificate of incorporation or a by-law adopted by the shareholders may provide that the board shall have the power to remove directors for cause and to suspend directors pending a final determination that cause exists for removal.

(4) The Superior Court, in an action in which the court may proceed in a summary manner or otherwise, may review the removal or suspension of a director for cause.

(5) No act of the board done during the period when a director has been suspended or removed for cause shall be impugned or invalidated if the suspension or removal is thereafter rescinded by the shareholders or by the board or by the final judgment of a court.

14A:6-7. Quorum of Board of Directors and Committees; Action of Directors Without a Meeting.

(1) A majority of the entire board, or of any committee thereof, shall constitute a quorum for the transaction of business, unless the certificate of incorporation or the by-laws shall provide that a different number shall constitute a quorum, which in no case shall be less than the greater of two persons or one-third of the entire board or committee, except that when a board of one director is authorized under the provisions of section 14A:6-2, then one director shall constitute a quorum. The act of the majority present at a meeting at which a quorum is present shall be the act of the board or of the committee, unless the act of a greater number is required by this Act, the certificate of incorporation or the by-laws.

(2) Any action required or permitted to be taken pursuant to authorization voted at a meeting of the board or any committee thereof may be taken without a meeting

(a) if the certificate of incorporation authorizes such procedure; and

(b) if, prior to such action, a written consent thereto is signed by all members of the board, or of such committee as the case may be, and such written consent is filed with the minutes of proceedings of the board or committee.

Such consent shall have the same effect as a unanimous vote of the board or committee for all purposes, and may be stated as such in any certificate or other document filed with the Secretary of State.

14A:6-8. Effect of Common Directorships and Directors' Personal Interest.

(1) No contract or other transaction between a corporation and one or more of its directors, or between a corporation and any domestic or foreign corporation, firm, or association of any type or kind in which one or more of its directors are directors or are otherwise interested, shall be void or voidable by reason of such common directorship or interest, or because such director or directors are present at the meeting of the board or a committee thereof which authorizes or approves the contract or transaction, or because his or their votes are counted for such purpose, if the contract or other transaction is fair and reasonable as to the corporation at the time it is authorized, approved or ratified, and

(a) the fact of the common directorship or interest is disclosed or known to the board or committee and the board or committee authorizes, approves, or ratifies the contract or transaction by a vote sufficient for the purpose without counting the vote or votes of such common or interested director or directors; or

(b) the fact of the common directorship or interest is disclosed or known to the shareholders, and they approve or ratify the contract or transaction.

(2) Common or interested directors may be counted in determining the presence of a quorum at a board or committee meeting at which a contract or transaction described in subsection 14A:6-8(1) is authorized, approved or ratified.

(3) The board, by the affirmative vote of a majority of directors in office and irrespective of any personal interest of any of them, shall have authority to establish reasonable compensation of directors for services to the corporation as directors, officers, or otherwise; provided that the approval of the shareholders shall be required if the certificate of incorporation or the by-laws so provide.

14A:6-9. Executive Committee; Other Committees.

(1) If the certificate of incorporation or the by-laws so provide, the board, by resolution adopted by a majority of the entire board, may appoint from among its members an

executive committee and one or more other committees, each of which shall have at least 3 members. To the extent provided in such resolution, or in the certificate of incorporation or in the by-laws, each such committee shall have and may exercise all the authority of the board, except that no such committee shall

(a) make, alter or repeal any by-law of the corporation;

(b) elect or appoint any director, or remove any officer or director;

(c) submit to shareholders any action that requires shareholders' approval;

(d) amend or repeal any resolution theretofore adopted by the board.

(2) The board, by resolution adopted by a majority of the entire board, may

(a) fill any vacancy in any such committee;

(b) appoint one or more directors to serve as alternate members of any such committee, to act in the absence or disability of members of any such committee with all the powers of such absent or disabled members;

(c) abolish any such committee at its pleasure;

(d) remove any director from membership on such committee at any time, with or without cause.

(3) Actions taken at a meeting of any such committee shall be reported to the board at its next meeting following such committee meeting; except that, when the meeting of the board is held within two days after the committee meeting, such report shall, if not made at the first meeting, be made to the board at its second meeting following such committee meeting.

(4) The designation of any such committee and the delegation thereto of authority shall not operate to relieve the board, or any member thereof, of any responsibility imposed by law.

14A:6-10. Place and Notice of Directors' Meetings.

(1) Meetings of the board may be held either within or without this State, unless otherwise provided by the certificate of incorporation or the by-laws.

(2) Regular meetings of the board may be held with or without notice as prescribed in the by-laws. Special meetings of the board shall be held upon such notice as is prescribed in the by-laws. Notice of any meeting need not be given to any director who signs a waiver of notice, whether before or after the meeting. The attendance of any director at a meeting without protesting prior to the conclusion of the meeting the lack of notice of such meeting shall constitute a waiver of notice by him. Neither the business to be transacted at, nor the purpose of, any meeting of the board need be specified in the notice or waiver of notice of such meeting unless required by the by-laws. Notice of an adjourned meeting need not be given if the time and place are fixed at the meeting adjourning and if the period of adjournment does not exceed ten days in any one adjournment.

14A:6-11. Loans to Officers or Employees.

A corporation may lend money to, or guarantee any obligation of, or otherwise assist, any officer or other employee of the corporation or of its subsidiary, whenever, in the judgment of the directors, such loan, guarantee or assistance may reasonably be expected to benefit the corporation; provided however, that a corporation shall not lend money to, guarantee any obligation of or otherwise assist any officer or other employee who is also a director of the corporation unless such loan, guarantee or assistance is authorized by the certificate of incorporation or a by-law adopted by the shareholders, and then only when authorized by a majority of the entire board.

14A:6-12. Liability of Directors in Certain Cases.

(1) In addition to any other liabilities imposed by law upon directors of a corporation, directors who vote for, or

concur in, any of the following corporate actions shall be jointly and severally liable to the corporation for the benefit of its creditors or shareholders, to the extent of any injury suffered by such persons, respectively, as a result of such action

(a) the declaration of any dividend or other distribution of assets to the shareholders contrary to the provisions of this Act or contrary to any restrictions contained in the certificate of incorporation;

(b) the purchase of the shares of the corporation contrary to the provisions of this Act or contrary to any restrictions contained in the certificate of incorporation;

(c) the distribution of assets to shareholders during or after dissolution of the corporation without paying, or adequately providing for, all known debts, obligations and liabilities of the corporation, except that the directors shall be liable only to the extent of the value of assets so distributed and to the extent that such debts, obligations and liabilities of the corporation are not thereafter paid, discharged, or barred by statute or otherwise;

(d) the making of any loan to an officer, director or shareholder of the corporation contrary to the provisions of this Act.

(2) Any director against whom a claim is successfully asserted under this section shall be entitled to contribution from the other directors who voted for, or concurred in, the action upon which the claim is asserted.

(3) Directors against whom a claim is successfully asserted under this section shall be entitled, to the extent of the amounts paid by them to the corporation as a result of such claims,

(a) upon payment to the corporation of any amount of an improper dividend or distribution, to be subrogated to the rights of the corporation against shareholders who received such dividend or distribution with knowledge of facts indicating that it was not authorized by this Act, in proportion to the amounts received by them respectively;

(b) upon payment to the corporation of any amount of the purchase price of an improper purchase of shares, to have the corporation rescind such purchase of shares and recover for their benefit, but at their expense, the amount of such purchase price from any seller who sold such shares with knowledge of facts indicating that such purchase of shares by the corporation was not authorized by this Act;

(c) upon payment to the corporation of the claim of any creditor by reason of a violation of paragraph 14A:6-12 (1)(c), to be subrogated to the rights of the corporation against shareholders who received an improper distribution of assets;

(d) upon payment to the corporation of the amount of any loan made improperly to a director or shareholder, to be subrogated to the rights of the corporation against a director or shareholder who received the improper loan.

(4) A director shall not be liable under this section if, in the circumstances, he discharged his duty to the corporation under section 14A:6-14.

(5) Every action against a director for recovery upon a liability imposed by subsection 14A:6-12(1) shall be commenced within six years next after the cause of any such action shall have accrued.

14A:6-13. Liability of Directors; Presumption of Assent to Action Taken at a Meeting.

A director of a corporation who is present at a meeting of its board, or any committee thereof, at which action on any corporate matter referred to in section 14A:6-12 is taken shall be presumed to have assented to the action taken unless his dissent shall be entered in the minutes of the meeting or unless he shall file his written dissent to such action with the person acting as the secretary of the meeting before or promptly after the adjournment thereof. Such right to dissent shall not apply to a director who voted in favor of such action. A director who is absent from a meeting of the board, or any committee thereof, at which any such action is taken shall be presumed to have assented to the action unless he shall file his dissent with the secretary of the corporation within a reasonable time after learning of such action.

14A:6-14. Liability of Directors; Reliance on Corporate Records.

Directors and members of any committee designated by the board shall discharge their duties in good faith and with that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions. In discharging their duties, directors and members of any committee designated by the board shall not be liable if, acting in good faith, they rely upon the written opinion of counsel for the corporation or upon written reports setting forth financial data concerning the corporation and prepared by an independent public accountant or certified public accountant or firm of such accountants or upon financial statements, books of account or reports of the corporation represented to them to be correct by the president, the officer of the corporation having charge of its books of account, or the officer presiding at a meeting of the board.

14A:6-15. Officers.

(1) The officers of a corporation shall consist of a president, a secretary, a treasurer, and, if desired, a chairman of the board, one or more vice presidents, and such other officers as may be prescribed by the by-laws. Unless otherwise provided in the by-laws, the officers shall be elected or appointed by the board.

(2) Any two or more offices may be held by the same person but, no officer shall execute, acknowledge, or verify any instrument in more than one capacity if such instrument is required by law or by the certificate of incorporation or the by-laws to be executed, acknowledged, or verified by two or more officers.

(3) Any officer elected or appointed as herein provided shall hold office for the term for which he is so elected or appointed and until a successor is elected or appointed and has qualified, subject to earlier termination by removal or resignation.

(4) All officers of the corporation, as between themselves and the corporation, shall have such authority and perform such duties in the management of the corporation as may be provided in the by-laws, or as may be determined by resolution of the board not inconsistent with the by-laws.

14A:6-16. Removal and Resignation of Officers; Filling of Vacancies.

(1) Any officer elected or appointed by the board may be removed by the board with or without cause. An officer elected by the shareholders may be removed, with or without cause, only by vote of the shareholders but his authority to act as an officer may be suspended by the board for cause. The removal of an officer without cause shall be without prejudice to his contract rights, if any. Election or appointment of an officer shall not of itself create contract rights.

(2) An officer may resign by written notice to the corporation. The resignation shall be effective upon receipt thereof by the corporation or at such subsequent time as shall be specified in the notice of resignation.

(3) Any vacancy occuring among the officers, however caused, shall be filled in the manner provided in the by-laws. In the absence of such provision, any vacancy shall be filled by the board.

14A:6-17. Bonds; Facsimile Signatures and Seals.

The seal of the corporation and any or all signatures of the officers or other agents of the corporation upon a bond and any coupon attached thereto may be facsimilies if the bond is countersigned by an officer or other agent of a trustee or other certifying or authenticating authority. In case any officer or other agent who has signed or whose facsimile signature has been placed upon such bond or coupon shall have ceased to be such officer or agent before such bond is issued, it may be issued by the corporation with the same effect as if he were such officer or agent at the date of its issue.

CHAPTER 7

SHARES AND DIVIDENDS

Sec.

14A:7-1. Authorized Shares.

(1) Each corporation shall have power to create and issue the number of shares stated in its certificate of incorporation. Such shares may be divided into one or more classes or one or more series within any class or classes, any or all of which classes may consist of shares with par value or without par value, and which classes or series may have such designations, preferences, limitations and relative rights as shall be stated in the certificate of incorporation, except that, in the case of any class consisting of shares with par value, all shares in such class shall have the same par value. The certificate of incorporation may limit or deny the voting rights of, or provide

special or multiple voting rights for, the shares of any class or series to the extent not inconsistent with the provisions of this Act.

(2) Without limiting the authority contained in subsection 14A:7-1(1), a corporation, when so authorized in its certificate of incorporation or by action of the board pursuant to subsection 14A:7-2(2), may issue classes of shares and series of shares of any class

(a) entitling the holders thereof to cumulative, non-cumulative or partially cumulative dividends;

(b) entitling the holders thereof to receive dividends payable on a parity with or in preference to the dividends payable on any other class or series;

(c) entitling the holders thereof to preferential rights upon the liquidation of, or upon any distribution of the assets of, the corporation;

(d) entitling the holders thereof to any other rights and preferences, including rights and preferences relating to redemption and conversion;

(e) convertible as provided in section 14A:7-9;

(f) redeemable as provided in section 14A:7-6.

(3) To the extent authorized by the certificate of incorporation or by board action pursuant to subsection 14A:7-2(2), any class or series may be issued having rights and preferences which are prior or subordinate to, or equal with, the shares of any class or series, whether or not such other shares are issued and outstanding at the time when such class or series is issued.

14A:7-2. Issuance of Shares in Series.

(1) If the certificate of incorporation so provides, the shares of any class may be issued in series. In such

cases, each series shall be designated so as to distinguish its shares from the shares of all other series and classes. The designation of the number of shares of any series, and the preferences, limitations and relative rights of the shares of such series, may be fixed by the certificate of incorporation.

(2) If the certificate of incorporation has not divided a class into series or has not fixed the designation or the number of shares of a series or any preference, limitation or relative rights of the shares of a series, the certificate of incorporation may authorize the board to do so.

(3) Whenever the board acts under subsection 14A:7-2 (2), it shall adopt a resolution setting forth its action and stating the designation and number of shares of each series affected, and the preferences, limitations and relative rights of the shares of each such series.

(4) Before the issue of any shares of a series with respect to which the board has acted under subsection 14A:7-2 (2), the corporation shall execute and file in the office of the Secretary of State a certificate of amendment to the certificate of incorporation, setting forth

(a) the name of the corporation;

(b) a copy of the resolution of the board required by subsection 14A:7-2(3);

(c) that such resolution was duly adopted by the board and the date of such adoption;

(d) that the certificate of incorporation is amended so that the designation and number of shares of each series acted upon in the resolution, and the preferences, limitations and relative rights of the shares of each such series, are as stated in the resolution.

14A:7-3. Subscriptions for Shares.

(1) Unless otherwise provided by the subscription agreement or unless all of the subscribers consent to the revocation of such subscription, a subscription for shares of a corporation to be formed shall be irrevocable for a period of 6 months if no certificate of incorporation shall be filed within such period. If the certificate of incorporation is filed within such period, or if it is filed at any later time before revocation, such subscription shall also be irrevocable until 60 days after the filing of the certificate of incorporation. Subscriptions for shares, whether made before or after the organization of a corporation, shall be accepted or rejected by the board, unless the certificate of incorporation or the by-laws require action by the shareholders.

(2) A subscription agreement, whether made before or after the formation of a corporation, shall not be enforceable unless it satisfies the requirements provided in R.S. § 12A:8-319 (Supp. 1962) (Statute of Frauds) with respect to a contract for the sale of securities.

(3) Unless otherwise provided by the subscription agreement

(a) the subscriber shall not become a holder of any shares for which the full consideration to be received by the corporation has not been paid;

(b) any payment made by the subscriber, in accordance with the subscription agreement or as called for by the board, shall be applied to pay the full consideration to be received by the corporation for as many whole shares as possible and any remaining balance of such payment shall be applied as part payment of a share;

(c) a share certificate shall be registered in the name of the subscriber for the number of shares so paid for in full; and

(d) the corporation shall be entitled to retain such share certificate as security for the performance by the

subscriber of his obligations under the subscription agreement and subject to the power of sale or rescission upon default provided in paragraphs 14A:7-3(5)(b) and 14A:7-3(5)(c).

(4) Unless otherwise provided by the subscription agreement

(a) subscriptions for shares, whether made before or after the organization of a corporation, shall be paid in full at such time, or in such installments and at such times, as shall be determined by the board;

(b) any call made by the board for payment on subscriptions shall be uniform as to all shares of the same class or as to all shares of the same series, as the case may be;

(c) all such calls for payments on subscriptions shall be upon 30 days' notice thereof and of the time and place of payment, which notice shall be given personally or by registered or certified mail.

(5) In the event of default in the payment of any installment or call or other amount due under the terms of the subscription agreement, including any amount which may become due as a result of a default in the performance of any provision thereof, the corporation shall have the following rights and duties:

(a) It may proceed to collect the amount due in the same manner as any other debt owing to it. At any time before full satisfaction of the claim or any judgment therefor, it may proceed as provided in paragraph 14A:7-3(5)(b);

(b) It may sell the shares in any reasonable manner. Notice of the time and place of any public sale or of the time after which any private sale may be had, together with a statement of the amount due upon each share, shall be given in writing to the subscriber personally or by registered or certified mail at least 20 days before any such time stated in the notice. Unless otherwise provided in the subscription agreement, the corporation may not be the purchaser at any sale. Any excess of net proceeds realized over the amount due plus interest shall be paid over to the

subscriber. If the sale is made in good faith, in a reasonable manner and upon the notice required by this paragraph, the corporation may recover the difference between the amount due plus interest and the net proceeds of the sale. A good faith purchaser for value shall acquire title to the sold shares free of any rights of the subscriber even though the corporation fails to comply with one or more of the requirements of this subsection;

(c) It may rescind the subscription, with the effect provided in subsection 14A:7-3(6), and may recover damages for breach of contract. Unless special circumstances show proximate damages of a different amount, the measure of damages shall be the difference between the market price at the time and place for tender of the shares and the unpaid contract price. Liquidated damages may be provided for in the subscription agreement in an amount which is reasonable under the circumstances, including the difficulties of proof of loss. The subscriber shall be entitled to restitution of any amount by which the sum of his payments exceeds the corporation's damages for breach of contract, whether fixed by agreement or judgment.

The rights and duties set forth in subsection 14A:7-3(5) shall be interpreted as cumulative so far as is consistent with the purpose of entitling the corporation to a full and single recovery of the amount due or its damages. The subscription agreement may limit the rights and remedies of the corporation set forth in subsection 14A:7-3(5), and may add to them so far as is consistent with the preceding sentence.

(6) The recission by the corporation of a subscription under which a portion of the shares subscribed for have been issued and in which the corporation retains a security interest, as provided in subsection 14A:7-3(3), shall effect the cancellation of such shares.

(7) A contract made with a corporation to purchase its shares, whether shares to be issued or treasury shares, is a subscription agreement and not an executory contract to purchase shares, unless otherwise provided in the agreement.

14A:7-4. Consideration for Shares.

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

(2) Shares without par value may be issued for such consideration expressed in dollars, as may be fixed from time to time by the board unless the certificate of incorporation reserves to the shareholders the right to fix the consideration. If such right is reserved as to any shares, the shareholders shall either fix the consideration to be received for such shares or authorize the board to fix such consideration.

(3) Unless otherwise provided in the certificate of incorporation, treasury shares may be disposed of by the corporation for such consideration expressed in dollars as may be fixed from time to time by the board.

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

(5) Upon a conversion of shares or of convertible bonds, or upon an exchange of shares with or without par value for the same or a different number of shares with or without par value, whether of the same or different class or classes, the consideration for the shares so issued in exchange or conversion shall be

(a) the stated capital then represented by the shares so exchanged or converted, or, in the case of convertible bonds, the principal sum of and the accrued interest on the convertible bonds; and

(b) any stated capital not theretofore allocated to any designated class or series of shares which is thereupon allocated to the new shares; and

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

(d) any additional consideration paid to the corporation upon the issuance of shares for the shares or bonds so exchanged or converted.

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

14A:7-5. Payment for Shares.

(1) Subject to any restrictions contained in the certificate of incorporation, the consideration for the issuance of shares may be paid, in whole or in part, in money, in real property, in tangible or intangible personal property, including stock of another corporation, or in labor or services actually performed for the corporation or in its formation. Neither obligations of the subscriber nor any future services shall constitute payment or part payment for shares of the corporation.

(2) When payment of the full consideration for which shares are to be issued is received by the corporation, the subscriber shall thereupon become entitled to all the rights and privileges of a holder of such shares, including the registration in his name of a certificate representing them, and such shares shall be fully paid and nonassessable.

14A:7-6. Redeemable Shares.

(1) A corporation may provide in its certificate of incorporation for one or more classes or series of shares which are redeemable, in whole or in part, at the option of the corporation in cash, its bonds or other property, at such price or prices, within such period or periods, and under such conditions as are stated in the certificate of incorporation.

(2) A corporation which is an open-end investment company, as defined in an act of congress entitled "Invest-Company Act of 1940," as amended or supplemented, or any act adopted in substitution therefor, may, if its certificate of incorporation so provides and upon compliance with that act, issue shares which are redeemable at the option of the holder at a price approximately equal to the shares' proportionate interest in the net assets of the corporation, and a shareholder may compel redemption of such shares in accordance with their terms.

(3) A corporation may provide, in its original certificate of incorporation or by an amendment approved by unanimous vote of the shareholders, for one or more classes of shares which are redeemable, in whole or in part, at the option of the holder. Such shares may be redeemable in cash, bonds of the corporation or other property, at such price or prices, within such period or periods and under such conditions as are stated in the certificate of incorporation. Such shares may also be redeemable at the option of the corporation, as provided in subsection 14A:7-6(1). The certificate of incorporation may be amended to delete or change a provision for shares redeemable at the option of the holder only with the unanimous approval of the holders of such shares. A provision for shares redeemable at the option of the holder shall become invalid when the number of holders of such shares, other than directors, officers, employees and the spouses of such persons, shall become 25 or more. The provisions of this subsection shall not be applicable to an open-end investment company.

(4) If a provision for shares redeemable at the option of the holder shall have become invalid as provided in the last sentence of subsection 14A:7-6(3), the board shall amend the certificate of incorporation to delete such provision by filing a certificate of amendment in the office of the Secretary of State. The certificate shall be executed on behalf of the corporation and shall set forth

(a) the name of the corporation;

(b) the date of adoption of the amendment;

(c) the deleted provision; and

(d) that the provision for shares redeemable at the option of the holder has become invalid because the number of holders of such shares, other than directors, officers, employees and the spouses of such persons, has become 25 or more.

14A:7-7. Share Rights and Options.

(1) Subject to any provisions in respect thereof set forth in its certificate of incorporation, a corporation may create and issue, whether or not in connection with the issuance and sale of any of its shares or bonds, rights or options entitling the holders thereof to purchase from the corporation shares of any class or classes for such consideration and upon such terms and conditions as may be fixed by the board. The shares to be purchased upon the exercise of any such right or option may be authorized but unissued shares, treasury shares or shares to be purchased or acquired by the corporation for the purpose. Such rights or options shall be evidenced in such manner as the board shall approve and, without limiting the generality of the foregoing, may be evidenced by warrants attached to or forming part of bond instruments or share certificates or existing independently thereof. The instruments evidencing such rights or options shall set forth or incorporate by reference the terms and conditions of their exercise, including the time or times, which may be limited or unlimited in duration, within which, and the price or prices at which such shares may be purchased from the corporation, and any limitations on the transferability of any such right or option. The consideration for shares to be purchased upon the exercise of any such right or option shall comply with the requirements of sections 14A:7-4 and 14A:7-5. In the absence of fraud in the transaction, the judgment of the board as to the adequacy of the consideration received for such rights or options shall be conclusive.

(2) If such rights or options are to be issued to directors, officers or employees as such of the corporation or of any subsidiary thereof, or to their families, dependents or beneficiaries, pursuant to a plan, the provisions of Chapter 8 of this Act govern their issuance. Without a plan,

a corporation may also issue such rights or options to any such person, as an incentive to service or continued service of any such director, officer or employee, provided that no such director, officer or employee, together with his dependents and beneficiaries, shall receive in the aggregate rights and options entitling him to more than 1% of each class of shares of the corporation except with shareholder approval.

14A:7-8. Determination of Amount of Stated Capital.

(1) The consideration received by a corporation upon the issuance of shares having a par value shall constitute stated capital to the extent of the par value and the excess, if any, shall constitute capital surplus.

(2) The consideration received by a corporation upon the issuance of shares without par value shall constitute stated capital unless, within 60 days after the issuance of such shares, the board shall allocate a portion of such consideration to capital surplus. No such allocation shall be made of any portion of the consideration for the issue of shares without par value which is fixed by the shareholders pursuant to a right reserved in the certificate of incorporation, unless such allocation is authorized by a vote of the shareholders, nor shall such allocation be made contrary to any restrictions contained in the certificate of incorporation. If shares without par value have a preference in the assets of the corporation upon liquidation, the certificate of incorporation may provide that the board shall have discretion to determine what portion of the consideration received for such shares to allocate to capital surplus; otherwise an amount at least equal to such preference shall constitute stated capital before any allocation of the consideration shall be made to capital surplus.

(3) If shares have been or shall be issued by a corporation in merger or consolidation or in acquisition of all or substantially all of the outstanding shares or of the property and assets of another corporation, whether domestic or foreign, any amount that would otherwise constitute capital surplus under the foregoing provisions of this section may instead be

allocated to earned surplus by the board of the issuing corporation except that its aggregate earned surplus shall not exceed the sum of the earned surpluses of the issuing corporation and of all other corporations, domestic or foreign, that were merged or consolidated or of which the shares or assets were acquired.

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

14A:7-9. Convertible Shares and Bonds.

(1) When so provided in its certificate of incorporation, a corporation may issue shares of any class convertible, at the option of the holder or of the corporation or both, into shares of any other class or classes or of any series of the same or any other class or classes.

(2) Subject to any provisions in respect thereof set forth in its certificate of incorporation, a corporation may issue bonds convertible, at the option of the holder of of the corporation or both, into shares of any class or classes or of any series of any class or classes, upon such terms and conditions as may be fixed by the board. The bond instrument shall set forth or incorporate by reference the terms and conditions of the conversion privilege.

(3) No issue of shares or bonds convertible into shares of the corporation shall be made unless a sufficient number of shares of the appropriate class or classes or series, either authorized but unissued or treasury shares, are reserved by the board to be issued or disposed of only in satisfaction of the conversion privileges of the convertible shares or bonds being issued.

(4) If there is shareholder approval of the issue of shares or bonds convertible into shares of the corporation,

such approval may provide that the board is authorized upon such issue to increase the authorized shares to such number and kind as will be not more than sufficient, when added to the previously authorized but unissued shares, to satisfy the conversion privileges of the convertible shares or bonds being issued. The board, when so authorized, may increase the authorized shares of the corporation by filing a certificate of amendment to the certificate of incorporation. The certificate shall be executed on behalf of the corporation and shall set forth

(a) the name of the corporation;

(b) the date of adoption of the amendment;

(c) the amendment so adopted;

(d) that the amendment is made pursuant to authority granted by the shareholders in connection with shareholder approval of the issue of shares or bonds of the corporation convertible into the shares being authorized by the amendment; and

(e) the designation of the convertible shares or bonds and the date of such shareholder approval.

(5) If, upon the conversion of shares, the stated capital represented by the shares being converted is greater than the amount of stated capital required by the provisions of subsections 14A:7-8(1) and 14A:7-8(2) to be represented by the shares being issued, a reduction of stated capital by all or any part of such excess may be accomplished at any time thereafter by the procedure set forth in section 14A:7-19. Subsection 14A:7-19(3) shall not limit the power of the board to make such reduction of stated capital.

(6) No privilege of conversion shall be conferred upon, or altered in respect to, any shares or bonds which would result in the receipt by the corporation, upon the exercise of such privilege, of less than the minimum consideration for which the new shares may lawfully be issued, except that a privilege of conversion may provide for adjustments of the conversion rate or price as required to maintain the value of

the privilege unimpaired by changes in the capital structure of the corporation occurring after the issue of such convertible shares or bonds.

(7) When bonds have been converted, they shall be cancelled and not reissued. The disposition of converted shares is provided for in section 14A:7-18.

14A:7-10. Expenses of Organization, Reorganization and Financing.

The reasonable charges and expenses of organization or reorganization of a corporation, and the reasonable expenses of and compensation for the sale or underwriting of its shares, may be paid or allowed by such corporation out of the consideration received by it in payment for its shares without thereby rendering such shares not fully paid or assessable.

14A:7-11. Certificates Representing Shares.

(1) The shares of a corporation shall be represented by certificates signed by the president or a vice president and either the treasurer or an assistant treasurer, or the secretary or an assistant secretary of the corporation, and may be sealed with the seal of the corporation or a facsimile thereof. The signatures of the officers upon a certificate may be facsimiles if the certificate is countersigned by a transfer agent, or registered by a registrar, other than the corporation itself or an employee of the corporation. In case any officer who has signed or whose facsimile signature has been placed upon such certificate shall have ceased to be such officer before such certificate is issued, it may be issued by the corporation with the same effect as if he were such officer at the date of its issue.

(2) Every certificate representing shares issued by a corporation which is authorized to issue shares of more than one class shall set forth upon the face or back of the certificate, or shall state that the corporation will furnish to

any shareholder upon request and without charge, a full statement of the designations, preferences, limitations, and relative rights of the shares of each class authorized to be issued and, if the corporation is authorized to issue any preferred or special class in series, the variations in the relative rights and preferences between the shares of each such series so far as the same have been fixed and determined and the authority of the board to fix and determine the relative rights and preferences of subsequent series.

(3) Each certificate representing shares shall state upon the face thereof

(a) that the corporation is organized under the laws of this State;

(b) the name of the person to whom issued; and

(c) the number and class of shares, and the designation of the series, if any, which such certificate represents.

(4) No certificate shall be issued for any share until such share is fully paid, except as provided in section 14A:8-3.

14A:7-12. Shares of Stock; Personal Property; Transfer.

The shares of a corporation shall be personal property, and shall be transferable in accordance with the provisions of section 12A:8-191, et seq. of the New Jersey Statutes. Reasonable restrictions on the transfer of shares may be imposed by agreement or by provision in the by-laws or the certificate of incorporation.

14A:7-13. Issuance of Fractional Shares or Scrip.

Subject to any restrictions contained in the certificate of incorporation, a corporation may, but shall not be obliged

to, issue a certificate for a fractional share where necessary to effect share transfers, dividends, distributions, exchanges or reclassifications, or to effect mergers, consolidations or reorganizations. By action of its board, a corporation may, in lieu of issuing fractional shares, pay cash equal to the value of such fractional share, or issue scrip in registered or bearer form which shall entitle the holder to receive a certificate for a full share upon the surrender of such scrip aggregating a full share. A certificate for a fractional share shall, but scrip shall not unless otherwise provided therein, entitle the holder to exercise voting rights, to receive dividends thereon, and to participate in any distribution of assets of the corporation in the event of liquidation. All scrip shall be issued subject to the condition that it shall become void if not exchanged for certificates representing full shares before a specified date. If such scrip is not so exchanged, the corporation shall either sell the shares for which such scrip was exchangeable and distribute the proceeds thereof pro rata to the holders of such scrip, or pay, pro rata, to the holders of such scrip the market value of the shares for which such scrip was exchangeable as of the day when such scrip became void.

14A:7-14. Dividends or Other Distributions in Cash or Property.

(1) A corporation may, from time to time, by action of its board, declare and pay dividends or make other distributions on its outstanding shares in cash or in its bonds or other property, including the shares or bonds of other corporations, except when the corporation is insolvent or would thereby be made insolvent, or when the payment or distribution would be contrary to any restrictions contained in the certificate of incorporation. The certificate of incorporation may provide that such payments or distributions may be made whether or not the net assets remaining after the transaction are less than the aggregate amount of the preferences of outstanding shares in the assets of the corporation upon liquidation; otherwise, no such payment or distribution shall be made unless the net assets remaining after the transaction shall at least equal the aggregate amount of such preferences.

(2) Dividends may be declared or paid and other distributions may be made out of surplus only, except in dissolution and except that a corporation engaged in the exploitation of wasting assets or formed primarily for the liquidation of specific assets may declare and pay dividends or make other distributions in excess of its surplus to the extent that the cost of the wasting or specific assets has been recovered by depletion reserves, amortization or sale.

14A:7-15. Share Dividends.

(1) Subject to any restrictions contained in the certificate of incorporation, a corporation may, from time to time, by resolution of its board, pay dividends in its own shares, as provided in this section.

(2) Such dividends may be paid in authorized but unissued shares out of surplus upon the following conditions

(a) if a dividend is payable in shares having a par value, such shares shall be issued at not less than the par value thereof and there shall be transferred to stated capital at the time such dividend is paid an amount of surplus at least equal to the aggregate par value of the shares to be issued as a dividend;

(b) if a dividend is payable in shares without par value, the amount of stated capital to be represented by each share shall be fixed by the board by resolution adopted at the time such dividend is declared, unless the certificate of incorporation reserves to the shareholders the right to fix the consideration for the issue of such shares, and there shall be transferred to stated capital at the time such dividend is paid an amount of surplus equal to the aggregate stated capital represented by such shares.

(3) Such dividends may be paid in treasury shares, in which event no transfer from surplus to capital need be made.

(4) A corporation paying a dividend in authorized but unissued shares to the holders of any class or series of

outstanding shares may at its option make an equivalent distribution on treasury shares of the same class or series and any shares so distributed shall be treasury shares.

(5) The certificate of incorporation may provide that a dividend may be paid in shares having a preference in the assets of the corporation upon liquidation, whether or not the net assets remaining after such payment are less than the aggregate amount of such preferences of outstanding shares; otherwise, no such dividend in shares shall be paid unless the net assets remaining thereafter shall at least equal the aggregate of such preferences.

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

14A:7-16. Right of a Corporation to Acquire and Dispose of Its Own Shares.

(1) A corporation shall have the right to purchase or otherwise acquire, and to sell, create a security interest in, or otherwise dispose of its own shares, but purchases of its own shares, whether direct or indirect, shall be made only out of surplus, except as provided in subsections 14A:7-16(2), 14A:7-16(3) and 14A:7-16(4).

(2) A corporation may purchase its own shares out of stated capital for the purpose of

(a) eliminating fractional shares;

(b) collecting or compromising indebtedness to the corporation; or

(c) paying dissenting shareholders entitled to payment for their shares under the provisions of this Act.

(3) A corporation may redeem or purchase its redeemable shares out of stated capital, except when after such redemption

or purchase net assets would be less than the stated capital remaining after giving effect to the cancellation of such shares.

(4) A corporation may purchase its nonredeemable shares out of stated capital, if such shares have a preference over the shares of any other class in the payment of dividends or in the distribution of the assets upon liquidation, except when after such purchase net assets would be less than the stated capital remaining after giving effect to the cancellation of such shares.

(5) No purchase or redemption of its own shares shall be made by a corporation

(a) contrary to any restrictions contained in the certificate of incorporation;

(b) at a time when the corporation is insolvent or when such purchase or redemption would render the corporation insolvent;

(c) unless after such purchase or redemption there remain outstanding one or more classes or series of shares possessing, among them collectively, voting rights and unlimited residual rights as to dividends and distribution of assets on liquidation; or

(d) in the case of redeemable shares, at a price greater than the applicable redemption price.

(6) The certificate of incorporation may provide that a corporation may purchase or redeem its shares whether or not the net assets remaining after the transaction are less than the aggregate amount of the preferences of outstanding shares in the assets of the corporation upon liquidation. If the certificate of incorporation lacks such a provision, the corporation may not purchase or redeem any of its shares unless the net assets remaining after the transaction shall at least equal the aggregate amount of the preferences in the assets of the corporation upon liquidation of those outstanding shares whose rights in the assets of the corporation upon liquidation are prior to or equal to those of the shares being purchased or redeemed.

14A:7-17. Disclosure to Shareholders Upon Certain Distributions or Earned Surplus Transactions.

(1) Every dividend or other distribution from a source in whole or in part other than earned surplus, and every share dividend or other distribution of shares of the corporation shall be accompanied by a written notice disclosing the amounts by which such dividend or distribution affects stated capital, capital surplus and earned surplus, or, if such amounts are not determinable at the time of such notice, disclosing the approximate effect of such dividend or distribution upon stated capital, capital surplus and earned surplus and stating that such amounts are not yet determinable.

(2) A corporation which applies any part or all of its capital surplus to the reduction or elimination of any deficit in its earned surplus, as permitted by subsection 14A:7-20(3), shall disclose such application in each financial statement covering the period in which such application is made that is furnished by the corporation to any of its shareholders, and in any event to all its shareholders within 6 months of the date of such application.

(3) Failure of the corporation to comply in good faith with the provisions of this section shall make it liable for any damage sustained by any shareholder in consequence thereof.

14A:7-18. Cancellation of Reacquired Shares.

(1) When shares of a corporation are reacquired out of stated capital or by their conversion into other shares of the corporation, the reacquisition shall effect their cancellation. When shares of a corporation are otherwise reacquired by it, the corporation may retain them as treasury shares or may cancel them by resolution of the board. In all cases of cancellation, except that of converted shares, a statement of cancellation shall be filed as provided in this section. Upon their cancellation, reacquired shares shall be restored to the status of authorized but unissued shares, unless the certificate of incorporation, or the plan of merger or consolidation in the case of shares acquired by the corporation

pursuant to Chapter 11 of this Act, provides that such shares shall not be reissued, in which case the filing of the statement of cancellation, pursuant to a resolution of the board, shall constitute an amendment to the certificate of incorporation and shall reduce the authorized number of shares of the class to which such shares belong by the number of shares so cancelled.

(2) The statement of cancellation shall be executed on behalf of the corporation and filed in the office of the Secretary of State not later than 30 days after the cancellation of the reacquired shares. The statement shall set forth:

(a) The name of the corporation;

(b) The number of shares cancelled, itemized by classes and series, and if cancelled shares were not reacquired out of stated capital or by their conversion into other shares of the corporation, the date of adoption of the resolution of the board cancelling such shares;

(c) The aggregate number of issued shares, itemized by classes and series, after giving effect to such cancellation;

(d) The amount, expressed in dollars, of the stated capital of the corporation after giving effect to such cancellation;

(e) If the certificate of incorporation, or the plan of merger or consolidation in the case of shares acquired by the corporation pursuant to Chapter 11 of this Act, provides that the cancelled shares shall not be reissued

(i) that the certificate of incorporation is amended pursuant to a resolution of the board by decreasing the aggregate number of shares which the corporation is authorized to issue by the number of shares cancelled, and

(ii) the number of shares which the corporation has authority to issue, itemized by classes and series, after giving effect to such cancellation; and

(f) If shareholder approval is required by subsection 14A:7-18(3) for a reduction of the stated capital of the corporation, a statement of the date of approval by the shareholders, the number of shares outstanding, the number of shares entitled to vote thereon, and the number of shares voted for and against the reduction of the stated capital, respectively.

(3) Except as otherwise provided in this subsection, upon the cancellation of reacquired shares the stated capital of the corporation shall be reduced by the amount represented by such shares before their cancellation. In the case of shares without par value for whose issue the consideration was fixed by the shareholders, as provided in subsection 14A:7-4(2), if such shares are not redeemable and are not preferred over the shares of any other class in the payment of dividends or in the distribution of assets upon liquidation and have not been reacquired for any of the purposes set forth in subsection 14A:7-16(2), their cancellation shall cause a reduction of the stated capital only to the extent, if any, that the stated capital represented by such shares exceeded the minimum amount required, as provided in subsection 14A:7-8(2), unless such further reduction has been approved by a vote of the shareholders or is authorized by the certificate of incorporation. This subsection shall not be applicable to converted shares.

(4) A statement of cancellation of converted shares shall be filed only if the certificate of incorporation provides that such shares shall not be reissued. The statement of cancellation shall set forth the information required by paragraphs 14A:7-18(2)(a), (b), (c) and (e).

(5) Nothing contained in this section shall be construed to forbid a cancellation of shares or a reduction of stated capital in any other manner permitted by this Act.

14A:7-19. Reduction of Stated Capital by Board Action.

(1) Unless otherwise provided in the certificate of incorporation and subject to the provisions of subsections 14A:7-19(3), 14A:7-19(4) and 14A:7-19(5), a reduction of the stated capital of a corporation, where such reduction is not accompanied by any action requiring an amendment of the certificate of incorporation and not accompanied by a cancellation of shares, may be made by resolution of the board setting forth the amount of the proposed reduction, the manner in which the reduction shall be effected and the date upon which the reduction shall become effective.

(2) A statement of such reduction shall be executed on behalf of the corporation and filed in the office of the Secretary of State not later than 30 days after the effective date of the reduction. Such statement shall set forth

(a) the name of the corporation;

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

(c) if shareholder approval is required by subsection 14A:7-19(4) for a reduction of the stated capital of the corporation, a statement of the date of approval by the shareholders, the number of shares outstanding, the number of shares entitled to vote thereon, and the number of shares voted for and against the reduction of the stated capital, respectively; and, if any shares are entitled to vote as a class, a separate statement of such facts for each class entitled to vote separately.

(3) The certificate of incorporation may provide that the board shall have discretion to reduce the stated capital of shares under this section whether or not the stated capital after such reduction is at least equal to the aggregate amount of the preferences of issued shares in the assets of the corporation upon liquidation plus the aggregate amount of the par value of all other issued shares with par value.

Unless the certificate of incorporation so provides, or unless adopted by the votes of the holders of each class, voting by classes, of shares having a preference in the assets of the corporation upon liquidation, no reduction of stated capital shall be made under this section if, after such reduction, the stated capital would be less than such aggregate amounts of preferences and par values.

(4) If the consideration for the issue of shares without par value was fixed by the shareholders under subsection 14A:7-4(2), the board shall not reduce the stated capital represented by such shares except to the extent, if any, that the board was authorized by the shareholders to allocate a portion of such consideration to surplus, as provided in subsection 14A:7-8(2), unless such further reduction has been approved by a vote of the shareholders or is authorized by the certificate of incorporation.

(5) Stated capital which remains in existence, because of the applicability of the second sentence of subsection 14A:7-18(3), after the cancellation of the shares which formerly represented it, shall not be reduced by the board unless such reduction has been approved by a vote of the shareholders or is authorized by the certificate of incorporation.

14A:7-20. Special Provisions Relating to Surplus.

(1) The surplus, if any, created by or arising out of a reduction of the stated capital of a corporation, or a revaluation to reflect unrealized appreciation of its assets, shall be capital surplus. Upon the realization of any such increase in value, the board may, by resolution, transfer from capital surplus to earned surplus the amount realized. When a corporation has applied its earned surplus to the acquisition of treasury shares and such shares are subsequently disposed of for a consideration, the corporation may, at its option, restore to earned surplus, out of the consideration received, all or part of the amount by which earned surplus was reduced at the time of acquisition of such shares. If the consideration received exceeds the amount by which earned

surplus was reduced with respect to such shares, the excess shall be capital surplus. When treasury shares are used to satisfy the exercise of conversion privileges, if the stated capital formerly represented by the converted shares is reduced in accordance with the provisions of section 14A:7-19, the surplus so produced may be restored to earned surplus as provided in this subsection, as if it were consideration for the disposition of the treasury shares.

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

(3) A corporation may, by resolution of its board, apply any part or all of its capital surplus to the reduction or elimination of any deficit in the earned surplus account.

(4) The board of any corporation formed before the effective date of this Act may determine the amount of the corporation's earned surplus before the declaration of the first dividend after the effective date of this Act, and such determination if made in good faith shall be conclusive.

CHAPTER 8

BENEFICIAL PROVISIONS FOR EMPLOYEES

Sec.

14A:8-1. Employee Benefit Plans.

(1) A corporation may, in the manner prescribed in section 14A:8-2, establish and carry out wholly or partly at its expense, any one or more of the following plans for the benefit of some or all employees of the corporation or any subsidiary thereof and their families, dependents or beneficiaries

(a) plans providing for the sale or distribution of its shares of any class or classes, held by it or issued or purchased by it for the purpose, including stock option, stock purchase, stock bonus, profit-sharing, savings and other plans of similar nature, whether or not such plans also provide for the distribution of cash or property other than its shares;

(b) plans providing for payments solely in cash orproperty other than shares of the corporation, including profit-sharing, bonus, savings, pension, retirement, deferred compensation and other plans of similar nature; and

(c) plans for the furnishing of medical services; life, sickness, accident, disability or unemployment insurance or benefits; education; housing; social and recreational services; and other similar aids and services.

(2) The term "employees" as used in this Chapter means employees, officers and directors, including any who have retired, become disabled or died prior to the establishment of any plan heretofore or hereafter adopted.

14A:8-2. Formulation of Plans; Submission to Shareholders in Certain Instances.

The board alone, by affirmative vote of a majority of directors in office, may adopt any plan described in section 14A:8-1 and may include such provisions therein as the board may deem advisable; provided that the approval of the shareholders shall be required for the adoption of any plan which permits the use or issuance of treasury shares or authorized but unissued shares, and shall also be required for the adoption of any other plan if the certificate of incorporation or the by-laws so provide.

14A:8-3. Terms of Plan; Issuance of Certificates.

The approval by the shareholders of a plan for the issue of rights or options to employees shall include approval of the terms and conditions upon which such rights or options are to be issued, such as, but without limitation thereof, any restrictions upon the administration of the plan, the terms and conditions of payment for shares in full or in installments, the issue of certificates for shares to be paid for in installments, any limitations upon the transferability of such shares and the voting and dividend rights to which the holders of such shares may be entitled, though the full amount of the consideration therefor has not been paid; provided that no certificate for shares shall be delivered under the plan, prior to full payment in cash, property or services therefor, unless the fact that the shares are partly paid for is noted conspicuously on the face of such certificate.

14A:8-4. Amendment or Termination of Plans.

Unless otherwise provided in the plan, the board may amend or terminate any plan described in section 14A:8-1 heretofore or hereafter adopted, provided that

(a) no such amendment or termination shall impair any rights which have accrued under the plan or deprive any employee or beneficiary of the employee of the equivalent in cash or other benefits of the contributions of the employee under the plan; and

(b) any amendment made by the board to a plan which was approved by the shareholders in accordance with section 14A:8-2, shall be submitted to the shareholders for approval, unless the board shall have determined that such amendment will not result in a material increase in the cost of the plan to the corporation; and

(c) any amendment made by the board to a plan which, under section 14A:8-2, did not initially require shareholder approval, shall require shareholder approval, if the effect of such amendment is to include in the plan a provision, which if originally included in the plan, would have required shareholder approval of the plan.

14A:8-5. Trust Funds for Employees; Creation; Maintenance and Administration.

Any domestic or foreign corporation which has adopted, or hereafter adopts, a plan described in section 14A:8-1 may establish one or more trust funds of the property contributed or held by any such corporation or any subsidiary thereof for the purposes of such plan. Any such trust fund may be held and administered by the corporation adopting such plan or by any trustee or trustees, within or without this State, appointed by the corporation for that purpose.

14A:8-6. Continuation of Trust; Law Against Perpetuities Inapplicable.

The period for which any such trust may be created and maintained may be as long as may be desirable for the complete administration of any such plan as originally adopted or thereafter amended, and no such trust or trust fund shall be subject to or held to be in violation of any principle of law against perpetuities or restraints on alienation or perpetual accumulations or trusts.

CHAPTER 9

AMENDMENTS, CHANGES OR ALTERATIONS

Sec.

14A:9-1. Amendment of Certificate of Incorporation.

(1) A corporation may amend its certificate of incorporation, from time to time, in any and as many respects as may be desired so long as the amendment contains only such provisions as might lawfully be contained in an original certificate of incorporation filed at the time of making such amendment.

(2) In particular, and without limitation upon the general power of amendment granted by subsection 14A:9-1(1), a corporation may amend its certificate of incorporation

(a) to change its corporate name;

(b) to enlarge, limit, or otherwise change its corporate purposes or powers;

(c) to change the duration of the corporation, or if such duration has expired but the corporation continues in business, to revive its existence for a limited or perpetual duration;

(d) to increase or decrease the aggregate number of shares, or shares of any class or series of any class, which the corporation has authority to issue;

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

(f) to exchange, classify, reclassify or cancel all or any part of its shares, whether issued or unissued;

(g) to change the designation of all or any part of its shares, whether issued or unissued, and to change the preferences, limitations and the relative rights in respect of all or any part of its shares, whether issued or unissued;

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

(i) to change the shares of any class or series, whether issued or unissued, and whether with or without par value, into a different number of shares of the same class or series or into the same or a different number of shares, either with or without par value, of other classes or series;

(j) to create new classes or series of shares having rights and preferences superior or inferior to, or equal with, the shares of any class or series then authorized, whether issued or unissued;

(k) to cancel or otherwise affect the right of the holders of the shares of any class or series to receive dividends which have accrued but have not been declared;

(l) to divide any class of shares, whether issued or unissued, into series and fix the designations of such series and the preferences, limitations and relative rights of the shares of such series;

(m) to authorize the board to divide authorized but unissued shares of any class into series and fix the designations and number of shares of such series and the preferences, limitations and relative rights of the shares of such series;

(n) to authorize the board to fix or change the designation or number of shares of, or preferences, limitations or relative rights of the shares of any theretofore established series the shares of which have not been issued;

(o) to revoke, diminish or enlarge the authority of the board to take any of the actions set forth in paragraphs 14A:9-1(2)(m) and 14A:9-1(2)(n);

(p) to limit, deny or grant to shareholders of any class the preemptive right to acquire additional or treasury shares of the corporation, whether then or thereafter authorized;

(q) to strike out, change or add any provision, not inconsistent with law, for the management of the business and the conduct of the affairs of the corporation, or creating, defining, limiting and regulating the powers of the corporation, its directors and shareholders or any class of shareholders, including any provision which under this Act is required or permitted to be set forth in the by-laws.

(3) An amendment of the certificate of incorporation may, by resolution of the board, be accompanied by a reduction of stated capital. Such reduction shall not be part of the amendment, but may be set forth in the certificate of amendment as provided in subsection 14A:9-4(4) and shall become effective as provided in subsection 14A:9-4(5).

14A:9-2. Procedure to Amend Certificate of Incorporation.

(1) Before the organization meeting of the board, the incorporators may amend the certificate of incorporation by complying with subsection 14A:9-4(1).

(2) Amendment of the certificate of incorporation by action of the board is provided for in subsection 14A:4-3(1) (Change of Registered Office or Registered Agent), subsection 14A:5-21(4) (Agreements as to Voting; Provision in Certificate of Incorporation as to Control of Directors), subection 14A:7-2(4) (Issuance of Shares in Series), subsection 14A:7-6(5) (Redeemable Shares), subsection 14A:7-9(4) (Convertible Shares and Bonds) and subsections 14A:7-18(1) and 14A:7-18(4) (Cancellation of Reacquired Shares).

(3) An amendment of the certificate of incorporation pursuant to a plan of merger may be made in the manner provided in Chapter 10 of this Act.

(4) All other amendments of the certificate of incorporation shall be made in the following manner:

(a) The board shall approve the proposed amendment and direct that it be submitted to a vote at a meeting of the shareholders.

(b) Written notice setting forth the proposed amendment or a summary of the changes to be effected thereby shall be given to each shareholder of record entitled to vote thereon within the time and in the manner provided in this Act for the giving of notice of meetings of shareholders. Such notice shall include, or shall be accompanied by, a statement informing shareholders who, under Chapter 11 of this Act are entitled to dissent, that they have the right to dissent and to be paid the fair value of their shares, provided that they comply with the procedures set forth in Chapter 11 of this Act.

(c) At such meeting a vote of shareholders entitled to vote thereon shall be taken on the proposed amendment. The proposed amendment shall be adopted upon receiving the affirmative vote of a majority of the votes cast by the holders entitled to vote thereon, unless any class of shares is entitled to vote thereon as a class, in which event the proposed amendment shall be adopted upon receiving the affirmative vote of a majority of the votes cast by the holders of each class entitled to vote thereon as a class, and a majority of the votes cast by all other holders of shares entitled to vote thereon. The voting requirements of this section shall be subject to such greater requirements as are provided in this Act for specific amendments.

(d) Any number of amendments may be acted upon at one meeting.

(e) Upon adoption, a certificate of amendment shall be filed in the office of the Secretary of State as provided in section 14A:9-4.

14A:9-3. Class Voting on Amendments.

(1) Except as otherwise provided in subsection 14A:9-3(3), and notwithstanding any provision in the certificate of incorporation, the holders of the outstanding shares of a class shall be entitled to vote as a class upon a proposed amendment, if the amendment would

(a) increase or decrease the authorized number of shares of such class or any series of such class;

(b) increase or decrease the par value of the shares of such class;

(c) effect a conversion, exchange or reclassification of all or any part of the shares of such class or any series of such class;

(d) effect a conversion or exchange, or create a right of conversion or exchange, of all or any part of the shares of another class or series of such class into the shares of such class or any series of such class;

(e) change the designations, preferences, limitations or relative rights of the shares of such class or any series of such class;

(f) change the shares of such class or any series of such class, whether with or without par value, into the same or a different number of shares, either with or without par value, of the same class or a series of such class, or another class or classes or any series of such class;

(g) create a new class of shares or series of a class having, or convertible into the shares of a class having, rights or preferences prior or superior to the shares of such class or series of such class, or increase the rights or preferences of any class or series of such class having rights or preferences prior or superior to the shares of such class or any series of such class;

(h) divide the shares of such class into series or fix the designations or number of shares of such series or the preferences, limitations or relative rights of the shares of such series, or authorize the board to take any or all such action;

(i) limit or deny the existing preemptive rights of the shares of such class or any series of such class;

(j) cancel or otherwise affect dividends on the shares of such class or any series of such class which have accrued but have not been declared.

(2) If any proposed amendment referred to in subsection 14A:9-3(1) would affect or subordinate the rights of the holders of shares of only one or more series of any class, but not the entire class, then only the holders of each series whose rights would be adversely affected or subordinated shall be considered a separate class for the purposes of this Chapter.

(3) This section shall not apply to amendments of the certificate of incorporation which may be made by board action without shareholder approval, as set forth in subsection 14A:9-2(2).

14A:9-4. Certificate of Amendment.

(1) If the amendment is made as provided by subsection 14A:9-2(1), a certificate of amendment shall be signed by all the incorporators, shall set forth the name of the corporation and the amendment so adopted, and shall recite that the amendment is made by unanimous consent of the incorporators before the organization meeting of the directors.

(2) If the amendment is made by the board, a certificate of amendment shall be executed on behalf of the corporation. The certificate shall set forth the information required by the section of this Act which empowers the board to make the amendment.

(3) If the amendment is made as provided by subsection 14A:9-2(4), a certificate of amendment shall be executed on behalf of the corporation and shall set forth

(a) the name of the corporation;

(b) the amendment so adopted;

(c) the date of the adoption of the amendment by the shareholders;

(d) the number of shares outstanding, and the number of shares entitled to vote thereon, and if the shares of any class are entitled to vote thereon as a class, the designation and number of outstanding shares entitled to vote thereon of each such class;

(e) the number of shares voted for and against such amendment, respectively, and if the shares of any class are entitled to vote thereon as a class, the number of shares of each such class voted for and against such amendment, respectively;

(f) if such amendment is intended to provide for an exchange, reclassification or cancellation of issued shares, a statement of the manner in which the same shall be effected; and

(g) if, pursuant to subsection 14A:9-4(5), the amendment is to become effective at a time subsequent to the time of filing, the date and hour when the amendment is to become effective.

(4) If such amendment is accompanied by a reduction of stated capital, the corporation may also include in the certificate, at its discretion, in lieu of a statement of reduction under section 14A:7-19, a statement of the amount of the reduction, the manner in which the reduction is effected, and the amount, expressed in dollars, of stated capital of the corporation after giving effect to the reduction.

(5) Each certificate of amendment of the certificate of incorporation shall be filed in the office of the Secretary of State and the amendment shall become effective upon the date and hour of filing or at such later time, not to exceed 30 days from the date and hour of filing, as may be set forth in the certificate. If the certificate of amendment includes a statement provided for in subsection 14A:9-4(4), the stated capital shall be reduced when the amendment becomes effective.

14A:9-5. Restated Certificate of Incorporation.

(1) A corporation may restate in a single certificate the provisions of its certificate of incorporation as theretofore amended, including any provision effected by a merger or consolidation and any further amendments as may be adopted concurrently with the restated certificate, in the following manner:

(a) The board shall approve the proposed restated certificate and direct that it be submitted to a vote at a meeting of the shareholders.

(b) Written notice setting forth the proposed restated certificate shall be given to each shareholder of record entitled to vote thereon within the time and in the manner provided in this Act for the giving of notice of such meeting.

(c) At such meeting a vote of shareholders entitled to vote thereon shall be taken on the proposed restated certificate. The proposed restated certificate shall be adopted upon receiving the affirmative vote of a majority of the votes cast by the holders entitled to vote thereon. The voting requirements of this section shall be subject to such greater requirements as are provided in this Act for specific amendments or as may be provided in the certificate of incorporation.

(2) The restated certificate shall recite that it is a restated certificate and shall contain all such provisions as are required in an original certificate of incorporation filed at the time the restated certificate is filed, except that

(a) it shall state the address of the then-registered office and the name of the corporation's then-registered agent, instead of the initial registered office and the name of the initial registered agent;

(b) it shall state the number of directors constituting the then-existing board and their names and addresses, instead of the number of directors constituting the first board and their names and addresses;

(c) it may omit the names and addresses of incorporators; and

(d) if, pursuant to subsection 14A:9-5(4), the restatement of the certificate of incorporation is to become effective subsequent to the time of filing with the Secretary of State, it shall state the date and hour when the restated certificate is to become effective.

(3) The restated certificate shall be executed on behalf of the corporation, and shall be filed in the office of the Secretary of State. There shall be attached to the restated certificate and filed therewith a certificate executed on behalf of the corporation and setting forth

(a) The name of the corporation;

(b) That the restated certificate of incorporation has been adopted by the shareholders;

(c) The date of such adoption;

(d) The number of shares outstanding, and the number of shares entitled to vote on the matter; and

(e) The number of shares voted for and against such adoption, respectively. If an amendment of the certificate of incorporation is adopted concurrently with the restated certificate, the certificate attached to the restated certificate shall set forth, in addition to the information required by the preceding sentence, the information required by paragraphs 14A:9-4(3)(b), (d), (e), (f) and (g).

(4) The restated certificate of incorporation and any amendment included therein shall become effective upon the date and hour of filing with the Secretary of State or at such later time, not to exceed 30 days from the date and hour of filing as may be set forth in the restated certificate.

14A:9-6. Abandonment of Amendment.

Prior to the effective date of an amendment of the certificate of incorporation for which shareholder approval is required under the provisions of this Act, such amendment may be abandoned pursuant to provisions therefor, if any, set forth in the resolution of the shareholders approving such amendment. If a certificate of amendment has been filed in the office of the Secretary of State prior to such abandonment, a certificate of abandonment shall be filed in the office of the Secretary of State. The certificate shall state that the amendment has been abandoned in accordance with the provisions therefor set forth in the resolution of the shareholders adopting such amendment.

CHAPTER 10

MERGER, CONSOLIDATION, ACQUISITION OF ALL CAPITAL SHARES OF A CORPORATION AND SALE OF ASSETS

Sec.

14A:10-1. Procedure for Merger.

(1) Any two or more domestic corporations may merge into one of such corporations pursuant to a plan of merger approved in the manner provided in this Act.

(2) The board of each corporation shall approve a plan of merger setting forth

(a) the names of the corporations proposing to merge, and the name of the corporation into which they propose to merge, which is hereinafter designated as the surviving corporation;

(b) the terms and conditions of the proposed merger, including a statement of any amendments in the certificate of incorporation of the surviving corporation to be effected by such merger;

(c) the manner and basis of converting the shares of each merging corporation into shares, other securities, or obligations of the surviving corporation, or into cash or other consideration, or into any combination thereof; and

(d) such other provisions with respect to the proposed merger as are deemed necessary or desirable.

14A:10-2. Procedure for Consolidation.

(1) Any two or more domestic corporations may consolidate into a new corporation pursuant to a plan of consolidation approved in the manner provided in this Act.

(2) The board of each corporation shall approve a plan of consolidation setting forth

(a) the names of the corporations proposing to consolidate, and the name of the new corporation into which they propose to consolidate, which is hereinafter designated as the new corporation;

(b) the terms and conditions of the proposed consolidation;

(c) the manner and basis of converting the shares of each corporation into shares, other securities, or obligations of the new corporation, or into cash or other consideration, or into any combination thereof;

(d) with respect to the new corporation, all of the statements required to be set forth in the certificate of incorporation for corporations organized under this Act, except that it shall not be necessary to set forth the name and address of each incorporator; and

(e) such other provisions with respect to the proposed consolidation as are deemed necessary or desirable.

14A:10-3. Approval by Shareholders.

(1) The board of each corporation, upon approving such plan of merger or plan of consolidation, shall direct that the plan be submitted to a vote at a meeting of shareholders. Written notice shall be given to each shareholder of record, whether or not entitled to vote at such meeting, not less than 20 days before such meeting, in the manner provided in this Act for the giving of notice of meetings of shareholders. Such notice shall include, or shall be accompanied by

(a) a copy or a summary of the plan of merger or consolidation, as the case may be; and

(b) a statement informing shareholders who, under Chapter 11 of this Act are entitled to dissent, that they have the right to dissent and to be paid the fair value of their shares, provided that they comply with the procedures set forth in Chapter 11 of this Act.

(2) At each such meeting, a vote of the shareholders shall be taken on the proposed plan of merger or consolidation. The plan of merger or consolidation shall be approved upon receiving the affirmative vote of a majority of the votes cast by the holders entitled to vote thereon of each such corporation, unless any class of shares of any such corporation is entitled to vote thereon as a class, in which event, as to such corporation, the plan of merger or consolidation shall be approved upon receiving the affirmative vote of a majority of the votes cast by the holders of each class entitled to vote thereon as a class, and a majority of the votes cast by all other holders of shares entitled to vote thereon. Any class of shares of any such corporation shall be entitled to vote as a class if the plan of merger or consolidation, as the case may be, contains any provision which, if contained in a proposed amendment to the certificate of incorporation, would entitle such class of shares to vote as a class. The voting requirements of this section shall be subject to such greater requirements as are provided in this Act for specific amendments.

14A:10-4. Certificate of Merger or Consolidation.

(1) After approval of the plan of merger or consolidation by the board and shareholders of each corporation, a certificate of merger or a certificate of consolidation, as the case may be, shall be executed on behalf of each corporation. The certificate shall set forth

(a) the plan of merger or the plan of consolidation;

(b) as to each corporation, the number of shares outstanding, and, if the shares of any class are entitled to vote as a class, the designation and number of outstanding shares of each such class;

(c) as to each corporation, the number of shares voted for and against such plan, respectively, and, if the shares of any class are entitled to vote as a class, the number of shares of each such class voted for and against such plan, respectively; and

(d) if, pursuant to subsection 14A:10-4(2), the merger is to become effective at a time subsequent to the date and hour of filing with the Secretary of State, the date and hour when the merger is to become effective.

(2) The certificate shall be filed in the office of the Secretary of State and the merger or consolidation shall become effective upon the date and hour of such filing or at such later time, not to exceed 30 days from the date and hour of filing, as may be set forth in the certificate.

14A:10-5. Merger of Subsidiary Corporation.

(1) Any domestic corporation owning at least 90% of the outstanding shares of each class of another domestic corporation or corporations, may merge such other corporation or corporations into itself, or may merge itself, or itself and any such subsidiary corporation or corporations, into any such subsidiary corporation, without approval of the

shareholders of any of the corporations, except as provided in subsections 14A:10-5(5) and 14A:10-5(6). The board of the parent corporation shall approve a plan of merger setting forth those matters required to be set forth in plans of merger under section 14A:10-1. Approval by the board of any such subsidiary corporation shall not be required.

(2) If the parent corporation owns at least 90% but less than 100% of the shares of each subsidiary corporation, it shall mail to each minority shareholder of record of each subsidiary corporation, unless waived in writing, a copy or a summary of the plan of merger. The parent corporation shall also mail to each shareholder who, under Chapter 11 of this Act, is entitled to dissent, a statement informing such shareholder that he has the right to dissent and to be paid the fair value of his shares, provided that he complies with the procedures set forth in Chapter 11 of this Act.

(3) A certificate of merger shall be executed on behalf of the parent corporation. The certificate shall set forth

(a) the plan of merger;

(b) the number of outstanding shares of each class of each subsidiary corporation which is a party to the merger and the number of such shares of each class owned by the parent corporation;

(c) if the parent corporation does not own all the shares of each subsidiary corporation, the date of the mailing of a copy or a summary of the plan of merger to minority shareholders of each subsidiary corporation; or if all such shareholders have waived such mailing in writing, a statement that such waiver has been obtained; and

(d) if, pursuant to subsection 14A:10-5(4), the merger is to become effective at a time subsequent to the date and hour of filing with the Secretary of State, the date and hour when the merger is to become effective.

(4) The certificate shall be filed in the office of the Secretary of State and the merger shall become effective upon the date and hour of such filing or at such later time, not

to exceed 30 days from the date of filing, as may be set forth in the certificate.

(5) Approval of the shareholders of any such subsidiary corporation shall be obtained pursuant to its certificate of incorporation, if such certificate requires approval of a merger by the affirmative vote of the holders of more than the percentage of the shares of any class of such corporation then owned by the parent corporation.

(6) Approval of the shareholders of the parent corporation shall be obtained:

(a) Pursuant to its certificate of incorporation where such certificate requires shareholder approval of a merger, unless such certificate specifically excepts a merger of the character proposed; or

(b) Pursuant to section 14A:10-3 where

(i) the plan of merger contains a provision which would change any part of the certificate of incorporation of the parent corporation into which a subsidiary corporation is being merged, unless such change is one that can be made under subsection 14A:9-2(2) by the board without shareholder approval; or

(ii) a subsidiary corporation is to be the surviving corporation.

(7) The grant of the power to merge under this section shall not preclude the effectuation of any merger as elsewhere provided in this Chapter.

14A:10-6. Effect of Merger or Consolidation.

When a merger or consolidation has become effective

(a) the parties to the plan of merger or consolidation shall be a single corporation, which, in the case of a merger, shall be that corporation designated in the plan

merger as the surviving corporation, and, in the case of a consolidation, shall be the new corporation provided for in the plan of consolidation.

(b) The separate existence of all parties to the plan of merger or consolidation, except the surviving or new corporation, shall cease.

(c) Such surviving or new corporation shall, to the extent consistent with its certificate of incorporation as amended or established by the merger or consolidation, possess all the rights, privileges, powers, immunities, purposes and franchises, both public and private, of each of the merging or consolidating corporations.

(d) All real property and personal property, tangible and intangible, of every kind and description, belonging to each of the corporations so merged or consolidated shall be vested in the surviving or new corporation without further act or deed; and the title to any real estate, or any interest therein, vested in any of such corporations shall not revert or be in any way impaired by reason of such merger or consolidation.

(e) The surviving or new corporation shall be liable for all the obligations and liabilities of each of the corporations so merged or consolidated; and any claim existing or action or proceeding pending by or against any of such corporations may be enforced as if such merger or consolidation had not taken place. Neither the rights of creditors nor any liens upon, or security interests in, the property of any of such corporations shall be impaired by such merger or consolidation.

(f) In the case of a merger, the certificate of incorporation of the surviving corporation shall be amended to the extent, if any, stated in the plan of merger; and, in the case of a consolidation, the statements set forth in the certificate of consolidation and which are required or permitted to be set forth in the certificate of incorporation of corporations organized under this Act shall be the certificate of incorporation of the new corporation.

14A:10-7. Merger or Consolidation of Domestic and Foreign Corporations.

(1) One or more foreign corporations and one or more domestic corporations may be merged or consolidated in the following manner, if such merger or consolidation is permitted by the laws of the jurisdiction under which each such foreign corporation is organized

(a) each domestic corporation shall comply with the provisions of this Act with respect to the merger or consolidation of domestic corporations and each foreign corporation shall comply with the applicable provisions of the laws of the jurisdiction under which it is organized;

(b) if the surviving or new corporation is to be a foreign corporation and is to transact business in this State, it shall comply with the provisions of this Act with respect to foreign corporations, and, whether or not it is to transact business in this State, it shall file with the Secretary of State of this State a certificate setting forth

(i) an agreement that it may be served with process in this State in any proceeding for the enforcement of any obligation of any domestic corporation or any foreign corporation, previously amenable to suit in this State, which is a party to such merger or consolidation, and in any proceeding for the enforcement of the rights of a dissenting shareholder of any such domestic corporation against the surviving or new corporation;

(ii) an irrevocable appointment of the Secretary of State of this State as its agent to accept service of process in any such proceeding, and the post office address, within or without this State, to which the Secretary of State shall mail a copy of the process in such proceeding;

(iii) an agreement that it will promptly pay to the dissenting shareholders of any such domestic corporation the amount, if any, to which they shall be entitled under the provisions of this Act with respect to the rights of dissenting shareholders.

(2) If the surviving or new corporation is to be a domestic corporation, the effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of domestic corporations. If the surviving or new corporation is to be a foreign corporation, the effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of domestic corporations except insofar as the laws of the jurisdiction of incorporation of such foreign corporation shall provide otherwise.

(3) The procedure for the merger of a subsidiary corporation or corporations under section 14A:10-5 shall be available where either a subsidiary corporation or the corporation owning at least 90% of the outstanding shares of each class of a subsidiary corporation is a foreign corporation, and such merger is permitted by the laws of the jurisdiction of incorporation of such foreign corporation, provided that, if the parent corporation is a foreign corporation, it shall, notwithstanding the provisions of the laws of its jurisdiction of incorporation, comply with the provisions of subsection 14A:10-5(2) with respect to notice to shareholders of any domestic subsidiary corporation which is a party to the merger.

14A:10-8. Abandonment of Merger or Consolidation.

Prior to the time when a merger or consolidation authorized by this Chapter shall become effective, the merger or consolidation may be abandoned pursuant to provisions therefor, if any, set forth in the plan of merger or consolidation. If a certificate of merger or consolidation has been filed in the office of the Secretary of State prior to such abandonment, a certificate of abandonment shall be filed in the office of the Secretary of State. The certificate shall be executed on behalf of each corporation which is a party to the plan of merger or consolidation, unless the plan permits abandonment by less than all of such corporations, in which event the certificate may be executed on behalf of the corporation or corporations exercising the right to abandon. The certificate shall state that the merger or consolidation has been abandoned in accordance with provisions therefor set forth in the plan of merger or consolidation.

14A:10-9. Acquisition of All the Shares or a Class of Shares of a Corporation.

(1) Any domestic corporation may, in the manner provided by this section, acquire, in exchange for its shares, all the shares, or all the shares of any class, of any other corporation organized under any statute of this State.

(2) Such acquiring corporation shall submit by first-class mail to all holders of the shares to be acquired a written offer which shall

(a) specify the shares to which such offer relates;

(b) prescribe the terms and conditions of such offer, including the method of acceptance thereof and the manner of exchanging such shares;

(c) contain a statement summarizing the rights of such shareholders as provided in paragraph 14A:10-9(3)(b).

Any such offer may provide for the payment of cash in lieu of the issuance of fractional shares of the acquiring corporation.

(3) If, within 120 days after the date of such mailing, the offer is accepted by the holders of not less than 90% of the shares of each class to which the offer relates, other than shares already held at the date of mailing by, or by a nominee for, the acquiring corporation or any subsidiary thereof, the acquiring corporation shall, within 60 days after such acceptance:

(a) Execute and file a certificate in the office of the Secretary of State setting forth such acceptance; and

(b) Give written notice of such acceptance, by registered or certified mail, return receipt requested, to each holder of such shares to which the offer relates, who has not accepted the offer. Such notice shall include, or be accompanied by, a statement that

(i) such shareholders may elect either to accept the offer or to dissent therefrom and be paid the full market value of their shares provided that they comply with the procedures set forth in Chapter 11 of this Act; and

(ii) if such shareholders do not make written demand for the payment of the full market value of their shares to which the offer relates within the 30-day period specified in subsection 14A:11-2(5), they shall be deemed to have accepted the offer.

(4) Upon the filing of such certificate in the office of the Secretary of State as required by paragraph 14A:10-9 (3)(a)

(a) the acquiring corporation shall cause to be issued to the holders of shares who have accepted or who are deemed to have accepted such offer pursuant to the provisions of paragraph 14A:10-9(3)(b) certificates for shares of the acquiring corporation to which they respectively are entitled;

(b) all shares in exchange for which shares of the acquiring corporation are so issued shall become the property of the acquiring corporation, irrespective of whether the certificates for such shares have been surrendered for exchange, and the acquiring corporation shall be entitled to have new certificates registered in its name as the holder thereof; and

(c) the acquiring corporation or a corporate fiduciary designated by it, shall hold in trust, for delivery to the persons entitled thereto, certificates for its shares registered in the names of any holders, other than shares of dissenting shareholders, who have not surrendered their shares for exchange in accordance with the offer, and shall hold in trust, for payment to the persons entitled thereto, any cash payable in lieu of fractional shares.

(5) This section shall not be construed to prevent a corporation from making an offer to purchase the shares of another corporation conditioned upon the acceptance of holders of less than 90% of the shares to which such offer relates. Such an offer may be joined as an alternate offer with an

offer made pursuant to this section; but in no case shall the acquiring corporation have the right to avail itself of the provisions of this section unless the holders of the percentage of shares to which the offer relates required by subsection 14A:10-9(3) shall accept the offer within the time period required by subsection 14A:10-9(3).

14A:10-10. Sale or Other Disposition of Assets in Regular Course of Business and Mortgage or Pledge of Assets.

The sale, lease, exchange, or other disposition of all, or substantially all, the assets of a corporation in the usual and regular course of its business as conducted by such corporation and the mortgage or pledge of any or all the assets of a corporation whether or not in the usual and regular course of business as conducted by such corporation may be made upon such terms and conditions and for such consideration, which may consist in whole or in part of money or property, real or personal, including shares, bonds or other securities of any other corporation, domestic or foreign, as shall be authorized by its board. In any such case, unless otherwise provided in the certificate of incorporation, no approval of the shareholders shall be required.

14A:10-11. Sale or Other Disposition of Assets Other Than in Regular Course of Business.

(1) A sale, lease, exchange, or other disposition of all, or substantially all, the assets of a corporation, if not in the usual and regular course of its business as conducted by such corporation, may be made upon such terms and conditions and for such consideration, which may consist in whole or in part of money or property, real or personal, including shares, bonds or other securities of any other corporation, domestic or foreign, as may be authorized in the following manner:

(a) The board shall recommend such sale, lease, exchange, or other disposition and direct that it be submitted to a vote at a meeting of shareholders.

(b) Written notice shall be given to each shareholder of record, whether or not entitled to vote at such meeting, not less than 20 days before such meeting, in the manner provided in this Act for the giving of notice of meetings of shareholders. Such notice shall include, or shall be accompanied by

(i) a statement summarizing the principal terms of the proposed transaction; and

(ii) a statement informing shareholders who, under Chapter 11 of this Act, are entitled to dissent, that they have the right to dissent and to be paid the full market value of their share, provided that they comply with the procedures set forth in Chapter 11 of this Act.

(c) At such meeting the shareholders may approve such sale, lease, exchange, or other disposition and may fix, or may authorize the board to fix, any or all of the terms and conditions thereof and the consideration to be received by the corporation therefor. Such approval or authorization shall require the affirmative vote of a majority of the votes cast by the holders entitled to vote thereon, unless any class of shares is entitled to vote thereon as a class, in which event such approval or authorization shall require the affirmative vote of a majority of the votes cast by the holders of each class entitled to vote thereon as a class, and a majority of the votes cast by all other holders of shares entitled to vote thereon.

(2) Notwithstanding such approval or authorization by the shareholders, the board may abandon such sale, lease, exchange, or other disposition of assets, subject to the rights of third parties under any contracts relating thereto, without further action by the shareholders.

CHAPTER 11

RIGHTS OF DISSENTING SHAREHOLDERS

Sec.

14A:11-1. Right of Shareholders to Dissent.

(1) Any shareholder of a domestic corporation shall have the right to dissent from any of the following corporate actions

(a) any plan of merger or consolidation to which the corporation is a party, provided that a shareholder shall not have the right to dissent from a plan of merger or consolidation, if, after consummation of the transaction, the shareholders of such corporation would hold, were there no right to dissent, not less than 75% of the shares of the surviving or new corporation, regardless of class, unconditionally entitled to vote for the election of directors;

(b) any sale, lease, exchange or other disposition of all or substantially all of the assets of a corporation not in the usual or regular course of business as conducted by such corporation, other than

(i) a transaction pursuant to a plan of dissolution of the corporation which provides for distribution of substantially all of its net assets to shareholders in accordance with their respective interests within 1 year after the date of such transaction, where such transaction is wholly for

(A) cash; or

(B) shares, bonds and other securities which are listed on a national securities exchange or are regularly quoted in an over-the-counter market by one or more members of a national or affiliated securities association; or

(C) cash and such securities;

(ii) a sale pursuant to an order of a court having jurisdiction;

(c) any amendment of the certificate of incorporation which

(i) alters or abolishes any preferential right of any outstanding shares; or

(ii) creates, alters or abolishes any right of redemption of any outstanding shares; or

(iii) alters or abolishes any preemptive rights to acquire shares or other securities; or

(iv) excludes or limits the right of such holder to vote on any matter, except as such right may be limited by the voting rights given to new shareholders then being authorized of any existing or new class;

provided that a holder shall have the right to dissent only with respect to those of his shares which are adversely affected by such proposed amendment.

(2) Any shareholder of a domestic corporation all of the shares of which, or all of any class of the shares of which, are to be acquired pursuant to an offer made in accordance with section 14A:10-9, shall have the right to dissent with respect to any shares owned by him which are subject to such offer.

(3) A shareholder may not dissent as to less than all of the shares owned beneficially by him and with respect to which a right of dissent exists. A nominee or fiduciary may not dissent on behalf of any beneficial owner as to less than all of the shares of such owner with respect to which the right of dissent exists.

14A:11-2. Notice of Dissent; Demand for Payment; Endorsement of Certificates.

(1) Whenever a meeting of shareholders is called to vote upon a proposed corporate action from which a shareholder may dissent under section 14A:11-1, any shareholder electing to dissent from such action shall file with the corporation not later than the close of business on the third day prior to the date fixed for the meeting of the shareholders a written notice of such dissent stating that he intends to demand payment for his shares if the action is taken.

(2) Within 10 days after the date on which such corporate action takes effect, the corporation, or, in the case of a merger or consolidation, the surviving or new corporation, shall give written notice of the effective date of such corporate action, by registered mail to each shareholder who filed written notice of dissent pursuant to subsection 14A:11-2(1), except any who voted for or consented in writing to the proposed action.

(3) Within 20 days after the mailing of such notice, any shareholder to whom the corporation was required to give such notice and who has filed a written notice of dissent pursuant to this section may make written demand on the corporation, or, in the case of a merger or consolidation, on the surviving or new corporation, for the payment of the full market value of his shares.

(4) Whenever a corporation is to be merged pursuant to section 14A:10-5 or subsection 14A:10-7(3), a shareholder who has the right to dissent pursuant to section 14A:11-1 may, not later than 20 days after a copy or summary of the plan of such merger is mailed to such shareholder, make written demand on the corporation or on the surviving corporation, for the payment of the full market value of his shares.

(5) Whenever all the shares, or all the shares of a class are to be acquired by another corporation pursuant to section 14A:10-9, a shareholder of the corporation whose shares are to be acquired may, not later than 30 days after the mailing of notice by the acquiring corporation pursuant to paragraph 14A:10-9(3)(b), make written demand on the acquiring corporation for the payment of the full market value of his shares.

(6) Not later than 20 days after demanding payment for his shares pursuant to this section, the shareholder shall submit the certificate or certificates representing his shares to the corporation upon which such demand has been made for notation thereon that such demand has been made, whereupon such certificate or certificates shall be returned to him. If shares represented by a certificate on which notation has been made shall be transferred, each new certificate issued therefor shall bear similar notation, together with the name of the original dissenting holder of such shares, and a transferee of such shares shall acquire by such transfer no rights in the corporation other than those which the original dissenting shareholder had after making a demand for payment of the full market value thereof.

14A:11-3. "Dissenting Shareholder" Defined; Date for Determination of Full Market Value

(1) A shareholder who has made demand for the payment of his shares in the manner prescribed by subsections 14A:11-2(3), 14A:11-2(4) or 14A:11-2(5) is hereafter in this Chapter referred to as a "dissenting shareholder".

(2) Upon making such demand, the dissenting shareholder shall cease to have any of the rights of a shareholder except the right to be paid the full market value of his shares and any other rights of a dissenting shareholder under this Chapter.

(3) "Full market value" as used in this Chapter shall be determined

(a) as of the day prior to the day on which the vote of shareholders was taken approving the proposed action; or

(b) in the case of a merger pursuant to section 14A:10-5 or subsection 14A:10-7(3) in which shareholder approval is not required, as of the day prior to the day on which the board of directors approves the plan of merger; or

(c) in the case of an acquisition of all the shares or all the shares of a class by another corporation pursuant to section 14A:10-9, as of the day prior to the day on which the board of directors of the acquiring corporation authorizes the acquisition.

In all cases, "full market value" shall exclude any appreciation or depreciation resulting from the proposed action.

14A:11-4. Termination of Right of Shareholder to be Paid the Full Market Value of His Shares.

(1) The right of a dissenting shareholder to be paid the full market value of his shares under this Chapter shall cease if

(a) he has failed to present his certificates for notation as provided by subsection 14A:11-2(6), unless a court having jurisdiction, for good and sufficient cause shown, shall otherwise direct;

(b) his demand for payment is withdrawn with the written consent of the corporation;

(c) the full market value of the shares is not agreed upon as provided in this Chapter and no action for the determination of full market value by the Superior Court is commenced within the time provided in this Chapter;

(d) the Superior Court determines that the shareholder is not entitled to payment for his shares;

(e) the proposed corporate action is abandoned or rescinded;

(f) a court having jurisdiction permanently enjoins or sets aside the corporate action.

(2) In any case provided for in subsection 14A:11-4(1), the rights of the dissenting shareholder as a shareholder shall be reinstated as of the date of the making of a demand for payment pursuant to subsections 14A:11-2(3), 14A:11-2(4) or 14A:11-2(5) without prejudice to any corporate action which has taken place during the interim period. In such event, he shall be entitled to any intervening preemptive rights and the right to payment of any intervening dividend or other distribution, or, if any such rights have expired or any such dividend or distribution other than in cash has been completed, in lieu thereof, at the election of the board, the full market value thereof in cash as of the time of such expiration or completion.

14A:11-5. Rights of Dissenting Shareholder.

(1) A dissenting shareholder may not withdraw his demand for payment of the full market value of his shares without the written consent of the corporation.

(2) The enforcement by a dissenting shareholder of his right to receive payment for his shares shall exclude the enforcement by such dissenting shareholder of any other right to which he might otherwise be entitled by virtue of share ownership, except as provided in subsection 14A:11-4(2) and except that this subsection shall not exclude the right of such dissenting shareholder to bring or maintain an appropriate action to obtain relief on the ground that such corporate action will be or is ultra vires, unlawful or fraudulent as to such dissenting shareholder.

14A:11-6. Determination of Full Market Value by Agreement.

(1) Not later than 10 days after the expiration of the period within which shareholders may make written demand to be paid the full market value of their shares, the corporation upon which such demand has been made pursuant to subsections 14A:11-2(3), 14A:11-2(4) or 14A:11-2(5) shall mail to each dissenting shareholder the balance sheet and the surplus statement of the corporation whose shares he holds, as of the latest available date which shall not be earlier than 12 months prior to the making of such offer and a profit and loss statement or statements for not less than a 12-month period ended on the date of such balance sheet or, if the corporation was not in existence for such 12-month period, for the portion thereof during which it was in existence. The corporation may accompany such mailing with a written offer to pay each dissenting shareholder for his shares at a specified price deemed by such corporation to be the full market value thereof. Such offer shall be made at the same price per share to all dissenting shareholders of the same class, or, if divided into series, of the same series.

(2) If, not later than 30 days after the expiration of the 10-day period limited by subsection 14A:11-6(1), the full market value of the shares is agreed upon between any dissenting shareholder and the corporation, payment therefor shall be made within 20 days after surrender of the certificate or certificates representing such shares.

14A:11-7. Procedure on Failure to Agree upon Full Market Value; Commencement of Action to Determine Full Market Value.

(1) If the full market value of the shares is not agreed upon within the 30-day period limited by subsection 14A:11-6 (2), the dissenting shareholder may serve upon the corporation upon which such demand has been made pursuant to subsections 14A:11-2(3), 14A:11-2(4) or 14A:11-2(5) a written demand that it commence an action in the Superior Court for the determination of the full market value of the shares. Such demand shall be served not later than 30 days after the expiration of the 30-day period so limited and such action shall be commenced by the corporation not later than 30 days after receipt by the corporation of such demand, but nothing herein shall prevent the corporation from commencing such action at any earlier time.

(2) If a corporation fails to commence the action as provided in subsection 14A:11-7(1), a dissenting shareholder may do so in the name of the corporation, not later than 60 days after the expiration of the time limited by subsection 14A:11-7(1) in which the corporation may commence such an action.

14A:11-8. Action to Determine Full Market Value; Jurisdiction of Court; Appointment of Appraiser.

In any action to determine the full market value of shares pursuant to this Chapter:

(a) The Superior Court shall have jurisdiction and may proceed in the action in a summary manner or otherwise; and

(b) All dissenting shareholders, wherever residing, except those who have agreed with the corporation upon the price to be paid for their shares, shall be made parties thereto as an action against their shares quasi in rem; and

(c) In any action brought to determine the full market value of shares pursuant to this Chapter, the court in

its discretion may appoint an appraiser to receive evidence and report to the court on the question of full market value. The appraiser shall have such power and authority as shall be specified in the order of his appointment; and

(d) The court shall render judgment against the corporation and in favor of each shareholder who is a party to the action for the amount of the full market value of his shares.

14A:11-9. Judgment in Action to Determine Full Market Value.

(1) A judgment for the payment of the full market value of shares shall be payable upon surrender to the corporation of the certificate or certificates representing such shares.

(2) The judgment shall include an allowance for interest at such rate as the court finds to be equitable, from the date of the dissenting shareholder's demand for payment under subsections 14A:11-2(3), 14A:11-2(4) or 14A:11-2(5) to the day of payment. If the court finds that the refusal of any dissenting shareholder to accept any offer of payment, made by the corporation under section 14A:11-6, was arbitrary, vexatious or otherwise not in good faith, no interest shall be allowed to him.

14A:11-10. Costs and Expenses of Action.

The costs and expenses of bringing an action pursuant to section 14A:11-8 shall be determined by the court and shall be assessed against the corporation; but all or any part of such costs and expenses may be apportioned and assessed, as the court may determine, against any or all of the dissenting shareholders who are parties to the action if the court finds that the refusal of such dissenting shareholders to accept an offer of payment made by the corporation under section 14A:11-6 to pay for the shares was arbitrary or vexatious or otherwise not in good faith. Such expenses shall include reasonable compensation for and reasonable expenses

of the appraiser, if any, but shall exclude the fees and expenses of counsel for and experts employed by any party; but if the full market value of the shares as determined materially exceeds the amount which the corporation offered to pay therefor, or if no such offer was made, the court in its discretion may award to any dissenting shareholder who is a party to the action a reasonable attorney's fee, together with such sum as the court may determined to be reasonable compensation to any expert or experts employed by the dissenting shareholder.

14A:11-11. Disposition of Shares Acquired by Corporation.

(1) The shares of a dissenting shareholder in a transaction described in paragraphs 14A:11-1(1)(b) or 14A:11-1(1)(c) and the shares of a dissenting shareholder of the surviving corporation in a merger shall become reacquired by the corporation which issued them upon the payment of the full market value of shares. Such shares shall be cancelled if reacquired out of stated capital or if the plan of merger so requires; otherwise they shall become treasury shares.

(2) In a merger or consolidation, if the surviving or resulting corporation pays out of surplus the full market value of the shares of dissenting shareholders of the merged or a constituent corporation, the shares of the surviving or resulting corporation into which such shares would have been converted under the plan of merger or consolidation shall become treasury shares of such corporation, unless the plan shall provide otherwise.

(3) In an acquisition of shares pursuant to section 14A:10-9, the shares of a dissenting shareholder shall become the property of the acquiring corporation upon the payment by the acquiring corporation of the full market value of such shares. Such payment may be made with the consent of the acquiring corporation, by the corporation which issued the shares, in which case the shares so paid for shall become reacquired by the corporation which issued them and shall be cancelled.

CHAPTER 12

DISSOLUTION

Sec.

14A:12-1. Methods of Dissolution.

(1) A corporation may be dissolved in any one of the following ways

(a) automatically by expiration of any period of duration stated in the corporation's certificate of incorporation;

(b) by action of the incorporators or directors pursuant to section 14A:12-2;

(c) by unanimous action of the shareholders pursuant to section 14A:12-3;

(d) by action of the board and the shareholders pursuant to section 14A:12-4;

(e) by action of a shareholder or shareholders pursuant to section 14A:12-5;

(f) by a judgment of the Superior Court in an action brought pursuant to sections 14A:12-6 or 14A:12-7, or otherwise;

(g) automatically by proclamation of the Governor repealing or revoking a certificate of incorporation for nonpayment of taxes.

(2) A corporation which has been dissolved in a proceeding pursuant to section 14A:12-6 or 14A:12-7, or which has been dissolved, or whose charter has been forfeited or revoked, for a cause or by a method not mentioned in this section, shall be subject to all the provisions of this Chapter and of Chapter 14, to the extent that such provisions are compatible with a court directed dissolution, or with the statute or common law proceeding pursuant to which such dissolution, forfeiture or revocation is effected.

14A:12-2. Dissolution Before Commencing Business.

(1) A corporation may be dissolved by action of its incorporators when there has been no organization meeting of the board, or by the board if there has been an organization meeting, provided that the corporation

(a) has not commenced business; and

(b) has not issued any shares; and

(c) has no debts or other liabilities; and

(d) has received no payments on subscriptions for its shares, or, if it has received such payments, has returned them to those entitled thereto, less any part thereof disbursed for expenses.

(2) The dissolution of such a corporation shall be effected in the following manner: the sole incorporator or director, if there is only one, or both incorporators or directors, if there are only two, or a majority of the incorporators or directors, if there are more than two, shall execute and file in the office of the Secretary of State a certificate of dissolution stating

(a) the name of the corporation;

(b) the name of the registered agent of the corporation;

(c) the location of the registered office of the corporation;

(d) the names of the incorporators and directors constituting the first board;

(e) that the corporation has not commenced business and has issued no shares, and has no debts or other liabilities;

(f) that the corporation has received no payments or subscriptions to its shares, or, if it has received such payments, that it has returned them to those entitled thereto, less any part thereof disbursed for expenses; and

(g) that the sole incorporator or director, if there is only one, or both incorporators or directors, if there are only two, or a majority of the incorporators or directors, if there are more than two, has or have elected that the corporation be dissolved.

14A:12-3. Dissolution by Consent of All Shareholders.

A corporation may be dissolved by the consent of all its shareholders, whether with or without voting power. To effect such dissolution, the shareholders shall sign and file in the office of the Secretary of State a certificate of dissolution which shall state

(a) the name of the corporation;

(b) the name of the registered agent of the corporation;

(c) the location of the registered office of the corporation;

(d) the names of its directors and officers;

(e) that the corporation is dissolved;

(f) that the certificate has been signed by all the shareholders of the corporation in person or by proxy.

14A:12-4. Dissolution Pursuant to Action of Board and Shareholders.

(1) A corporation may be dissolved by action of its board and its shareholders as provided in this section.

(2) The board shall recommend that the corporation be dissolved, and direct that the question of dissolution be submitted to a vote at a meeting of shareholders.

(3) Notice of the meeting shall be given to each shareholder of record entitled to vote at such meeting within the time and in the manner provided in this Act for the giving of notice of meetings of shareholders.

(4) At such meeting, a vote shall be taken on the question of dissolution. The dissolution shall be approved upon receiving the affirmative vote of a majority of the votes cast by the holders of shares entitled to vote thereon, unless any class of shares is entitled to vote as a class thereon, in which event approval of the dissolution shall require the affirmative vote of a majority of the votes cast by the holders of each class entitled to vote thereon as a class and a majority of the votes cast by all other holders of shares entitled to vote thereon.

(5) If dissolution is approved as provided in this section, a certificate of dissolution shall be executed on be-

half of the corporation and shall be filed in the office of the Secretary of State. The certificate shall set forth

(a) the name of the corporation;

(b) the name of the registered agent of the corporation;

(c) the location of the registered office of the corporation;

(d) the names of the corporation's directors and officers;

(e) the text of the board resolution authorizing the dissolution;

(f) the date and place of the meeting of shareholders called to vote upon the dissolution;

(g) the number of shares of the corporation outstanding entitled to vote on the dissolution, and, if the shares of any class are entitled to vote as a class, the designation and number of outstanding shares of each such class; and

(h) the number of shares represented at the meeting, the number of shares voted for and voted against the dissolution, and, if the shares of any class are entitled to vote as a class, the number of shares of each such class voted for and voted against the dissolution.

14A:12-5. Dissolution Pursuant to Provision in Certificate of Incorporation.

(1) The certificate of incorporation may provide that any shareholder, or any specified number of shareholders, or the holders of any specified number or proportion of shares, or of any specified number or proportion of shares of any class or series, may effect the dissolution of the corporation at will or upon the occurrence of a specified event. In such a case, dissolution of the corporation may be effected by the filing of a certificate of dissolution in the office of the Secretary of State, signed, as the certificate of incorporation may provide, by a single shareholder, or the specified number of shareholders, or the holders of any speci-

fied number or proportion of shares, or of any specified number or proportion of shares of any class or series. The certificate of dissolution shall state the name of the corporation, the location of its registered office and the name of its registered agent. It shall also state that the corporation is dissolved; that the dissolution is effected pursuant to a provision of the certificate of incorporation; and that the certificate is executed and filed by the person or persons authorized by the certificate of incorporation.

(2) An amendment of the certificate of incorporation which adds a provision authorized by this section, or which amends or deletes such a provision, shall be authorized at a meeting of shareholders by a vote of all outstanding shares, whether or not otherwise entitled to vote on any amendment, or of such lesser proportion of shares and of such class or series of shares, but not less than a majority of all outstanding shares entitled to vote on any amendment, as may be provided specifically in the certificate of incorporation for adding, amending or deleting such a provision.

(3) If the certificate of incorporation of any corporation contains a provision authorized by this section, the fact that such provision exists shall be noted conspicuously on the face or back of every certificate for shares issued by such corporation.

14A:12-6. Dissolution in Action Brought by the Attorney General.

(1) The Attorney General may bring an action in the Superior Court for the dissolution of a corporation upon the ground that the corporation

(a) has procured its organization through fraud; or

(b) is exceeding the authority conferred upon it by law; or

(c) has conducted or is conducting its business in an unlawful manner.

(2) The Superior Court may proceed in such action in a summary manner or otherwise.

(3) The enumeration in subsection 14A:12-6(1) of grounds for dissolution shall not exclude any other statutory or common

law action by the Attorney General for the dissolution of a corporation or the revocation or forfeiture of its corporate franchises.

14A:12-7. Dissolution of Deadlocked Corporations.

A corporation may be dissolved by a judgment entered in an action brought in the Superior Court by one or more directors or by one or more shareholders entitled to vote at an election of directors of the corporation, upon proof that

(a) the directors of the corporation, or its shareholders, if a provision in the corporation's certificate of incorporation contemplated by subsection 14A:5-21(2) is in effect, are unable to agree on matters respecting the management of the corporation's affairs; or

(b) the shareholders of the corporation are so divided in voting power that, for a period which includes at least two consecutive annual meeting dates, they have failed to elect successors to directors whose terms have expired or would have expired upon the election and qualification of their successors; and

(c) as a result of the facts contemplated by either or both paragraphs 14A:12-7(a) and 14A:12-7(b), the corporation is unable to function normally in the best interests of its creditors and shareholders.

14A:12-8. Effective Time of Dissolution.

A corporation is dissolved

(a) when the period of duration stated in the corporation's certificate of incorporation expires; or

(b) upon the proclamation of the Governor issued pursuant to R.S.§ 54: 11-2 (1937) of the Revised Statutes; or

(c) when a certificate of dissolution is filed in the office of the Secretary of State pursuant to sections 14A:12-2, 14A:12-3, 14A:12-4 or 14A:12-5, except when a later time is specified in the certificate of dissolution; or

(d) when a judgment of forfeiture of corporate franchises or of dissolution is entered by a court of competent jurisdiction.

14A:12-9. Effect of Dissolution.

(1) Except as a court may otherwise direct, a dissolved corporation shall continue its corporate existence but shall carry on no business except for the purpose of winding up its affairs by

(a) collecting its assets;

(b) conveying for cash or upon deferred payments, with or without security, such of its assets as are not to be distributed in kind to its shareholders;

(c) paying, satisfying and discharging its debts and other liabilities; and

(d) doing all other acts required to liquidate its business and affairs.

(2) Subject to the provisions of subsection 14A:12-9(1), and except as otherwise provided by court order, the corporation, its officers, directors and shareholders shall continue to function in the same manner as if dissolution had not occurred. In particular, and without limiting the generality of the foregoing,

(a) the directors of the corporation shall not be deemed to be trustees of its assets and shall be held to no greater standard of conduct than that prescribed by section 14A:6-14;

(b) title to the corporation's assets shall remain in the corporation until transferred by it in the corporate name;

(c) the dissolution shall not change quorum or voting requirements for the board or shareholders, nor shall it alter provisions regarding election, appointment, resignation or removal of, or filling vacancies among, directors or officers, or provisions regarding amendment or repeal of by-laws or adoption of new by-laws;

(d) shares may be transferred;

(e) the corporation may sue and be sued in its corporate name and process may issue by and against the corporation in the same manner as if dissolution had not occurred;

(f) no action brought against any corporation prior to its dissolution shall abate by reason of such dissolution.

(3) The right of the corporation to sell its assets and the right of a shareholder to dissent from such sale shall be governed by Chapters 10 and 11 in the same manner as if the corporation were not in dissolution.

14A:12-10. Revocation of Dissolution Proceedings.

(1) Dissolution proceedings commenced pursuant to sections 14A:12-3, 14A:12-4 or 14A:12-5 may be revoked at any time within sixty days after the effective time of dissolution, as determined pursuant to section 14A:12-8, provided that no distribution of corporate assets has been made to the shareholders and no proceeding pursuant to section 14A:12-15 is pending, by filing in the office of the Secretary of State a certificate of revocation signed, in person or by proxy, by all of the shareholders, stating that revocation is effective pursuant to subsection 14A:12-10(1) and that all the shareholders of the corporation have signed the certificate, in person or by proxy.

(2) Dissolution proceedings commenced pursuant to sections 14A:12-3 or 14A:12-4 may also be revoked at any time within sixty days after the effective time of dissolution, as determined pursuant to section 14A:12-8, provided that no distribution of corporate assets has been made to the shareholders and no proceeding pursuant to section 14A:12-15 is pending, in the following manner:

(a) The board of directors shall call a meeting of shareholders to vote upon the question of revocation of the dissolution proceedings. In connection with such meeting, the shareholders shall be given the same notice, and the revocation shall be approved by the same vote, as that required by section 14A:12-4 for the approval of dissolution.

(b) A certificate of revocation, stating

(i) that dissolution is revoked pursuant to subsection 14A:12-10(2), and

(ii) the matters required by subsection 14A:12-4(5)

shall be executed on behalf of the corporation and shall be filed in the office of the Secretary of State.

14A:12-11. Effect of Revocation of Dissolution.

(1) Upon the filing of a certificate of revocation of dissolution proceedings as authorized by this Act, the revocation of dissolution proceedings shall become effective, and the corporation may, subject to the provisions of subsection 14A:12-11(2), again carry on its business in the same manner as if dissolution proceedings had never been commenced. The corporation shall be liable for all taxes payable under the "Corporation Business Tax Act (1945)" (P.L. 1945, c. 162), as amended and supplemented, or under the "Financial Business Tax Law (1946)" (P.L. 1946, c. 174), as amended and supplemented, as though dissolution of the corporation had not occurred.

(2) If, pursuant to subsection 14A:2-2(3), a dissolved corporation has filed a written consent to the adoption of its name or a confusingly similar name by another, the subsequent revocation of dissolution proceedings pursuant to this section shall not restore the dissolved corporation's right to the use of its name.

14A:12-12. Notice to Creditors; Filing Claims.

(1) At any time after a corporation has been dissolved, the corporation, or a receiver appointed for the corporation pursuant to this Chapter, may give notice requiring all creditors to present their claims in writing. Such notice shall be published twice, once in each of two consecutive weeks, in a newspaper of general circulation in the county in which the registered office of the corporation is located and shall state that all persons who are creditors of the corporation shall present written proof of their claims to the corporation or the receiver, as the case may be, at a place and on or before a date named in the notice, which date shall not be less than 6 months after the date of the first publication.

(2) On or before the date of the first publication of the notice as provided in subsection 14A:12-12(1), the corporation, or the receiver, as the case may be, shall mail a copy of the notice to each known creditor of the corporation. The giving of such notice shall not constitute recognition that any person to whom such notice is directed is a creditor of the corporation other than for the purpose of receipt of notice hereunder.

(3) As used in this section, "creditor" means all persons to whom the corporation is indebted, and all other persons who have claims or rights against the corporation, whether liquidated or unliquidated, matured or unmatured, direct or indirect, absolute or contingent, secured or unsecured.

(4) Proof of the publication and mailing required by this section shall be made by an affidavit filed in the office of the Secretary of State.

14A:12-13. Barring of Claims of Creditors.

(1) Except as otherwise provided in this section and elsewhere in this Chapter, any creditor as defined in subsection 14A:12-12(3) who does not file his claim as provided in the notice given pursuant to section 14A:12-12, and all those claiming through or under him, shall be forever barred from suing on such claim or otherwise realizing upon or enforcing it.

(2) This section shall not apply to claims which are in litigation on the date of the first publication of the notice pursuant to section 14A:12-12.

14A:12-14. Disposition of Rejected Claims.

If the corporation, or the receiver of a corporation appointed pursuant to this Chapter, rejects in whole or in part any claim filed by a creditor, as defined in subsection 14A:12-12(3), the corporation or the receiver, as the case may be, shall mail notice of such rejection to the creditor. If the creditor does not bring suit upon such claim within 60 days from the time such notice was mailed to him, the creditor and all those claiming through or under him shall, except as otherwise provided in this Chapter, be forever barred from suing on such claim or otherwise realizing upon or enforcing it. Proof of the mailing required by this section shall be made by an affidavit filed in the office of the Secretary of State.

14A:12-15. Jurisdiction of the Superior Court.

(1) At any time after a corporation has been dissolved in any manner, a creditor, as defined in subsection 14A:12-12(3), or a shareholder of the corporation, or the corporation it-

self, may apply to the Superior Court for a judgment that the affairs of the corporation and the liquidation of its assets continue under the supervision of the Court. The Court shall have power to proceed in a summary manner or otherwise upon such application, and shall make such orders and judgments as may be required, including, but not limited to, the continuance of the liquidation of the corporation's assets by its officers and directors under the supervision of the Court, or the appointment of a receiver of the corporation, who shall be vested with all the powers provided in Chapter 14 to be exercised by receivers appointed to liquidate the affairs of a corporation.

(2) For good cause shown, and so long as the corporation has not made complete distribution of its assets, the Superior Court may, in an action pending under subsection 14A:12-15(1) or otherwise, permit a creditor who has not filed his claim within the time limited by section 14A:12-13, or who has not begun suit on a rejected claim within the time limited by section 14A:12-14, to file such claim, or to bring such suit, within such time as the Court shall direct.

14A:12-16. Distribution to Shareholders.

Any assets remaining after payment of or provision for claims against the corporation shall be distributed among the shareholders according to their respective rights and interests. Distribution may be made in either or both cash and kind.

14A:12-17. Disposition of Unclaimed Distributive Shares.

The distributive share payable to any person who is unknown or cannot be found, or who is under a disability and for whom there is no legal representative, shall be paid into the Superior Court to be held for the benefit of the owners, subject to the order of the Court.

CHAPTER 13

FOREIGN CORPORATIONS

Sec.

14A:13-1. Application of Act to Foreign Corporations.

(1) Foreign corporations which are duly authorized to transact business in this State on the effective date of this Act, for a purpose or purposes for which a corporation might secure such authority under this Act, shall be entitled to all the rights and privileges applicable to foreign corporations procuring certificates of authority to transact business in this State under this Act, and from the time this Act takes effect such corporations shall be subject to all the duties, restrictions, penalties and liabilities prescribed herein for foreign corporations procuring certificates of authority to transact business in this State under this Act.

(2) A foreign corporation which receives a certificate of authority under this Act shall, until a certificate of revocation or of withdrawal is issued as provided in this Act, enjoy the same, but no greater, rights and privileges as a domestic corporation organized for the purposes set forth in the application pursuant to which such certificate of authority is issued; and, except as in this Act otherwise provided, shall be subject to the same duties, restrictions, penalties and liabilities now or hereafter imposed upon a domestic corporation of like character.

(3) A foreign corporation which transacts business in this State without a certificate of authority under this Act shall be subject to the same duties, restrictions, penalties and liabilities now or hereafter imposed upon a foreign corporation procuring such certificate of authority.

14A:13-2. Admission of Foreign Corporation.

(1) No foreign corporation shall have the right to transact business in this State until it shall have procured a certificate of authority so to do from the Secretary of State. A foreign corporation may be authorized to do in this State any business which may be done lawfully in this State by a domestic corporation, to the extent that it is authorized to do such business in the jurisdiction of its incorporation, but no other business.

(2) Without excluding other activities which may not constitute transacting business in this State, a foreign corporation shall not be considered to be transacting business in this State, for the purposes of this Act, by reason of carrying on in this State any one or more of the following activities

(a) maintaining, defending or otherwise participating in any action or proceeding whether judicial, administrative, arbitrative or otherwise, or effecting the settlement thereof or the settlement of claims or disputes;

(b) holding meetings of its directors or shareholders;

(c) maintaining bank accounts or borrowing money, with or without security, even if such borrowings are repeated and continuous transactions and even if such security has a situs in this State;

(d) maintaining offices or agencies for the transfer, exchange and registration of its securities, or appointing and maintaining trustees or depositaries with relation to its securities.

(3) The specification in subsection 14A:13-1(2) does not establish a standard for activities which may subject a foreign corporation to service of process or taxation in this State.

14A:13-3. Holding and Conveying Real Estate.

A corporation organized under laws other than the laws of this State, whether or not constituting a foreign corporation as defined in this Act, shall have the same powers with respect to real property located in this State, or any interest therein, as a domestic corporation.

14A:13-4. Application for Certificate of Authority.

(1) To procure a certificate of authority to transact business in this State, a foreign corporation shall submit to the Secretary of State an application setting forth

(a) the name of the corporation and the jurisdiction of its incorporation;

(b) the date of incorporation and the period of duration of the corporation;

(c) the address of the principal office of the corporation in the jurisdiction of its incorporation;

(d) the address of the proposed registered office of the corporation in this State, and the name of its proposed registered agent in this State at such address, together with a statement that the registered agent is to be an agent of the corporation upon whom process against the corporation may be served; and

(e) the character of the business it is to transact in this State, together with a statement that it is authorized to transact such business in the jurisdiction of its incorporation.

(2) Attached to the application shall be a certificate setting forth that such corporation is in good standing under the laws of the jurisdiction of its incorporation, executed by the official of such jurisdiction who has custody of the records pertaining to corporations. If such certificate is in a foreign language, a translation thereof under oath of the translator shall be attached thereto.

14A:13-5. Filing of Application for Certificate of Authority; Effect of Certificate of Authority.

(1) The application of the foreign corporation for a certificate of authority shall be filed in the office of the Secretary of State. Thereupon the Secretary of State shall issue to the foreign corporation a certificate of authority to transact business in this State.

(2) Upon the issuance of a certificate of authority by the Secretary of State, the foreign corporation shall be authorized to transact in this State any business of the character set forth in its application. Such authority shall continue so long as it retains its authority to transact such business in the jurisdiction of its incorporation and its authority to transact business in this State has not been surrendered, suspended or revoked.

(3) When two or more foreign corporations have been merged or consolidated into a single corporation by reason of the law of the jurisdiction of any one of such foreign corporations, no certificate of authority shall be issued by the Secretary of State to the surviving or consolidated corporation until all corporations included in such merger or consolidation which prior to such consolidation or merger were authorized by any law of this State to transact business in this State, shall have first filed with the Secretary of State certificates issued by the Director of the Division of Taxation evidencing the payment by such corporations of all taxes, fees, penalties and interest due from them under any statute imposing State taxes.

14A:13-6. Amended Certificate of Authority.

(1) A foreign corporation authorized to transact business in this State shall procure an amended certificate of authority in the event it desires to change its corporate name, or to enlarge, limit or otherwise change the character of the business which it proposes to transact in this State, by making application therefor to the Secretary of State.

(2) The requirements in respect to the form and contents of such application, the manner of its execution, the filing thereof in the office of the Secretary of State, the issuance of an amended certificate of authority and the effect thereof, shall be the same as in the case of an original application for a certificate of authority.

14A:13-7. Change of Name by Foreign Corporation.

Whenever a foreign corporation which is authorized to transact business in this State shall change its name to one under which a certificate of authority would not be granted to it on application therefor, the certificate of authority of such corporation shall be suspended and the corporation shall not thereafter transact any business in this State until it has changed its name to a name which is available to it under the laws of this State.

14A:13-8. Withdrawal of Foreign Corporation.

(1) A foreign corporation authorized to transact business in this State may withdraw from this State upon procuring from the Secretary of State a certificate of withdrawal. In order to procure such a certificate of withdrawal, such foreign corporation shall file in the office of the Secretary of State an application for withdrawal setting forth

(a) the name of the corporation and the jurisdiction of its incorporation;

(b) that the corporation is not transacting business in this State;

(c) that the corporation surrenders its authority to transact business in this State; and

(d) a post-office address to which the Secretary of State may mail a copy of any process against the corporation that may be served on him.

(2) Upon the filing of the application for withdrawal, the Secretary of State shall issue to the corporation a certificate of withdrawal, whereupon

(a) the authority of the corporation to transact business in this State shall cease;

(b) the authority of its registered agent in this State to accept service of any process against the corporation shall be deemed revoked;

(c) the corporation shall be deemed to have irrevocably consented that service of process in any action or proceeding based upon any liability or obligation incurred by it within this State before the issuance of the certificate of withdrawal may thereafter be made on such corporation by service thereof on the Secretary of State or the chief clerk in his office; and

(d) the Secretary of State shall be charged with such duties and shall be entitled to receive such fees with respect to any process which may be served hereunder on him or the chief clerk of his office, as are provided in R. S. §§ 2A:15-26 to 2A:15-29 (Supp. 1944).

(3) The post-office address specified in paragraph 14A:13-8(1)(d) may be changed from time to time by filing in the office of the Secretary of State a certificate setting forth

(a) the name of the foreign corporation;

(b) the jurisdiction if its incorporation;

(c) the date of the issuance of its certificate of withdrawal by the Secretary of State; and

(d) the changed post-office address.

14A:13-9. Termination of Existence of Foreign Corporation.

(1) When a foreign corporation authorized to transact business in this State is dissolved, or its authority or existence is otherwise terminated or cancelled in the jurisdiction of its incorporation, or it is merged into or consolidated with another corporation, there shall be filed in the office of the Secretary of State

(a) a certificate of the official of the jurisdiction of incorporation of such foreign corporation who has custody of the records pertaining to corporations, attesting the occurrence of any such event; or

(b) a certified copy of an order or decree of a court of competent jurisdiction directing the dissolution of such foreign corporation, the termination of its existence, or the cancellation of its authority;

together with a statement of the post-office address to which the Secretary of State may mail a copy of any process against the corporation that may be served on him.

(2) Upon the filing of the certificate, order or decree and the statement of the post-office address, the Secretary of State shall issue a certificate of withdrawal with like effect as provided in subsection 14A:13-8(2).

(3) The post-office address specified in subsection 14A:13-9(1) may be changed from time to time in the same manner as is provided in subsection 14A:13-8(3).

14A:13-10. Revocation of Certificate of Authority; Issuance of Certificate of Revocation.

(1) In addition to any other ground for revocation provided by law, the certificate of authority of a foreign corporation to transact business in this State may be revoked by the Secretary of State upon the conditions prescribed in this section when

(a) the certificate of authority of the corporation has been suspended for 30 days under this Act; or

(b) the corporation has failed to apply for an amended certificate of authority within 30 days after it was required to do so under this Act; or

(c) the corporation has failed to maintain a registered agent in this State as required by this Act; or

(d) the corporation has failed, after change of its registered office or registered agent,to file in the office of the Secretary of State a statement of such change as required by this Act; or

(e) the corporation has failed to file its annual report within the time required by this Act.

(2) No certificate of authority of a foreign corporation shall be revoked by the Secretary of State unless

(a) he shall have given the corporation not less than 30 days' notice that such default exists and that its certificate of authority will be revoked unless such default is cured within 30 days after the mailing of such notice; and

(b) the corporation shall fail prior to revocation to cure such default.

Such notice shall be sent by certified mail to the corporation at its registered office in this State and at its principal office in the jurisdiction of its incorporation as such offices appear on record in the office of the Secretary of State.

(3) Upon revoking any such certificate of authority, the Secretary of State shall issue a certificate of revocation and shall mail a copy to such corporation at each of the addresses designated in subsection 14A:13-10(2).

(4) The issuance of the certificate of revocation shall have the same force and effect as the issuance of a certificate of withdrawal under subsection 14A:13-8(2).

14A:13-11. Transacting Business Without Certificate of Authority.

(1) No foreign corporation transacting business in this State without a certificate of authority shall maintain any action or proceeding in any court of this State, until such corporation shall have obtained a certificate of authority. This prohibition shall apply to

(a) any successor in interest of such foreign corporation, except any receiver, trustee in bankruptcy or other representative of creditors of such corporation; and

(b) any assignee of the foreign corporation, except an assignee for value who accepts an assignment without knowledge that the foreign corporation should have but has not obtained a certificate of authority in this State.

(2) The failure of a foreign corporation to obtain a certificate of authority to transact business in this State shall not impair the validity of any contract or act of such corporation, and shall not prevent such corporation from defending any action or proceeding in any court of this State.

(3) In addition to any other liabilities imposed by law, a foreign corporation which transacts business in this State without a certificate of authority shall be liable to this State for a penalty in the amount of $1,000.00 for each calendar year in which it shall have transacted business in this State without a certificate of authority. Such amount shall be recovered with costs in an action prosecured by the Attorney General in the name of the State.

PRELIMINARY DRAFT

OF

TITLE 14A

THE NEW JERSEY BUSINESS CORPORATION ACT

REVISING TITLE 14, CORPORATIONS, GENERAL
OF THE REVISED STATUTES

VOLUME 2
COMMISSIONERS' COMMENTS

N.J. CORPORATION LAW REVISION COMMISSION
Suite 2900
744 Broad Street
Newark, New Jersey 07102

14A:1-1

Short Title

Source or Reference

N.J.: None
Model Act: § 1 (1960)
Other: None.

Comment

None.

Definitions

Source or Reference

N.J.: R.S. §§ 14:1-1 (1937); 14:4-1 (1937)
Model Act: § 2 (1960 and Supp. 1966)
Other: As noted in the Comment

Comment

Par. (a) - "Attorney General"
This term is not defined in the Model Act.

Par. (b) - "Authorized shares"
This definition is identical to that appearing in section 2(g) of the Model Act.

Par. (c) - "Board"
The definition of the term "board" does not appear in the Model Act. It is taken verbatim from the New York Act (N.Y. Bus. Corp. Law §102(a)(5)). The term "entire board" is also taken from the New York Act (N.Y. Bus. Corp. Law §702(a)). It is not defined in the Model Act. Both definitions were included to facilitate drafting.

Par. (d) - "Bonds"
This term is not defined in the Model Act. The definition substantially follows that of the New York Act (N.Y. Bus. Corp. Law §102(a)(1)), with the addition of the words "and other written obligations" adapted from R.S. 14:8-5(1938).

Par. (e) - "Capital surplus"
This definition is identical to that appearing in section 2(m) of the Model Act. It should be read with the definition of "earned surplus" (paragraph 14A:1-2(i)) and "surplus," (paragraph 14A:1-2(r)). See, also sections 14A:7-14 (Dividends or Other Distributions in Cash or Property), 14A:7-15 (Share Dividends), 14A:7-16 (Right of a Corporation to Acquire and Dispose of Its Own Shares), and 14A:7-20 (Special Provisions Relating to Surplus).

Par. (f) - "Certificate of incorporation"
This definition is identical to that appearing in the New York Act (N.Y. Bus. Corp. Law §102(a)(3). The Model Act uses the term "articles of incorporation" to denote the instrument

filed with the Secretary of State to form a corporation (Model Bus. Corp. Act Ann. §§ 2(c), 47, 48 (1960)) and provides for a "certificate of incorporation" which the Secretary of State issues to evidence its formation (Model Bus. Corp. Act Ann. §§ 49, 50 (1960)). In this Revision, the term "certificate of incorporation" retains its traditional meaning in this State as the instrument filed to form a corporation or, prior to general incorporation laws, the charter granted by the Legislature. The result is that "certificate of incorporation" in this Revision embraces the same general concept as the Model Act "articles of incorporation".

Par. (g) - "Corporation" or "domestic corporation"

This definition, with slight changes, is taken from the New York Act (N.Y. Bus. Corp. Law §102(a)(4)). It covers corporations organized for profit under this Revision or prior law, general or special, for a purpose or purposes for which there may be organization under this Revision.

Par. (h) - "Director"

This definition does not appear in the Model Act. It is taken verbatim from the New York Act (N.Y. Bus. Corp. Law §102(a)(5)). Together with the definition of "board" and "entire board" (Par. (c), supra), it was included for convenience in drafting the statute.

Par. (i) - "Earned surplus"

This definition is almost identical to the one appearing in the New York Act (N.Y. Bus. Corp. Law §102(a)(6)). It is primarily intended to indicate that the source of earned surplus is net gains and profits rather than contributions. The Commission preferred the definition appearing in the New York Act to that of the Model Act (Model Bus. Corp. Act Ann. §2(1) (Supp. 1966)), because it is clearer, shorter and — because it does not purport to be all-encompassing — less misleading. It must be read in conjunction with the following subsections of the Revision, which set forth rules for computing earned surplus: 14A:7-8(3) (allocation to earned surplus upon merger, consolidation, or acquisition of another corporation); 14A:7-20(1) (unrealized appreciation of assets and subsequent realization; acquisition of treasury shares out of earned surplus and subsequent disposition); 14A:7-20(3) (reduction or elimination of deficit in earned surplus account); and 14A:7-20(4) (determination of amount of earned surplus before declaration of first dividend after effective date of Act).

Par. (j) - "Foreign corporation"
This definition is almost identical with that appearing in section 2(b) of the Model Act.

Par. (k) - "Insolvent"
This definition, based on section 2(n) of the Model Act, is commonly known as the equity concept of insolvency. "Insolvent" is specifically defined in 14A:14-1 for purposes of Chapter 14. A corporation may be insolvent under the definition in paragraph 14A:1-2(k) without being insolvent for purposes of Chapter 14, and vice versa.

Par. (l) - "Net assets"
This definition substantially adopts the definition in section 2 of the Pennsylvania Act (Pa. Stat. Ann. tit. 15 §2852-2 (Supp. 1966)), except for the provision that treasury shares are not assets. That provision is taken from the New York Act (N.Y. Bus. Corp. Law §102(a)(14)).

Par. (m) - "Secretary of State"
This definition does not appear in the Model Act.

Par. (n) - "Shareholder"
This definition is identical to the one appearing in section 2(f) of the Model Act.

Par. (o) - "Shares"
This definition is identical to the one appearing in section 2(d) of the Model Act.

Par. (p) - "Stated capital"
This definition is identical to the one appearing in section 2(j) of the Model Act, except for the omission of the last sentence of the Model Act definition and the omission of "capital" before "surplus" in clause (2) of the paragraph.

Par. (q) - "Subscriber"
This definition is identical to the one appearing in section 2(e) of the Model Act.

Par. (r) - "Surplus"
This definition is identical to the one appearing in section 2(k) of the Model Act.

Par. (s) - "Treasury shares"

This definition is substantially similar to that in the New York Act (N.Y. Bus. Corp. Law §102(a)(14)), except for the provision in the New York Act that treasury shares are not assets. That provision is included in paragraph 14A:1-2(1) as part of the definition of "net assets".

Application of Act

Source or Reference

N.J.: R.S. §§ 14:1-2 (1938); 14:1-6 (1938); 14:2-8 (1938); 14:3-3 (1938); 14:15-2 (1938)
Model Act: §140 (1960)
Other: None.

Comment

This section follows section 140 of the Model Act with changes to make it clear that upon its effective date this Revision will apply, to the extent constitutionally permissible, (i) to all existing domestic business corporations theretofore organized for any of the purposes permitted by this Revision, whether organized under prior general or special laws; and (ii) to all business corporations organized under this Revision.

A business corporation incorporated by special act with respect to which the power to amend or repeal was not reserved to the Legislature, may, if it was incorporated for any of the pruposes permitted by this Revision, come under and be subject to this Revision by utilizing the succeeding section, 14A:1-4.

Title 14 of the Revised Statutes presently contains a number of sections which also apply to domestic corporations other than what might be called "Title 14" corporations, such as R.S. §§ 14:3-13; 14:3-13.1 through 14:3-13.4; 14:3-15 through 14:3-17 (a non-exclusive list). Paragraph 14A:1-3(4)(a) carries over such provisions wherever they appear in this Revision. The effect of paragraph 14A:1-3(4)(b) is to make this Revision otherwise applicable to such corporations only to the extent, if any, as may be provided in the specific law governing such corporations. Compare §338 of The Banking Act of 1948 (R.S. §17:9A-338 (1950)).

For the effect of subsection 14A:1-3(5), see the comment to section 14A:13-3.

14A:1-4

Reorganization Under This Act by Certain Corporations Organized Under Special Acts.

Source or Reference

N.J.: R.S. §14:2-6 (1938)
Model Act: None
Other: None.

Comment

This section carries into this Revision a method comparable to that in R.S. §14:2-6, whereby certain corporations incorporated by special act of the Legislature may reincorporate under this Revision. The Revision automatically applies to corporations incorporated by the Legislature under special acts with respect to which the Legislature reserved the power to amend or repeal. See subsection 14A:1-3(1).

14A:1-5

Reservation of Power

N.J.: 1947 Const., Art. IV, Sec. VII, par. 9; R.S. §14:2-9 (1938)
Model Act: §142 (1960)
Other: N.Y. Bus. Corp. Law §110.

Comment

This section sets forth the reserved power of the Legislature over all corporations, domestic and foreign. It goes beyond R.S. §14:2-9, which is limited to the traditional concept of the reserved power as expressed in the case of domestic corporations. In this respect the section follows section 110 of the New York Act.

The comprehensive scope of the reserved power of the Legislature over domestic corporations was recently recognized in Brundage v. The New Jersey Zinc Company, 48 N.J. 450 (1967), which expressly overruled the widely criticized Zabriskie v. Hackensack and New York Railroad Company, 18 N.J. Eq. 178 (Ch. 1867).

Execution and Filing of Documents

Source or Reference

N.J.: R.S. § 14:1-3 (1938)
Model Act: None
Other: Conn. Gen. Stat. Rev. § 33-285 (1961).

Comment

The trend in the most recently revised corporation statutes of other jurisdictions is to include a section such as the above, stating the general requirements with respect to the form and content of certificates or other documents which are to be filed under the particular statute. E.g., N.Y. Bus. Corp. Law § 104; S.C. Code Ann. §§ 12-11.4, 12-11.6 (Supp. 1966); and Conn. Gen. Stat. Ann., § 33-285. See Folk, The Model Act and the South Carolina Corporation Law Revision, 18 Bus. Law. 351, 357 (1963). The presence of this general section eliminates repetition of its provisions throughout the rest of the statute. Paragraph 14A:1-6(1)(a) is based on R.S. § 14:1-3. Paragraph 14A:1-6(1)(b) and subsection 14A:1-6(2) were derived from the above-cited Connecticut statute, with the exception that the Commission eliminated the requirement, contained in various sections of Title 14 as well as the Connecticut statute, that two corporate officers sign documents filed with the Secretary of State.

The Commission also eliminated the requirements contained in various sections of Title 14 that such documents bear the corporate seal and be either sworn to or acknowledged. Subsection 14A:1-6(2) makes it clear, however, that the presence of dual signing, the corporate seal and either an acknowledgment or proof will not invalidate a document submitted to the Secretary of State for filing.

The provision in paragraph 14A:1-6(1)(c) for the delayed effective date of documents filed with the Secretary of State is new to the law of New Jersey. It should

be noted that a document may be made effective at a time subsequent to the time of filing only if a section of this Revision expressly authorizes a delayed filing date for the particular document. For provisions authorizing delayed filing dates, see subsection 14A:2-7(2) (Certificate of Incorporation); subsection 14A:9-4(5) (Certificate of Amendment); subsection 14A:9-5(4) (Restated Certificate of Incorporation); subsection 14A:10-4(2) (Certificate of Merger or Consolidation); subsection 14A:10-5(4) (Certificate of Merger of Subsidiary Corporation); paragraph 14A:12-6 (1)(c)(Certificate of Dissolution).

14A:1-7

Repeal of Prior Acts

Source or Reference

N.J.: R.S. §§1:1-18 Supp. (1962); 14:1-6 (1937)
Model Act: §143 (1960)
Other: N.Y. Bus. Corp. Law §103 (c) and (d).

Comment

None

Notices

Source or Reference

N.J.: R.S. §1:1-2.5 (Supp 1944); R.R. 1:27
Model Act: §27 (1960)
Other: Conn. Gen. Stat. Rev. §33-414 (1961); Ohio Rev. Code Ann. §1701.02 (Page 1964).

Comment

This section is largely based on the provisions of the Connecticut and Ohio Acts with the addition in the second sentence of language from the second sentence of section 27 of the Model Act. The first sentence states the common law rule in this State. State v. Rhodes, 11 N.J. 515 (1953).

This section should be read with R.S. §1:1-2.5, the wartime legislation, enacted in 1942, under which any corporate or other notice required to be transmitted out of the United States is dispensed with where restricted or forbidden (as in the case of enemy shareholders) by present or future federal law, rule, regulation, proclamation or executive order. As to R.S. §1:1-2.5, see Latty, Some Miscellaneous Novelties in the New Corporation Statutes, 23 Law & Contemp. Prob., 363, 383 (1958).

14A:1-9

Certificates and Certified Copies as Evidence

Source or Reference

N.J.: R.S. §§14:2-4 (Supp. 1941); 14:3-8 (1938); 14:11-2 (1938); 14:12-3 (1938); 14:14-41 (1938)
Model Act: §134 (1960)
Other: None.

Comment

This section is based on section 134 of the Model Act. Sections in Title 14 equivalent to subsection 14A:1-9 (1) are limited to particular documents such as the certificate of incorporation (R.S. §14:2-4), an amendment to the certificate of incorporation (R.S. §14:11-2), a certificate of merger or consolidation (R.S. §14:12-3), and the like. See, also, Report of the New Jersey Supreme Court Committee on Evidence (1963) with respect to Rules 63(17), 68 and 69 of the Uniform Rules of Evidence.

14A:2-1

Purposes

Source of Reference

N.J.: R.S. §§14:2-1 (1938); 14:2-2 (Supp. 1965); 14:3-4 (1938)
Model Act: §3 (1960)
Other: N.Y. Bus. Corp. Law §201(a).

Comment

This section is derived from the first sentence of section 201(a) of the New York Act. Only a corporation for profit may be organized under this Revision. See the definition of "corporation" or "domestic corporation" in subsection 14A:1-2(g), as well as the words in this section authorizing organization under this Act of a corporation "for any lawful business purpose or purposes". This section expressly excludes from organization under this Act those classes of corporations for profit for which the Legislature has prescribed or may hereafter prescribe organization under other general legislation, such as banks, savings banks, insurance companies, savings and loan associations, etc. Each such corporation is compelled to resort for organization to the statute specifically applicable to it, unless that statute also permits organization under this Revision.

Corporate Name of Domestic or Foreign Corporations

Source or Reference

N.J.: R.S. §§ 14:2-3a (Supp. 1955); 14:11-15 (Supp. 1955); 14:13-7.2 (Supp. 1952)
Model Act: §§ 7 (1960); 101 (1960)
Other: N.Y. Bus. Corp. Law §§ 301(a)(2) and (3); 302(b)(1); Pa. Stat. Ann. tit. 15 § 2852-202B(1) (Supp. 1966); S.C. Code Ann. § 12-13.1(d) (Supp. 1966).

Comment

Paragraphs 14A:2-2(1)(a) and (1)(b) are largely based on clauses (b) and (c) of sections 7 (domestic corporations) and 101 (foreign corporations) of the Model Act. The Commission omitted as unnecessary the provision in clause (a) of each of the Model Act sections requiring that the corporate name indicate a corporate existence.

Title 14 does not prevent a domestic corporation from being organized with the same name as a foreign corporation authorized to transact business in this State (R.S. § 14:2-3a); nor does it prevent a foreign corporation from qualifying with the same name as an existing domestic corporation (R.S. § 14:15-3 (1938)). Paragraph 14A:2-2(1)(b) changes this feature of present law and extends protection, as well, to any corporate names reserved or registered under this Act. See sections 14A:2-3 (Reserved Name), 14A:2-4 (Registered Name) and 14A:2-5 (Renewal of Registered Name).

In the case of similar names, paragraph 14A:2-2(1)(b) proscribes the use of names "confusingly similar" in preference to the Model Act standard "deceptively similar," which appears to suggest a requirement of evil intent in addition to a

likelihood of confusion. In this respect, paragraph 14A:2-2(1)(b) continues present law as expressed in R.S. § 14:2-3a (the name must not be so similar "as to lead to uncertainty or confusion"). The provision at the end of paragraph 14A:2-2(1)(b) and in subsection 14A:2-2(3), authorizing the use of the same or a confusingly similar name if written consent thereto by the prior user is filed in the office of the Secretary of State, codifies a practice of the Secretary of State which is without legislative sanction at present. This provision is taken from section 2852-202B(1) of the Pennsylvania Act. Paragraph 14A:2-2(1)(c) of this section is based on section 301(a)(3) of the New York Act.

Subsection 14A:2-2(2) has no counterpart in the Model Act. Its first sentence follows a similar provision in section 306(b)(1) of the New York Act. The second sentence continues the policy in R.S. § 14:11-15 prohibiting certain changes of corporate names.

Subsection 14A:2-2(3) does not appear in the Model Act. It revises R.S. §14:13-7.2 to make available for use by any other corporation, domestic or foreign, the corporate name of any domestic corporation heretofore or hereafter dissolved in any manner and not reinstated within two years. Subsection 14A:2-2(3) differs from R.S. §14:13-7.2 in that the latter is limited to domestic corporations dissolved by voluntary action of their stockholders and, hence, has no application in the case of the numerous domestic corporations whose charters are forfeited under R.S. § 54:11-2 (1938) for nonpayment of state franchise taxes. As used in this Revision, "dissolution" includes such forfeiture. See paragraph 14A:12-1(1)(b). In view of this broadening of the scope of R.S. §14:13-7.2, the Commission extended the period of protection of the name of a dissolved domestic corporation from one year after dissolution, as in R.S. §14:13-7.2, to two years.

Subsection 14A:2-2(4) does not appear in Title 14 or the Model Act. It is adapted from section 12-13.1(d) of

the South Carolina Act. Under present law, approval of a corporate name by the Secretary of State in connection with the organization of a domestic corporation or the filing of a certificate of amendment does not conclusively determine the right to use that name. Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co., 69 N.J. Eq. 159 (Ch. 1905), aff'd, 71 N.J. Eq. 300 (E. & A. 1906). Compare Model Business Corporation Act § 4 VIII 9, 9 U.L.A. 127, promulgated by the National Conference of Commissioners on Uniform State Laws. The latter act is not to be confused with the Model Act, promulgated by the American Bar Foundation. See 1 Model Bus. Corp. Act Ann., § 1, par. 4.03 (1960).

Reserved Name

Source or Reference

N.J.: None
Model Act: § 8 (1960)
Other: N.Y. Bus. Corp. Law § 303(b)

Comment

This section is new and is based on section 8 of the Model Act. A provision for reservation of a corporate name for a limited period, anywhere from 30 to 120 days, appears in virtually all recent corporation statutes, thus eliminating the need to rely on the uncertain practice or reservation by administrative courtesy without legislative sanction. 1 Model Bus. Corp. Act Ann., § 8, pars. 2.01, 2.02, at 223 (1960); 1 Hornstein, Corporation Law and Practice, § 105 (1959). The Commission did not consider it necessary to set forth, as in the Model Act, who may be an applicant to reserve a name under this section. The Commission also reduced the period of reservation from 120 days in Model Act § 8 to 60 days, which should prove ample in almost every case. The provision with respect to the issuance by the Secretary of State of a certificate of reservation is derived from section 303(b) of the New York Act.

It should be noted that under this section a corporate name may be reserved not only by an applicant intending to form a corporation in New Jersey or to qualify a foreign corporation in New Jersey, but by an existing domestic corporation or qualified foreign corporation which wishes to assure availability of a specified name pending approval of the name change by shareholders.

14A:2-4

Registered Name

Source or Reference

N.J.: None
Model Act: §9 (1960)
Other: None.

Comment

This section has no counterpart in Title 14. It is based on section 9 of the Model Act. This section and section 14A:2-5 provide a method whereby a foreign corporation (defined in subsection 14A:1-2(j)) which is not authorized to transact business in this State may register its name and renew the registration from year to year, thus reserving the availability of its name in this State for a longer time than the 60-day period permitted by section 14A:2-3. 1 Model Bus. Corp. Act Ann., §§ 9 and 10, par. 4, at 227 (1960). This enables the "fencing in" of a name, if it is still open, which makes it unavailable even to domestic corporations, in the event that the foreign corporation should, in the future, expand its activities into this State and wish to use the name, See Latty, Some Miscellaneous Novelties in New Corporation Statutes, 23 Law & Contemp. Prob. 363-364 (1958). The section offers a practical alternative to the formation by a foreign corporation of a New Jersey subsidiary corporation in order to achieve the same result of "fencing in" its name in this State.

14A:2-5

Renewal of Registered Name

Source or Reference

N.J.: None
Model Act: § 10 (1960)
Other: None.

Comment

See Comment to section 14A:2-4 (Registered Name).

14A:2-6

Incorporators

Source or Reference

N.J.: R.S. §§ 14:2-1 (1938); 14:2-3 (Supp. 1955); 14:2-4 (1938); 14:2-7 (1938); 14:10-1 (1938)
Model Act: § 47 (Supp. 1966)
Other: N.Y. Bus. Corp. Law § 615(c).

Comment

Subsection 14A:2-6(1) changes R.S. § 14:2-1 by authorizing a single incorporator, as in section 47 of the Model Act and in the New Jersey Professional Service Corporation Act (R.S. § 14:19-5 (Supp. 1965)). Subsection 14A:2-6(1) probably broadens the scope of R.S. § 14:2-1 by allowing corporations to act as incorporators. No court has decided whether "persons" as used in R.S. § 14:2-1 encompasses corporations; however, it has been decided that "persons," as used in the incorporator section of the general railroad law, does not include corporations. Central R.R. Co.of N.J. v. Pennsylvania R.R. Co., 31 N.J. Eq. 475 (Ch. 1879), rev'd on other grounds, 32 N.J. Eq. 755 (E. & A. 1880). Based on that holding, commentators have observed that only natural persons may be incorporators under Title 14. E.g., Model Business Corporation Act, Commissioners' Note to § 2, 9 U.L.A. 123; Smith, Encyclopedia of New Jersey Corporation Law § 42-3, at 144 (2nd ed. 1923). The provision that individuals acting as incorporators must be at least 21 years of age is not expressly contained in Title 14, but probably is implied by the use of the word "persons," since the act of incorporating involves a contract, and minors in New Jersey are generally disqualified from entering into binding contracts. 21 N.J. Practice § 2663 (1960). The provision that incorporators need not be United States citizens or residents of this State does not change existing law.

Subsection 14A:2-6 (1) eliminates existing requirements that each incorporator must be a subscriber to shares

of the corporation (R.S. § 14:2-3(f)); that the certificate of incorporation must be proved or acknowledged as required for deeds of real estate (R.S. § 14:2-4); and that a certified copy of the certificate of incorporation be locally recorded after being filed and recorded in the office of the Secretary of State (R.S. §14:2-4).

Subsection 14A:2-6(2) is new.

Subsection 14A:2-6(3) is derived from N.Y. Bus. Corp. Law § 615(c). A comparable provision appears in R.S. § 14:2-7.

The role of an incorporator under this Act is much more limited than under Title 14. There is no organization meeting of incorporators, as in R.S. § 14:10-1. The first board of directors is required to be named in the certificate of incorporation (paragraph 14A:2-7(1)(h)) and it is the first board which organizes the corporation. See section 14A:2-8. Before such organization meeting of the board, the incorporators are authorized by subsection 14A:9-2(1) to amend the certificate of incorporation. Also, before such organization meeting of the board, the incorporators may, under certain conditions, dissolve the corporation. See section 14A:12-2. Since the occasion for any such amendment or dissolution should be uncommon, the incorporators' function, as such, will normally terminate upon filing the certificate of incorporation in the office of the Secretary of State under this section and upon giving notice of the organization meeting of directors under section 14A:2-8.

The Wisconsin statute contains a novel, but the Commission thought cumbersome, combination of the approaches of Title 14 and the Revision to the role of incorporators (Wis. Stat. Ann. § 180.49 (Supp. 1966)). Under the Wisconsin Act the incorporators or directors organize the corporation, depending on whether the initial directors are designated in the articles of incorporation.

14A:2-7

Certificate of Incorporation

Source or Reference

N.J.: R.S. §§ 14:2-3 (1938); 14:2-4 (Supp. 1941)
Model Act: §§ 48 (1960); 49 (1960); 50 (1960)
Other: Wis. Stat. Ann. § 180.45(1)(c)(1957); N.Y. Bus. Corp. Law § 402(a)(9) and (b).

Comment

Subsection 14A:2-7(1) prescribes the contents of the certificate of incorporation and largely follows section 48 of the Model Act.

The second sentence of paragraph 14A:2-7(1)(b), which authorizes the creation of an all-purpose corporation, is based on section 180.45(1)(c) of the Wisconsin Act. Use of the all-purpose authorization will enable draftsmen to dispense with the traditional practice of reciting the corporate purposes at length. Under subsection 14A:3-1(2) it is unnecessary to set forth in the certificate of incorporation any of the general powers of a corporation under this Act. If desired, limitations as to both corporate purposes and powers may be expressed in the certificate of incorporation. See paragraphs 14A:2-7(1)(b), 14A:2-7(1)(f) and subsection 14A:3-1(1).

There is no requirement of any minimum paid-in capital with which the corporation will commence business, as appears in section 48(g) of the Model Act, and, as to corporations having par value shares, in R.S. § 14:2-3(e). Compare R.S. § 14:8-8 (1938) as to corporations where all shares are without par value. Accordingly, sections 43(e) and 51 of the Model Act do not appear in this Revision. Section 48(h) of the Model Act, which permits inclusion in the certificate of a provision limiting or denying preemptive rights to shareholders, was omitted in view of section 14A:5-29, which denies preemptive rights to shareholders unless they are expressly provided for in the certificate of incorporation.

Paragraph 14A:2-7(1)(f) follows section 402(b) of the New York Act, by authorizing any optional provision "not inconsistent with this Act or any other statute of this State" — a standard which is intentionally broader than the "consistent with law" standard in R.S. § 14:2-3. Cf., State v. Jefferson Lake Sulphur Co., 36 N.J. 577 (1962), cert. den., 370 U.S. 158 (1962). In other respects paragraph 14A:2-7(1)(f) retains the terminology of the last paragraph of R.S. §14:2-3 in preference to section 48(i) of the Model Act. The final clause in paragraph 14A:2-7(1)(f) authorizes the incorporators to insert in the certificate of incorporation any provision which this Act requires or permits to be set forth in the by-laws. This is derived from section 48(i) of the Model Act. Under subsection 14A:2-9(2), any such provision has equal force and effect if set forth in the certificate of incorporation rather than in the by-laws.

Under paragraph 14A:2-7(1)(h) the certificate of incorporation must set forth the number of directors constituting the board or a statement that the board shall be not less than a stated minimum nor more than a stated maximum. This is a departure from present law. As to the permissible number of directors, see section 14A:6-2.

Paragraph 14A:2-7(1)(i) requires that the certificate of incorporation recite the number of directors constituting the first board, if that number is not fixed pursuant to paragraph 14A:2-7(1)(h), and the names of the persons who will serve as such directors. This requirement is also a departure from present law. It, like the requirement of paragraph 14A:2-7(1)(h), is related to the fact that under the Revision the directors, not the incorporators, organize the corporation. For the limited role of the incorporators under the Revision, see the comment to section 14A:2-6.

Unlike section 48(b) of the Model Act, paragraph 14A:2-7(1)(k) does not require any statement to be made in the certificate of incorporation with respect to the

duration of the corporation, unless the duration is to be limited. This continues present law, R.S. § 14:2-3(g), although the actual language of paragraph 14A:2-7(1)(k) is derived from section 402(a)(9) of the New York Act.

Under subsection 14A:2-7(2) the certificate of incorporation is filed in the office of the Secretary of State. The corporate existence begins at the date and hour of filing with the Secretary of State unless a later time, not to exceed 30 days from the date and hour of filing, is specified in the certificate. If a later time is specified, the corporate existence begins at the time so specified. The provision for the beginning of the corporate existence at the time of filing is consistent with present law (R.S. § 14:2-4). The provision for a delayed beginning of the corporate existence is new to the law of New Jersey. It is based on the Florida Corporation Act (Fla. Stat. Ann. § 608.041(b) (Supp. 1965)), and should be a decided convenience in those transactions where it is important that the corporate existence begin at a particular time. There are a number of sections of the Revision which authorize delayed filing dates for documents filed with the Secretary of State. For a listing of those sections, see the comment to section 14A:1-6.

No local recording of the certificate of incorporation is required. See the comment to section 14A:2-6. The last sentence of subsection 14A:2-7(2) has no counterpart in Title 14. It is adapted from section 50 of the Model Act. Such a provision, which virtually eliminates the distinction between de jure and de facto corporations, has been enacted in about half the states. As to the purpose and effect of such provisions, see 1 Hornstein, Corporation Law and Practice, § 29 (1959); Model Bus. Corp. Act Ann., § 50, par. 4 (1960).

14A:2-8

Organization Meeting of Directors

Source or Reference

N.J.: R.S. § 14:10-1 (1939)
Model Act: § 52 (1960)
Other: None.

Comment

This section is based on section 52 of the Model Act. It should be noted that under paragraph 14A:2-7(1)(i) the certificate of incorporation must set forth the number of directors constituting the first board, and their names. It is the first board which organizes the corporation under this section, rather than the incorporators (as under R.S. § 14:10-1). Another departure from R.S. § 14:10-1 is the elimination of the requirement that in the absence of unanimous execution of a waiver of notice the notice of the meeting must be served personally or published in a newspaper. It is sufficient under this section that the notice be served by mail.

The notice of meeting may be dispensed with by a written waiver which may be executed before or after the meeting. In addition, the attendance of a director at the meeting without protesting prior to the conclusion of the meeting the lack of notice to him constitutes a waiver of notice by him. See subsection 14A:6-10(2).

The directors may act without a meeting to effect the organization of the corporation, if the certificate of incorporation authorizes such procedure and a written consent in lieu of meeting is executed by all the directors. See subsection 14A:6-7(2).

14A:2-9

By-laws; Making and Altering

Source or Reference

N.J.: R.S. § 14:3-2 (1939)
Model Act: § 25 (1960)
Other: Conn. Gen. Stat. Rev. § 33-306(b) (1961); Va. Code Ann. § 13.1-24 (1964).

Comment

Subsection 14A:2-9(1) is largely derived from section 13.1-24 of the Virginia Act. The Virginia Statute and the introductory portion of subsection 14A:2-9(1) follow section 25 of the Model Act in requiring that the first board of directors named in the certificate of incorporation shall adopt the initial by-laws of the corporation at their organization meeting, and in vesting in the board the subsequent power to make, alter or repeal by-laws unless that power is reserved to the shareholders in the certificate of incorporation. Present New Jersey law confers the power to make by-laws on the shareholders, unless that power is conferred upon the directors in the certificate of incorporation. The remainder of subsection 14A:2-9(1) continues present law, as expressed in the second sentence of R.S. § 14:3-2, by providing that directorial power over by-laws always remains subject to the right of shareholders to alter or repeal any by-laws made by the directors and to adopt new by-laws. The last sentence of subsection 14A:2-9(1) does not appear in the Model Act. It permits the shareholders to "lock in" any by-law that they make by prohibiting its alteration or repeal by the board. This provision is taken from the Virginia Statute.

Subsection 14A:2-9(2) is based on section 33-306(b) of the Connecticut Act. Under the Connecticut Act, as under Title 14, the incorporators adopt the initial by-laws. As noted above, the Revision assigns that responsibility to the first board. For the limited role of

the incorporators under the Revision, see the comment to section 14A:2-6. Subsection 14A:2-9(2) is of significance in relation to various sections of the Revision which require that particular provisions appear in the certificate of incorporation or a by-law adopted by the shareholders. See subsection 14A:6-5(3) (By-law Authorizing Board to Fill Newly Created Directorships); subsection 14A:6-6(1) (By-law Authorizing Removal of Directors by Shareholders Without Cause); subsection 14A:6-6(3) (By-law Authorizing Removal of Directors by Board for Cause); section 14A:6-11 (By-law Authorizing Loan or Other Assistance to Officer or Employee Who is Also Director).

Subsection 14A:2-9(3) does not appear in Title 14 or the Model Act. It was added by the Commission to round out the statutory scheme of this Revision. No section of this Revision which prescribes or authorizes a particular provision in the by-laws is intended to constitute the by-laws the sole and exclusive repository of the power thus conferred. Compare Gow v. Consolidated Coppermines Corp., 165 Atl. 136 (Del. 1933); and see 1 O'Neal, Close Corporations § 3.79 (1958). Any such provision may be set forth in the certificate of incorporation (see paragraph 14A:2-7(1)(f)) and, in such case, has equal force and effect under subsection 14A:2-9(2).

14A:2-10

By-laws and Other Powers in Emergency

Source or Reference

N.J.: None
Model Act: § 25A (Supp. 1966)
Other: None.

Comment

This section is virtually identical with section 25A of the Model Act. It authorizes special by-laws to assure the continuity of corporate business and affairs in the event of an attack upon the United States or any nuclear or atomic disaster resulting in an emergency in the conduct of the business of the corporation. Gibson, Corporate Management During Nuclear Attack, 17 Bus. Law. 249 (1962). Comparable legislation in the field of State Government was enacted in New Jersey in 1963. See the "Emergency Interim Executive Succession Act," R.S. §§ 52:14A-1 et seq. (Supp. 1966). See also, R.S. §§ 52:1-1.1 et seq. (Supp. 1966).

14A:3-1

General Powers

Source or Reference

N.J.: R.S. §§ 14:3-1 (1938); 14:3-3 (1938)
Model Act: §§ 4, (1960); 48 (1960); 49 (Supp. 1966)
Other: N.Y. Bus. Corp. Law §202; S.C. Code Ann. §12-12.2(a)(20)(Supp. 1966).

Comment

Subsection 14A:3-1(1) is largely based on section 4 of the Model Act, and subsection 14A:3-1(2) is derived from the last paragraph of section 48 of the Model Act. The section enumerates the general powers which each domestic corporation shall have, subject to any limitations provided elsewhere in this Revision, or in any other statute of this State, or in its certificate of incorporation. See paragraphs 14A:2-7(1)(f) and 14A:9-1(2)(q). The requirement that the exercise of the powers be in furtherance of the corporate purposes is derived from section 202(a) of the New York Statute, and should be read with paragraph 14A:2-7(1)(b), which sanctions the creation of an all-purpose corporation, and section 14A:3-2, which materially abrogates the doctrine of ultra vires.

This section goes beyond present law (R.S. §14:3-1) by expressly enumerating many more powers, thus avoiding the need to rest certain powers upon implication. Paragraph 14A:3-1(1)(n) is derived from section 12.2(a)(20) of the South Carolina Act. Paragraph 14A:3-1(1)(o) restates in affirmative language the negative phraseology of the incidental powers provision at the end of R.S. §14:3-3. It is derived from section 4(r) of the Model Act.

Not every general power set forth in section 4 of the Model Act was incorporated in this section. Section 4(f) of the Model Act, dealing with loans to employees and

other assistance to employees, officers and directors, was extensively revised and transposed to section 14A:6-11. The subject matter of section 4(m) of the Model Act, relating to the power to make charitable donations, and section 4(o) of the Model Act, relating to indemnification of directors and officers, appear in sections 14A:3-3 and 14A:3-4, respectively. Section 4(q) of the Model Act (Surrender of Franchise) was omitted as unnecessary. See section 14A:12-1, et seq.

The Commission recognized that section 4(g) of the Model Act, which appears in somewhat revised form as paragraph 14A:3-1(1)(f), might be interpreted to permit a corporation to be a partner to the extent permitted in applicable partnership laws and to participate in a joint venture. 1 Model Bus. Corp. Act Ann., § 4(g), par. 4, at 89 (1960). However, it was considered preferable to express the power more explicitly, as in paragraph 14A:3-1 (1)(m), taken from section 202(a)(15) of the New York Act. This is the most significant variation from R.S. § 14:3-1 in this section. While there is no direct authority, it is probable that the New Jersey courts would follow the rule in the majority of states prohibiting a corporation from becoming a partner, in the absence of express statutory or charter authority, but authorizing it to enter a joint venture. 6 Fletcher, Corporations § 2520 (perm. ed. rev. repl. 1953); 1 Hornstein, Corporation Law and Practice § 117 (1959); "May A Corporation Be A Partner?", 17 Bus. Law., 514 (1962); Annot., 60 A.L.R. 2d 917 (1958).

14A:3-2

Ultra Vires Transactions

Source or Reference

N.J.: None
Model Act: §6 (1960)
Other: None.

Comment

This section has no counterpart in Title 14. It is identical to section 6 of the Model Act. The section precludes the defense of ultra vires by the parties to a contract, irrespective of performance or benefits. It also precludes the parties to a contract from using the doctrine of ultra vires as the basis for a suit of rescission. However, the section preserves the right of shareholders to enjoin unauthorized acts, the right of the corporation to recover from its officers and directors the damages resulting therefrom, and the right of the State to enjoin the transaction by the corporation of unauthorized business or to dissolve the corporation by reason of the same. See the comment to the foregoing effect by the Model Act annotators (1 Model Bus. Corp. Act Ann., § 6, par. 4 at 203 (1960)).

In precluding the defense of ultra vires to the parties, this section changes present New Jersey case law with respect to a contract which is wholly executory on both sides. In such a situation, the ultra vires defense is now available. Camden and Atlantic R.R. Co. v. Mays Landing &., R.R. Co., 48 N.J.L. 530, 561 (E. & A. 1886) (dictum); 7 Fletcher, Corporations § 3459 (1964 rev. ed.). In other respects, this section largely codifies New Jersey case law, which precludes the defense of ultra vires to the parties in the case of a partially executory contract fully performed by either party in reliance upon the agreement in such a manner as to benefit the other party. Hudson

Co-operative Loan Association v. Horowytz, 116 N.J.L. 605 (Sup. Ct. 1936); Eastern Speedways, Inc. v. Hamilton Trust Co., 123 N.J.L. 257 (E. & A. 1939); Ross v. Realty Abstract Co., 50 N.J. Super. 147 (App. Div. 1958); Fletcher, op. cit. supra, §3473. The section does not change the rule that an ultra vires contract, where fully executed on both sides cannot be rescinded by either party on the ground of ultra vires. First National Bank of Ocean City v. Zelley, 106 N.J.L. 510 (E. & A. 1930); Fletcher, op. cit. supra, §3497. Neither does the section affect the defense of illegality. Stickland v. National Salt Co., 79 N.J. Eq. 182 (E. & A. 1911).

Actions by shareholders under this section would be subject to existing limitations, equitable or otherwise. 1 Model Bus. Corp. Act. Ann., §6, par. 4 at 204. Grausman v. Porto Rican-American Tobacco Co., 95 N.J. Eq. 155 (Ch. Div. 1923), aff'd 95 N.J. Eq. 223 (E. & A. 1923); Fraser v. The Great Western Sugar Co., 14 N.J. Misc. 610 (Ch. Div. 1935), aff'd 120 N.J. Eq. 288 (E. & A. 1936). The Commission noted that North Carolina has added to its version of section 6 of the Model Act a provision imposing upon a shareholder seeking an injunction the burden of proof that he has not at any time assented to the act or transfer in question and that in bringing the action he is not acting in collusion with officials of the corporation. N.C. Gen. Stat. §55-18(a)(1) (1965). The Commission rejected such an approach, being of the view that the burden of proof should remain with the defending third parties, whose interests the Commission considered adequately protected by the discretion vested in the court to set aside and enjoin the performance of the ultra vires contract only if the court "deems the same to be equitable". If the shareholders are successful in setting aside the ultra vires transaction and in enjoining its performance, the court may allow to the corporation or to the other contracting party or parties appropriate compensation, but not including anticipated profits. For detailed analysis of the shareholders' injunctive remedy under section 6 of the Model Act, see Ham, Ultra Vires Contracts Under Modern Corporate Legislation, 46 Ky. L.J. 215 (1958); Comment, Ultra Vires Under the New Colorado Corporation Act, 31 Rocky Mt. L. Rev. 79 (1958); Brimble, Ultra Vires Under the Texas Business Corporation Act, 40 Texas L. Rev. 677 (1962).

Guaranty Authorized by Shareholders

Source or Reference

N.J.: None
Model Act: None
Others: N.Y. Bus. Corp. Law §908

Comment

This section was taken verbatim from section 908 of the New York Act. It has no counterpart in Title 14 or the Model Act.

This section provides that no guaranty or giving of security by a corporation can be attacked in any way as ultra vires when it has received the shareholder approval required by the section. The certificate of incorporation may of course require a greater percentage of assenting votes. See section 14A:5-12. The section is not intended to affect the application of the law of fraudulent conveyances, voidable preferences or breach of fiduciary duty by directors or controlling shareholders. It adds to the protection of the contracting parties given by section 14A:3-2 which limits drastically the cases in which a corporate act can be attacked as ultra vires. The section will prove useful, in the opinion of the Commission, where the transaction is entered into in good faith and with the thought of indirect or long-run corporate benefit but where there is also doubt as to whether it would be adjudicated to be "in furtherance of its corporate purposes," as required by paragraph 14A:3-1(e).

Contributions by Corporations

Source or Reference

N.J.: R.S. §§ 14:3-13 (Supp. 1959); 14:3-13.1 (Supp. 1950), .2 (Supp. 1959), .3 (Supp. 1950) and .4 (Supp. 1950)
Model Act: §4(m) (1960)
Other: N.Y. Bus. Corp. Law §202(a)(12).

Comment

This section is substantially identical to R.S. §§ 14:3-13.2 and 14:3-13.3, which were considered in A.P. Smith Mfg. Co. v. Barlow, 13 N.J. 145 (1953), the leading case in the country on the subject of charitable contributions by a corporation. Although perhaps not necessary, the Commission considered it desirable to insert the phrase "irrespective of corporate benefit". See discussion in Smith v. Barlow, supra. This language follows section 202(a)(12) of the New York Act. See Latty, Some Miscellaneous Novelties in the New Corporation Statutes, 23 Law & Contemp. Prob. 363, 369 (1958).

The Commission considered it unnecessary to retain R.S. §§ 14:3-13; 14:3-13.1 and 14:3-13.4 in this Revision.

Under section 4(m) of the Model Act, the power of a corporation to make charitable donations is unlimited within the defined field. The Commission preferred to retain the limitations incorporated in R.S. §14:3-13.2.

Indemnification of Directors, Officers and Employees

Source or Reference

N.J.: R.S. §14:3-14 (Supp. 1944)
Model Act: §4(o) (1960)
Other: N.Y. Bus. Corp. Law §723(a).

Comment

Section 14A:3-4, whose application is not limited to corporations as defined in subsection 14A:1-2(g), differs significantly from R.S. §14:3-14. It provides for indemnification without requiring a provision therefor in the certificate of incorporation or by-laws. It also authorizes indemnification of any person who "is or was" a director, officer or employee, and not merely a "present and future director, trustee or officer" of the corporation as does R.S. §14:3-14. It expressly permits indemnification for amounts paid in satisfaction of fines, judgments and settlements, exclusive of amounts paid to the indemnifying corporation, or to an enterprise in which the person indemnified is serving at the request of the indemnifying corporation.

The addition in subsection 14A:3-4(1) of the words "civil" and "criminal" taken from paragraph 4(o) of the Model Act will prevent the result reached in Schwarz v. General Aniline & Film Corp., 305 N.Y. 395, 113 N.E. 2d 533 (1953), where it was held that a New York indemnification statute was not intended to apply to criminal proceedings. Section 723(a) of the New York Act now includes similar provisions to preclude a repetition of the Schwarz result.

Subsection 14A:3-4(1) eliminates the requirement in R.S. §14:3-14 that the board of directors must determine the absence of dereliction in the performance of duties in cases which are terminated other than by a final adjudication. Furthermore, the last sentence of subsection 14A:3-4(1) permits indemnification in certain specified cases when there is a final adjudication adverse to the director, officer or employee, provided the board finds that he acted in

good faith for a purpose reasonably believed to be in the best interests of the corporation, and in the case of a criminal action, suit or proceeding, that he had no reason to believe that his conduct was unlawful. The test itself is derived from subsection 723(a) of the New York Act.

Subsection 14A:3-4(3) expressly permits corporations to carry insurance against the liability of directors, officers and employees which is asserted against them in such capacity. It is derived from an amendment to section 4 of the Model Act proposed by the Committee on Corporate Laws of the Section of Corporation, Banking and Business Law of the American Bar Association.

It should be noted that indemnification may not be available where the liability of the director, officer or employee arises under Federal law.

Provisions Relating to Actions by Shareholders

Source or Reference

N.J.: R.S. §§ 14:3-15 (Supp. 1947); 14:3-16 (Supp. 1947);14:3-
(Supp. 1947); R.R. 4:36-2
Model Act: §43A (1960)
Other: None.

Comment

This section regulates various phases of actions brought by shareholders in the right of a corporation, domestic or foreign. Only subsection 14A:3-6(2) has no counterpart in Title 14.

This section is largely based on optional section 43A of the Model Act. The Commission omitted the requirement appearing in the 1962 addendum to the Model Act that the shares or voting trust certificates be held of record. Equitable ownership, not of record, is sufficient under both the present statute (R.S. §14:3-16), and the rule of court which implements the statute (R.R. 4:36-2). 2 Schnitzer & Wildstein, N.J. Rules Service, A-IV, at 1149; Gallup v. Caldwell, 120 F. 2d 90 (3d Cir. 1941) applying New Jersey common law and citing O'Connor v. International Sales Co., 68 N.J. Eq. 67 (Ch. Div. 1904), aff'd , 68 N.J. Eq. 680 (E. & A. 1905).

The section changes present New Jersey law in the following significant respects:

(1) Subsection 14A:3-6(2) authorizes the court in a derivative action found to have been brought without reasonable cause to require the plaintiff or plaintiffs to pay to the defendants the reasonable expenses, including attorney's fees, incurred in the defense of the action. It has been recognized that the ordinary security-for-expenses statute, such as R.S. §14:3-15, goes far beyond "security" and imposes a potential liability for the corporation's

reasonable expenses upon the relatively small shareholders who have been required to furnish security thereunder. At the same time, more affluent plaintiffs who hold more than the requisite stock, in percentage or market value, do not become subject either to the requirement that they post security or to the liability impact of the statute. Their sole liability is limited to costs (not expenses). Cf. Mayflower Industries v. Thor Corp., 15 N.J. Super. 139, 150 (Ch. Div. 1951), aff'd , 9 N.J. 605 (1953). This liability impact of R.S. §14:3-15 was recognized in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 552 (1949). See, also, 2 Hornstein, Corporation Law and Practice, §722, at 224 (1959). Subsection 14A:3-6(2) remedies the foregoing situation. "The provision for reimbursement of the defendants' expenses by the plaintiffs, even when security therefor has not previously been given, is the unique contribution of the Model Act." 2 Model Bus. Corp. Act , §43A, par. 4, at 70. Subsection (2) applies only to derivative actions hereafter instituted. For comparable provisions in certain federal securities statutes, see 3 Loss, Securities Regulation p. 1836 (1961).

(2) Under subsection 14A:3-6(3) the plaintiff or plaintiffs in a shareholders' derivative action may escape the security-for-expenses requirement if he or they hold at least 5% of the outstanding shares of any class of the corporation or of voting trust certificates therefor. R.S. §14:3-16 requires that the plaintiff or plaintiffs hold shares, or voting trust certificates representing shares, of the corporation having a total par value or stated capital value of at least 5% of the aggregate par value or stated capital value of all the outstanding shares of the corporation's stock of every class, exclusive of shares held in the corporation's treasury. In addition, subsection 14A:3-6(3) adopts the Model Act market value limitation of $25,000 rather than the $50,000 limitation contained in R.S. §14:3-16.

The Commission recognized that security-for-expenses statutes, such as R.S. §14:3-15, have been widely criticized as posing a very serious obstacle to the maintenance of derivative suits by those shareholders to whom they apply. See McClure v. Borne Chemical Co., 292 F. 2d 824 (3d Cir. 1961), cert. denied, 368 U.S. 939 (1961). The Commission further recognized that the historical abuse of stockholders' suits, the extortionate secret settlement, is

effectively barred by rule of court, R.R. 4:36-3, which prohibits dismissal or compromise of any stockholders' derivative action without prior approval of the trial court, and after notice of the proposed dismissal or compromise is given to members of the class. See 2 Schnitzer & Wildstein, N.J. Rules Service, A-IV, at 1160, et seq. On balance, after much reflection, the Commission determined to retain in this Revision the public policy of New Jersey with respect to a security-for-expenses statute, as revised by this section.

In view of the extensive dictum of Judge Goldmann in DeBow v. Lakewood Hotel and Land Ass'n., 52 N.J. Super. 288, 294 (App. Div. 1958) with respect to the impact of the rules of court on the present security-for-expenses statute, R.S. § 14:3-15, the Commission recommends to the Supreme Court that R.R. 4:36-2 ["Secondary Action by Shareholders"] be amended to read as follows:

> "(b) In any such action brought in the right of a domestic or foreign corporation, the rules of court do not supersede N.J.S. 14A:3-6."

Registered Office and Registered Agent

Source or Reference

N.J.: R.S. §§ 14:4-2 (1938); 14:15-3 (1938)
Model Act: §§ 11 (1960); 106 (1960)
Other: None.

Comment

This section combines and rewords certain basic provisions in sections 11 and 106 of the Model Act with respect to the registered office and registered agent of each domestic corporation and of each foreign corporation authorized to transact business in this State. The section broadens R.S. §14:15-3 with respect to the registered agent of a foreign corporation by omitting the requirement therein that the registered agent, if a natural person, be "actually resident in this state," and by authorizing a foreign corporation, as well as a domestic corporation, to serve as registered agent. The clause at the end of subsection 14A:4-7(3) "whether or not any such agent corporation is organized for a purpose or purposes for which a corporation may be organized under this Act" was added by the Commission to avoid any possible implication of an intent to repeal R.S. §17:9A-28(2) (Supp. 1950), under which certain domestic banks may act as registered agent of any corporation. Such an implication might otherwise arise in view of the definitions of domestic and foreign corporations in paragraphs 14A:1-2(g) and 14A:1-2(j).

This Revision does not carry over any counterpart to R.S. §14:4-3 (Supp. 1965), which requires that the name of every corporation be displayed at its principal office except where that office is located in the office of an attorney at law who is the registered agent. A similar requirement was deleted in 1959 by Delaware. Del. Laws 1959, ch. 16.

14A:4-2

Function of Registered Agent and Office; Service of Process, Notice or Demand

Source or Reference

N.J.: R.S. §§14:4-2 (1938); 14:6-1 (1938); 14:15-3 (1938)
Model Act: §§ 13 (1960); 108 (1960)
Other: None.

Comment

This section is derived from R.S. §§ 14:4-2 and 14:6-1 and from sections 13 and 108 of the Model Act. As under present law, the registered agent is a non-exclusive agent upon whom process against the corporation may be served. Martin v. Atlas Estate Co., 72 N.J. Eq. 416 (E. & A. 1907); R.R. 4:4-4(d). Subsections 14A:4-2(2) and (4) have no counterparts in the Model Act. They are carried over from the second and third paragraphs of R.S. §14:6-1. The Commission considered the first paragraph of R.S. §14:6-1 unnecessary.

Change of Registered Office or Registered Agent

Source or Reference

N.J.: R.S. §§ 14:4-4 (1938); 14:4-4.1 (Supp. 1950); 14:4-5 (Supp. 1952); 14:11-4 (Supp. 1952)
Model Act: §§ 12 (1960); 107 (1960)
Other: None.

Comment

This section is derived from sections 12 and 107 of the Model Act which relate to domestic corporations and to foreign corporations authorized to transact business, respectively. The Model Act sections were revised by the Model Act Committee in 1964 to add a provision comparable to R.S. §14:4-6 (1938) (repealed, P.L. 1963, c. 124, §4) under which the registered agent changing his address to another place within the same municipality or county may change the location of the registered office of any corporation for which he or it is acting by filing the statement required by sections 12 and 107 of the Model Act. Model Bus. Corp. Act Ann., §§ 12, 107 (Supp. 1966). The Commission did not adopt this feature of the Model Act. As to resignation of a registered agent, which is provided for in sections 12 and 107 of the Model Act, see section 14A:4-4.

This section also differs from the Model Act sections in the additional requirement that the statement setting forth the change of registered office or registered agent, or both, be filed "forthwith" in the office of the Secretary of State. This is taken from the first paragraph of R.S. §14:4-5. The monetary penalty in the second paragraph of R.S. §14:4-5 for violation of that section has not been retained. A failure to comply with this section renders a domestic corporation subject to involuntary dissolution under section 14A:12- and a foreign corporation authorized to transact business in this State subject to

revocation of its certificate of authority by the Secretary of State under section 14A:13-10. The latter provision is comparable to the third paragraph of R.S. §14:4-5.

Under subsection 14A:9-2(2) a change of the registered office or registered agent, or both, of a domestic corporation constitutes an amendment to the certificate of incorporation, but is one which may be made by the board by complying with the provisions of this section. Before the organizational meeting of the board, the incorporators may effect such a change or any other amendment of the certificate of incorporation under subsection 14A:9-2(1) by complying with section 14A:9-4.

14A:4-4

Resignation of Registered Agent

Source or Reference

N.J.: R.S. §§ 14:4-7 (Supp. 1965); 14:4-8 (Supp. 1965)
Model Act: §§ 12 (1960); 107 (1960)
Other: None.

Comment

This section is derived from R.S. §§14:4-7 and 14:4-8. The Commission omitted the requirement contained in R.S. §§ 14:4-7 and 14:4-8 that service be made upon the corporation. A comparable provision as to resignation by the registered agent of a domestic corporation or a foreign corporation authorized to transact business in this State appears in sections 12 and 107 of the Model Act.

The Commission considered it unnecessary to include in this section a reference to N.J.S. 2A:15-26 to 2A:15-30, such as appears in R.S. §14:4-8.

14A:4-5

Annual Report to Secretary of State

Source or Reference

N.J.: R.S. §14:6-2 (Supp. 1965)
Model Act: §§ 118 (1960); 119 (1960)
Other: None.

Comment

This section is largely derived from R.S. §14:6-2. Subsection 14A:4-5(1) reduces the information presently required in an annual report under R.S. §14:6-2 to the minimum data which the Commission considered essential. Subsection 14A:4-5(2) changes the filing date of the first and each succeeding annual report from that in R.S. §14:6-2, keying it solely to the date fixed by the corporation for the annual election of directors. The result is that the information in each report with respect to the names of the directors and officers will be current. Subsection 14A:4-5(3) retains the essence of the penultimate paragraph of R.S. §14:6-2, except that the Commission omitted as unnecessary the provision therein with respect to disqualification of directors who willfully refuse to comply with the provisions of the section. Under this Revision officers execute the annual report on behalf of the corporation. See subsection 14A:1-6(2). Subsection 14A:4-5(4) is virtually identical to the last paragraph of R.S. §14:6-2. This is the only instance in this Revision where it is mandatory to use a form furnished by the Secretary of State. Subsection 14A:4-5(5) carries over an equivalent provision in the first paragraph of R.S. §14:6-2.

14A:5-1

Place of Shareholders' Meetings

Source or Reference

N.J.: R.S. §14:10-4 (Supp. 1950)
Model Act: §26 (1960)
Other: Pa. Stat. Ann. tit. 15, §2852-501A (1958)

Comment

This section incorporates the provisions of the first paragraph of section 26 of the Model Act, and adds the provision relating to every corporation organized under any general or special law of New Jersey. The provision vesting authority in the board of directors is not found in the Model Act, but is patterned after section 501A of the Pennsylvania Act. The section is similar to the first paragraph of R.S. §14:10-4, but eliminates some of the technical requirements of that section.

14A:5-2

Annual Meeting of Shareholders

Source or Reference

N.J.: R.S. §§ 14:10-2 (Supp. 1955); 17:9A-79 (Supp. 1966)
Model Act: § 26 (1960)
Other: None.

Comment

This section re-enacts the substance of R.S. § 14:10-2, with the following differences: (1) it omits the provision for holding directors in contempt of court for their failure to hold a meeting as ordered by the court; and (2) it contains a self-executing provision, based on R.S. § 17:9A-79 (Supp. 1950), in the event the by-laws fail to fix a date for the annual meeting.

Section 26 of the Model Act contains no self-executing provision, nor does it provide a judicial remedy on failure to hold a meeting.

The provision of the final sentence of the section, reducing the quorum requirement at an annual meeting ordered by the court, was included to assure that the court order could be implemented.

Call of Special Meetings of Shareholders

Source or Reference

N.J.: R.S. §14:10-9 (1938)
Model Act: §26
Other: None.

Comment

Title 14 of the Revised Statutes has no general provision governing special meetings of shareholders. There are a number of sections in Title 14 applicable to the calling of special shareholder meetings for particular purposes. E.g., Sale of Assets (§14:3-5) (1938); Philanthropic Contributions (§§ 14:13-3 (Supp. 1959), 14:3-13.2 (Supp. 1959)); Employees' Stock Participation and Benefits (§14:9-2) (1938); Stockholders' Meeting Called by Stockholders (§14:10-11) (1938); Amendment of Certificate (§14:11-2) (1938); Extension of Corporate Existence (§14:11-8) (Supp. 1959); Merger or Consolidation (§14:12-3) (1938); Dissolution (§14:13-1) (1938); Insolvency (§14:14-1) (1938).

Section 26 of the Model Act gives to holders of 10% of all shares entitled to vote at a meeting the right to call a special meeting. The Commission has accepted the Model Act limitation of 10%, but has added the requirement that the shareholders must apply to the court for an order directing a meeting. The Commission believed that such a requirement would provide a desirable protection to the corporation against multiple calls for special meetings by minority shareholders.

The provision of the final sentence of the section, reducing the quorum requirement at a special meeting ordered by the court, was included, as was the similar provision in section 14A:5-2, to assure that the court order for a special meeting could be implemented.

R.S. §14:10-11 provides the procedure when, for any reason a "legal" meeting of the stockholders cannot be held. This provision is not carried over into the Revision, because the Commission believed it was unnecessary. If deemed desirable by a corporation, a provision similar to that of R.S. §14:10-11 could be included in the by-laws or certificate of incorporation.

14A:5-4

Notice of Shareholders' Meetings

Source or Reference

N.J.: See Comment below
Model Act: §27 (1960)
Other: N.Y. Bus. Corp. Law §605(b).

Comment

Title 14 of the Revised Statutes contains no general provision governing notice of shareholders' meetings. There are a number of sections in Title 14 applicable to the notice required for shareholder meetings called for particular purposes. E.g., Employees' Stock Participation and Benefits (R.S. §14:9-2 (1938)); Stockholders' Meeting Called by Stockholders (R.S. §14:10-11 (1938)); Amendment of Certificate (R.S. §14:11-2 (1938)); Extension of Corporate Existence (R.S. §14:11-8 (Supp. 1959)); Merger or Consolidation (R.S. §14:12-3 (1938)); Dissolution (R.S. §14:13-1 (1938)).

Subsection 14A:5-4(1) is patterned after section 27 of the Model Act. It introduces into New Jersey statutory law the requirement that shareholders must receive notice of the purposes of all meetings, including the annual meeting; and it clarifies the ambiguity of present law concerning what business may be transacted at an annual meeting.

Subsection 14A:5-4(2) has no counterpart in either Title 14 or the Model Act. It was patterned after section 605(b) of the New York Act.

14A:5-5

Waiver of Notice or Lapse of Time

Source or Reference

N.J.: R.S. §14:10-3 (1938)
Model Act: §137 (1960)
Other: N.Y. Bus. Corp. Law §606.

Comment

Subsection 14A:5-5(1) is derived from section 606 of the New York Act. It probably changes present New Jersey law by authorizing a waiver of notice to be executed after the meeting to which it relates. R.S. §14:10-3 authorizes waivers of notice but implies that the waiver must be executed before the meeting. Such a rule is consistent with the common law of New Jersey as to waivers of notice of directors' meetings, which must be executed before or at the meeting. E.g., Hill v. Trenton White City Co., 80 N.J. Eq. 122 (Ch. 1912), aff'd, 82 N.J. Eq. 364 (E. & A. 1913). The provision that attendance by a shareholder at a meeting without protest of lack of notice constitutes a waiver of notice is probably consistent with the common law of New Jersey. Cf. Weinburgh v. Union Street Railway Advertising Co., 55 N.J. Eq. 640 (Ch. 1897).

Subsection 14A:5-5(2) is based upon R.S. 14:10-3. It changes R.S. § 14:10-3, however, by allowing a waiver of lapse of time to be executed before or after the action to which the action relates.

14A:5-6

Action by Shareholders Without a Meeting

Source or Reference

N.J.: R.S. §14:10-9.1 (Supp. 1965)
Model Act: §138 (1960)
Other: None.

Comment

This section is identical in substance with section 138 of the Model Act and R.S. §14:10-9.1, added to Title 14 in 1964. It is one of the sections of the Revision which should be of particular utility for the close corporation. For other provisions of the Revision which will be useful in organization and operation of the close corporation, see the comment to section 14A:5-12.

14A:5-7

Fixing Record Date

Source or Reference

N.J.: R.S. §14:5-3 (Supp. 1941)
Model Act: §28 (1960)
Other: N.Y. Bus. Corp. Law §604.

Comment

This section eliminates the provision, contained in R.S. §14:5-3 and in section 28 of the Model Act, for the closing of the stock transfer books. It further differs from R.S. §14:5-3 in that it contains a self-executing provision, based upon section 28 of the Model Act, fixing a record date if it is not otherwise fixed by the corporation.

14A:5-8

Voting List

Source or Reference

N.J.: R.S. §14:10-5 (Supp. 1965)
Model Act: §29 (Supp. 1966)
Other: Va. Code Ann. §13.1-30 (1964)

Comment

Subsection 14A:5-8(1) of this section closely follows the first paragraph of section 29 of the Model Act and the first paragraph of R.S. §14:10-5. Unlike Title 14 and the Model Act, however, this section requires an alphabetical arrangement of shareholders by class. The section follows section 29 of the Model Act in providing that the certified list of shareholders shall be prima facie evidence as to the identity of shareholders entitled to vote, and so departs from R.S.§14:10-5, which provides that the transfer books and the stock books shall be the only evidence on the identity of shareholders.

Subsection 14A:5-8(1) changes existing New Jersey law by eliminating the necessity of producing stock and transfer books at a shareholders' meeting. It should be noted, however, that the list of shareholders required by this subsection must be available prior to, and at, all meetings of shareholders. Existing law requires the production of the stock and transfer books and list of shareholders only at shareholder meetings held for the purpose of electing directors. R.S. §14:10-5.

Subsection 14A:5-8(2) has no counterpart in either Title 14 or the Model Act. The first sentence of this subsection is derived from section 13.1-30 of the Virginia Act. Section 29 of the Model Act provides for damages — and R.S. §14:10-5 renders directors ineligible for election — if the list is not produced.

The Commission has eliminated the present statutory penalty imposed upon the officer who fails or neglects to produce the books or list upon demand of any shareholder. In addition, the Commission has eliminated the present provision of R.S. §14:10-6 (1938) that the stock books control as compared with the alphabetical list, and that the transfer books control as compared with the stock certificate books. The Commission is of the opinion that these matters should not be the subject of legislation, and that the facts should be determined, where necessary, in each instance by a court.

14A:5-9

Quorum of Shareholders

Source or Reference

N.J.: R.S. §§ 14:10-9 (1938); 14:10-13 (Supp. 1944)
Model Act: § 30 (1960)
Other: N.Y. Bus. Corp. Law § 608; D.C. Code Ann. § 29-915 (1961); Va. Code Ann. § 13.1-31 (Supp. 1964).

Comment

Subsection 14A:5-9(1) of this section modifies R.S. § 14:10-9. The provision that the departure of shareholders from the meeting shall not affect the meeting is patterned after section 31 of the District of Columbia Act and section 608(c) of the New York Act. The provision for adjournment in the absence of a quorum is taken from section 13.1-31 of the Virginia Act. Subsection 14A:5-9(2) is similar to the proviso of section 608(a) of the New York Act.

No limits are set upon the power of the corporation to determine, by appropriate provision in its certificate of incorporation, the number of shares required for a quorum. The Commission believed that the absence of a "floor" is consistent with the present New Jersey law and declined to adopt the provisions of section 30 of the Model Act and section 608(b) of the New York Act which require at least one-third of the eligible shares to be represented. On the other hand, this section requires that the provision for a quorum of less than a majority of shares appear in the certificate of incorporation, a change from R.S. § 14:10-9, which permits it to be set forth in the by-laws.

The provision in R.S. § 14:10-9 that a quorum cannot be more than a majority has also been eliminated.

The authorization for high quorum requirements will be of particular utility for the close corporation. For other provisions of the Revision which will be useful in organization and operation of the close corporation, see the comment to section 14A:5-12.

14A:5-10

Voting of Shares

Source or Reference

N.J.: R.S. §14:10-12 (1938)
Model Act: § 31, ¶ 1 (1960)
Other: None.

Comment

This section is substantially the same as the first paragraph of section 31 of the Model Act. It is also substantially the same as the first sentence of R.S. §14:10-12, except that R.S. §14:10-12 permits a variation from the one-share-one-vote standard to appear in the by-laws. This section requires that the provision for such a departure appear in the certificate of incorporation.

14A:5-11

Votes Required

Source or Reference

N.J.: R.S. §14:10-9 (1938)
Model Act: § 30 (1960)
Other: N.Y. Bus. Corp. Law §§ 614 (b) and 617 (b).

Comment

Subsection 14A:5-11(1) is based on the second sentence of section 30 of the Model Act and section 614 (b) of the New York statute.

Subsection 14A:5-11(2) is based on section 617 (b) of the New York Act.

Subsection 14A:5-11(3) is a corollary to subsection 14A:5-11(2). It makes explicit what seems to be implicit in the aforementioned sections of the Model Act and the New York Act.

Title 14 does not contain a section, like this, setting forth the general voting requirement for shareholder action. There is a provision in R.S. §14:10-9 authorizing a corporation to provide in its certificate that wherever Title 14 requires a vote of 2/3 in interest of all stockholders or 2/3 in interest of each class of stockholders having voting powers, a vote of 2/3 in interest of the stockholders present and voting or 2/3 of each class present and voting, as the case may be, shall suffice. The statutory standard of the Revision is based on a percentage of those stockholders present and voting. Under section 14A:5-12 (Greater Voting Requirements) the corporation may vary the statutory standard — by increasing the percentage of assenting votes required or by changing the standard to a proportion of issued shares — by appropriate provision in the certificate of incorporation.

It should be noted that the majority-vote standard of this section is subject to provisions elsewhere in the Revision which require a greater percentage of affirmative votes for specific corporate action to be effective. See, e.g., section 14A:3-3 (Guaranty Authorized by Shareholders); subsection 14A:5-21(5) (Amendment Deleting Provision in Certificate as to Control of Directors).

For the general voting provision with respect to the election of directors, see section 14A:5-24.

14A:5-12

Greater Voting Requirements

Source or Reference

N.J.: None
Model Act: § 136 (1960)
Other: Conn. Gen. Stat. Rev. § 33-329(c) (1961).

Comment

Subsection 14A:5-12(1) is taken from section 136 of the Model Act. It has no counterpart in Title 14. Our courts have held that under Title 14 statutory requirements as to the shareholder vote necessary to authorize particular transactions could not be increased by provision in the certificate of incorporation. E.g., Clausen v. Leary, 113 N.J. Eq. 324 (Ch. 1933). But see Katcher v. Ohsman, 26 N.J. Super. 28 (Ch. Div. 1953).

Greater-than-statutory voting requirements will be of primary interest to the principals of close corporations. The Commission could see no public policy in preventing such principals from organizing their internal controls as if they were doing business as a partnership, particularly since that is the way in which the principals of most close corporations view their relationship. For other provisions of the Revision which will be of particular utility in the organization and operation of the close corporation, see section 14A:5-6 (Action by Shareholders Without a Meeting); section 14A:5-9 (Quorum of Shareholders); section 14A:5-21 (Agreements as to Voting; Provision in Certificate of Incorporation as to Control of Directors); section 14A:6-2 (Number of Directors); section 14A:6-7 (Quorum of Board of Directors and Committees; Action of Directors Without a Meeting); section 14A:7-12 (Shares of Stock; Personal Property; Transfer); section 14A:12-5 (Dissolution Pursuant to Provision in Certificate of Incorporation).

Subsection 14A:5-12(2) is based on section 33-329(c) of the Connecticut Act. It is designed to protect a higher-than-statutory voting provision from amendment out of the certificate of incorporation by a vote less than the vote required by the provision itself. So, for example, a provision in the certificate of incorporation requiring the vote of the holders of at least 75% of all outstanding shares for authorization of a merger could not be amended unless the holders of at least 75% of all outstanding shares voted in favor of the amendment. Note that a vote higher than that statutorily prescribed for amendments is not required to add a provision permitted by this section, unless, of course, the certificate of incorporation so requires. This is in contrast to the approach of the New York Act (N.Y. Bus. Corp. Law § 616 (b)) which requires the vote of the holders of at least 2/3 of all outstanding shares to add, change or delete a higher-than-statutory provision, unless the certificate of incorporation expressly requires more than a 2/3 vote to amend a higher-than-statutory voting provision.

The utility of a provision such as that in subsection 14A:5-12(2) is illustrated by Warren v. 536 Broad St. Corp., 4 N.J. Super. 584 (Ch. Div. 1949), aff'd, 6 N.J.Super. 170 (App. Div. 1950) where the court assumed the validity of a charter provision requiring approval by holders of 75% of outstanding shares for any lease, mortgage or sale of corporate real estate but held that the provision could be amended by vote of 2/3 in interest of shareholders in compliance with R.S. § 14:11-2 (1938).

Shares Owned or Controlled by the Corporation Not Voted or Counted

Source or Reference

N.J.: R.S. §14:10-8 (1938)
Model Act: § 31, ¶ 2 (1960)
Other: N.Y. Bus. Corp. Law § 612(b).

Comment

This section enlarges R.S. §14:10-8 by adding the provision respecting the voting of stock held by another corporation.

This section follows paragraph 2 of section 31 of the Model Act, except that the words "held by another domestic or foreign corporation of any type or kind" are taken from section 612(b) of the New York Act.

14A:5-14

Shares Held by Another Corporation

Source or Reference

N.J.: R.S. §17:9A-87 (Supp. 1950)
Model Act: § 31, ¶5 (1960)
Other: Minn. Stat. Ann. § 301.26(9) (1947).

Comment

This section has no counterpart in Title 14. It is similar to R.S. §17:9A-87 and follows closely the provisions of section 301.26(9) of the Minnesota Act.

14A:5-15

Shares Held by Fiduciaries

Source or Reference

N.J.: R.S. §§ 14:10-7 (Supp. 1955); 17:9A-89 (Supp. 1955)
Model Act: §31, ¶s 6-7 (1960)
Other: None.

Comment

This section re-enacts the substance of R.S. §14:10-7. The provision for voting rights without transfer into the name of the fiduciary is confirmatory of the New Jersey cases, at least insofar as executors and trustees are concerned. See Elevator Supplies Co., Inc. v. Wylde, 106 N.J. Eq. 163 (Ch. 1930).

Paragraphs 6 and 7 of section 31 of the Model Act provide that administrators, executors, guardians and conservators may vote without transfers into their names, but a trustee may not vote unless the shares have been transferred.

The provision of this section respecting shares held jointly by fiduciaries has no counterpart either in Title 14 or the Model Act. It is patterned after R.S. §17:9A-89.

14A:5-16

Shares Held Jointly or as Tenants in Common

Source or Reference

N.J.: R.S. §17:9A-88 (Supp. 1950)
Model Act: None
Other: Conn. Gen. Stat. Rev. § 33-311a(f) (1961).

Comment

None.

14A:5-17

Voting of Pledged Stock

Source or Reference

N.J.: R.S. §14:10-7 (Supp. 1955)
Model Act: § 31, ¶8 (1960)
Other: None.

Comment

This section re-enacts present New Jersey law as set forth in the first paragraph of R.S. §14:10-7.

Section 31 of the Model Act contains a similar provision in somewhat different language.

14A:5-18

When Redeemable Shares are No Longer Entitled to Vote

Source or Reference

N.J.: None
Model Act: §31, ¶9 (1960)
Other: None.

Comment

This section repeats verbatim the last paragraph of section 31 of the Model Act.

The section has no counterpart in Title 14, However, it gives statutory sanction to a practice widely followed in New Jersey.

14A:5-19

Proxy Voting

Source or Reference

N.J.: R.S. §§ 14:10-9 (1938); 14:10-12 (1938); 17:9A-90 (Supp. 1950)
Model Act: §31, ¶3 (1960)
Other: N.Y. Bus. Corp. Law § 609(a).

Comment

The first sentence of this section is taken from section 609(a) of the New York Act. The remainder of the section is, for the most part, taken from R.S. §17:9A-90, and is similar to the New York Corporation Law.

The self-executing provision limiting the life of a proxy to 11 months unless a longer period is provided, has no counterpart in Title 14.

The Commission thought it inadvisable to attempt to define the term "coupled with an interest" in connection with irrevocable proxies. The risk of adopting a definition that might prove too inclusive or not inclusive enough, was deemed great enough to leave the definition to the courts in particular cases.

Subsection 14A:5-19(2) has no counterpart in New Jersey law. It gives statutory sanction to a practice which has been widely followed for many years.

Subsection 14A:5-19(3) is taken from R.S. §17:9A-90.

14A:5-20

Voting Trusts

Source or Reference

N.J.: R.S. §14:10-10 (1938)
Model Act: § 32 (1960)
Other: Del. Code Ann. tit. 8, § 218(b) (1953); S.C. Code Ann. § 12-16.16(f) (Supp. 1966).

Comment

The first sentence of subsection 14A:5-20(1) is derived from section 32 of the Model Act, but follows substantially the provision of R.S. §14:10-10. The 21-year period of effectiveness exceeds the period limited by R.S. §14:10-10 and section 32 of the Model Act, both of which impose a maximum period of 10 years. The second sentence of subsection 14A:5-20(1) is derived from R.S. §14:10-10, and the third sentence is taken from section 32 of the Model Act and R.S. §14:10-10.

The Commission believed that there was no compelling reason to follow the 10-year limitation under existing New Jersey law. To the knowledge of the Commission, no other state has a provision extending beyond 10 years.

Subsection 14A:5-20(2) is taken from R.S. §14:10-10. The first part of subsection 14A:5-20(3) is also taken from R.S. §14:10-10, while the remainder is new.

This section permits, but does not require, the issuance of voting trust certificates.

Subsection 14A:5-20(4) gives legislative sanction to a common practice heretofore followed. Note that subsections 14A:5-20(1) and 14A:5-20(4) require filing with the corporation of an executed counterpart of the voting trust agreement and the extension agreement, respectively.

This changes the procedure under R.S. §14:10-10, which required the filing of an unexecuted copy of the voting trust agreement.

Subsection 14A:5-20(5) is based on section 12-16.16(f) of the South Carolina Act.

It should be noted that the holders of voting trust certificates are accorded rights of inspection under section 14A:5-28 and the right to bring derivative actions under section 14A:3-6.

Agreements as to Voting; Provision in Certificate of Incorporation as to Control of Directors

Source or Reference

N.J.: None
Model Act: None
Other: N.Y. Bus. Corp. Law § 620.

Comment

Subsection 14A:5-21(1) authorizes the so-called stock pooling agreement. It is based on section 620(a) of the New York Act. There is no similar provision in Title 14. However, our courts have upheld the validity of stock pooling agreements when such agreements have been untainted by provisions designed to control the normal discretion and powers of the board or to require a higher-than-statutorily-prescribed vote. E.g., In re Evening Journal Association, 7 N.J. Super 360 (Ch. Div. 1950), aff'd, 5 N.J. 142 (1950).

Subsection 14A:5-21(2) authorizes the inclusion of provisions in the certificate of incorporation for the management of the corporation by the shareholders (so-called director-control provisions). It is taken from section 620 of the New York Act, but differs from the New York Act in the following respects: The New York Act requires at least a 2/3 vote of shareholders for an amendment deleting a director-control provision, whereas this section, in conjunction with paragraph 14A:9-2(4)(c), would permit amendment by majority vote, unless, pursuant to section 14A:5-12, the certificate of incorporation requires a greater vote. In addition, the New York Act does not contain the provision of subsection 14A:5-21(6) that when a legend appears on a share certificate to the effect that director-control provision is contained in the certificate of incorporation, the holder of the share certificate is conclusively deemed to have had notice of the provision.

Subsection 14A:5-21(2) has no counterpart in Title 14. In the absence of such an enabling provision in Title 14, our courts have held that agreements among shareholders restricting the normal discretion or powers of the board are invalid. E.g., Jackson v. Hooper, 76 N.J. Eq. 592 (E. & A. 1910). But see Katcher v. Ohsman, 26 N.J. Super. 28 (Ch. Div. 1953).

The provisions authorized by subsections 14A:5-21(1) and 14A:5-21(2) will be of particular utility for the close corporation. For other provisions of the Revision which might be useful in the organization and operation of the close corporation, see the comment to section 14A:5-12.

14A:5-22

Infant Shareholders and Bondholders

Source or Reference

N.J.: None
Model Act: None
Other: N.Y. Bus. Corp. Law §625.

Comment

This section has no counterpart in New Jersey law or in the Model Act. It is taken almost verbatim from section 625 of the New York Act, except for the last sentence of subsection 14A:5-22(2) which was added by the Commission.

The Commission considered and rejected a proposal to make comparable provisions in respect to incompetents.

14A:5-23

Voting Powers of Bondholders; Right to Inspect

Source or Reference

N.J.: R.S. §14:10-10.1 (1938)
Model Act: None
Other: Del. Code Ann. tit. 8, §221 (1953).

Comment

This section is based on R.S. §14:10-10.1 except for the last sentence which gives bondholders the inspection rights of shareholders whenever the bondholders are entitled to exercise voting rights. The last sentence of the section has no counterpart in Title 14. It is taken from section 221 of the Delaware Act.

14A:5-24

Election of Directors; Cumulative Voting

Source or Reference

N.J.: R.S. §§14:10-13 (Supp. 1944); 14:10-15 (1938)
Model Act: § 31, ¶4 (1960)
Other: None.

Comment

Subsection 14A:5-24(1) eliminates the present requirement of New Jersey law (R.S. §14:10-13) that all elections for directors shall be by ballot unless otherwise provided in the certificate of incorporation. The Model Act has no provision governing ballots.

Subsection 14A:5-24(2) repeats the substance of the fourth paragraph of section 31 of the Model Act and makes no change in New Jersey law as expressed in R.S. §14:10-15.

Subsection 14A:5-24(3) is based on R.S. §14:10-13.

The provision in R.S. §14:10-13 with respect to the hours of polling has not been carried over into this Revision.

14A:5-25

Selection of Inspectors

Source or Reference

N.J.: R.S. §§14:10-14 (1938); 17:9A-92 (Supp. 1950)
Model Act: None
Other: N. Y. Bus. Corp. Law § 610.

Comment

Subsection 14A:5-25(6) re-enacts the substantive provisions of the first two sentences of R.S. §14:10-14, except for the 12-month disqualification of a candidate who has served as an inspector and has been elected as a director.

Subsection 14A:5-25(4) was taken from the 1963 amendment to section 610 of the New York Act, except that subsection 14A:5-25(4) does not require the requesting shareholder either to be present in person or be represented by proxy at the meeting.

The remainder of this section incorporates some of the provisions of R.S. §17:9A-92.

14A:5-26

Duties of Inspectors

Source or Reference

N.J.: R.S. §§14:10-6 (1938); R.S. 14:10-14 (1938); 17:9A-92 (Supp. 1950)
Model Act: None
Other: N. Y. Bus. Corp. Law § 611.

Comment

This section, which is based upon R.S. §17:9A-92 and section 611 of the New York Act, catalogues and clarifies the powers of inspectors of election. It is much more comprehensive than the Title 14 provisions.

The provision of R.S. §14:10-6 that the inspectors shall refer to the stock books to ascertain who are stockholders, and that, in case of discrepancy, the transfer books shall control, has not been carried over into this Revision.

14A:5-27

Review of Elections by Superior Court

Source or Reference

N.J.: R.S. §14:10-16 (Supp. 1955)
Model Act: None
Other: Del. Code Ann. tit. 8, § 225 (1953); N.Y. Bus. Corp. Law § 619.

Comment

This section re-enacts present law. The changes from R.S. §14:10-16 are formal only.

14A:5-28

Books and Records; Right of Inspection

Source or Reference

N.J.: R.S. §§ 14:5-1 (1938); 14:5-1.1 (1938); 14:5-2 (Supp. 1955)
Model Act: § 46 (1960)
Other: N.Y. Bus. Corp. Law § 624.

Comment

Subsection 14A:5-28(1) is based upon present law and the first paragraph of section 46 of the Model Act. The last sentence of subsection 14A:5-28(1) is taken from section 624 of the New York Act. The Commission believes that subsection 14A:5-28(1) is broadly enough expressed to make specific re-enactment of R.S. § 14:5-1.1 unnecessary.

Subsection 14A:5-28(2) has no counterpart in Title 14. It is based on the last paragraph of section 46 of the Model Act. The Model Act refers simply to "financial statements," whereas subsection 14A:5-28(2) specifies the balance sheet, the profit-and-loss statement and the surplus statement.

Subsection 14A:5-28(3) has no counterpart in Title 14. It is based on the second paragraph of section 46 of the Model Act. However, the Model Act requires a person who has not been a shareholder of record for 6 months to be the holder of, or to be authorized by the holders of, at least 5% of all outstanding shares. Subsection 14A:5-28(3) requires only 5% of the outstanding shares of any class.

Subsection 14A:5-28(4) is based on the fourth paragraph of section 46 of the Model Act.

The third paragraph of section 46 of the Model Act, which provides for the imposition of a penalty against an officer or agent of a corporation for refusing a shareholder access to books and records, has not been included in the Revision. The Commission also did not carry R.S. § 14:5-2 over into the Revision.

Subsection 14A:5-28(5), giving the holders of voting trust certificates the same rights of inspection as shareholders, is derived from section 624 of the New York Act.

Note that under section 14A:5-23, bondholders have the inspection rights provided in this section 14A:5-28 whenever they are entitled, pursuant to provision in the certificate of incorporation, to exercise voting powers.

14A:5-29

Preemptive Rights

Source or Reference

N.J.: R.S. §14:8-17 (1938)
Model Act: § 24 (1960)
Other: None.

Comment

This section is based on alternative section 24 of the Model Act. Present statutory law (R.S. §14:8-17) accords preemptive rights to shareholders unless such rights are negated in the certificate of incorporation or in by-laws adopted by 2/3 in interest of each class of shareholders. This section establishes the rule that there shall be no preemptive rights unless they are provided for in the certificate of incorporation. Similar provisions are contained in the California, Indiana, Massachusetts, Oklahoma and Pennsylvania statutes.

Liability of Subscribers and Shareholders

Source or Reference

N.J.: R.S. §14:8-13(1938)
Model Act: § 23 (1960)
Other: N.Y. Bus. Corp. Law §628.

Comment

Subsection 14A:5-30(1) of this section re-enacts R.S. §14:8-13, but specifies with greater particularity the amount which a holder or subscriber may be called upon to pay. The subsection represents an amalgam of R.S. §14:8-13, the first paragraph of section 23 of the Model Act and section 628(a) of the New York Act.

Subsection 14A:5-30(2) is derived, without substantial change, from the third paragraph of section 23 of the Model Act. The subsection has no counterpart in Title 14. There do not appear to be any reported New Jersey decisions involving the subject matter of subsection 14A:5-30(2).

Subsection 14A:5-30(3) has no counterpart in Title 14. That part of the subsection ending with the comma is taken from the second paragraph of section 23 of the Model Act. The portion following the comma is based on section 628(b) of the New York Act. The section is confirmatory of the New Jersey common law. E.g.,See v. Heppenheimer, 69 N.J. Eq. 36 (Ch. 1905); Easton Nat. Bank v. American Brick & Tile Co., 69 N.J. Eq. 326 (Ch. 1905) rev'd in part 70 N.J. Eq. 732 (E. & A. 1906).

Subsection 14A:5-30(4) has no counterpart in Title 14. It is taken from the fourth paragraph of section 23 of the Model Act.

As to the consideration for which shares may lawfully be issued upon exercise of a conversion privilege, see the text of, and comments to, subsections 14A:7-4(5) and 14A:7-9(6).

14A:6-1

Board of Directors

Source or Reference

N.J.: R.S. §§ 14:7-1 (1938); 14:7-2 (Supp. 1962)
Model Act: § 33 (1960)
Other: Del. Code Ann. tit.8, § 141a (1953).

Comment

This section enacts the substance of section 33 of the Model Act.

The provisions concerning age and residence of directors have no counterpart in Title 14, but are probably declaratory of the common law. The provision that directors need not be shareholders changes existing statutory law. R.S. § 14:7-2 requires that directors be bona fide shareholders of the corporation or of another corporation owning at least 25% of the outstanding stock of the corporation. The words "except as in this Act or in a certificate of incorporation otherwise provided" at the end of the first sentence have no counterpart either in the Model Act or in Title 14. They are patterned after section 141a of the Delaware Act and similar provisions in the New York and North Carolina Statutes. Their purpose is to permit the directors to delegate their duties, within the limits provided by the Revision or by the certificate of incorporation. This provision, which represents a departure from present law, as established by the cases (e.g., Klein v. Journal Square Bank Building Company, 110 N.J.Eq. 607 (Ch. 1932), will be of interest to close corporations. For other provisions of the Revision which will be particularly useful in the organization and operation of the close corporation, see the comment to section 14A:5-12.

Section 33 of the Model Act also contains a provision authorizing the directors to fix their own compensation unless otherwise provided in the certificate of incorporation. A similar provision is contained in section 14A:6-8.

Number of Directors

Source or Reference

N.J.: R.S. §§ 14:3-1(f)(1938); 14:7-1(1938); 17:9A-101 (Supp. 1950)
Model Act: § 34 (1960)
Other: N.Y. Bus. Corp. Law § 702.

Comment

This section preserves the requirement of Title 14 (R.S. § 14:7-1) that ordinarily there be a minimum of three directors. However, it changes present law by authorizing one or two directors where there are only one or two shareholders. The source of this exception is section 702 of the New York Act.

The second and third sentences of this section are patterned after R.S. § 17:9A-101, and have no counterpart in either Title 14 or the Model Act.

This section represents a departure from present law as expressed in R.S. § 14:3-1(f), which provides that the number of directors may be fixed by the by-laws. Under this section, as revised, the number of directors, whether fixed or variable between fixed limits, is stated in the certificate of incorporation and can be changed only by amendment. The intent is to prevent undue control by the board over their own number.

The provision authorizing one- or two-director boards will be of particular utility for the close corporation. For other provisions of the Revision which will be useful in the organization and operation of the close corporation, see the comment to section 14A:5-12.

14A:6-3

Term of Directors

Source or Reference

N.J.: R.S.14:7-1 (1938)
Model Act: § 34 (1960)
Other: Del. Code Ann. tit. 8, §222 (Supp. 1966).

Comment

This section is substantially the same as the last three sentences of section 34 of the Model Act, except for the last sentence, which is taken from the Delaware Act. The provision for resignation of a director expresses what is generally assumed to be the common law of New Jersey.

14A:6-4

Classification of Directors; Restriction of Right to Choose Directors

Source or Reference

N.J.: R.S. § 14:7-3 (1938)
Model Act: § 35 (1960)
Other: None.

Comment

The first sentence of subsection 14A:6-4(1) re-enacts the provisions of the first paragraph of R.S. § 14:7-3. The second sentence of subsection 14A:6-4(1) is derived from the last sentence of section 35 of the Model Act. Subsection 14A:6-4(1) does not limit classification of directors to the extent limited by the Model Act. The Model Act permits classification of directors only when the board of directors consists of 9 or more members, limits the classification to 3 classes, and requires that each class be as nearly equal in number as possible.

Subsection 14A:6-4(2) re-enactes the provisions of the second paragraph of R.S. § 14:7-3.

It is often the practice to include in the certificate of incorporation provisions authorized by both subsections 14A:6-4(1) and 14A:6-4(2), so that there is a staggered board the different classes of which are elected by different classes of shareholders.

Vacancies and Newly Created Directorships

Source or Reference

N.J.: R.S. § 14:7-7 (1938)
Model Act: § 36 (1960; Supp. 1966)
Other: Del. Code Ann. tit. 8, § 223 (Supp. 1966); Wyo. Stat. Ann. § 17-36.35 (Supp. 1961).

Comment

Subsection 14A:6-5(1) re-enactes R.S. § 14:7-7 and adds the provision, taken from section 36 of the Model Act, for a majority vote even if there is less than a quorum of the board.

Subsection 14A:6-5(2) is the same as the last sentence of section 223 of the Delaware Act.

Subsection 14A:6-5(3) is based on the 1962 amendment of the last sentence of section 36 of the Model Act. However, the Model Act authorizes the board to fill a vacancy resulting from a newly-created directorship, without any enabling provision in the certificate of incorporation or by-laws. Subsection 14A:6-5(3) requires the shareholders to fill such a vacancy unless the certificate or a by-law adopted by the shareholders authorizes the board to do so. As it read prior to 1937, R.S. § 14:7-7 has been interpreted by our courts to prohibit the filling of newly-created directorships by the board. In Re Griffing Iron Co., 63 N.J.L. 168 (Sup.Ct. 1898), aff'd 63 N.J.L. 357 (E.&A. 1899). Query whether the substitution in 1937 of the words "however caused" for "by death, resignation, removal or otherwise" was intended to overrule or codify the holding of the Griffing case. Note that pursuant to subsection 14A:2-9(2), the initial by-laws of a corporation adopted by the board at its organization meeting are deemed adopted by the shareholders for purposes of the Revision.

Subsection 14A:6-5(4) is taken from section 17-36.35 of the Wyoming Act. Arkansas has a similar provision in its statute (Ark. Stat. Ann. § 64-303B (1966)).

Removal of Directors

Source or Reference

N.J.: None
Model Act: § 36A (1960)
Other: None.

Comment

This section is based on section 36A of the Model Act. It has no counterpart in Title 14.

Prior to 1937, R.S. § 14:7-7 (1938), dealing with vacancies on the board, expressly referred to vacancies resulting from removal, but did not specify by whom or under what conditions a director could be removed. To the extent that it authorizes shareholder removal of directors without cause if the certificate of incorporation or a by-law adopted by the shareholders so provides, this section changes present New Jersey law. Under present New Jersey common law, shareholders may remove a director for cause and after a hearing, but not arbitrarily, and this power of removal may be delegated by the shareholders to the directors. Costello v. Thomas Cusack Co., 96 N.J. Eq. 90, 92 (Ch. 1922), aff'd on other grounds, 94 N.J. Eq. 423 (E.&A. 1923).

Note with regard to subsections 14A:6-6(1) and 14A:6-6(3) that under subsection 14A:2-9(2) the initial by-laws of a corporation adopted by the board at its organization meeting are deemed adopted by the shareholders for purposes of the Revision.

14A:6-7

Quorum of Board of Directors and Committees; Action of Directors Without a Meeting

Source or Reference

N.J.: None
Model Act: §§ 37 (1960), 39A (Supp. 1966)
Other: Del. Code Ann. tit. 8, § 141(b) and (g) (Supp. 1966); Pa. Stat. Ann. tit. 15, § 2852-402(5) (Supp. 1966).

Comment

This section has no counterpart in Title 14. The first sentence of subsection 14A:6-7(1) is derived from the Delaware Act. It is consistent with the New Jersey cases, which hold that a majority of all the members of the board of directors is necessary to constitute a quorum in the absence of some other provision of the certificate of incorporation or by-laws. Freidus v. Kaufman, 35 N.J.Super. 601, 610 (Ch. Div. 1955), aff'd, 36 N.J.Super. 321 (App. Div. 1955). The same rule applies to a committee of the board of directors. Metropolitan Telephone Co. v. Domestic Telegraph Co., 44 N.J.Eq. 568 (E.&A. 1888).

The exception appearing at the end of the first sentence of subsection 14A:6-7(1),to the effect that when a board consists of only one director that one director constitutes a quorum, was added to this section by the Commission.

The second sentence of subsection 14A:6-7(1) is derived from section 37 of the Model Act. This, too, is consistent with existing New Jersey case law. See Freidus v. Kaufman, supra; Metropolitan Telephone Co. v. Domestic Telegraph Co., supra. The requirement in the second sentence of subsection 14A:6-7(1) that directors must act while "present at a meeting" continues existing law. Audenried v. East Coast Milling Co., 68 N.J.Eq. 450 (Ch. 1904).

Subsection 14A:6-7(2) is derived from the Pennsylvania and Delaware Statutes and from section 39A of the Model Act. Subsection 14A:6-7(2) differs from section 39A of the Model Act in that the Model Act does not require that the certificate of incorporation authorize action by unanimous written consent of the directors. It represents a departure from present New Jersey law as expressed in cases such as Audenried v. East Coast Milling Co., supra. It should be noted that Title 14, R.S. § 14:10-9.1 (Supp. 1965), permits action by consent of stockholders in lieu of a meeting.

The high quorum requirements permitted by subsection 14A:6-7(1) and the unanimous written waiver in lieu of a directors' meeting permitted by subsection 14A:6-7(2) will be of particular utility for the close corporation. For other provisions of the Revision which will be useful in the organization and operation of the close corporation, see the comment to section 14A:5-12.

14A:6-8

Effect of Common Directorships and Directors' Personal Interest

Source or Reference

N.J.: None
Model Act : § 33 (1960)
Other: Cal. Corp. Code § 820; Ohio Rev. Code Ann. § 1701.60 (Page 1964); Wis. Stat. Ann. § 180.31 (1957).

Comment

Subsections 14A:6-8(1) and 14A:6-8(2) of this section have been adapted from section 820 of the California Act and have no counterpart in Title 14. The rule in effect in New Jersey is that any contract or other transaction between a corporation and one or more of its directors is voidable at the election of the corporation unless the party seeking to enforce the contract or transaction demonstrates by clear and convincing proof that it is honest, fair and reasonable. Abeles v. Adams Engineering Co., Inc., 35 N.J. 411, 428-429 (1961).

Subsection 14A:6-8(2) provides that common or interested directors may be counted in determining the presence of a quorum at a meeting of the board or a committee thereof which authorizes, approves or ratifies a contract or transaction described in subsection 14A:6-8(1). This represents a change in the case law of New Jersey. Metropolitan Telephone Co. v. Domestic Telegraph Co., 44 N.J.Eq. 568 (E.&A. 1888); Hill Dredging Corp. v. Risley, 18 N J. 501, 534 (1955).

Subsection 14A:6-8(3) is derived from section 33 of the Model Act. It is, however, broader than the Model Act, which provides only that the board shall have authority to fix compensation of directors unless otherwise provided in the certificate of incorporation.

Executive Committee; Other Committees

Source or Reference

N.J.: R.S. §§ 14:7-4 (1938); 17:9A-108 (Supp. 1950)
Model Act: § 38 (1960)
Other: None.

Comment

Subsection 14A:6-9(1) is based upon section 38 of the Model Act. It defines with greater particularity than that found in Title 14 the powers which may be exercised by the executive and other committees. The limitations imposed by subsection 14A:6-9(1) on the exercise of powers by committees are based, in part,on R.S. § 17:9A-108.

Subsection 14A:6-9(2) has no direct statutory counterpart. It gives the board flexibility in controlling the committees created by it. Compare section 141 of the Delaware Act, as amended in 1963 (Del. Code Ann. tit. 8, § 141 (Supp. 1965).

Subsection 14A:6-9(3) is also based on R.S. § 17:9A-108.

Place and Notice of Directors' Meetings

Source or Reference

N.J.: R.S. §§14:3-3.1 (1930); 14:10-4 (Supp. 1950)
Model Act: §§ 39 (1960); 137 (1960)
Other: N.C. Gen. Stat. §55-28(c) (1965).

Comment

Subsection 14A:6-10(1) is based on the second paragraph of R.S. §14:10-4 and section 39 of the Model Act. R.S. §14:3-3.1, which expressly permits the directors to have an office outside of the State, has not been carried over into this Revision because the Commission believed that the corporation would have such power without express statutory authorization.

Subsection 14A:6-10(2) is primarily based on sections 39 and 137 of the Model Act. Title 14 has no provision as to notice of directors' meetings. The provisions in subsection 14A:6-10(2) that (a) subject to contrary provisions in the by-laws, notice need not be given of a regular meeting of the board and that (b) notice shall be given of special meetings of the board are consistent with the general common law rule. This provision should be contrasted with the analogous provision relating to shareholders' meetings. Subsection 14A:5-4(1) requires notice of regular as well as special meetings of shareholders.

The provision in subsection 14A:6-10(2) concerning waivers of notice is based on section 137 of the Model Act. It is consistent with the common law of this State to the extent that it authorizes a waiver executed before the meeting to which it relates. To the extent that subsection 14A:6-10(2) authorizes a waiver of notice executed after the meeting, it changes the common law of New Jersey. E.g., Hill v. Trenton White City Co., 80 N.J. Eq. 122 (Ch. 1912), aff'd, 82 N.J. Eq. 364 (E. & A. 1913); Hill Dredging Corp. v. Risley, 18 N.J. 502 (1955). The provision that attendance by a director at a meeting without protesting lack of notice constitutes a waiver of notice is probably consistent with the common law of New Jersey. Cf. Weinburgh v. Union Street Railway Advertising Co., 55 N.J. Eq. 640 (Ch. 1897).

Note that unless the by-laws otherwise require, the purposes of a directors' meeting need not be stated in the notice of meeting. This approach should be contrasted with the analogous provision relating to shareholders' meetings. Subsection 14A:5-4(1) requires that the purposes of the meeting be specified in the notice to shareholders.

The provision of subsection 14A:6-10(2) relating to notices of adjourned meetings of directors is derived from section 55-28(c) of the North Carolina Act. It is confirmatory of the general common law rule. See 2 Fletcher, Corporations § 401 (rev. ed. 1954). There is no counterpart in either Title 14 or the Model Act.

Loans to Officers or Employees

Source or Reference

N.J.: R.S. §14:8-10 (Supp. 1962)
Model Act: § 42 (1960)
Other: None.

Comment

This section authorizes loans and other forms of assistance to officers and other employees. If the officer or other employee is a director of the corporation, the loan or other form of assistance must be authorized by the certificate of incorporation or a by-law adopted by the shareholders and by a majority of the entire board. The section changes existing New Jersey law. R.S. §14:8-10 prohibits the making of loans to officers and shareholders and provides that if such a loan is made the officers who made or consented to it shall be liable, to the extent of such loan and interest, for all debts of the corporation until repayment of the loan.

Section 42 of the Model Act prohibits loans to officers or directors. It also prohibits loans secured by the corporation's own shares.

Note that under subsection 14A:2-9(2) the initial by-laws of a corporation adopted by the board at its organization meeting are deemed adopted by the shareholders for purposes of the Revision.

14A:6-12

Liability of Directors in Certain Cases

Source or Reference

N.J.: R.S. §§ 14:8-10 (Supp. 1962); 14:8-19 (1938); 14:13-6 (1938)
Model Act: § 43
Other: N.Y. Bus. Corp. Law § 719(d)

Comment

Paragraph 14A:6-12(1)(a) is a combination of section 43(a) of the Model Act and R.S. § 14:8-19.

Paragraph 14A:6-12(1)(b) is a combination of section 43(b) of the Model Act and R.S. § 14:8-19.

Paragraph 14A:6-12(1)(c) enacts section 43(c) of the Model Act, except that it adds the words "or barred by statute or otherwise".

Paragraph 14A:6-12(1)(d) departs from present law (R.S. § 14:8-10) which makes officers liable for making loans to stockholders or officers, but makes no provision in respect to loans to directors. It also differs from section 43(d) of the Model Act, which makes directors liable for making a loan secured by shares of the corporation.

Subsection 14A:6-12(2) has no counterpart in Title 14. It is based on section 43 of the Model Act but is similar to the Joint Tortfeasor's Contribution Law, P.L. 1952, c. 335.

Subsection 14A:6-12(3) is based partly upon section 43 of the Model Act and partly on section 719(d) of the New York Act.

Subsection 14A:6-12(5) carries forward the 6-year limitation on actions contained in R.S. § 14:8-19, but

makes the limitation applicable to every liability imposed by subsection 14A:6-12(1). No limitation is presently imposed by New Jersey law on actions to impose liability upon directors for actions similar to those interdicted by paragraphs 14A:6-12(1)(c) and 14A:6-12(1)(d).

Section 43(e) of the Model Act, imposing liability on directors if a corporation commences business before a minimum of $1,000 has been paid in for shares, has not been carried over into the Revision.

Subsection 14A:6-12(4) has no exact counterpart in prior law. It is derived from section 719(e) of the New York Act. To the extent that it makes good faith and ordinary prudence the test of liability, it is opposed to R.S. § 14:8-19.

14A:6-13

Liability of Directors; Presumption of Assent to Action Taken at a Meeting

Source or Reference

N.J.: R.S. § 14:8-19 (1938)
Model Act: § 43 (1960)
Other: N.Y. Bus. Corp. Law § 719(b)

Comment

This section is based on section 43(e) of the Model Act with slight changes, the principal ones being the addition of the reference to any meeting of a committee of the board and the restricting of the section to a corporate matter referred to in section 14A:6-12.

The section is broader than the similar provision in R.S. § 14:8-19.

The New York Act has a provision, not found in the Model Act, similar to the last sentence of this section.

14A:6-14

Liability of Directors; Reliance on Corporate Records

Source or Reference

N.J.: None
Model Act: § 43 (1960)
Other: Del. Code Ann. tit. 8, § 141 (f)(1953)

Comment

This section is primarily based on section 43 of the Model Act. It differs from the Model Act by expressly authorizing reliance on the written opinion of counsel and books of account and reports of account represented as correct by the officer in charge thereof, the president or the officer presiding at the meeting. Section 141 (f) of the Delaware Act also authorizes reliance on books of account and reports.

Except where expressly provided in this section, directors and any committee designated by the board may rely upon oral representation.

14A:6-15

Officers

Source or Reference

N.J.: R.S. § 14:7-6 (1938)
Model Act: § 44 (1960)
Other: Ohio Rev. Code Ann. § 1701.64 (Page 1964); N.Y. Bus. Corp. Law § 715.

Comment

Subsection 14A:6-15(1) continues R.S. § 14:7-6, with these differences: (1) R.S. § 14:7-6 requires that the president, secretary and treasurer shall be chosen by the directors or stockholders, as the by-laws may direct; subsection 14A:6-15(1) provides that the officers shall be elected or appointed by the board unless otherwise provided in the by-laws; (2) subsection 14A:6-15(1) makes specific mention of the office of chairman of the board; R.S. § 14:7-6 makes no such mention; (3) R.S. § 14:7-6 requires that the president be chosen from among the directors; subsection 14A:6-15(1) eliminates that requirement; (4) R.S. § 14:7-6 requires that the secretary take an oath of office and that the treasurer be bonded; subsection 14A:6-15(1) eliminates those requirements. The Commission was of the opinion that, if any of the deleted provisions was deemed desirable in a particular case, adequate provision could be made in the by-laws.

The provision for election or appointment of officers is based on section 715 of the New York Act. It departs from the Model Act which provides for election as the sole method of selection.

Subsection 14A:6-15(2) is derived from the Ohio Act. It was deemed by the Commission to be superior to the comparable Model Act provision. It has no counterpart in Title 14.

Subsection 14A:6-15(3) enlarges upon R.S. § 14:7-6 by making specific mention of removal and resignation.

Subsection 14A:6-15(4) is derived from the second paragraph of section 44 of the Model Act. Its purpose is to define the relationship between the corporation and its officers with respect to expressed powers. It leaves the question of apparent powers to the common law. Accordingly, the case-law protection afforded to innocent third parties in dealing with corporate officers apparently clothed with authority will be continued. See, e.g., J. Wiss & Sons Co. v. H. G. Vogel Co., 86 N.J.L. 618 (E.&A. 1914); Ross v. Realty Abstract Co., 50 N.J.Super. 147, 154-155 (App. Div. 1958).

Section 44 of the Model Act includes agents with officers. The Commission deemed it undesirable to adopt this grouping, being of the opinion that the two groups, officers and agents, should not be handled together. New York reached a similar conclusion (N.Y. Bus. Corp. Law § 715). Corporate power to hire agents is set out in paragraph 14A:3-1(1)(j).

14A:6-16

Removal of Officers; Filling of Vacancies

Source or Reference

N.J.: R.S. § 14:7-7 (1938)
Model Act: § 45 (1960)
Other: N.Y. Bus. Corp. Law § 716(a).

Comment

Subsection 14A:6-16(1) is based on section 45 of the Model Act and section 716(a) of the New York Act. It has no counterpart in Title 14. The subsection differs from the Model Act in that the Model Act applies also to the removal of agents. The express right of the board to remove officers, subject to a right of action if there is a breach of a contract of employment, is confirmatory of the common law. In Re Griffing Iron Co., 63 N.J.L. 168, 175 (Sup. Ct. 1898), aff'd, 63 N.J.L. 357 (E.&A. 1899). The general common law rule has been modified in New Jersey, by the holding that no cause of action for breach of contract will lie even in the case of employment for a stated term, if, at the time of employment, there was a by-law in effect giving the board the power to remove an officer and employee during the term of employment, and the officer knew or should have known of such by-law. Cohen v. Camden Refrigerating & Terminals Co., 129 N.J L. 519 (E.&A. 1943). Subsection 14A:6-16(1) changes common law as announced in the Cohen case.

Subsection 14A:6-16(2) has no direct counterpart in Title 14. Its provisions are consistent with the provisions governing resignation of directors and appearing in section 14A:6-3.

14A:6-17

Bonds; Facsimile Signatures and Seals

Source or Reference

N.J.: None
Model Act: None
Other: Conn. Gen. Stat. Rev. § 33-417 (1961).

Comment

This section is based on section 33-417 of the Connecticut Act. It has no counterpart in Title 14 or the Model Act.

This section is consistent with the provisions of section 14A:7-11 concerning signatures and seals on share certificates.

14A:7-1

Authorized Shares

Source or Reference

N.J.: R.S. §§ 14:8-1 (1937); 14:8-2 (Supp. 1952)
Model Act: § 14 (1960)
Other: N.Y. Bus. Corp. Law § 501(a); Del. Code Ann. tit. 8, § 151

Comment

This section, like the Delaware Act, is broader than section 14 of the Model Act or the New York Act in that it expressly permits any series to vary from any other class or series in any respect other than par value.

The substance of the first paragraph of R.S. § 14:8-1 has been retained, except that the 8% limitation on preferred dividends has been rejected as obsolete. The Commission considered it unnecessary to include the second and third paragraphs of R.S. § 14:8-1 in this section since the substance of the second paragraph has been included in section 14A:9-1 and the third paragraph has been included in subsection 14A:7-4(1). The substance of the first paragraph of R.S. § 14:8-2 has been retained.

Full voting rights must exist either in one class or collectively in several classes. Where shareholder approval is required, the right to a class vote on specified amendments to the certificate of incorporation cannot be taken away. See section 14A:9-3. The provision in subsection 14A:7-1(1) for multiple voting rights, which is not specifically included in section 14 of the Model Act (but which may well be permitted under the broad language of that section), was included to recognize existing practice.

Subject to equitable restraints in appropriate cases, shares may be classified in all possible ways not inconsistent with the Act, provided the classification is set forth in the certificate of incorporation. The

enumeration of powers of classification in section 14A:7-1 and elsewhere in the Act is not exclusive. Examples of permissible categories which are not expressly provided for are sinking funds, denial of dividends and limitation of liquidation rights. It is not intended to prohibit the use of non-enumerated categories in appropriate circumstances. The classification must not, however, make it impossible to determine which class or classes is entitled to the residual dividend or liquidation rights. Such rights may reside in one or more (but less than all) series within a class, as explained in the comment to section 14A:7-2.

Subsection 14A:7-1(3) makes plain that classes and series of shares may be issued having rights and preferences which adversely affect existing shares.

The Commission felt that the absence of specific definition of the rights of holders of non-cumulative preferred stock would not preclude the application of equitable principles such as the dividend credit rule as developed in Bassett v. U.S. Cast Iron Pipe and Foundry Co., 74 N.J.Eq. 668 (Ch. 1908), aff'd, 75 N.J.Eq. 539, (E. & A. 1909), and subsequent decisions. See e.g., Sanders v. Cuba Railroad Co., 21 N.J. 78 (1956); Agnew v. American Ice Co., 2 N.J. 291 (1949).

Issuance of Shares in Series

Source or Reference

N.J.: R.S. § 14:8-2 (Supp. 1952)
Model Act: § 15 (1960)
Other: N.Y. Bus. Corp. Law § 502; Del. Code Ann. tit. 8, § 151 (Supp. 1966)

Comment

This section, together with section 14A:7-1, permits any class of shares to be divided into series, if the certificate of incorporation so provides. Under R.S. § 14:8-2, the division into series is restricted to non-participating preferred or special shares. No limitation is placed upon the permissible variations among series except for the common designation of the class and the requirement that all shares of the same class have either the same par value or no par value, as to which see section 14A:7-1.

Subsection 14A:7-2(2), which provides that the certificate of incorporation may authorize the board to act with respect to series, is intended to permit a "blanket" authorization in general terms. Board action under this subsection does not require the approval of the shareholders or of any series or class of shareholders. See subsection 14A:9-3(3).

Unlike R.S. § 14:8-2, this section provides that that the certificate filed with the Secretary of State pursuant to subsection 14A:7-2(4) is a certificate of amendment of the certificate of incorporation, as in the New York Act and the Model Act. For execution and filing requirements, see section 14A:1-6.

Subscriptions for Shares

Source or Reference

N.J.: R.S. §§ 14:8-14 (1938); 14:8-15 (1938)
Model Act: § 16 (1960)
Other: N.Y. Bus. Corp. Law § 503; Minn. Stat. Ann. § 301.17 (1947); N.C. Gen. Stat. § 55-43 (1965)

Comment

This section introduces provisions which are new to the statutory law of New Jersey, but which have been adopted in other jurisdictions.

Subsection 14A:7-3(1) is adopted from section 16 of the Model Act and subdivision 2 of section 301.17 of the Minnesota Act. A preincorporation subscription is made irrevocable for a period of six months in order to permit the necessary arrangements for forming the corporation to proceed securely. After the expiration of the 6 months, such a subscription may be revoked if no certificate of incorporation has been filed. Preincorporatoration subscriptions are not accepted automatically by the formation of the corporation, but must be acted upon by the board. When a certificate of incorporation is filed, whether before or after the expiration of the 6 months, subscriptions which were not previously revoked become irrevocable for a 60-day period. If they have not been accepted by the corporation during this 60-day period, they may be revoked thereafter at any time without regard to when they were first made.

Subsection 14A:7-3(2) applies to subscription agreements the same Statute of Frauds, including its exceptions, as is provided by R.S. § 12A:8-319 (Supp. 1962) for a contract for the sale of securities. This makes irrelevant for this purpose the question whether a subscription agreement is a contract for the sale of securities within the meaning of R.S. §

12A:8-319. The requirement of a writing for enforceable subscriptions is widespread. See, e.g., N.Y. Bus. Corp. Law § 503(b) and N.C. Gen. Stat. § 55-43(b) (1965).

Subsection 14A:7-3(3) is adapted from the Minnesota Act (Minn. Stat. Ann. § 301.17, subd. 8 (1947)). Paragraph 14A:7-3(a) prohibits making the subscriber a holder of any share until it is fully paid for. Subsection 14A:7-5(2) has the same effect. A fortiori, these provisions prohibit the issue of certificates for shares before full payment.

Paragraphs 14A:7-3(3)(b) and 14A:7-3(3)(c) provide for the issue of shares to the subscriber in proportion to his payments of installments of the subscription obligation. In order to protect the corporation's power of sale or rescission under subsection 14A:7-3(5), paragraph 14A:7-3(3)(d) gives the corporation a possessory security interest in the share certificates which are registered in the name of the subscriber. The subscription agreement may modify the rights which are provided in paragraphs 14A:7-3(3)(a), 14A:7-3(3)(b), 14A:7-3(3)(c) and 14A:7-3(3)(d).

No attempt has been made to prescribe the proper accounting treatment of subscription obligations, but upon the issue of shares to a subscriber, whether or not he has a remaining subscription obligation, stated capital must of course be credited in accordance with section 14A:7-8.

Subsection 14A:7-3(4) is adapted from section 16 of the Model Act. It includes the provision in R.S. § 14:8-14 that assessments on shares shall be on 30 days' notice unless otherwise provided in the subscription agreement.

Subsection 14A:7-3(5) builds upon Model Act section 16 and section 55-43(i) of the North Carolina Act, using remedial concepts developed in the Uniform Commercial Code. Cf. N.J.S.A. 12A:2-703 et. seq., 12A:9-504. The intention is to provide the corporation with all the remedies it may need to net the subscription price or damages and no more.

Paragraph 14A:7-3(5)(a) makes explicit the corporation's right to sue for any amount due. Paragraph 14A:7-3(5)(b) permits the corporation to sell the shares subscribed for, to apply the net proceeds to the claim against the subscriber and to recover any deficiency. The remedies under paragraphs 14A:7-3(5)(a) and (b) are not mutually exclusive, so long as there is only one satisfaction of the amount due. The right to sell the shares before payment by the defaulting subscriber is valuable for a close corporation. because its effective business existence may depend upon bringing innew participants to replace a defaulting subscriber and the subscribed shares may be a significant element of control arrangements. In view of this primary reason for permitting a resale and deficiency judgment, paragraph 14A:7-3(5)(b) prohibits the corporation from purchasing at a sale, unless the subscription agreement otherwise provides. The corporation has ample remedies under paragraph 14A:7-3(5)(c) where it desires to retain the shares. The formal requirements of a resale have been reduced to a minimum, but good faith purchasers are not affected by the corporation's failure to meet even those requirements. The remedy of the affected subscriber is to claim damages for injury shown; perhaps more important, he will not be liable for any deficiency. Under paragraph 14A:7-3(5)(c), the corporation may elect to cancel the subscription. In such case, the paragraph explicitly permits it to sue for damages for breach of contract. Where the corporation has received part payments, it may retain them only to the extent that they do not exceed its damages.

The rules of subsection 14A:7-3(5) may be varied by agreement.

Subsection 14A:7-3(6) deals with the case in which the subscriber has become the holder of some of the shares subscribed for. So long as the corporation retains the certificates evidencing such shares, they are subject to a power of rescission, as provided by paragraph 14A:7-3(3)(c) and subsection 14A:7-3(5), as a security to the corporation for the unpaid portion of the subscription. If the power of

rescission is exercised, the shares are cancelled. Stated capital is reduced by the cancellation as provided in section 14A:7-18.

Subsection 14A:7-3(7) is intended to avoid the result of those occasional cases which have relieved a subscriber from liability for the unpaid balance of the price by treating the agreement as an ordinary contract for the sale of personal property. Under this Act, the corporation is entitled to the unpaid balance of the price regardless of its damages and whether or not it is solvent when it sues. Application of this subsection will make the liability of post-incorporation and preincorporation subscribers the same.

14A:7-4

Consideration for Shares

Source or Reference

N.J.: R.S. §§ 14:8-1 (1938); 14:8-6 (1938)
Model Act: §§ 17 (1960); 18 (1960)
Other: N. Y. Bus. Corp. Law § 504 (d) and (g)

Comment

This section is substantially the same as section 17 of the Model Act, except for subsections 14A:7-4(5) and 14A:7-4(6).

Subsection 14A:7-4(1) substantially follows the last paragraph of R.S. § 14:8-1.

Subsection 14A:7-4(2), while covering the same subject matter as the first paragraph of R.S. § 14:8-6, follows section 17 of the Model Act in empowering the directors to determine the consideration for shares without par value unless the certificate of incorporation reserves the right to the shareholders. Where a shareholder vote is required, a majority vote of shares entitled to vote will suffice (see subsection 14A:5-11(1)); whereas R.S. § 14:8-6 calls for the consent of two-thirds of each class having voting powers. With respect to the shareholder vote, the Commission followed section 504(d) of the New York Act, which permits the shareholders to fix the consideration or to authorize the board to do so.

Subsections 14A:7-4(3) and 14A:7-4(4) are believed to be consistent with existing New Jersey practice.

Subsection 14A:7-4(5) differs from the Model Act in providing for convertible bonds as well as convertible shares and in including explicitly as an element of consideration the stated capital described in paragraph 14A:7-4(5)(b), following section 504(g)(3) of the New York Act.

Subsection 14A:7-4(6) is taken from the third paragraph of section 18 of the Model Act. It restores to the statute a provision substantially similar to section 49 of the New Jersey Corporation Act of 1896 (P.L. 1896, c. 185, § 49, p. 294), repealed in 1913 (P.L. 1913, c. 15, § 1, pp. 28-29). This subsection is merely a restatement of common law. See: Holcombe v. Trenton White City Co., 80 N.J. Eq. 122 (Ch. 1912), aff'd, 82 N.J. Eq. 364 (E. & A. 1913).

14A:7-5

Payment for Shares

Source or Reference

N.J.: R.S. §§ 14:3-9 (1938); 14:8-9 (1938)
Model Act: § 18 (1960)
Other: N.Y. Bus. Corp. Law §§ 504(b) and (i).

Comment

The first sentence of subsection 14A:7-5(1) is substantially similar to the first paragraph of section 18 of the Model Act. The second sentence of subsection 14A:7-5(1) differs from the second paragraph of section 18 of the Model Act in that the concept expressed in the words "promissory note" has been broadened to include any other obligation, and the prohibition has been restricted to obligations of the subscriber, as in section 504(b) of the New York Act. A similar prohibition appeared in the original 1846 Corporation Act (P.L. 1846, § 27, p. 69) and although the language was changed in the Revision of 1875 to a form more like that of R.S. § 14:8-9, the Commission believes that the second sentence of subsection 14A:7-5(1) is consistent with present New Jersey law. See Donald v. American Smelting and Refining Co., 61 N.J. Eq. 458, 459 (Ch. 1901), rev'd on other grounds, 62 N.J. Eq. 729 (E. & A. 1901).

Subsection 14A:7-5(2) is adopted from section 504(i) of the New York Act. It expresses affirmatively the rights of a subscriber who has paid the agreed consideration, and by negative implication it prohibits the issue of shares for which the entire consideration has not been received by the corporation. Subsection 14A:7-3(3) expressly states such a prohibition and also provides that payments made in accordance with the subscription agreement are applied as payment in full for a portion of the shares subscribed for, unless otherwise provided by the agreement.

Subsection 14A:7-5(2) assumes that the corporation has received at least the minimum consideration for which the shares may be lawfully issued; otherwise, the recipient is liable as provided in subsection 14A:5-30(1).

The Commission has omitted any provision comparable to R. S. § 14:8-16 (Supp. 1959), requiring the making and filing of a certificate of payment of capital stock. Such a provision was not considered necessary, and is not generally contained in the corporation laws of other states or the Model Act.

14A:7-6

Redeemable Shares

Source or Reference

N.J.: R.S. § 14:8-3 (Supp. 1944)
Model Act: § 14 (1960)
Other: N.Y. Bus. Corp. Law § 512

Comment

Subsection 14A:7-6(1) is a broad grant of power to create redeemable shares. Unlike section 14 of the Model Act, it does not restrict redeemability to preferred shares or to shares which are otherwise special. In this permissive approach, it resembles section 512 of the New York Act, but it goes beyond it by omitting the requirement of subsection 512(c) of the New York Act that there be a class of nonredeemable common shares in addition to redeemable common shares. The Commission believes that provision for the redemption of all common shares may be a useful ingredient of shareholder planning in the close corporation and that the restrictions on redemption which are set forth in section 14A:7-16, together with judicial control over the abuse of the redemption power, are sufficient protection for all parties in interest. For the use of shares redeemable at the option of the holder, see subsections 14A:7-6(3) and 14A:7-6(4). For a restriction upon a redemption which would leave outstanding no voting or participating shares, see paragraph 14A:7-16(5)(c).

No minimum redemption price is prescribed. The power to redeem may be exercised by the corporation on a non pro rata basis, subject to any equitable limitations established by the courts. Shares may be redeemable in bonds as well as in cash or other property, but it should be noted that the relative position of such former shareholders among creditors is not determined by the section.

Subsection 14A:7-6(2) explicitly permits shares which are redeemable at the option of the holder in the case of "mutual funds" subject to federal regulation.

Subsection 14A:7-6(3) permits shares which are redeemable at the option of the holder in a close corporation, as defined therein. The Commission believes that this provision, which is not now expressly provided for in New Jersey law, is desirable to enable careful planning of participations in such essentially "incorporated partnerships," and affords a technique superior to the present practice of reliance on "buy-sell" agreements between shareholders and the corporation.

A number of provisions contained in R.S. § 14:8-3 are eliminated or dealt with in other sections. The Commission thought it unnecessary to insert authority for the creation of sinking funds or for their administration. The effect of redemption upon stated capital is governed by subsections 14A:7-16(1) and 14A:7-16(3). Certain financial restrictions upon the exercise of the redemption privilege are also stated in section 14A:7-16. The cancellation of redeemed shares is governed by section 14A:7-18. The provisions of R.S. § 14:8-3 for a certificate of retirement of redeemed shares and for its publication have been eliminated. Section 14A:7-18 determines whether a certificate has to be filed and provides that when redeemed shares are cancelled, they are not required to be eliminated from authorized shares unless the certificate of incorporation so provides.

14A:7-7

Share Rights and Options

Source or Reference

N.J.: R.S. § 14:8-4 (Supp. 1962)
Model Act: § 18A (Supp. 1966)
Other: N.Y. Bus. Corp. Law § 505; Del. Code Ann. tit. 8, § 157 (Supp. 1964)

Comment

Subsection 14A:7-7(1) substantially follows section 18A of the Model Act, but adds some clarifying language from section 505 of the New York Act to indicate its non-restrictive character. Unlike R.S. § 14:8-4, the subsection permits stock rights and options to be granted by the board, without shareholder approval or authorization expressed in the certificate of incorporation.

Sound corporate practice requires that the board reserve for the satisfaction of stock rights and options a sufficient number of authorized shares, whether of unissued or treasury status. In view of the relatively small number of such shares which are likely to be required for purposes other than employee or director incentive plans, as to which see Chapter 8,no requirement of such reservation has been included in the section.

Subsection 14A:7-7(2) makes this section inapplicable to stock rights or options which form part of a plan of benefits intended as an incentive to service or continued service by one or more directors, officers or employees. Such plans are governed by Chapter 8 of the Act. Subsection 14A:7-7(2) also limits the aggregate amount of rights and options which may be granted under the section, as contrasted with those granted under a plan subject to the provisions of Chapter 8.

Convertible shares are governed by section 14A:7-9 and not by this section.

14A:7-8

Determination of Amount of Stated Capital

Source or Reference

N.J.: R.S. § 14:8-6 (1938)
Model Act: § 19 (Supp. 1966)
Other: N.Y. Bus. Corp. Law § 506

Comment

This section in large part follows section 19 of the Model Act and section 506 of the New York Act. Subsection 14A:7-8(2) includes the second paragraph of R.S. § 14:8-6 except for the substitution of 60 days for 30 days. Subsections 14A:7-6(1) and 14A:7-6(3) have no counterpart in the present New Jersey statutes but in the opinion of the Commission represent no change in New Jersey law.

Subsection 14A:7-8(2) does not set any minimum consideration for shares without par value which have a liquidation preference, but it restricts the power of the board to make an allocation from the consideration for such shares to capital surplus. This restriction may be made inapplicable by the certificate of incorporation.

Subsection 14A:7-8(3), following section 19 of the Model Act, permits a continuance of the combined earned surplus of parties to a merger, consolidation or acquisition of assets.

Subsection 14A:7-8(4) is broader than the provision in R.S. § 14:8-6 in that it expressly permits the transfer of all the surplus of a corporation to stated capital and does not impose any requirements for allocation of any of the amount transferred or any limitations upon its allocation to any designated class or series of shares. Even where all shares have par value, the board may increase stated capital beyond the aggregate par values. Subsection 14A:7-8(4) will

facilitate the exercise of conversion privileges of shares having par value where the shares issuable also have a par value and a transfer from surplus is required to make the consideration received (subsection 14A:7-4(5)) equal to the aggregate par value of such new shares.

For the increase of stated capital required upon the issuance of share dividends, see subsection 14A:7-4(4) and 14A:7-15(1). For the reduction of stated capital by various methods, see sections 14A:7-18 and 14A:7-19, and paragraph 14A:9-4(3)(g).

Convertible Shares and Bonds

Source or Reference

N.J.: R.S. §§ 14:8-4 (Supp. 1952); 14:8-5 (1938)
Model Act: § 14 (1960)
Other: N.Y. Bus. Corp. Law § 519

Comment

This section is adapted from section 519 of the New York Act.

Unlike section 14 of the Model Act and section 519(a) of the New York Act, subsection 14A:7-9(1) does not prohibit the issuance of shares convertible into shares of a class having prior or superior rights and preferences as to dividends or distribution of assets upon liquidation (so-called "upstream conversion"). The Commission considered present law (R.S. § 14:8-4), which does not bar upstream conversion, to be preferable. A number of jurisdictions with modern corporation statutes also omit this prohibition, e.g. Cal. Corp. Code § 1100; Del. Code Ann. tit. 8, § 151(e)(1953); D.C. Code Ann. § 29-908(1961); Ill. Ann. Stat. ch. 32, § 157.14(Smith-Hurd Supp (1966); Pa. Stat. Ann. tit. 15, § 2852-601(Supp. 1965). A measure of protection against dilution of senior shares is provided in the class voting requirement of subsection 14A:9-3(1).

Subsection 14A:7-9(2) does not prohibit changing the terms of issued bonds to make them convertible, as was apparently intended by R.S. § 14:8-5, which required the board to act "prior to the issue" of the bonds. "Bonds",as defined in subsection 14A:1-2(d) includes secured and unsecured bonds, debentures, notes and other written obligations. These words are therefore not repeated as in R.S. § 14:8-5.

Subsection 14A:7-9(3) reflects sound corporate practice by requiring reservation of sufficient shares to

satisfy the exercise of conversion privileges. Treasury shares may be used for this purpose.

Provided sufficient authorized shares are in existence, the board can issue convertible shares or bonds without further shareholder action. If insufficient shares are authorized to meet the requirements of subsection 14A:7-9(3), the shareholders may either approve the amendment of the certificate of incorporation to increase the number of shares, pursuant to paragraph 14A:9-1(2)(d), or they may authorize the board to do so, as provided in subsection 14A:7-9(4). Such authority of the board must be exercised, if at all, only upon the issue of convertible securities and only for the purpose of increasing the authorized number of shares to the number required to be reserved pursuant to subsection 14A:7-9(3).

The stated capital represented by a convertible share may be considerably greater than the par value of the shares into which it may be converted, or it may be convertible into shares without par value. Nevertheless, such conversions do not automatically reduce stated capital. Subsection 14A:7-9(5) provides that if the board wants to reduce stated capital in such a case, it may do so pursuant to the usual procedure set forth in section 14A:7-19. The subsection is consistent with subsection 14A:7-18(4), which provides that the cancellation of converted shares does not automatically reduce stated capital. The reduction of stated capital following a conversion may take place without regard to the aggregate liquidation preferences and par values of issued shares, but since the consideration received upon conversion is defined in subsection 14A:7-4(5) to include the stated capital represented by the converted shares, section 14A:7-8 determines the minimum amount of such capital which must be kept as stated capital in respect of the shares issued upon the conversion.

Subsection 14A:7-9(6), which is based upon the second sentence of subsection 519(e) of the New York Act, is intended to prevent the exercise of a conversion privilege from creating what is in effect "watered" stock. The

exception validates the conventional clauses in share and bond contracts which protect against dilution of the conversion privilege. In instances covered by the exception, no liability arises under subsection 14A:5-30(1). The consideration for which shares are issued upon a conversion is defined in subsection 14A:7-4(5).

Subsection 14A:7-9(7) prohibits the reissue of a converted bond. This facilitates orderly record-keeping and the observance of the requirement of subsection 14A:7-9(3) that a reserve of shares be maintained to satisfy the exercise of conversion privileges.

14A:7-10

Expenses of Organization, Reorganization and Financing

Source or Reference

N.J.: None
Model Act: § 20 (1960)
Other: N.Y. Bus. Corp. Law § 507

Comment

The Commission is of the opinion that this section is declaratory of the New Jersey common law. The charges and expenses described in the section are, realistically considered, for "services actually performed for the corporation or in its formation," within the meaning of those words in subsection 14A:7-5(1).

14A:7-11

Certificates Representing Shares

Source or Reference

N.J.: R.S. §§ 14:8-7 (1938); 14:8-11 (1938)
Model Act: § 21 (1960)
Other: N.Y. Bus. Corp. Law §508

Comment

This section substantially follows section 21 of the Model Act with the addition of some clarifying language. Subsection 14A:7-11(1) substantially follows R.S. § 14:8-11. Subsections 14A:7-11(2) and 14A:7-11(3) provide greater flexibility in the form and content of stock certificates than under existing New Jersey law. Subsection 14A:7-11(2) reflects the greater freedom granted by section 14A:7-2 to divide classes into series, as compared with section 15 of the Model Act. Subsection 14A:7-11(4) reflects the rules stated in subsection 14A:7-3(3) and subsection 14A:7-5(2).

If a corporation's certificate of incorporation contains specified unusual provisions, or if shares have been issued partly paid as employee benefits, the Act requires an appropriate notation upon the share certificates, e.g., subsections 14A:5-21(7) and 14A:12-5(3) and section 14A:8-3.

14A:7-12

Shares of Stock; Personal Property; Transfer

Source or Reference

N.J.: R.S. § 14:8-12 (1938)
Model Act: None
Other: Del. Code Ann. tit. 8, § 159 (1953)

Comment

This section substantially follows R.S. § 14:8-12, except that the last sentence thereof was omitted as unnecessary and possibly in conflict with Article 8 of the Uniform Commercial Code (R.S. § 12:8-1, et seq.)(Supp. 1964)), which repealed R.S. § 14:8-27 et seq. (1938).

R.S. § 12A:8-105 (Supp. 1961) provides that shares are negotiable instruments and R.S. § 12A:8-204 (Supp. 1961) requires a share transfer restriction to be noted conspicuously on the certificate in order to be binding upon a person who acquired it without actual knowledge of the existence of the restriction.

The use of restrictions on the transfer of shares will be of particular utility for the close corporation. For other provisions of the Revision which will be useful in the organization and operation of the close corporation, see the comment to section 14A:5-12.

14A:7-13

Issuance of Fractional Shares or Scrip

Source or Reference

N.J.: None
Model Act: § 22 (1960)
Other: N.Y. Bus. Corp. Law § 509; Ill. Ann. Stat. ch. 32, § 157.22 (Smith-Hurd Supp. 1966)

Comment

This section is new to the statutory law of this State, but is believed by the Commission to be consistent with present and past practice. The power to issue fractional shares or script may be used only to the extent necessary to accomplish accurately share transfers, distributiont and various fundamental changes.

Dividends or Other Distributions In Cash or Property

Source or Reference

N.J.: R.S. §§ 14:8-19 (1938); 14:8-20 (1938)
Model Act: §§ 40 (Supp. 1966); 41 (Supp. 1966)
Other: N.Y. Bus. Corp. Law § 510.

Comment

This section is limited to dividends in cash or property, including the shares of other corporations. It does not cover share dividends, which are treated in section 14A:7-15. Unlike R.S. § 14:8-19, it expressly prohibits dividends when the corporation is or would thereby become equitably insolvent. For the definition of "insolvent," see subsection 14A:1-2(k).

Dividends may be paid out of any kind of surplus, as under present law and subsection 510(b) of the New York Act, but this section eliminates the possibility of declaring dividends from "historical" net earnings while there is a capital deficit, which might be permissible under R.S. § 14:8-19.

The Commission considered, but did not adopt, the provisions of the Delaware statute (Del. Code Ann. tit. 8, § 170 (1953)) which permit dividends from current earnings where there is no surplus. The power to create a surplus by reduction of stated capital (with appropriate notice to, or action by, shareholders) will make it possible for the corporation to pay a dividend out of current earnings.

Since dividends may be paid only during solvency and out of surplus, consideration must be given to the possibility of an adverse change in financial condition between the date of declaration and the date of payment of a dividend.

Subsection 14A:7-14(2) follows section 510(b) of the New York Act, using simpler language intended to avoid any implication of restriction upon generally accepted accounting procedures. For the definition of surplus, see subsection 14A:1-2(r). The exception which permits distributions in excess of surplus by corporations engaged in the exploitation of so-called wasting assets has been adopted in principle in a number of jurisdictions, including Delaware and New York, and is reflected in section 40 (b) of the Model Act. To the extent that such a corporation's gross receipts cover charges for depletion or amortization of wasting assets, the corporation has received a return of invested capital which it is permitted to distribute, charging stated capital after capital surplus, if any, has been exhausted. The proceeds of the sale of eligible assets, at least part of which will represent cost, may likewise be distributed.

Whenever a dividend or distribution is made out of a source other than earned surplus, subsection 14A:7-17(1) requires specified disclosure to be made to the recipients. For the definition of earned surplus, see subsection 14A:1-2(i).

Although the present section requires maintenance of a cushion of net assets equal to liquidation preferences of outstanding shares, this restriction may be eliminated by the certificate of incorporation.

For the liability of directors for improper dividends, see sections 14A:6-12, 14A:6-13 and 14A:6-14.

14A:7-15

Share Dividends

Source or Reference

N.J.: R.S. §§ 14:8-19 (1938); 14:8-20 (1938)
Model Act: §§ 40 (Supp. 1966)
Other: N.Y. Bus. Corp. Law § 511.

Comment

Subsection 14A:7-15(2) is adapted from section 40(d) of the Model Act. Share dividends may be paid out of any surplus, but subsection 14A:7-17(1) requires specified information to accompany such payment.

Subsection 14A:7-15(3) follows section 40(c) of the Model Act and section 511(d) of the New York Act.

Subsection 14A:7-15(4) follows section 511(b) of the New York Act and is believed to be declaratory of present New Jersey practice.

Subsection 14A:7-15(5) requires maintenance of a cushion of net assets equal to liquidation preferences of outstanding shares, but permits the certificate of incorporation to eliminate this restriction.

Subsection 14A:7-15(6) follows the last paragraph of section 40 of the Model Act.

Subject to equitable limitations in appropriate cases, the section empowers a corporation to issue as a dividend shares of any class or series payable upon shares of the same or any other class or series. This power may be subject to preemptive rights provided by the certificate of incorporation. See section 14A:5-29.

See also the comment to section 14A:7-14.

Right of a Corporation to Acquire and Dispose of its Own Shares

Source or Reference

N.J.: R.S. §§ 14:8-3 (Supp. 1944); 14:8-3.1 (Supp. 1965)
Model Act: §§ 5 (1960); 60 (1960)
Other: N.Y. Bus. Corp. Law § 513.

Comment

Subsection 14A:7-16(1) empowers a corporation to purchase its own shares out of surplus, as recognized by present New Jersey case law. This section also permits a corporation to purchase or redeem its own shares out of stated capital in the cases specified in subsections 14A:7-16(2), 14A:7-16(3) and 14A:7-16(4). This power is broader than those granted by R.S. § 14:8-3, which permits redemption of preferred or special stock out of stated capital, and R.S. § 14:8-3.1, which permits the purchase of nonredeemable preferred or special stock out of surplus with a charge against stated capital upon its retirement.

The powers granted by this section have been drafted broadly to avoid any implication of a "proper corporate purpose" test, leaving questions of unfairness to be dealt with on equitable principles.

The provision of R.S. § 14:11-5(f)(1938), requiring that a purchase by a corporation for retirement be either pro rata from all owners of shares of the class of stock being purchased or from the open market, has been omitted, consistently with the elimination of preemptive rights by section 14A:5-29 unless expressly inserted in the certificate of incorporation. The Act permits the use of any generally accepted accounting technique to reflect the purchase of treasury shares, except that no decrease may be made in stated capital. See section 14A:7-18 for cancellation of reacquired shares and subsection 14A:7-20(1) for resale of treasury shares.

Subsection (2), which follows section 5 of the Model Act and section 513(b) of the New York Act permits the purchase of shares in the absence of surplus in specified in-

stances where convenience or necessity makes this desirable.

Subsection 14A:7-16(3) which follows section 513(c) of the New York Act, permits the purchase or redemption of redeemable shares without a charge to surplus, provided that stated capital is not impaired. Upon such a purchase or redemption, stated capital is reduced and the reacquired shares are cancelled, as provided by section 14A:7-18.

Subsection 14A:7-16(4) applies a like provision to the purchase of nonredeemable preferred shares. A similar power appears in the Delaware Act (Del. Code Ann. tit. 8 § 243(a) and (c)(1953)).

Subsection 14A:7-16(5) contains various restrictions upon purchase or redemption. The substance of paragraphs 14A:7-16(5)(a), 14A:7-16(5)(b) and 14A:7-16(5)(d), appears in section 513 of the New York Act; that of paragraph 14A:7-16(5)(b) appears as well in sections 5 and 60 of the Model Act. Paragraph 14A:7-16(5)(d) includes the provision in the first sentence of the second paragraph of R.S. §14:8-3, but goes beyond it to place the same restriction upon the purchase price of redeemable shares.

Paragraph 14A:7-16(5)(c) prohibits the purchase or redemption of shares unless there remain outstanding one or more classes or series of shares possessing, among them, the primary attributes of common shares, i.e., voting rights and unlimited participation rights in dividends and liquidating distributions. It is not required that all such attributes exist in any one class or series of shares, but they must coexist among the aggregate of the outstanding shares. This restriction is required because Section 14A:7-6, unlike section 14 of the Model Act, does not limit redeemability to preferred or special stock. Section 512(c) of the New York Act has a more restrictive provision one of whose purposes seems similar to that of paragraph 14A:7-16(5)(c).

Unlike the last sentence of section 5 of the Model Act, this section does not prohibit payment by an insolvent corporation for shares lawfully purchased or redeemed before insolvency. The Commission believes that under New Jersey law the shareholder has become a creditor, whose rights are governed by the law concerning fraudulent conveyances, voidable preferences, insolvency and bankruptcy. The Act also avoids the troublesome question of the right of a solvent corporation to

pay for previously purchased shares, when there is insufficient surplus at the time of payment. The Commission believes that the courts should be left free to develop the law on this matter. See e.g., Kleinberg v. Schwartz, 87 N.J. Super. 216 (App. Div., 1965), aff'd, 46 N.J. 2 (1965); Wolff v. Heidritter Lumber Co.,112 N.J. Eq. 34 (Ch. 1932).

Subsection 14A:7-16(6) requires the maintenance of a cushion of net assets for outstanding shares whose liquidation preferences are equal to or superior to those of the shares being purchased or redeemed, but the certificate of incorporation may eliminate this restriction.

The obligation of a corporation to the bona fide purchaser of an overissue under R.S. § 12A:8-104(1)(a) (Supp. 1961) is considered by the Commission to be subject to the restrictions of section 14A:7-16. The alternative remedy under R.S. § 12A:8-104(1)(b) (Supp. 1961) does not appear to be affected by this section.

Disclosure to Shareholders Upon Certain Distributions or Earned Surplus Transactions

Source or Reference

N.J.: None
Model Act: § 40 (Supp. 1966); § 41 (Supp. 1966)
Other: N.Y. Bus. Corp. Law §§ 510; 511; 517

Comment

The contents of this section are new to New Jersey law. Subsection 14A:7-17(1) follows sections 40 and 41 of the Model Act, section 510(c) of the New York Act and, in part, section 511(f) of the New York Act. It is based on the principle that the recipient of a dividend or other distribution, except one in cash or other property which is made out of earned surplus, should be informed of its source.

Subsection 14A:7-17(2) follows section 517(a)(4) of the New York Act. When an earned surplus deficit is eliminated by a transfer from capital surplus and a period of earnings follows, the corporation may declare a dividend out of earned surplus without restoring to the capital surplus account any of the amount which was used to eliminate the deficit. In an economic sense, such a dividend may be regarded as a distribution of contributed capital. The disclosure requirement of subsection 14A:7-17(2) appears to be a necessary corollary to the disclosure required by subsection 14A:7-17(1).

The Commission considered, but did not adopt, other disclosure requirements, principally on the ground that the benefits to shareholders would not clearly outweigh the expense and problems of administration created. Much fuller disclosures are required by the federal securities acts, which affect most larger corporations, while most shareholders of small corporations are not passive investors and may be expected to have access to the kind of information which might be required to be disclosed by the Act. It should be noted that all significant financial transactions will be reported in the financial statements which any shareholder may request, as provided by subsection 14A:5-28(2).

Cancellation of Reacquired Shares

Source or Reference

N.J.: R.S. §§ 14:8-3 (Supp. 1944); 14:8-3.1 (Supp. 1965)
Model Act: §§ 61 (1960); 62 (1960)
Other: N.Y. Bus. Corp. Law § 515

Comment

This section is adapted from sections 61 and 62 of the Model Act, with the addition of some provisions from section 515 of the New York Act. The Commission considered it unnecessary to retain the provisions of R.S. §§14:8-3 and 14:8-3.1, requiring publication of a certificate of redemption and cancellation of reacquired shares, respectively. Unlike R.S. §§ 14:8-3 and 14:8-3.1, subsection 14A:7-18(1) provides that cancelled shares are restored to authorized but unissued status, unless the certificate of incorporation prohibits their reissue.

Shares which are reacquired out of stated capital are thereby cancelled, without any further board action. For instances in which shares may be reacquired out of stated capital see subsections 14A:7-16(2), 14A:7-16(3) and 14A:7-16(4). Other reacquired shares may be cancelled by resolution of the board. In both cases, reduction of stated capital takes place upon the cancellation of the shares.

For the formalities required in execution and filing of the statement of cancellation, see subsection 14A:7-18(2) and section 14A:1-6.

The second sentence of subsection 14A:7-18(3) restricts the reduction of stated capital upon cancellation of shares without par value for whose issue the consideration was fixed by the shareholders, except when they could have been or have been reacquired out of stated capital. For other provisions governing such shares,see subsections 14A:7-4(2), 14A:7-8(2), 14A:7-19(4) and 14A:7-19(5).

Subsections 14A:7-18(3) and 14A:7-18(4) treat converted shares separately from other reacquired shares because, although cancellation is obligatory as with redeemed shares, it does not effect a reduction of stated capital. A proceeding under section 14A:7-19 is required in case the board wishes to reduce the

stated capital following a conversion (see subsection 14A:7-9(5)). The Commission considered it unnecessary to provide for a statement of cancellation of converted shares when the certificate of incorporation does not prohibit reissue, because in such case there is neither an amendment to the certificate of incorporation nor a reduction of stated capital.

Reduction of Stated Capital by Board Action

Source or Reference

N.J.: R.S. §§ 14:11-1(f)(1938); 14:11-2(1938); 14:11-5(1938)
Model Act: § 63 (Supp. 1966)
Other: N.Y. Bus. Corp. Law § 516(a)

Comment

Under this Act, stated capital may be reduced by any of three procedures: (1) by the cancellation of reacquired shares, except converted shares, pursuant to section 14A:7-18; (2) by the procedure set forth in this section; and (3) by a resolution of the board accompanying an amendment of the certificate of incorporation, as provided in subsection 14A:9-1(3). In the special case of shares without par value for whose issue the consideration has been fixed by the shareholders, as provided in subsection 14A:7-4(2), shareholder action may be required to reduce the stated capital represented by such shares. See subsection 14A:7-19(4), 14A:7-19(5) and 14A:7-18(3).

Examples of cases in which the board may act under this section are: (1) the reduction of the stated capital represented by shares without par value; (2) the reduction of stated capital represented by shares having par value when such stated capital exceeds the aggregate par value of such shares; (3) the reduction of stated capital by amounts previously transferred by the board from surplus to stated capital and not allocated to any designated class or series of shares; and (4) the reduction of stated capital following a conversion of shares where an excess exists, as provided in subsection 14A:7-9(5).

Subsections 14A:7-19(1) and 14A:7-19(2) are based on section 63 of the Model Act except that as a general rule they permit action to be taken by the board of directors without a shareholder vote. Unlike R.S. §§ 14:11-2 and 14:11-5, the present section does not require publication of a certificate of reduction of capital. For the formalities of execution and filing of a statement of reduction, see subsection 14A:7-19(2) and section 14A:1-6.

Subsection 14A:7-19(3) prohibits reduction of stated capital below an amount sufficient to satisfy liquidation preferences and cover the par values of other issued shares, except when approved by a class vote of such preferred shares, but the certificate of incorporation may eliminate this restriction.

Special Provisions Relating to Surplus

Source or Reference

N.J.: None
Model Act: § 64 (1960)
Other: N.Y. Bus. Corp. Law § 517; Pa. Stat. Ann. tit. 15, § 2852-704B (1958)

Comment

The first sentence of subsection 14A:7-20(1) is derived from the first paragraph of section 64 of the Model Act. The second sentence of subsection 14A:7-20(1) is derived from the Pennsylvania Act (Pa. Stat. Ann. tit. 15 § 2852-704B(1958)). The third and fourth sentences of subsection 14A:7-20(1) are derived from section 517(a)(5) of the New York Act. The fifth sentence of subsection 14A:7-20(1) applies the rule of the preceding two sentences to the case of the disposition of treasury shares to satisfy the exercise of conversion privileges of shares or bonds.

Subsection 14A:7-20(2) follows the second paragraph of section 64 of the Model Act. For transfers from surplus to stated capital, see subsection 14A:7-8(4).

Subsection 14A:7-20(3) is substantially similar to the third paragraph of section 64 of the Model Act. The application of capital surplus to reduce or eliminate an earned surplus deficit must be disclosed to shareholders as provided in subsection 14A:7-17(2).

Subsection 14A:7-20(4) follows the New York Act (N.Y. Bus. Corp. Law § 517(a)(1)(A)). For other provisions relating to the determination of earned surplus see the Comment to the definition of earned surplus in subsection 14A:1-2(i).

Paragraph 4 of section 64 of the Model Act has been omitted in the belief that the establishment of reserves when appropriate does not require legislative sanction. Nothing in this section is intended to restrict the power of a corporation to create, increase, decrease or abolish reserves from surplus for proper purposes.

14A:8-1

Employee Benefit Plans

Source or Reference

N.J.: R.S. § 14:9-1 (1937)
Model Act: §§ 4(f)(1960); 4(p)(Supp. 1966)
Other: None

Comment

Subsection 14A:8-1(1) is similar to R.S. § 14:9-1 except that: (1) the description of the types of plans which may be adopted has been modernized to conform to contemporary practice; (2) the provision found in R.S. 14:9-1(d) relating to the election of one or more directors by employees has been omitted; and (3) language has been added expressly permitting plans to cover families, dependents or beneficiaries of employees. Subsection 14A:8-1(2) expands the definition of "employees" to make it clear that it includes officers and directors, and any employees, directors or officers who have retired, become disabled or died prior to the establishment of any plan. Compare Hoblitzell v. Howard, 30 N.J. Super. 159 (Ch. Div. 1954), aff'd, 18 N.J. 104 (1955), which construes the definition of "employees" under R.S. 14:9-1(c) to exclude former employees.

Formulation of Plans; Submission to Shareholders in Certain Instances

Source or Reference

N.J.: R.S. § 14:9-2 (1938)
Model Act: None
Other: None

Comment

Unlike R.S. § 14:9-2, this section requires shareholder approval only when the employee benefit plan permits the use or issuance of treasury shares or authorized but unissued shares. However, this section does not preclude the submission of any plan to the shareholders. In most instances it will be wise for counsel to recommend shareholder approval of any plan which favors directors and senior officers. See Eliasberg v. Standard Oil Co., 23 N.J. Super. 431 (Ch. Div. 1952), aff'd, 12 N.J. 467 (1953) for a discussion of the burden-of-proof effect of shareholder approval.

It should be noted that this section, like subsection 14A:6-8(3), requires that the board act by affirmative vote of a majority of directors in office. In addition, shareholder approval is required for any plan, if the certificate of incorporation or the by-laws so provide.

Terms of Plan; Issuance of Certificates

Source or Reference

N.J.: R.S. § 14:9-1(a)(1938)
Model Act: None
Other: N.Y. Bus. Corp. Law § 505(e)

Comment

This section is adapted from subsection 505(e) of the New York Law. The Commission considered it would be desirable to permit the issuance to employees of share certificates which have not been fully paid, as in R.S. § 14:9-1(a), provided that the certificates contain the conspicuous notation required.

Amendment or Termination of Plans

Source or Reference

N.J.: R.S. § 14:9-4 (1950)
Model Act: None
Other: None

Comment

This section simplifies the provisions of R.S. § 14:9-4 and, subject to certain limitations, empowers the board to amend or terminate any plan, except that shareholder approval is required for (1) an amendment to a plan which was originally approved by the shareholders, unless the board determines that the amendment will not result in a material increase in cost to the corporation, and (2) an amendment which, if a part of the original plan, would have required the plan to be submitted to the shareholders for approval.

It should be noted that, as in the case of R.S. § 14:9-4, this section makes provision for the protection of rights which have accrued prior to amendment or termination of the plan and assures that the employee or his beneficiary will not be deprived of the benefit of the employee's own contributions.

14A:8-5

Trust Funds for Employees; Creation; Maintenance and Administration

Source or Reference

N.J.: R.S. § 14:9-6 (Supp. 1965)
Model Act: None
Other: None

Comment

This section is comparable to R.S. § 14:9-6. It simplifies the language of that section and also makes it clear that the trustee under a plan may be a trustee either within or without the State of New Jersey.

14A:8-6

Continuation of Trust; Law Against Perpetuities Inapplicable

Source or Reference

N.J.: R.S. § 14:9-7 (1938)
Model Act: None
Other: None

Comment

This section is substantially the same as R.S. § 14:9-7.

Amendment of Certificate of Incorporation

Source or Reference

N.J.: R.S. § 14:11-1 (1937)
Model Act: § 53(1960)
Other: N.Y. Bus. Corp. Law § 801

Comment

This section is based on section 53 of the Model Act. It differs from section 53 in two respects. First, the Model Act provides that the certificate of incorporation, as amended, must contain only such provisions as might lawfully be contained in an original certificate filed at the time the amendment is made. This seems to require an elimination of all pre-existing, non-conforming provisions of the certificate of incorporation at the time of the amendment. The Commission preferred the approach of section 801 of the New York Act, which requires that the amendment contain only such provisions as might lawfully be contained in an original certificate of incorporation. Second, the Model Act permits the certificate of incorporation to contain provisions necessary to effect an amendment changing, exchanging, reclassifying or cancelling shares or rights of shareholders. This language has been eliminated from the Revision because it is intended that such implementing provisions be recited in the certificate of amendment and not in the amendment.

This section is not materially different from R.S. § 14:11-1, which enumerates specific changes which may be made by amendment, and follows the specification with a blanket power of amendment. Section 14A:9-1 reverses the order, setting forth the blanket power first and the enumeration of specific changes second. This makes it clearer to the reader that the opportunity for amendment is broad, and more effectively avoids the inference that the specific powers limit the blanket power. The Commission deemed it desirable to retain the enumeration of specific permissible changes to avoid doubtful questions of construction which have heretofore arisen under blanket powers of amendment. See, e.g., Ballantine, Corporations § 278, at 654 (rev. ed. 1946).

The specific amendments enumerated in this section are broader than specific amendments in R.S. § 14:11-1. This is in keeping with the Commission's principle of creating a statute with maximum flexibility and avoids the inference that might arise from a more restrictively worded enumeration that unenumerated transactions are of doubtful legality.

Paragraphs 14A:9-1(2)(a) through 14A:9-1(2)(j) are covered in the same or similar language in R.S. § 14:11-1 a. through m. Paragraph 14A:9-1(2)(q) is issentially the same as R.S. § 14:11-1 q. Paragraphs 14A:9-1(2)(m) through 14A:9-1(2)(o), which permit amendments authorizing the board of directors to establish series of stock and fix the relative rights and preferences thereof, or to fix the relative rights and preferences of series previously established, or to revoke, diminish or enlarge the aforesaid authority, are not specifically enumerated in the existing statute.

Paragraph 14A:9-1(2)(k) is a clear and specific authorization to cancel accrued dividends by amendment. The language goes beyond existing R.S. § 14:11-1 n., which provides that the corporation may "provide for funding or satisfying rights in respect to dividends in arrears by the issuance of stock therefor or otherwise". R.S. § 14:11-1 n. has been interpreted to permit an amendment changing preferred shares on which there were substantial accumulated dividends into a new class of preferred shares with a small cash payment. Franzblau v. Capital Securities Co., 2 N.J.Super. 517 (Ch. Div. 1949).

Subsection 14A:9-1(3) simplifies the reduction of stated capital at the same time that the certificate of incorporation is amended, by permitting the statement of reduction to be included in the certificate of amendment. Amendment of the certificate of incorporation does not of itself result in a reduction of stated capital. Only cancellation of reacquired shares as provided in section 14A:7-18 has of necessity such a result. If the amendment creates "free" stated capital, as for example upon a reduction in the par value of issued shares, the board may resolve to reduce stated capital by any amount up to the whole of the excess so created. Such action is not part of the amendment and therefore requires no shareholder action. Inclusion in the certificate of amendment of the statement provided for in subsection 14A:9-4(4) obviates the need for a separate statement of reduction under section 14A:7-19.

Procedure to Amend Certificate of Incorporation

Source or Reference

N.J.: R.S. §§ 14:2-5 (1938); 14:4-1 (Supp. 1950); 14:4-5 (Supp. 1952) and 14:11-2 (1938)
Model Act: §§ 12 (1960); 14 (1960)
Other: N.Y. Bus. Corp. Law § 803(b); S.C. Code Ann. § 12-19.3 (Supp. 1965)

Comment

This section describes four different ways in which amendments may be made: (a) by the incorporators prior to the organization meeting of the directors; (b) by board action alone; (c) by a merger or consolidation as provided for in Chapter 10 of this Act; and (d) by board action and shareholder approval. Most amendments fall within the fourth category.

Subsection 14A:9-2(1) (amendment by incorporators) is derived from R.S. § 14:2-5, but differs from R.S. § 14:2-5 in two respects. First, an amendment pursuant to subsection 14A:9-2(1) is effected under subsection 14A:9-4(1) which permits the incorporators to file a certificate of amendment, whereas R.S. § 14:2-5 requires the filing of an amended certificate. Second, R.S. § 14:2-5 permits amendment by the incorporators prior to the payment of any part of the capital, whereas subsection 14A:9-2(1) permits amendment by the incorporators at any time prior to the organization meeting of the directors.

Subsection 14A:9-2(2) catalogues all the provisions of the Act which set forth the procedures for amendments to the certificate of incorporation by board action alone.

Subsection 14A:9-2(4), prescribing the procedure for adoption of amendments which require stockholder approval, is similar to section 54 of the Model Act. It differs from R.S.§14:11-2 because the latter requires a two-thirds vote of shareholders, whereas paragraph 14A:9-2(4)(c) requires a major-

ity vote unless the certificate of incorporation requires a greater proportion. See section 14A:5-12.

Section 14A:9-3 specifies the instances in which class voting is necessary.

Section 14A:9-4 provides for the execution and filing of the certificate of amendment.

14A:9-3

Class Voting on Amendments

Source or Reference

N.J.: R.S. § 14:11-3 (1938)
Model Act: § 55 (1960)
Other: N.Y. Bus. Corp. Law § 804(b); Va. Code Ann. § 13. 1-57 (1964)

Comment

Subsection 14A:9-3(1), while patterned after section 55 of the Model Act, expressly recognizes that some changes affect only one or more series within a class. Subsection 14A:9-3(2) does not appear in the Model Act. It is patterned after the provisions of section 804(b) of the New York law and section 13. 1-57 of the Virginia law.

This section differs from existing New Jersey law in a number of respects. First, R.S. § 14:11-3 provides for class voting only when it is not prescribed by the certificate of incorporation. Second, R.S. § 14:11-3 is narrower in scope than this section. R.S. § 14:11-3 requires class voting only when the proposed amendment: (1) reduces the dividend rate; (2) reduces the right to cumulative dividends; (3) reduces the redemption price or amount payable on liquidation on preferred or special stock with limited or no voting powers; (4) changes the corporation's outstanding preferred or special stock into one or more classes of preferred or special or common stock, if the effect is any of the foregoing; or (5) provides for funding or satisfying rights with respect to dividends in arrears on its preferred or special stock. R.S. § 14:11-3 expressly provides that class voting is not necessitated by the creation of one or more new classes of preferred or prior preference or other special stock, or the creation of additional shares in any existing class of preferred or prior preference stock. This rule is expressly changed by section 14A:9-3 which requires class voting in such instances.

Subsection 14A:9-3(3) makes it clear that this section does not apply to amendments which may be made by board action without shareholder approval.

Certificate of Amendment

Source or Reference

N.J.: R.S. §§ 14:2-5 (Supp. 1941); 14:11-2 (1938)
Model Act: § 56 (1960)
Other: None

Comment

The Model Act does not contain a provision like subsection 14A:9-4(1) which provides for amendment by the incorporators. Subsection 14A:9-4(1) covers the subject matter of R.S. § 14:2-5, but the latter requires the incorporators to file an amended certificate rather than a certificate of amendment.

Subsection 14A:9-4(2) refers to amendment by board action, without approval by the shareholders, as provided in the sections listed in subsection 14A:9-2(2).

Subsection 14A:9-4(3) follows section 56 of the Model Act, except for paragraph 14A:9-4(3)(f) and the last sentence of the subsection. Paragraph 14A:9-4(3)(f) requires the manner of effecting an exchange, reclassification or cancellation of issued shares to appear in the certificate of amendment, but does not permit such data to appear in the amendment itself. The subject matter of subsection 14A:9-4(3) is covered by R.S. § 14:11-2. R.S. § 14:11-2 provides that if two-thirds in interest of each class of stockholders vote in favor of an amendment, the corporation shall make a certificate thereof to be filed with the Secretary of State. It does not specify with any particularity what such a certificate should contain. In the interests of uniformity and clarity the Commission deemed it advisable to require that every certificate of amendment made pursuant to shareholder action contain at least the data specified in paragraphs 14A:9-4(3)(a) through 14A:9-4(3)(e).

If a reduction of stated capital accompanies the amendment, subsection 14A:9-4(4) authorizes inclusion of an optional statement in the certificate of amendment in lieu of the filing of a separate statement of reduction under section 14A:7-19. See subsection 14A:9-1(3) and its Comment.

Subsection 14A:9-4(5) is designed to permit reasonable flexibility in determining the effective date of the amendment and of any accompanying reduction of stated capital.

Restated Certificate of Incorporation

Source or Reference

N.J.: None
Model Act: § 59 (Supp. 1966)
Other: N.Y. Bus. Corp. Law § 807

Comment

This section is new and is based on section 59 of the Model Act. It follows the trend of recently-enacted corporation statutes and is designed to provide a simple procedure for eliminating the confusion which often results from multiple, sometimes conflicting, amendments. It differs from section 59 of the Model Act in the following ways: (1) section 59 permits only the restatement of the certificate of incorporation as theretofore amended whereas this section permits the inclusion of new amendments adopted concurrently with the restated certificate; and (2) section 59 repeats all of the provisions appearing in the Model Act section governing the contents of the original certificate of incorporation, whereas this section avoids such repetition by virtue of subsection 14A:9-5(2).

14A:9-6

Abandonment of Amendment

Source or Reference

N.J.: None
Model Act: None
Other: None

Comment

This section has no counterpart in Title 14 or the Model Act. It complements section 14A:10-8 (abandonment of a merger or consolidation) and subsection 14A:10-11(2) (abandonment of a sale, lease, exchange or other disposition of all, or substantially all, the assets of a corporation), and permits the corporation to abandon, prior to its effective date, any amendment which requires shareholder approval where provision is made therefor in the shareholder resolution.

14A:10-1

Procedure for Merger

Source or Reference

N.J.: R.S. §§ 14:12-1 (1938); 14:12-2 (1938); 14:12-8 (1937)
Model Act: R.S. § 65 (1960)
Other: N.Y. Bus. Corp. Law § 902(a)(3)

Comment

This section sets forth the procedures whereby two or more domestic corporations may merge. Section 14A:10-2 sets forth the analogous procedure for consolidation of domestic corporations, and section 14A:10-7 covers merger or consolidation of domestic and foreign corporations. In thus choosing to treat the subjects of merger and consolidation separately, the Commission followed the Model Act treatment of the subject.

This section substantially follows section 65 of the Model act except that paragraph 14A:10-1(2)(c) has been clarified to permit cash as a consideration, as in the New York Act (N.Y. Bus. Corp. Law § 902(a)(3)). Unlike present New Jersey law, this section requires a statement of any changes in the certificate of incorporation of the surviving corporation to be effected by the merger. The following provisions of R.S. § 14:12-2 have not been carried over into the Revision: (1) the requirement that the merger agreement state the mode of carrying the merger into effect; and (2) the requirement that the plan of merger set forth the initial directors of the surviving corporation. It should be noted that the names of the initial directors, and any other provision considered desirable, may be included in the plan of merger pursuant to paragraph 14A:10-1(2)(d).

Of particular significance, the requirement of present New Jersey law as to similarity of objects of merging corporations (R.S. § 14:12-1) has been eliminated.

It has not been clearly determined whether corporations organized under Title 15 or 16 may merge under the provisions of Title 14. See Group No. 23 &etc. vs. Assn. Sons of Poland, 121 N.J. Eq. 102, 106 (E.& A.1946). Paragraph 14A:1-2(g) clearly limits the definition of the term "corporation" as used in this Act to a corporation for profit.

The use of cash as part consideration has been recognized in Windhurst v. Central Leather Co., 101 N.J. Eq. 543 (Ch. 1927), and 105 N.J. Eq. 621 (Ch. 1928), aff'd per curiam, 107 N.J. Eq. 528 (E. & A. 1931), but the statute may be subject to the limitations found in Outwater v. Public Service Corp., 103 N.J. Eq. 461 (Ch. 1928), aff'd per curiam, 104 N.J. Eq. 490 (E. & A. 1929). See Clark v. Gold Dust Corp., 106 F. 2d 598 (3d. Cir. 1929, cert. den. 309 U.S. 671 (1939); Note, Freezing Out Minority Shareholders, 74 Harv. L. Rev. 1630, 1645, 1647 (1961).

The Commission intends that the powers encompassed by R.S. § 14:12-8 be included in subsection 14A:10-1(2) including the power to increase the authorized capital stock of the surviving corporation. See Moss Estate, Inc. vs. Metal & Thermit Corp., 73 N.J. Super 56 (Ch. Div. 1962). Note that paragraph 14A:10-1(2)(b) contemplates that any amendments to the certificate of incorporation shall be set forth in the plan of merger. If a number of amendments to the certificate of incorporation are involved, it may be desirable to include a restated certificate in the plan of merger. See section 14A:9-5 for provisions of this Act relating to restated certificates.

14A:10-2

Procedure for Consolidation

Source or Reference

N.J.: R.S. §§ 14:12-1 (1938); 14:12-2 (1938); 14:12-8 (1938)
Model Act: § 66 (1960)
Other: None

Comment

This section substantially follows section 66 of the Model Act.

In following the Model Act, recognition is given to the distinction between "consolidation" as the proper term where a new corporation is formed, and "merger" where one of the existing corporations survives. 15 Fletcher, Corporations, § 7041 (rev. ed. 1961); 7 S.E.C. Report on Protective and Reorganization Committees, 526 (1938); Lattin, Corporations, 537 (1959). See also comment to section 14A:10-1. The Commission intends that the powers encompassed by R.S. § 14:2-8 be included in subsection 14A:10-2(2).

Although consolidation has not been utilized in recent years, it was the sense of the Commission that this section should be retained for the purpose of flexibility.

Approval by Shareholders

Source or Reference

N.J.: R.S. § 14:12-3 (1938)
Model Act: § 67 (Supp. 1966)
Other: N.C. Gen. Stat. § 55-108(a) (1965)
Va. Code Ann. § 13.1-70 (1964)

Comment

This section follows section 67 of the Model Act, except that subject to provisions of the certificate of incorporation requiring a greater vote, the plan may be approved by the affirmative vote of a majority of the votes cast under this section, whereas the Model Act requires a two-thirds vote.

This section differs from R.S. § 14:12-3 in that (1) the vote of each share is not limited to one vote (as when a preferred stockholder may be entitled to multiple votes, see subsection 14A:7-1(1)), (2) R.S. § 14:12-3 requires the vote of two-thirds of all the stock, (3) Title 14 does not require the inclusion of a copy or summary of the plan with the notice to shareholders; and (4) Title 14 does not expressly require the notice of meeting to inform stockholders of their appraisal rights. (However, at least one New Jersey Court has stated that R.S. § 14:12-3 "inferentially requires" such notice. Applestein v. United Board & Carton Corp., 60 N.J. Super. 333, 341 (Ch. Div. 1960), aff'd, per curiam, 33 N.J. 72 (1960)).

It was felt by the Commission that multiple voting of shares should be permitted. Throughout the Act, the Commission is recommending a vote of the majority of those cast, unless the certificate of incorporation requires a greater vote.

The Model Act provides for submission of the plan to an annual or special meeting of the shareholders. The Commission considered it unnecessary to be so precise, although it intends that both types of meetings be included in the general language.

The requirement that the notice of meeting include a reference to the appraisal rights of dissenting shareholders is based on the North Carolina Act (N.C. Gen. Stat. § 55-108(a) (1965)).

14A:10-4

Certificate of Merger or Consolidation

Source or Reference

N.J.: R.S. §§ 14:12-3 (1938); 14:12-4 (Supp. 1941)
Model Act: § 68 (1960)
Other: None

Comment

Subsection 14A:10-4(1) follows the substantive part of section 68 of the Model Act, but the Commission preferred the existing New Jersey procedures for filing the certificate with the Secretary of State as in R.S. § 14:12-3 to those provided in the Model Act.

Subsection 14A:10-4(2) is designed to permit reasonable flexibility in determining the effective date.

14A:10-5

Merger of Subsidiary Corporation

Source or Reference

N.J.: R.S. § 14:12-10 (Supp. 1952)
Model Act: § 68A (1960)
Other: Del. Code Ann. tit. 8, §253 (Supp. 1964); N.C. Gen. Stat., § 55-108.1 (1965)

Comment

This section permits a short-form merger where a domestic corporation owns 90 per cent of each class of stock of another domestic corporation or corporations, whereas R.S. § 14:12-10 requires 100 per cent ownership. The 90 per cent requirement is derived from the Delaware statute (Del. Code Ann. tit. 8, § 253 (Supp. 1964)). Section 68A of the Model Act requires 95 per cent ownership.

Subparagraph 14A:10-5(6)(b)(i) follows section 55-108.1 of the North Carolina Act in requiring shareholders of the parent corporation to approve the merger where the plan of merger contains any provision changing the parent's certificate of incorporation in such a manner as would require shareholder approval under Chapter 9 of this Act.

Subsection 14A:10-5(1) follows the Delaware Act, supra, in permitting a down-stream merger. Neither the Revised Statutes nor the Model Act permits short-form down-stream mergers.

14A:10-6

Effect of Merger or Consolidation

Source or Reference

N.J.: R.S. § 14:12-5 (1938)
Model Act: § 69 (Supp. 1966)
Other: None

Comment

This section substantially follows section 69 of the Model Act, and substantially retains the provisions of R.S. § 14:12-5. See subsections 14A:1-2(e) (definition of "Capital Surplus") and 14A:1-2(i) (definition of "Earned Surplus") as to the treatment of the surplus of the merging or consolidating corporations. See comments to sections 14A:10-1 and 14A:10-2 covering the omission of the provisions of R.S. § 14:12-8.

14A:10-7

Merger or Consolidation of Domestic and Foreign Corporations

Source or Reference

N.J.: R.S. §§ 14:12-1 (1938); 14:12-10 (Supp. 1952)
Model Act: § 70 (1960)
Other: None

Comment

This section substantially follows section 70 of the Model Act.

Subsection 14A:10-7(3) is added to make plain that domestic and foreign corporations may merge under section 14A:10-5 when the parent or subsidiary is a foreign corporation and such merger is permitted by the foreign jurisdiction. R.S. § 14:2-10 does not expressly permit such a short-form merger. Note that when the parent is a foreign corporation, it must comply with subsection 14A:10-5(2), since shareholders of the domestic subsidiaries have a right of dissent. See paragraph 14A:11-1(1)(a).

This section makes it clear that a merger or consolidation among domestic and foreign corporations may involve more than two corporations, whereas R.S. § 14:12-1 might be interpreted as being limited to two.

Unlike R.S. § 14:12-1, this section is not limited to mergers or consolidations involving domestic corporations and corporations organized under the laws of another state. By virtue of the definition of "foreign corporation" (subsection 14A:1-2(j)), this section allows mergers or consolidations involving corporations organized under the laws of a foreign country. It is not clear whether the Model Act permits such a merger or consolidation. Compare subsection 2(b) of the Model Act with section 70 of the Model Act.

14A:10-8

Abandonment of Merger or Consolidation

Source or Reference

N.J.: None
Model Act: §§ 67 (Supp. 1966); 70 (1960)
Other: None

Comment

Title 14 contains no provision for the abandonment of a merger or consolidation.

Sections 67 and 70 of the Model Act provide for abandonment of a merger or consolidation at any time prior to the filing of the articles of merger or consolidation. In view of the provisions of subsections 14A:10-4(2) and 14A:10-5(4) permitting a merger or consolidation to take effect up to 30 days after the certificate of merger or consolidation has been filed pursuant to provisions set forth in the certificate, the present section permits abandonment at any time prior to the time the merger or consolidation shall become effective, and requires the filing of a certificate of abandonment with the Secretary of State if the certificate of merger or consolidation has already been filed.

Acquisition of all the Shares or a Class of Shares of a Corporation

Source or Reference

N.J.: None
Model Act: None
Other: Companies Act of 1948, 11 & 12 Geo. 6, c. 38 §209; Can. Rev. Stat., c. 53, §128 (1952)

Comment

This section has no counterpart in Title 14 or the Model Act. It is derived chiefly from the British and Canadian Corporation Acts. It is designed to permit two New Jersey corporations to amalgamate without loss of the corporate identity of either corporation, thus obviating the additional expenses involved in qualifying to do business in other states, organizing a subsidiary, etc.

In determining whether nine-tenths of the shareholders of the acquired corporation have accepted the offer of the acquiring corporation, shares already held by the acquiring corporation, or a nominee or subsidiary of the acquiring corporation are not to be included. This requirement is expressly embodied in the British Act and has been read into the Canadian Act by judicial interpretation. See Esso Standard (Inter-America) Inc. v. J.W. Enterprises, Inc., 37 D.L.R. 2d 598 (1963).

Shareholders of the acquired corporation have the right to dissent from the proposed acquisition, and may elect to become dissenting shareholders as defined in subsection 14A:11-3(1). If a shareholder of the corporation whose shares are to be acquired demands payment, he has all the rights of, and is subject to all the provisions relating to, dissenting shareholders set forth in Chapter 11 of this Revision.

Sale or Other Disposition of Assets in Regular Course of Business and Mortgage or Pledge of Assets

Source or Reference

N.J.: R.S. 14:3-5 (1938)
Model Act: § 71 (Supp. 1966)
Other: None

Comment

In this section, the Commission has adopted the concept of section 71 of the Model Act, permitting the sale or other disposition of all or substantially all of a corporation's assets in the regular course of business without shareholder approval, unless the certificate of incorporation otherwise provides. Title 14 requires shareholder approval for such transactions, and grants appraisal rights to dissenting shareholders. R.S. 14:3-5.

The Commission inserted the words "as conducted by such corporation" to emphasize that in determining whether a transaction is in the usual and regular course of business, the business engaged in by the corporation, rather than the business authorized in its certificate of incorporation, shall control. See section 909 of the New York Business Corporation Act, which adopts the minority position in Eisen v. Post, 3 N.Y.S.2d 518 (1957).

This section expressly permits a corporation to mortgage or pledge all its assets, whether or not in the usual and regular course of business, without shareholder approval. Although Title 14 is silent on the subject, the Commission believes that this section does not change existing New Jersey law.

14A:10-11

Sale or Other Disposition of Assets Other Than in Regular Course of Business

Source or Reference

N.J.: R.S. §§ 14:3-5 (1938); 14:3-6 (1938)
Model Act: § 72 (Supp. 1966)
Other: None

Comment

This section substantially follows section 72 of the Model Act. It combines into one section the concept of sale or exchange of assets (R.S. § 14:3-5) and lease of assets (R.S. § 14:3-6). It changes existing New Jersey law by requiring a majority vote of the shareholders, rather than a two-thirds vote.

14A:11-1

Right of Shareholders to Dissent

Source or Reference

N.J.: R.S. §§14:3-5 (1938); 14:12-6 (Supp. 1955); 14A:12-7 (Supp. 1955)

Model Act: §73 (Supp. 1966)

Other: N.Y. Bus. Corp. Law §§623(d); 806(b)(6); 910(a)(1)(B)

Comment

Paragraph 14A:11-1(1)(a) departs from Title 14 and follows section 73 of the Model Act by withholding the right of appraisal from shareholders of a substantially dominant corporation in a merger or consolidation. For this purpose, however, the Commission provided 75% voting rights as the test for dominance, instead of 100% as does section 73 of the Model Act.

By eliminating the right of dissent from an extraordinary sale pursuant to a plan of dissolution within one year, subparagraph 14A:11-1(1)(b)(i) also departs from Title 14 and adopts the approach of section 73 of the Model Act. However, not only are cash transactions excepted as in the Model Act, but also transactions involving only readily marketable securities, or cash and readily marketable securities, because such securities may be easily exchanged for cash. The language of division 14A:11-1(1)(b)(i)(B) is derived from paragraph 14A:5-21(3)(b).

Subparagraph 14A:11-1(1)(b)(ii) is derived from section 73 of the Model Act.

Paragraph 14A:11-1(1)(c), unlike Title 14 and the Model Act, follows section 806(b)(6) of the New York Act by extending the right of appraisal in certain specified situations to shareholders whose shares are adversely affected by amendments to the certificate of incorporation.

Subsection 14A:11-1(2) extends the rights of appraisal to shareholders whose shares are to be acquired by another corporation pursuant to section 14A:10-9.

The first sentence of subsection 14A:11-1(3) departs from the Model Act by not permitting a shareholder or his nominee or fiduciary to dissent as to less than all the shares with respect to which a right of dissent exists. Where, however, a nominee or fiduciary holds shares for more than one beneficiary, the second sentence of subsection 14A:11-1(3) permits the nominee or fidicuary to dissent as to the shares held for one or more beneficiaries without being required to dissent as to shares held for all beneficiaries. This is in accord with present New Jersey Law. See Bache & Co. v. General Instrument Corp., 74 N.J. Super. 92 (App. Div. 1964), cert. denied, 38 N.J. 181 (1962). Subsection 14A:11-1(3) is derived from section 623(d) of the New York Act. Of course, nothing in subsection 14A:11-1 (3) precludes a beneficial shareholder from dissenting in his own name. Compare Bohrer v. United States Lines Co., 92 N.J. Super. 592 (Law Div. 1966).

Since this section provides for a dissent by a shareholder of any domestic corporation, the Commission considered that corporations having the right to exercise a franchise for public use would be governed by this section. See R.S. §14:12-7.

Notice of Dissent; Demand for Payment; Indorsement of Certificates

Source or Reference

N.J.: R.S. §§14:12-6 (Supp. 1955); 14:12-7 (Supp. 1955)

Model Act: §74 (1960)

Other: N.Y. Bus. Corp. Law §623(a), (b), (c) and (f)

Comment

Sections 14A:11-2 to 14A:11-11 are adopted in large part from section 74 of the Model Act, and section 623 of the New York Act. However, in the interests of clarity the Commission divided the comparable section of both the Model Act and the New York Act into ten separate sections.

In subsection 14A:11-2(1) it is required that a shareholder's notice of dissent must contain a statement of intention to demand payment for his shares if the proposed corporate action is taken. This provision is intended to negate the holding in Jaquith & Co. v. Island Creek Coal Co., 47 N.J. 111 (1966) that a negative proxy may satisfy the requirement for a written notice of dissent.

The concept of "full market value" set forth in R.S. §§14:12-6 and 14:12-7 is retained by this section.

"Dissenting Shareholder" Defined; Date of Determination of Full Market Value

Source or Reference

N.J.: R.S. §§14:12-6 (Supp. 1955); 14:12-7 (Supp. 1955)

Model Act: §74 (1960)

Other: N.Y. Bus. Corp. Law §623(e) and (h)(4)

Comment

Although no provision comparable to subsection 14A:11-3(1) appears in other corporation statutes, the Commission considered it desirable to define "dissenting shareholder" for convenient reference in succeeding sections of this Chapter.

Subsection 14A:11-3(2) follows section 623(e) of the New York Act by providing that a dissenting shareholder no longer has the rights of a shareholder upon his making a demand under subsections 14A:11-2(3), 14A:11-2(4) or 14A:11-2(5). The appraisal remedy, however, is not exclusive. See subsection 14A:11-5(2).

Subsection 14A:11-3(3) is derived from the first paragraph of section 74 of the Model Act and retains the concept of Title 14 that any appreciation or depreciation resulting from the proposed action is excluded in determining the full market value. See also the third paragraph of the comment to section 14A:11-2.

The Commission decided to retain the Title 14 standard of "full market value" as the test for evaluating the shares of dissenting shareholders instead of the standard of "fair value" used in the Model Act.

Termination of Right of Shareholder to be paid the Full Market Value of his Shares

Source or Reference

N.J.: None

Model Act: §74 (1960)

Other: N.Y. Bus. Corp. Law §623(e) and (f)

Comment

Title 14 has no provisions similar to those contained in this section.

Paragraph 14A:11-4(1)(a) departs from section 74 of the Model Act and section 623(f) of the New York Act by providing that the rights of a dissenting shareholder cease upon his failure to present his shares for notation, without giving the corporation an option in this regard. Since the notation of the shares of the dissenting shareholders is intended to protect subsequent purchasers of such shares, the Commission believed this policy would best be served by terminating the rights of the dissenting shareholder automatically, if his shares are not tendered for notation within the time period specified by subsection 14A:11-2(6), unless there is a judicial determination, upon good and sufficient cause shown, that such rights should not terminate.

Paragraph 14A:11-4(1)(f) should be read in conjunction with subsection 14A:11-5(2).

Subsection 14A:11-4(2) is derived largely from section 623(e) of the New York Act.

Rights of Dissenting Shareholders

Source or Reference

N.J.: None

Model Act: §74 (1960)

Other: N.Y. Bus. Corp. Law §623(k)

Comment

Subsection 14A:11-5(1) is taken from section 74 of the Model Act.

As under existing law, the remedy of dissent and appraisal is not exclusive. See Colgate v. United States Leather Co., 73 N.J. Eq. 72 (Ch. 1907), rev'd on other grounds, 75 N.J. Eq. 229 (E.&A. 1909); Riker & Son Co. v. United Drug Co., 79 N.J. Eq. 580 (E.&A. 1912). In subsection 14A:11-5(2), the Commission followed closely the language of section 623(k) of the New York Act, limiting the alternate available actions to those where the corporate action is "ultra vires, unlawful or fraudulent." Compare Windhurst v. Central Leather Co., 105 N.J. Eq. 621, 624 (Ch. 1930) (dictum), aff'd., 107 N.J. Eq. 528 (E.&A. 1931), appeal dismissed per stipulation sub nom., Ingraham v. Central Leather Co., 286 U.S. 568 (1931). Attention is invited to the last sentence of the first paragraph of section 74 of the Model Act, which apparently makes the right of appraisal exclusive. Of course, the non-dissenting shareholder continues to have the right to resort to courts without regard to the provisions of this Chapter. See Imperial Trust Co. v. Magazine Repeating Razor Co., 138 N.J. Eq. 20 (Ch. 1946).

Determination of Full Market Value by Agreement

Source or Reference

N.J.: None

Model Act: §74 (1960)

Other: N.Y. Bus. Corp. Law §623(g)

Comment

This section has no counterpart in Title 14. There is, however, a similar provision in R.S. §17:9A-140 (Supp. 1951).

Unlike section 74 of the Model Act and section 623(g) of the New York Act, subsection 14A:11-6(1) leaves to the discretion of the corporation whether it shall make an offer to dissenting shareholders to purchase their shares.

In any event, the corporation must submit the specified financial data to dissenting shareholders. This provision was largely derived from section 623(g) of the New York Act.

Procedure on Failure to Agree on Full Market Value; Commencement of Action to Determine Full Market Value

Source or Reference

N.J.: R.S. §§14:12-6 (Supp. 1955); 14:12-7 (Supp. 1955)

Model Act: §74 (1960)

Other: None

Comment

Under R.S. §§14:12-6 and 14:12-7 either the corporation or any dissenting shareholder may apply for the appointment of appraisers. Under this section, the corporation has a 30-day period within which to initiate an action to determine full market value before any shareholder may commence such action.

Action to Determine Full Market Value; Jurisdiction of Court; Appointment of Appraiser

Source or Reference

N.J.: R.S. §§14:12-6 (Supp. 1955); 14A:12-7 (Supp. 1955); 20:1-2 (Supp. 1955)

Model Act: §74 (1960)

Other: N.Y. Bus. Corp. Law §623(h)(3) and (4)

Comment

This section substantially follows section 74 of the Model Act. It gives the court jurisdiction of actions to determine full market value. Subsection 14A:11-8(c) permits, but does not require, the appointment of an appraiser, whereas Title 14 requires the appointment of three appraisers. In many cases full market value is so readily determinable that the court can appropriately make the determination, thus saving the expense of an appraisal. Compare Bohrer v. United States Lines Co., 92 N.J. Super. 592 (Law Div. 1966).

14A:11-9

Judgment in Action to Determine Full Market Value

Source or Reference

N.J.: R.S. §§14:12-6 (Supp. 1955); 14:12-7 (Supp. 1955)

Model Act: §74 (1960)

Other: N.Y. Bus. Corp. Law §623(h)(6) and (8)

Comment

Subsection 14A:11-9(1) follows section 74 of the Model Act and section 623(h)(8) of the New York Act.

Subsection 14A:11-9(2) follows section 74 of the Model Act and section 623(h)(6) of the New York Act in allowing interest in the discretion of the court from a date prior to judgment and thereby departs from present law. See In re Janssen Dairy Corporation, 2 N.J. Super. 580 (Law Div. 1949).

Costs and Expenses of Action

Source or Reference

N.J.: R.S. §§14:12-6 (Supp. 1955); 14:12-7 (Supp. 1955)

Model Act: §74 (1960)

Other: N.Y. Bus. Corp. Law §623(h)(7); S.C. Code Ann. §12-16.27(i)(7) (Supp. 1965)

Comment

This section follows the seventh paragraph of section 74 of the Model Act. It provides statutory authority for apportioning costs and expenses, such as fees of appraisers, experts and attorneys. In re Janssen Dairy Corp., 2 N.J. Super. 580 (Law Div. 1949) found this authority was lacking in R.S. §§12:12-6 and 14:12-7.

14A:11-11

Disposition of Shares Acquired by Corporation

Source or Reference

N.J.: None

Model Act: §74 (1960)

Other: N.Y. Bus. Corp. Law §623(i)

Comment

This section has no counterpart in Title 14. It describes, with greater particularity than section 74 of the Model Act, how shares acquired from a dissenting shareholder are to be treated by the acquiring corporation.

Methods of Dissolution

Source or Reference

N.J.: None
Model Act: None
Other: N.C. Gen. Stat. § 55-114(a)

Comment

This section has no direct counterpart in either the Revised Statutes or the Model Act. It follows in part the format of subsection 55-114(a) of the North Carolina General Statutes.

The intent of the section is to make all dissolutions and all revocations and forfeitures of certificates of incorporation subject to the provisions of this Chapter, whether or not the causes for or the methods of such dissolution, revocation or forfeiture are stated in the section, except where the provisions of the Chapter are not compatible with a court directed dissolution, or special statute or common law proceeding.

The reference to common law proceedings in subsection 14A:12-1(2) is prompted by the discussion of such proceedings in In re Collins-Doan Co., 3 N.J. 382, 395 (1949).

It should be noted that no corporation may be dissolved by voluntary action or judgment of court without provision for payment of State taxes. See R.S. § 54:10A-12 (Supp. 1947). Accordingly, section R.S. § 14:13-2 (1937) has been omitted from the Revision.

Dissolution Before Commencing Business

Source or Reference

N.J.: R.S. § 14:13-3 (1937)
Model Act: § 75 (1960)
Other: None

Comment

This section is a combination of part of R.S. § 14:13-3 and part of section 75 of the Model Act.

R.S. § 14:13-3 does not apply in a case where any part of the capital has been paid. The Revision requires that, if any part of the capital has been paid in, it shall be returned to those entitled thereto, less amounts disbursed for expenses.

Section 75 of the Model Act is limited to cases where less than two years have passed since incorporation. The Revision does not incorporate this limitation.

The Model Act provides for the filing of "Articles of Dissolution" in duplicate, and the issuance of a certificate of dissolution by the Secretary of State. Neither of these provisions appears in the Revision.

R.S. § 14:13-3 requires that dissolution by the incorporators be accomplished by the consent of all incorporators. The provision for dissolution by the board does not appear in Title 14.

Dissolution by Consent of All Shareholders

Source or Reference

N.J.: R.S. § 14:13-1 (1937)
Model Act: § 76 (1960)
Other: None

Comment

This section combines aspects of R.S. § 14:13-1 and section 76 of the Model Act. It provides for dissolution by unanimous consent of shareholders without board action. The section makes it clear that consents may be given personally or by proxy, and signatures may be made by authorized agents. See subsection 14A:5-19(1).

The Model Act requires the filing of a "statement of intent to dissolve" as a step in the voluntary dissolution process. There would seem to be no compelling reason for the injection of this additional step. New York has rejected it and so has North Carolina.

The provision of R.S. § 14:13-1 for the issuance by the Secretary of State of a certificate of dissolution and for the publication of the certificate have not been carried over into the Revision.

14 A:12-4

Dissolution Pursuant to Action of Board and Shareholders

Source or Reference

N.J.: R.S. § 14:13-1 (1937)
Model Act: § 77 (1960)
Other None

Comment

This section departs drastically from the dissolution procedure established by R.S. 14:13-1.

R.S. § 14:13-1 provides for the approval of "two-thirds in interest of all the stockholders whether with or without voting powers and without regard to class." The Revision gives no votes to non-voting shares, recognizes voting by classes, and provides for a majority vote. R.S. § 14:13-1 requires the consents of shareholders in writing. The Revision makes no similar provision. R.S. § 14:13-1 requires the issuance of a certificate of dissolution by the Secretary of State, and the publication of that certificate. The Revision makes neither provision.

Dissolution Pursuant to Provision in Certificate of Incorporation.

Source or Reference

N.J.: None
Model Act: None
Other: N.Y. Bus. Corp. Law § 1002

Comment

This section has no counterpart in present New Jersey law or in the Model Act. It is based upon the New York Act, which, in turn, is based upon § 55-125(3) of the North Carolina General Statutes (1960).

The Revision note to section 1002 of the New York Act states, in part, that the use of this section "would be feasible only in close corporations and the anticipated condition would normally be a state of deadlock or dissension." Business Corporation Law, (1963) Part 2, p. 72.

Dissolution in Action Brought by the Attorney General

Source or Reference

N.J.: None
Model Act: § 87 (1960)
Other: None

Comment

This section does not apply to or affect any proceeding brought pursuant to section N.J.S. 2A:66-6 or to the Governor's action in repealing a corporation's certificate of incorporation under R.S. § 54:10A-22 (Supp 1947).

In addition to the grounds for action set forth in this section, the Model Act includes, as grounds for a judicially ordered dissolution, the failure of the corporation to pay its franchise tax, the failure to file an annual report, and the failure to appoint a registered agent. Failure to file an annual report and failure to appoint a registered agent are not made grounds for dissolution under Title 14. Dissolution of a corporation which fails to pay its franchise taxes follows automatically on proclamation of the Governor. R.S. § 54:11-2 (1937). R.S. § 14:5-2 (Supp. 1955) provides that a corporation's charter may be forfeited if it fails to comply with a court order that it bring its books into this State. This provision has not been carried over into the Revision.

In connection with the reference in subsection 14A:12-6(3) to the common law, see In re Collins-Doan Co., 3 N.J. 382, 393 (1949).

Dissolution of Deadlocked Corporations

Source or Reference

N.J.: R.S. § 14:13-15 (Supp. 1955)
Model Act: § 90 (1960)
Other: None

Comment

This section is based upon R.S. 14:13-15, but differs materially from it.

R.S. § 14:13-15 makes it a jurisdictional prerequisite that there be an even number of directors. This requirement is not found in the Model Act, and is not carried over into the Revision. There may be as complete a deadlock with an odd number of directors as there is with an even number, and the consequences of a deadlock among an odd number may be as serious as those which result from a deadlock among an even number.

This section permits an action to be brought in the name of one or more shareholders, in contrast to R.S. 14:13-15 which authorizes an action to be brought by one-half of the directors of a board having an even number of directors, if the holders of one-half or more of the shares have voted for dissolution. Alternatively, R.S. § 14:13-15 authorizes the action to be brought in the names of persons holding one-half the voting shares, when such persons are unable to agree with the persons holding the other half of such shares. R.S. § 14:13-15 further authorizes an action to be brought by a committee of shareholders.

The provision in R.S. 14:13-15 that the plaintiffs in the action shall, unless they are unable to do so, set forth the names and addresses of all the shareholders, and the number of shares held be each, has not been carried over into the Revision.

The provision authorizing dissolution when the shareholders, acting as directors pursuant to subsection 14A:5-21(2), are deadlocked has no counterpart in prior law.

Effective Time of Dissolution

Source or Reference

N.J.: R.S. § 14:13-1 (1937)
Model Act: §§ 85, 86 (1960)
Other: None

Comment

R.S. § 14:13-1 provides that dissolution becomes effective when the Secretary of State issues a certificate of dissolution, unless a later date is specified. The section, as revised, eliminates the requirement that the Secretary of State issue a certificate of dissolution.

The Model Act provisions postpone the effective date of dissolution until liquidation and distribution have been made and articles of dissolution have been filed in the office of the Secretary of State. Dissolution proceedings are initiated under section 78 of the Model Act by the filing of a statement of intent to dissolve. The effect of filing such a statement of intent is much the same as the filing of a certificate of dissolution under sections 14A:12-2, 14A:12-3, 14A:12-4 and 14A:12-5, except that dissolution is not thereby accomplished.

The revised section is more comprehensive and precise than present law.

14A:12-9

Effect of Dissolution

Source or Reference

N.J.: R.S. §§ 14:13-1 (1937), 14:13-4 (1937), 14:13-5 (1937), 14:13-6 (1937), 14:13-9 (Supp. 1955), 14:13-14 (Supp. 1955)
Model Act: §§ 79, 80 (1960)
Other: N.Y. Bus. Corp. Law §§ 1005, 1006.

Comment

This section represents a drastic departure from current New Jersey law. It eliminates the present statutory scheme of voluntary dissolution pursuant to which directors of dissolved corporations become trustees as provided by R.S. § 14:13-5. While a substantial number of states have the same scheme of voluntary dissolution as that presently in effect in New Jersey, the trend seems to be in the direction of a dissolution by the directors as directors, rather than as statutory trustees.

The Model Act makes it clear that embarking upon the process of dissolution does not change the status of directors. New York has joined the ranks of those states which have rejected the director-trustee device.

Paragraph 14A:12-9(2)(f)is based upon R.S. § 14:13-9, but it does not re-enact that part of R.S. § 14:13-9 which provides that no judgment shall be entered except as may be allowed by order of the court having jurisdiction over the dissolution.

Subsection 14A:12-9(2) has no counterpart in prior law.

R.S. § 14:13-14 has not been re-enacted as such, the Commission being of the opinion that the elaborate provisions for service of process contained in that section are unnecessary in view of the provisions of section 14A:12-9.

Revocation of Dissolution Proceedings

Source or Reference

N.J.: R.S. § 14:13-7.1 (Supp. 1952)
Model Act: §§ 81, 82 (1960)
Other: None

Comment

This section represents a combination of parts of R.S. § 14:13-7.1 and sections 81 and 82 of the Model Act.

R.S. 14:13-7.1 provides for revocation of voluntary dissolution proceedings only by unanimous consent of shareholders. The Model Act, plus legislation in some 21 states and the District of Columbia, authorize revocation by unanimous vote of shareholders without a meeting, and by vote of the holders of less than all the shares when a meeting is called.

The provision in present New Jersey law requiring that the certificate of revocation be signed by "all of the surviving directors" of the corporation has been dropped from the Revision as unnecessary.

The section as revised differs from the Model Act in that it places two limitations on revocation: (1) the requirement that it take place within sixty days after the effective time of dissolution; and (2) that it take place before any distribution of assets is made. The Model Act has neither limitation. Delaware has a three-year limitation. Del. Code. Ann. tit. 8 § 311(a)(1953) An examination of the statutes of all the other states disclosed none that limited the period within which revocation proceedings are required to be brought. The majority of states which have provisions for revocation of dissolution permit revocation at any time prior to complete distribution of assets.

The section as revised makes it clear that shareholders may sign in person or by proxy. There is no similar provision in R.S. § 14:13-7.1.

14A:12-11

Effect of Revocation of Dissolution

Source or Reference

N.J.: R.S. § 14:13-7.1 (Supp. 1952)
Model Act: § 84 (1960)
Other: None

Comment

Subsection (2) has no counterpart in prior law.

14A:12-12

Notice to Creditors; Filing Claims

Source or Reference

N.J.: R.S. §§ 14:13-11 (Supp. 1952), 14:13-12 (1937)
Model Act: § 80 (1960)
Other: N.Y. Bus. Corp. Law § 1007

Comment

This section differs from R.S. § 14:13-11 in that it authorizes notice to creditors without court order. The six-month grace period prescribed by this section for the filing of claims has no counterpart in Title 14.

R.S. § 14:13-11 requires that notice may be given by publication or by mail. The section as revised requires both. The second sentence of subsection 14A:12-12(2) is patterned after the last sentence of subsection 1007(a) of the New York Act.

The definition of "creditor" in subsection 14A:12-12(3) is new.

R.S. § 14:13-12 requires that all claims be verified under oath. The section as revised drops this provision. There is no reason why the unverified claim of a creditor may not be paid if it is not disputed by the corporation or the receiver.

R.S. § 14:13-11 requires that proof of the giving of notice shall be filed in the office of the Clerk of the Court. The section as revised designates the filing place as the office of the Secretary of State.

The Model Act does not require publication.

14A:12-13

Barring of Claims of Creditors

Source or Reference

N.J.: R.S. § 14:13-11 (Supp. 1952)
Model Act: § 93 (1960)
Other: N.Y. Bus. Corp. Law § 1007(b)

Comment

Subsection 14A:12-13(1) follows R.S. § 14:13-11, but differs from it in that R.S. § 14:13-11 provides that creditors may be barred only by order of the Superior Court. Subsection 14A:12-13(2) is new. The provision as to claims in litigation is patterned after subsection 1007(b) of the New York Act.

14A:12-14

Disposition of Rejected Claims

Source or Reference

N.J.: R.S. § 14:13-12 (1937)
Model Act: None
Other: None

Comment

This section is based on R.S.§14:13-12.

14A:12-15

Jurisdiction of the Superior Court

Source or Reference

N.J.: R.S. § 14:13-7
Model Act: § 80 (1960)
Other: None

Comment

None

14A:12-16

Distribution to Shareholders

Source or Reference

N.J.: R.S. §§ 14:13-5 (1937); 14:13-8 (1937)
Model Act: § 80 (1960)
Other: None

Comment

The Title 14 sections on which this section is based do not make express provision for distribution in cash or in kind, or partly each.

14A:12-17

Disposition of Unclaimed Distributive Shares

Source or Reference

N.J.: None
Model Act: § 97 (1960)
Other: None

Comment

This section confirms common practice in respect to the deposit in court of unclaimed funds. There is no express counterpart in Title 14.

14A:13-1

Application of Act to Foreign Corporations

Source or Reference

N.J.: R.S. §§ 14:15-2 (1938); 14:15-5 (Supp. 1965)
Model Act: §§ 100 (1960); 116 (1960)
Other: None.

Comment

Subsection 14A:13-1(1) is new and sets forth the application of this Revision to foreign corporations heretofore authorized to transact business in this State. Such corporations are equated in all respects to foreign corporations procuring certificates of authority under this Revision. It corresponds to subsections 14A:1-3(1) and 14A:1-3(2), which deal with the application of the Revision to domestic corporations heretofore and hereafter organized. The text of subsection 14A:13-2(1) is virtually identical to section 116 of the Model Act, the principal change being the omission of the words "subject to the limitations set forth in their respective certificates of authority," which were considered unnecessary.

Subsection 14A:13-1(2) is virtually identical with R.S. § 14:15-5, as amended in 1963, which amendment was based on section 100 of the Model Act. A question not yet resolved by the courts is the extent, if any, to which R.S. § 14:15-5, as amended, grants any power over the internal affairs of foreign corporations which have received a certificate of authority to transact business in this State. However the courts answer that question in construing R.S. § 14:15-5, as amended, the result should be the same under subsection 14A:13-2(1).

Subsection 14A:13-1(3) leaves to the courts the question of the rights and privileges of foreign corporations which transact business in this State without a certificate of authority, but subjects such corporations in all respects to the same obligations prescribed for foreign corporations which secure such authority.

Admission of Foreign Corporation

Source or Reference

N.J.: R.S. § 14:15-3 (1938)
Model Act: § 99 (1960)
Other: N.Y. Bus.Corp. Law § 1301(a) and (c).

Comment

The two sentences of subsection 14A:13-2(1) are identical to the first sentence of section 99 of the Model Act and the second sentence of paragraph 1301(a) of the New York Act, as amended in 1964, respectively. They continue the present requirement in R.S. § 14:15-3 that a foreign corporation must procure a certificate of authority from the Secretary of State before transacting any business here. See subsection 14A:1-2(j) for the definition of "foreign corporation".

Subsection 14A:13-2(2) is new and is based on the second paragraph of section 99 of the Model Act. It differs from Title 14 by setting forth a non-exclusive list of certain activities (not as extensive as in the Model Act), any one or more of which a foreign corporation may carry on in this State without having first secured a certificate of authority. Some such provision appears in nearly all the recent corporation statutes. See Latty, Some Miscellaneous Novelties in the New Corporation Statutes, 23 Law & Contemp. Prob., 363, 394 (1958). Subsection 14A:13-2(2) does not deal with the determination of what activities may subject a foreign corporation to service of process in the courts of this State (see R.R. 4:4-4(d)) or to local taxation (compare R.S. § 54:10A-2 (Supp. 1947)).

Subsection 14A:13-2(3) codifies a comment by the Model Act annotators to the foregoing effect, 2 Model Bus.

Corp. Act Ann. § 99, par. 4, at 566 (1960), and it has counterparts, limited to process only, in the Delaware Statute (Del. Code Ann. tit. 8, §343 (Supp. 1965)) and New York Statute (N.Y. Bus. Corp. Law § 1301(c)).

The Commission omitted from this section the sentence at the end of the first paragraph of section 99 of the Model Act relating to the internal affairs of a foreign corporation, as to which see 2 Model Bus. Corp. Act Ann. § 99, par. 4, at 550 (1960), and 1966 Supp. at 180, as well as the comment to section 14A:13-3.

Holding and Conveying Real Estate

Source or Reference

N.J.: R.S.§ 14:15-1 (1938)
Model Act: None
Other: None.

Comment

This section is similar in purpose to R.S. § 14:15-1, except that the Commission deleted the limitation upon a foreign municipal corporation holding real estate in this State. The Commission saw no reason for so limiting a foreign municipal corporation. This section confers upon all out-of-State corporations full powers with respect to realty; it does not in any way deal with the issue whether a foreign corporation owning or otherwise interested in real estate located in this State must secure a certificate of authority under section 14A:13-2.

14A:13-4

Application for Certificate of Authority

Source or Reference

N.J.: R.S. § 14:15-3 (1938)
Model Act: § 103 (1960)
Other: None.

Comment

This section is based on section 103 of the Model Act, but requires much less information than the Model Act from a foreign corporation applying for a certificate of authority. In this respect, it is closer to R.S. § 14:15-3. However, it departs from both the Model Act and Title 14 (R.S. §§ 14:1-1 (1938) and 14:15-3) in deleting the obsolete requirement that a foreign corporation must accompany its application with a copy of its certificate of incorporation and all amendments thereto. Subsection 14A:13-4(2) substitutes the requirement that a certificate of good standing in the jurisdiction of incorporation be filed. See Latty, Some Miscellaneous Novelties in New Corporation Statutes, 23 Law & Contemp. Prob. 363, 398 (1958); 2 Model Bus. Corp. Act Ann. § 104, par. 2.02 at 191 (Supp. 1966). Another departure from the Model Act is the deletion of the requirement that the application for a certificate of authority "shall be made on forms prescribed and furnished by the Secretary of State". The only instance in this Revision where it is mandatory to use forms prescribed and furnished by the Secretary of State is in the case of the annual report. See section 14A:4-5.

14A:13-5

Filing of Application for Certificate of Authority; Effect of Certificate of Authority

Source or Reference

N.J.: R.S. §§ 14:15-3 (1938); 14:15-10 (Supp. 1941)
Model Act: §§ 104 (1960); 105 (1960)
Other: N.Y. Bus. Corp. Law § 1305

Comment

The manner of execution and filing of documents in the office of the Secretary of State by a domestic or foreign corporation under this Revision is treated in section 14A:1-6. Therefore, subsection 14A:13-5(1) is very different from section 104 of the Model Act. Its language more closely parallels the analogous portions of R.S. § 14:15-3. See the comment to section 14A:13-5 as to the deletion of the charter-filing requirement of both the Model Act and Title 14.

Subsection 14A:13-5(2) is based section 105 of the Model Act and section 1305 of the New York Act.

Subsection 14A:13-5(3) is virtually identical with R.S. § 14:15-10.

The Commission elected to maintain in this section the two-step technique in R.S. § 14:15-3 and sections 103 and 104 of the Model Act under which, first, an application for a certificate of authority is filed and, second, the Secretary of State issues the certificate. The same approach has been followed with respect to withdrawal of a foreign corporation (see section 14A:13-8) or termination of its existence (see section 14A:13-9).

14A:13-6

Amended Certificate of Authority

Source or Reference

N.J.: None
Model Act: § 111 (1960)
Other: N.Y. Bus. Corp. Law § 1308.

Comment

This section has no counterpart in Title 14. It is based on section 111 of the Model Act with slight revision of language, particularly in subsection 14A:13-6(1) with respect to a change in the character of the business which the foreign corporation proposes to transact in this State. The new language is derived from paragraph 14A:13-5(1)(e) and from section 1308(a)(2) of the New York Act. A foreign corporation which fails to apply for an amended certificate of authority within 30 days after it was required to do so by this section may have its certificate of authority revoked by the Secretary of State pursuant to the provisions of paragraph 14A:13-10(1)(b). See, also, section 14A:13-7 as to a change of name by a foreign corporation.

Change of Name by Foreign Corporation

Source or Reference

N.J.: None
Model Act: § 102 (1960)
Other: None.

Comment

This section is new and is virtually identical with section 102 of the Model Act. Applicable only to foreign corporations, it corresponds to subsection 14A:9-1 (1) which has the effect of limiting a change of name by a domestic corporation. See section 14A:2-2 for the basic provisions in this Revision with respect to permissible corporate names for domestic or foreign corporations.

A foreign corporation whose certificate of authority has been suspended for 30 days under this section is subject to revocation of its certificate of authority by the Secretary of State under paragraph 14A:13-10(1)(a). A foreign corporation which is authorized to transact business in this State is required by section 14A:13-6 to procure an amended certificate of authority in the event it changes its corporate name.

14A:13-8

Withdrawal of Foreign Corporation

Source or Reference

N.J.: R.S. §§ 14:15-7, 8, 9 (Supp. 1941); 2A:15-26(b) (1951)
Model Act: §§ 112 (1960); 113 (1960)
Other: N.Y. Bus. Corp. Law § 1310

Comment

This section provides the procedure by which a foreign corporation authorized to transact business in New Jersey may voluntarily withdraw from this State. It should be read together with section 14A:13-9, which provides for an alternative method of withdrawal when the corporation has had its existence terminated in another jurisdiction or when it has merged into or consolidated with another corporation.

The tax clearance provision in R.S. § 14:15-8 has been omitted from this section as being unnecessary, in view of R.S. § 54:10A-12 (Supp. 1947), which contains the same requirement.

The authority of the withdrawing corporation's registered agent is revoked upon the issuance of a certificate of withdrawal by the Secretary of State, but the Secretary of State becomes an agent for service of process against the corporation in the instances mentioned in paragraph 14A:13-8(2)(c), derived from R.S. § 2A:15-26(b) and subparagraph 1310(a)(5) of the New York Act.

Paragraph 14A:13-8(1)(d) is derived from section 112(e) of the Model Act.

Subsection 14A:13-8(3) is derived from section 1310(d) of the New York Act.

14A:13-9

Termination of Existence of Foreign Corporation

Source or Reference

N.J. R.S. § 14:15-7 (Supp. 1941)
Model Act: None
Other: N.Y. Bus. Corp. Law § 1311.

Comment

This section provides a simple procedure for withdrawal by a foreign corporation which has been dissolved or has had its authority otherwise terminated in another jurisdiction or has merged into or consolidated with another corporation. The section is applicable when there has been no withdrawal pursuant to section 14A:13-9. It is derived from section 1311 of the New York Act, as amended in 1964.

14A:13-10

Revocation of Certificate of Authority

Source or Reference

N.J.: R.S. § 14:4-5 (Supp. 1952)
Model Act: § 114 (1960)
Other: Pa. Stat. Ann. tit. 15, § 2852-1013 (1958).

Comment

This section is new and is based on section 114 of the Model Act. It collects in subsection 14A:13-10(1) all of the grounds under this Revision for revocation by the Secretary of State of a certificate of authority of a foreign corporation and sets forth in subsections 14A:13-10(2) and 14A:13-10(3) the procedure for effecting the revocation. The requirement of prior notice and opportunity to cure the default is derived from section 1013 of the Pennsylvania Act. However, subsection 14A:13-10(1) expressly preserves any other ground and method of revocation provided by law—such as in R.S. § 54:10A-21, under which the Secretary of State immediately revokes the certificate of authority of a foreign corporation which has failed to pay certain taxes imposed by the Corporation Business Tax Act (R.S.§54:10A-1 et seq. (Supp. 1947)).

Transacting Business Without Certificate of Authority

Source or Reference

N.J.: R.S. §§ 14:15-4 (1938); 14:15-6 (1938)
Model Act: § 117 (1960)
Other: Texas Bus. Corp. Act art. 8.18A (1956).

Comment

This section is based on section 117 of the Model Act and sets forth some, but not all, of the consequences when a foreign corporation transacts business in this State without a certificate of authority. Thus, the "in addition" language at the beginning of subsection 14A:13-11(3) expressly preserves any other liabilities imposed by New Jersey law on the non-qualifying foreign corporation, such as its obligation to pay the taxes imposed by the Corporation Business Tax Act (R.S. § 54:10A-1 et seq. (Supp. 1947)).

R.S. §§ 14:15-4 and 14:15-6 impose upon the non-qualifying foreign corporation a limited disability to sue "upon any contract made by it in this State," and a monetary penalty, respectively. The monetary penalty has been revised and the disability to sue has been broadened by subsection 14A:13-11(1) to bar suit by the non-qualifying foreign corporation on any claim or demand. Paragraph 14A:13-11(1)(a) codifies the holding in Okin v. A.D. Gosman, Inc., 70 N.J. Super. 26 (Law Div. 1961), where the prohibition in R.S. § 14:15-4 was held inapplicable to the trustee in bankruptcy of a non-qualifying foreign corporation. Paragraph 14A:13-11(1)(b), in part, codifies the holding in Admiral Discount Corp. v. Bovadikov, 46 N.J. Super. 522 (Monmouth Co. Dist. Ct. 1957) that the prohibition in R.S. § 14:15-4 is applicable to the assignee of a foreign corporation (see Tunks, Corporations, 13 Rutgers Law Review, 176, 177-178 (1958)), but creates an exception to that rule for any assignee for value who takes the assignment without knowledge that the foreign corporation should have, but has not, obtained the necessary certificate of authority. Cf. R.S. § 12A:3-302; compare section 8.18A of the Texas Act.

Subsection 14A:13-11(2) is identical to the second paragraph of section 117 of the Model Act and continues present New Jersey law. Day v. Stokes, 97 N.J.Eq. 378, 379 (E.&A. 1925); Okin v. A.D. Gosman, Inc., supra, at p. 28; Marquette Bailey Lumber Co. v. Dexter Lumber & Flooring Co., 2 F. Supp. 3 (D. N.J. 1933), aff'd sub nom. on other grounds, Chase National Bank v. Gannon, 66 F. 2d 937 (3d Cir. 1933).

The Commission noted the provision,common to many corporation statutes (2 Hornstein, Corporation Law and Practice § 586, at 78 (1959)), under which a foreign corporation not authorized to transact business, which in fact does transact business in the state, submits itself to the jurisdiction of the courts of the state and is deemed to have designated the Secretary of State as its agent upon whom process may be served. The Model Act does not have an equivalent section, and neither does Title 14. The Commission considered that any such provision was unnecessary in view of the provisions of R.R. 4:4-4(d).